

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.,

Intervening Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division

BRIEF FOR THE UNITED STATES

JAMES B. YOUNG
United States Attorney

J. STANLEY POTTINGER
Assistant Attorney General

BRIAN K. LANDSBERG
ALEXANDER ROSS
SAMUEL J. FLANAGAN
WILLIAM C. GRAVES
Attorneys
Department of Justice
Washington, D. C. 20530

TABLE OF CONTENTS

CASE	Page
QUESTION PRESENTED -----	2
STATEMENT -----	3
1. Procedural History -----	3
2. The Record and Findings -----	6
3. The Remedy Ordered -----	16
ARGUMENT -----	18
1. Introduction -----	18
2. The District Court's Findings and Conclusions -----	22
3. The Remedy -----	27
4. The District Court's Injunctions Against HACI -----	35
CONCLUSION -----	45
ATTACHMENT A (3 pages) -----	31
<i>Mayers v. Ridley</i> , 465 F.2d 630 (C.A. D.C., 1972) -----	8
<i>Williken v. Bradley</i> , 421 U.S. 929 (1975) -----	passim
<i>Memphis Area Council v. Board of Education</i> , 510 F.2d 1358 (C.A. 6, 1974) cert. denied, 43 U.S.L.W. 3571 (1975) -----	23
<i>Shannon v. H.U.D.</i> , 436 F.2d 809 (C.A. 3, 1970) -----	36
<i>Shelley v. Kramer</i> , 334 U.S. 1 (1948) -----	8
<i>Swann v. Board of Education</i> , 402 U.S. 1 -----	passim

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Barrows v. Jackson</u> , 346 U.S. 249 (1953) -----	8
<u>Cisneros v. Corpus Christi I.S.D.</u> , 467 F.2d 142 (C.A. 5, 1972) -----	31
<u>Crow v. Brown</u> , 332 F. Supp. 382 (N.D. Ga., 1971) <u>aff'd</u> 457 F.2d 788 (C.A. 5, 1972) -----	36
<u>Evans v. Buchanan</u> , 393 F. Supp. 428 (D. Del. 1975); affirmed without opinion, No. 74-1418 (Sup. Ct.) Nov. 17, 1975 -----	9, 22
<u>Gautreaux v. Chicago Housing Authority</u> , 265 F. Supp. 582 (N.D. Ill. 1967) -----	36
<u>Gautreaux v. Chicago Housing Authority</u> , 503 F.2d 930 (C.A. 7, 1974) <u>cert. granted</u> , <u>sub. nom.</u> <u>Hills v. Gautreaux</u> , No. 74-1047, 44 U.S. L.W. 3010 (1975) -----	43
<u>Green v. County School Board</u> , 391 U.S. 430 (1967) -----	29
<u>Keyes v. School District No. 1</u> , 413 U.S. 189 (1973) ----	23, 28
<u>Kramer v. Union Free School District</u> , 395 U.S. 621 (1969) -----	31
<u>Mayers v. Ridley</u> , 465 F.2d 630 (C.A. D.C., 1972) -----	8
<u>Milliken v. Bradley</u> , 421 U.S. 929 (1975) -----	passim
<u>Newburg Area Council v. Board of Education</u> , 510 F.2d 1358 (C.A. 6, 1974) <u>cert. denied</u> , 43 U.S.L.W. 3571 (1975) -----	23
<u>Shannon v. H.U.D.</u> , 436 F.2d 809 (C.A. 3, 1970) -----	36
<u>Shelley v. Kramer</u> , 334 U.S. 1 (1948) -----	8
<u>Swann v. Board of Education</u> , 402 U.S. 1 -----	passim

	<u>Page</u>
<u>United States v. State of Missouri</u> , 515 F.2d 1365 (C.A. 8, 1975) <u>cert. denied</u> , Nos. 75-202, 75-214, 75-215, 44 U.S.L.W. 3280 -----	23
<u>United States v. Board of School Commissioners of Indianapolis</u> , 332 F. Supp. 665 (S.D. Ind. 1971), aff'd 483 F.2d 1406 (C.A. 7, 1973), <u>cert. denied</u> , 413 U.S. 920; 368 F. Supp. 1191 (1973), 503 F.2d 68 (1974), <u>cert. denied</u> 421 U.S. 929 (1975) -----	passim
 <u>Statutes</u>	
20 U.S.C. 1702, 1712, 1717, 1715 and 1756 -----	31, 33
42 U.S.C. 3601, <u>et seq.</u> -----	30
Burns Ind. Stats. Anno., 28-5001 -----	33
Burns Ind. Stats. Anno., §48-8101, et seq. -----	11
Ind. Acts 1959, Ch. 202 (IC 1971, 20-3-14) -----	12, 15
Ind. Acts 1961, Ch. 186 (IC 1971, 20-3-14) -----	13, 14
Ind. Acts 1969, Ch. 52 -----	14
Ind. Acts 1969, Ch. 173 (IC 1971, 18-4-1) -----	15

BRIEF FOR THE UNITED STATES

This is the third time that the instant case has been
before this Court on the merits of a school desegregation order
entered by the court below. The thirteen present separate appeals,

A substantial number of proceedings ancillary to this case
have also been brought to, or initiated in, this Court. See 303
2d at 73, nn. 6 and 7.

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.,

Intervening Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division

BRIEF FOR THE UNITED STATES

This is the third ^{1/} time that the instant case has been
before this Court on the merits of a school desegregation order
entered by the court below. The thirteen present separate appeals,

^{1/} A substantial number of proceedings ancillary to this case
have also been brought to, or initiated in, this Court. See 503
F. 2d at 73, nn. 6 and 7.

which are consolidated herein, have been taken from the district court's order entered after reconsideration of the inter-district issues pursuant to the directions of this Court's remand, 503 F. 2d 68 at 86, by the Indianapolis Public School System (IPS),^{2/} nine of the eleven defendant Marion County suburban school systems,^{3/} the State defendants,^{4/} and two agencies having authority over public housing in the Indianapolis Metropolitan area.^{5/}

QUESTIONS PRESENTED

1. Whether the limited inter-district remedy ordered by the district court is supported by the record in this case.

2. Whether the district court properly enjoined the Housing Authority of the City of Indianapolis from constructing any future publicly assisted low income housing projects inside the boundaries of the Indianapolis Public School District and from renovating an existing project for other than elderly occupancy.

2/ No. 75-1765.

3/ No. 75-1730 (Metropolitan School District of Perry Township); No. 75-1731 (School Town of Speedway); No. 75-1732 (School City of Beech Grove); No. 75-1733 (Metropolitan School District of Decatur Township); No. 75-1734 (Franklin Township Community School Corporation); No. 75-1735 (Metropolitan School District of Wayne Township); No. 75-1736 (Metropolitan School District of Lawrence Township); No. 75-1737 (Metropolitan School District of Warren Township); No. 75-1936 (Metropolitan School District of Washington).

4/ No. 75-1964.

5/ Nos. 75-1965 and 75-2007.

STATEMENT

1. Procedural History.

A detailed procedural history of this case up to the time of the most recent remand was set out in this Court's 1974 opinion at 503 F.2d at 71-75 and will not be reiterated here. In that decision, an order of the district court (see, 368 F. Supp. 1191), which contemplated, inter alia, a desegregation remedy involving IPS territory and ". . . that of all or part of the territory served by the ten Marion County (Uni-Gov) school districts and possibly also with that of some or all of the nine school districts in counties adjacent to Marion County . . .," 503 F.2d at 79, was reversed insofar as school districts outside of Marion County were involved; and the case was remanded with directions for reconsideration ". . . insofar as . . . [the district court's rulings] pertain to a remedy within the boundaries of Uni-Gov" 503 F.2d at 86. Specifically, this Court directed:

"The district court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with Milliken." (footnotes omitted) 503 F.2d at 86.

Petitions for rehearing were denied by this Court on November 18, 1974, and petitions for writs of certiorari were denied by the United States Supreme Court on April 21, 1975. 421 U.S. 929 (1975).

Meanwhile, on remand, the district court conducted pretrial proceedings, and entered an order describing certain of the issues that would be considered on remand and setting a schedule to complete the preparation for a hearing.^{6/} Trial was held on March 18, 19, 20 and 24, 1975, and on August 1, 1975, the court below entered the memorandum and order which are the subjects of this appeal. On the basis of the entire record in the case, the district court concluded ". . . that the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries, given all of the other facts and circumstances set out in this and former opinions of this Court, warrants a limited inter-district remedy within all of Marion County" ^{7/} The order of the court provided (in separate paragraphs for each of the suburban school district defendants, except Washington and Pike Townships) that IPS would transfer, and the transferee school system would accept, a specified number of black students in grades

^{6/} See, Appendix to the IPS Brief, pp. A5-A7. (Hereinafter App. of IPS, pp.).

^{7/} App. of IPS, pp. A14-A15.

1-9 and that continuing transfers would be made for ensuing school years.^{8/} The order also required IPS to prepare and file "a plan or alternative plans, for the final desegregation of its schools, taking into account the transfer of pupils ordered herein." ^{9/}

All of the school districts affected by the order ^{10/} filed notices of appeal;^{11/} and upon the application of certain of them, this Court on August 22, 1975 granted a stay of the inter-district provisions of the district court's order. On October 2, 1975, the court below stayed that part of the order requiring a final plan from IPS since the inter-district transfers had been stayed. Thus, the IPS schools are currently being operated essentially in the same manner as when this case was here on review in 1974.

See 503 F. 2d at 75-78.^{12/}

^{8/} App. of IPS, pp. A25-A29, paragraphs a through h.

^{9/} App. of IPS, pp. A29-A30, paragraph i. The order also enjoined the Housing Authority of the City of Indianapolis from taking certain action in locating and constructing family-type public housing projects. App. of IPS, p. A30, paragraphs j and k.

^{10/} Pike Township was not affected by the order and did not appeal. Washington Township, however, even though not affected by the order did appeal, No. 75-1936, herein.

^{11/} See, footnote 3, supra.

^{12/} As to that plan, this Court stated:

"Obviously many steps have been taken to dismantle the IPS dual school system within its boundaries, but more steps must be taken." 503 F. 2d at 80.

2. The Record and Findings. In prior opinions, the court below took judicial notice or made record findings of certain historical facts concerning discrimination against Negroes by the State of Indiana and its agencies both in the areas of education and of housing. 332 F. Supp. at 658-65 ^{13/} and 368 F. Supp. at 1199. The court found that from the inception of statehood racial "[d]iscrimination became the official policy of the State" 332 F. Supp. at 660. As to education, that policy was official segregation of public schools until a 1949 Act terminated the statutory sanction on a phased basis. 332 F. Supp. at 665.

After the passage of that Act, IPS adopted, or continued in effect, policies and practices of student and faculty assignment and committed other acts and omissions in order to segregate black students and faculty within the public schools of IPS, as has been previously found by the court below, 332 F. Supp. at 665-72, and affirmed by this Court. 474 F. 2d 81. As to the added suburban school district defendants, "[t]here was no evidence that

^{13/} While the added suburban school districts and State defendants were not parties to the case at the time of the first hearing in 1971, the district court reaffirmed its earlier findings relating to historical discrimination against blacks in the State of Indiana and Indianapolis Metropolitan area after those defendants had an ample opportunity to produce rebutting evidence at the 1973 hearing. See, 368 F. Supp. at 1199.

any of [them] . . . have committed acts of de jure segregation directed against Negro students living within their respective borders . . . because the Negro population residing within the borders of such defendants ranges from slight to none"

368 F. Supp. at 1203. This undisputed racial disparity in the attendance of students has at all times been mirrored by the racial compositions of faculties among school districts in Marion County.^{14/} The questions of how that circumstance occurred and the relationship and the legal consequences, if any, flowing from the enactment of certain state legislation affecting school district organization in Marion County were the primary subjects of the 1973 hearing below and the hearing on remand.

Based on the evidence before it, including the matters about which it took judicial notice, the court below found that "[i]n addition to pressures . . . applied by individual whites, residential segregation [within Marion County] was also enforced

^{14/} In 1968 none of the added defendant school systems, with the exception of Washington Township, employed any black teachers, even though they are all contiguous to Indianapolis which employed 913 black teachers constituting 22.5% of its teaching staff. Similarly, in 1972, while Lawrence and Pike each employed one black teachers, the remaining systems still had no blacks on their teaching staffs. In 1972, Indianapolis employed 940 black teachers constituting 23.9% of its teaching staff. See, e.g., Gov. Ex. Nos. 1 & 2 (1973 hearing); See also Brief for the U. S. as appellee in the prior appeal (Nos. 73-1968 to 1982 & 1984) n. 64 at p. 38.

by law, in many instances." 332 F. Supp. at 662. The evidence produced at the hearings showed that the methods used to confine black citizens to residential areas in and around Center Township (all of which lies within IPS) took various forms. First, early attempts were made to enforce residential segregation by ordinance in the City of Indianapolis. 332 F. Supp. at 662. Second, the court took judicial notice of a custom that was actually enforced by officials in many Indiana towns "that Negroes were not allowed to stay overnight" 332 F. Supp. at 663. Third, numerous plats with racial covenants both in Indianapolis and in the suburban townships "were routinely enforced until held unconstitutional in 1948." ^{15/} 332 F. Supp. at 662. The record indicates that deeds with racially restrictive covenants were recorded in Marion County at least as late as 1951. (Pl. Ex. 1, March 1975 hearing). Breach of those covenants presumably could have resulted in damage suits against the covenantors until 1953. ^{16/}

^{15/} Shelley v. Kramer, 334 U.S. 1 (1948).

^{16/} Such judicial enforcement was held unconstitutional in Barrows v. Jackson, 346 U.S. 249 (1953). See also, Mayers v. Ridley, 465 F. 2d 630 (C.A. D.C., 1972), for a discussion of the state support for racial discrimination provided by the mere recording of such deeds with racially restrictive covenants.

These official policies of maintaining racial residential segregation ^{17/} were continued overtly by individuals and the persons licensed by the State to deal in real estate well into the 1960's. Testimony of black real estate dealers (Tr. pp. 273-280, Vol. 2; Tr. pp. 460-64, Vol. 3, June 13-14, 1973), black homeowners (Tr. pp. 239-69, Vol. 2, June 13, 1973), and members of various commissions or agencies responsible for investigating charges of racial discrimination (Tr. pp. 86-7, Vol. 1; Tr. pp. 216-17, Vol. 2, June 13-14, 1973) established various methods by which "Negroes were discouraged from purchasing homes in predominantly 'white' neighborhoods . . ." in Marion County. See also, 332 F. Supp. at 662-63.

Finally, the district court found that defendant Housing Authority of the City of Indianapolis (hereinafter, HACI) compounded forces tending to isolate blacks within IPS by locating all of its family-type low-rent public housing projects within the boundaries of the old civil city of Indianapolis. (App. of

^{17/} These historical policies and practices are not, of course, particular to the State of Indiana. E.g., the 1936 Federal Housing Administration Mortgage Underwriting Manual, which continued in use until 1949, advocated racially homogeneous neighborhoods. See, Evans v. Buchanan, 393 F. Supp. 428, 434 (D. Del. 1975); affirmed without opinion, No. 74-1418 (Sup. Ct.), Nov. 17, 1975.

IPS, pp. A11-A13).^{18/} The HACI, after a brief period of operation during World War II,^{19/} became defunct and was not reactivated until around 1958. (Tr. p. 2634, Vol. 14, June 5, 1973). Most of its significant construction did not occur, however, until the period 1966 to 1970 when ten of its eleven family type low-rent housing projects opened for occupancy. (HACI Answers to Interrogatories, table I). From the inception, the racial makeup of these housing projects was approximately 75% black and 25% white. Soon, however, the pool of applicants for housing became over 90% black, and remains that composition today. (Tr. pp. 2630-31, Vol. 14, July 5, 1973; and Tr. p. 73, Vol. 1, March 18, 1975). Actual occupancy of the projects today is approximately 98% black. (App. of IPS, p. A12).

At all times when it was planning and locating the above projects, HACI had authority to construct projects not only within IPS but within five miles of the old corporate limits of Indianapolis

^{18/} In a prior reference to this fact the court below noted at 332 F. Supp. at 674, n. 81 that "[a] project typical of this kind is constructed at the periphery of an established Negro residential area . . ." and that the projects had tended to reinforce racial segregation in the IPS schools. 332 F. Supp. at 673-74.

^{19/} Apparently the only project operated by HACI at this time was Lockefield Gardens which was constructed in 1939. (Tr. p. 2634, 6-5-73).

(which then generally coincided with IPS boundaries). (App. of IPS, p. A12).^{20/} In order to construct projects outside the city, however, HACI had to obtain a cooperation agreement with the municipality or other civil governmental entity involved. (Tr. 255-56, Vol. 2, March 19, 1975). None of the surrounding municipalities ever entered into a cooperation agreement with HACI even though suitable alternative sites existed outside the old city limits. (See, Tr. 263-301, Vol. 2, March 19, 1975). Since the enactment of Uni-Gov in 1969, presumably HACI had the authority, except in the towns of Speedway, Lawrence, and Beech Grove, to construct outside the old city limits without the need for such cooperation agreements. However, no such construction has been undertaken although there are presently pending applications for approximately 3000 families. (Tr. p. 2631-32, Vol. 14, July 5, 1973). The court below concluded that "[t]he location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory." (App. of IPS, p. A12).

Coincident with the racial discrimination outlined above which tended to confine black residents of Marion County within

^{20/} Burn's Ind. Stat. Anno., §48-8101, et seq.; §48-8103(g)(1). Five miles from the corporate limits of the city would encompass most of Marion County.

the old City of Indianapolis, the State of Indiana prior to 1959 generally followed a policy of establishing school district boundaries to coincide with the boundaries of other governmental entities -- such as civil cities.^{21/} 332 F. Supp. at 675. According to the 1960 Census, 98.8%^{22/} of the black population of Marion County resided in the City of Indianapolis.^{23/} At about this time the General Assembly enacted the Indiana School Reorganization Act (Acts 1959, Ch. 202; IC 1971 20-4-1).^{24/} Pursuant to that statute,

^{21/} While the appellants point out that exceptions to this general rule were carved-out elsewhere in the State of Indiana (see, e.g. MSD Perry Brief, pp. 13-32), it remains undisputed that the Indiana Legislature can reorganize school districts in virtually any manner it desires and that, at least until legislation in 1959 applicable state laws provided for coterminous school district and civil city boundaries in Marion County. See also, Speedway/Beech Grove Brief, pp. 23-24.

^{22/} U.S. Bureau of the Census. U.S. Census of Population: 1960, Vol. I, Characteristics of Population; Part 16 Indiana. Table #28, p. 132 - Marion County -- 99912 blacks. Table #21, p. 66 - Indianapolis -- 98742 blacks.

^{23/} Id., according to Table 21, Beech Grove (p. 67) had a total population of 10,973 with 1 Negro, and Lawrence (p. 69) had a total population of 10,103 with 1 Negro. Table 22 lists Speedway (p. 77) with a total population of 9624 and 3 Negroes. The court below noted the "remarkable absence of Negro citizens from the territories of the added defendants" 368 F. Supp. at 1204.

^{24/} That Act mandated an improvement in the organization of school districts within the State and established an elaborate machinery to achieve that goal. Committees in each county were set up to analyze existing school district structures and to institute changes after approval by a State Commission. Pursuant to this Act and subsequent consolidations, the number of school districts in Indiana was reduced from more than 990 to around 300. See Warren Ex. A (1973 hearing).

the Marion County School Reorganization Committee was appointed and made its initial unanimous recommendation that all of the school systems in Marion County be merged into one metropolitan system. 368 F. Supp. at 1203. Numerous community meetings were held by the Committee to discuss the proposal, and it met with unanimous opposition from the suburban school systems. None of the participants in those meetings who testified in this case recalled that race was ever raised explicitly as a consideration. (Tr. p. 51, Vol. I, March 5, 1975). But, because of this opposition, the Committee "reversed itself and proposed a plan which, with minor exceptions . . . froze all existing school corporations in Marion County according to their then existing 1961 boundaries." 368 F. Supp. at 1203; see Pl. Ex. No. 2, 1973 hearing.

By the 1959 reorganization legislation and subsequent legislation, the General Assembly severed the relationship between the boundaries of civil cities and school corporations. Applicable to Marion County only, however, Chapter 186, Acts 1961, (IC 1971, 20-3-14) retained a vestige of that previous policy in that an extension of the boundaries of a civil city in the county operated as a prima facie extension of the boundaries of the corresponding

school district.^{25/} In the years following school reorganization, the process of annexation to the city of Indianapolis came to a virtual stand-still; so the boundaries of the defendant school systems have not changed significantly, if at all, as a result of the provisions of Chapter 186. (See, e.g., Brief of Perry, p. 10). Chapter 186, Acts of 1961, further revised the method of changing school district boundaries in Marion County by, among other things, giving IPS a unilateral power of annexation, subject to remonstrance. (Brief of Perry, p. 31). In light of the previous history of the effectiveness of the civil city of Indianapolis' similar annexation power, the court below found that "... the ability of the [IPS] Board to expand its jurisdiction . . . is . . . virtually nil, as a practical matter." 332 F. Supp. at 676.

Indeed, it apparently was because of the ineffectiveness of the annexation process that civic leaders in the metropolitan area began to promote the idea of a unified metropolitan government for the County through new legislation. (Tr. p. 166, Vol. I, March 19,

^{25/} Under the terms of the Act, school boundaries would follow a civil city annexation unless the city school district opted against the gain in territory or the losing school corporation prevailed in a remonstrance suit. This portion of the 1961 Act was repealed by Ch. 52, Acts 1969.

1975).^{26/} Nevertheless, the idea of a unified metropolitan government did not catch on easily. (Tr. p. 163; 165-6, Vol. 2, March 19, 1975). One of the barriers was that the defendant school systems wanted assurances that the consolidation of certain metropolitan functions would not affect the boundaries and operation of the school districts as established under the 1959 Reorganization Act. (Tr. pp. 46-53; pp. 57-60, Vol. 1, March 18, 1975; see also, Tr. p. 2526, Vol. XIII, July 3, 1973). Thus, the Uni-Gov Act as finally proposed and enacted in 1969, (Ch. 173, Acts of 1969; IC 1971, 18-4-1) specifically excluded school districts along with several incorporated towns from the county wide consolidation.

Based on this sequence of events, the court below found:

that the suburban Marion County units of government, including the added defendant school corporations, have consistently resisted the movement of black citizens or black pupils into their territory. They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov Act made it clear that the schools would not be involved. (App. of IPS, p. A12).

^{26/} For example, the problems of coordinating the actions of numerous agencies with overlapping jurisdictions of highway construction and maintenance, facilities, and the provision of similar public utilities and services had reached such a state in the 1960's that it took six years to widen about a mile and a half of a two lane highway from Indianapolis through a portion of Speedway. (Tr. pp. 2528-9, Vol. 13, July 3, 1973).

The combination of these acts, plus the actions of HACI and other agencies in locating public housing, ". . . directly and proximately contributed to cause the suburban school districts . . . to be and remain segregated white schools, with segregated white faculties and administrative staffs." (App. of IPS, p. A13). Conversely, as a result of the same actions, " . . . Negroes have consistently been deprived of the privilege of living [and, thus attending school] within the territory of the added defendants" 368 F. Supp. at 1204-05.

3. The Remedy Ordered.

On the basis of the violation described above, the district court concluded that a limited inter-district remedy would be appropriate. The court, however, did not require a merger or other restructuring of the school districts in Marion County. Rather, the court noted the recent enactment of a law by the General Assembly which permitted the transfer, and provided an administrative scheme for handling the transfer of students from one school district to another under defined circumstances. (App. of IPS, pp. A15-A16).

Adopting that statutory scheme as a guide for its remedial order, the court directed IPS to transfer and all but two of the respective suburban school districts to accept a group of black

students in grades 1-9 which would approximate 15% of the school district's existing enrollments in those grades. Students so transferred would continue in the transferee school district until they graduated or moved from IPS, and for each ensuing year first graders would be transferred from IPS to the respective school districts under the same standards and procedures. As to Washington and Pike Townships, however, the court cited current data on student enrollments which indicated that they "are integrating rather rapidly, as a result of demographic changes" (App. of IPS, p. A19) and therefore were not required to participate in the remedy.

The court order does not specify how such students will be selected, however, nor what measures, if any, will be adopted to protect the interests and rights of such students or their parents.^{27/} Also, it appears that the particular transfer percentage chosen by the district court was influenced to an extent by fear of possible "white flight from IPS." (See, App. of IPS, p. A17-A18).

^{27/} Although the order does not explicitly provide for transportation, it appears that IPS will be required to provide the transportation where necessary. (See, App. of IPS, p. A21).

ARGUMENT

1. Introduction. In the United States' Brief as Appellee filed on January 7, 1974 in the prior appeal of this case, we discussed at length what we viewed as the relevant facts of record and the proper legal standards applicable to the issue of whether the court below has the power to effectuate an inter-district remedy. Based on this discussion and upon the fact that the district court had at that time deferred to possible legislative action without indicating what sort of inter-district plan it might ultimately require, we concluded that:

[A]t least some of the possible forms of relief contemplated by the district court would exceed the bounds of judicial discretion. . . . For example, the judicial creation of one metropolitan school district and the judicial determination to desegregate schools within that district 'on the basis of approximately 85% white - 15% black' . . . would violate several of the legal principles and would not find factual support in the record. . . . Conversely, it is not at all clear that some limited form of relief carefully tailored to meet specific problems reflected by the record and to do so with minimum disruption to local government structure, could not properly be fashioned by the district court.

Brief of United States in Nos. 73-1968 to 73-1982 at pp. 39-40. We went on to suggest several examples of limited inter-district relief which might be supportable, id. at p. 40; and recommended that this Court permit the planning process to go forward with directions on remand to make specific and general findings of fact and to insure that de jure segregation in I.P.S. is eliminated, root and branch, by the 1974-75 school year.^{28/}

To a large extent the events transpiring since this case was last taken under submission have not altered our perception of the facts and legal principles involved. First, the proceedings on remand do not appear to have produced many new or different facts not uncovered in the lengthy, prior hearings in this case. This is reflected in the opinion now on appeal which makes few, if any, specific findings of fact relating to matters not adverted to in prior opinions.

^{28/} Indeed the United States filed a separate appeal (No. 73-1983) which challenged the district court's apparent disposition to condition further relief for the de jure segregation found in I.P.S. upon its being of an inter-district nature.

Second, the Indiana Legislature, during the period in which the district court deferred to its discretion, did not choose to provide a remedy, although it did establish an administrative procedure for effecting inter-district transfers of students and funds should that be ordered by the Federal judiciary.

Third, student assignment patterns in Indianapolis have not changed subsequent to this Court's remand with directions requiring the "prompt formulation of a decree directed to eliminating the segregation found to exist within I.P.S.", 503 F.2d at 80, and it has now been over 4 1/2 years since I.P.S. was found to be unconstitutionally segregated on system-wide basis.

Fourth, Milliken v. Bradley, 418 U.S. 717 (1974) was decided since this case was last taken under submission. However, the Supreme Court relied upon or articulated legal principles consistent with those outlined in our prior brief.^{29/}

^{29/} See Brief of United States in Nos. 73-1968 to 73-1982, pp. 22-25. The controlling remedial standards which we elaborated upon in an inter-district context are: (1) The district court must give great weight to existing governmental structures; (2) having found a violation; the court or school authorities should make every effort to achieve

(Footnote cont'd on next page)

Similar principles should continue to govern the ultimate disposition of this case.

Thus the primary difference between this and the last appeal is that there is now a specific inter-district remedial order on review rather than a spectrum of possibilities. Measured against the legal principles and facts of record discussed in our prior brief and herein, we do not think this order can be sustained. However, we also continue to be of the view that, given the record in this case, school district lines in Marion County are not totally sacrosanct. The district court will continue to have a duty to prescribe a remedy and, considering all the circumstances, we believe that it would be appropriate both in terms of law and policy, for this Court to specify in its directions on remand that voluntary majority to minority transfers of students between I.P.S. and the added defendant school districts should be permitted in conjunction with the final desegregation of black I.P.S. schools. *These*

29/ (Footnote cont'd from preceding page)

the greatest possible degree of actual desegregation, considering the practicalities of the situation; (3) the court is without authority to order a plan solely to achieve racial balance or to avoid schools with majority black enrollments; (4) the court should seek a plan that minimizes distances, time of transportation and other factors; (5) the remedy should bear a clear relation to the violation found and the problem to be solved; and (6) the use of optional inter-district transfers which promote desegregation is an appropriate part of a remedial order where such transfers have been granted in the past for educational reasons and where housing and other forms of official discrimination have played a role in determining where blacks can or cannot attend school.

conclusions are discussed in sections 2 and 3, infra. In section 4, infra we address the court's injunctions against HACI and state why that portion of the order should be affirmed.

2. The District Court's Findings and Conclusions.

There are significant factual and procedural differences between Milliken v. Bradley and the present case ^{30/} which would indicate that the conclusion reached by the Supreme Court is not necessarily determinative of the outcome here. ^{31/} The Court did not attempt, on the basis of an empty record, to catalogue all the possible circumstances that would justify an "inter-district remedy." The Court, however, did make it clear that some sort of constitutional violation producing an inter-district, segregative effect is necessary:

^{30/} The Milliken opinion appears to have attached considerable weight to a number of factors present in that record including: (a) that Detroit school boundaries are contiguous with civil city boundaries and have been unchanged for over a century, 418 U.S. at 748; (b) that the court below contemplated consolidating a 54-district metropolitan area "into a vast new super school district", id., at 743; (c) that in Michigan nothing but unitary school systems have been required by State law for over a century, id. at 749; (d) that neither the complaint, the relief sought nor the proof had focused on inter-district matters and the added suburban districts had not even participated in an evidentiary hearing, id., at 721-22; and (e) there was no evidence that any racially discriminatory state actions had been a substantial cause of inter-district segregation, id., at 745. As to each of the above particulars, the record in the present case, as outlined supra, presents a different picture.

^{31/} Subsequent to Milliken the Supreme Court has affirmed (without opinion) an order requiring submission of alternative, intra and inter-district desegregation plans for Wilmington, Delaware (Evans v. Buchanan, supra); and denied certiorari in a case where adjoining school districts were ordered to participate in the

(Footnote cont'd on next page)

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 inter-district segregation.

418 U.S. 717 at 745.

In the present case, the court below was not clearly erroneous in finding that the interrelation of various discriminatory actions by a number of State agencies and officials "have been a substantial cause of inter-district segregation."

Until very recently virtually all of the black students and black teachers in the Indianapolis metropolitan area were assigned, concentrated and segregated in "black" schools in I.P.S. Other courts have not hesitated to draw upon common sense inferences in assessing the effects of such practices.

For example,

. . . [t]he use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing racial concentration within the schools.

Keyes v. School District No. 1, 413 U.S. 189, 202 (1973).

31/ (Footnote cont'd from preceding page)

desegregation of an all-black district (United States v. State of Missouri, 515 F.2d 1365 (C.A. 8, 1975) cert. denied, Nos. 75-202, 75-214, 75-215, 44 U.S.L.W. 3280) and in a case holding that boundaries between two districts in the Louisville Metropolitan area could be crossed for desegregation purposes. Newburg Area Council v. Board of Education, 510 F.2d 1358 (C.A. 6, 1974) cert. denied, 43 U.S.L.W. 3571 (1975).

34/

each has a virtually all-black occupancy. Given that a disproportionate number of blacks are both in low income categories and were already concentrated in I.P.S. and considering the predominantly black composition of the pool of applicants for the H.A.C.I. low-income housing projects, it is a reasonable inference that this action would and did have a further impact evidence of prior housing discrimination, on the one hand, and present residential patterns on the other (e.g. 368 F. Supp. at 1204), are logical, valid and have never been persuasively disputed.^{32/} Further, it is not disputed that all of the H.A.C.I. low-income, multi-family housing projects built in Marion County are located within the boundaries of I.P.S. and

^{32/} Justice Stewart's concurring opinion in Milliken, which clarifies the underpinnings of the majority's decision, notes: "Were it to be shown, for example, that state officials had contributed to the separation of the races . . . by purposefully racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across boundary lines or for restructuring of district lines might well be appropriate." 418 U.S. at 755.

^{33/} E.g., several of the added defendants (e.g. Speedway/Beach Grove Brief, p. 10) object that no subsidiary findings of housing discrimination were specifically made concerning them. Were this a housing discrimination case the defendants' point might be better taken. In that event, it would be more essential to demonstrate specific discriminatory acts and practices of the defendants in order to formulate appropriate housing relief as to each of them. But the district court emphasized repeatedly that this is not a housing discrimination case. 368 F. Supp. at 1205. The court considered the evidence only for the effect it had on school segregation, including the light it shed on other policies of the defendants with respect to such matters as school reorganization and Uni-Gov.

34/
each has a virtually all-black occupancy. Given that a disproportionate number of blacks are both in low income categories and were already concentrated in IPS and considering the predominantly black composition of the pool of applicants for the H.A.C.I. low-income housing projects, it is a reasonable inference that this action would and did have a further impact

34/ Although a witness for HACI testified concerning various reasons that ostensibly justified the location of low-income housing projects in Indianapolis, cross-examination disclosed that those considerations were insubstantial and had not prevented the location of other similar housing outside the city. (Tr. Vol. II, pp. 259-304, March 19, 1975). It is clear that the district court did not credit those reasons as legitimate. E.g., consider the following exchange between the court and a witness for H.A.C.I. concerning the 102 family unit Clearstream Gardens project that was located on the I.P.S. side of a street running along the boundary with Warren MSD:

THE COURT: Can you tell me any practical difference between the east side and the west side of Emerson 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 [sic] Warren Township school?

* * *

THE COURT: 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?

* * *

WITNESS CARROLL: I cannot specifically answer that question.

Tr. Vol. II, pp. 289-90 (March 19, 1975).

upon the racial compositions of schools and school districts
35/
in Marion County.

Finally, while no evidence has been presented that the school re-organization, annexation and Uni-Gov legislation referred to, supra, has had a direct, causal effect upon the racial composition of schools in Marion County, it at least appears to have frozen the pre-existing school lines in Marion County for all practical purposes, and thereby insulated the territory served by added defendant districts (and a large portion of the white residents of the City of Indianapolis) from potential inclusion in I.P.S. wherein black students and

35/ Evidence produced by appellants to show that multi-family and low and moderate priced single-family housing such as federally assisted §235 and §236 housing was available in their territories (see, e.g., Perry Brief, pp. 11-12) does not rebut the evidence and the findings of the court that black persons have in the past been discriminatorily excluded from residency within their boundaries. Indeed, such evidence bolsters the trial court's conclusion that the "remarkable absence" of black persons from most of the defendant suburban school districts is not attributable to economic or other ostensibly neutral factors. It also indicates that whatever objection appellants may have had to the location of low-income housing outside I.P.S., it was not the federally-assisted nature of the housing. Again, were this a case attempting to overturn the zoning policies and practices of the MDC, the defendant's evidence would be appropriate to show that those policies had not resulted in the unavailability of housing in a price range that most black homeowners could afford. This is not such a case, however, and except with respect to federally assisted low-income housing, the court made no finding on those policies of the MDC.

teachers were concentrated in part because of other discriminatory actions.^{36/}

3. The Remedy. Considered together and cumulatively, the factors referred to above tend to support a conclusion that purposeful state action has contributed to the confinement of blacks to I.P.S. and Center Township^{37/} and established real and efficient impediments to the ability of blacks to live, and therefore to attend school other than in a de jure segregated school system. However, the nature, context and effect of these actions are unlike the traditional type of proof of discriminatory conduct required by the law in order to place on a school board "the affirmative duty to desegregate the

^{36/} Under current circumstances this may have the effect of perpetuating the effects of past discrimination and the relative racial disparities between adjacent districts, at least to the extent that black teachers would otherwise be assigned and black students would otherwise transfer (under a majority-to-minority race or other type of transfer provision) to schools beyond the frozen boundaries.

^{37/} That confinement is, of course, far from absolute today. Many of the more shameful practices of the past have now been eliminated. It is evident, however, that present effects of past discrimination continue to exist.

^{38/} "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation." Milliken v. Bradley, 418 U.S. at 744.

entire system 'root and branch'" (Keyes, supra, 413 U.S. at 213). The actions focused on by the district court only indirectly affected racial compositions of school districts in the Indianapolis metropolitan area and were largely committed by authorities other than those who determine the assignments of students and teachers to schools. What, if any, school remedy is appropriate under such circumstances remains to be considered.

a. The district court's order. There are ample reasons why the district court's order requiring mandatory transfers of black I.P.S. students in order to achieve a 15% black ratio in eight of the 10 added defendant school districts cannot be squared with prevailing legal standards. Foremost among these is that such mandatory transfers across district lines are not related to the nature of nor necessary to correct any constitutional violations identified by the district court.^{38/}

The use of mandatory reassignments of students as a remedy for school segregation evolved in cases where the violation was

^{38/} "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation." Milliken v. Bradley, 418 U.S. at 744.

direct and systemic discrimination in the assignment of minority race students by school authorities. The use of racial percentages was necessary to determine whether the dual system of assignments would be or had been eliminated.

Brown II was a call for the dismantling of well-entrenched dual systems. . . . School boards such as the respondent . . . [were] clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

* * *

Rather than further the dismantling of the dual system, [respondent's 'freedom-of-choice'] plan has operated simply to burden children and their parents with a responsibility which Brown II placed squarely on the School Board.

Green v. County School Board, 391 U.S. 430, 437, 441-442 (1967).

Conversely, if it is fair to characterize the violation here as the setting of impediments to blacks residing outside I.P.S. borders, it does not follow that either the involuntary transfer of black students or relocation of black families is necessary or appropriate to cure the wrong.

In any event, reading the district court's past decisions as a whole and considering the uniform 15% formula adopted and its exclusion of Washington and Pike Townships (which already have enrollments approaching 15% black) from the remedy, it appears clear that the predicate for the order is to ensure the distribution of a percentage of blacks sufficiently tolerable to avoid "white flight".

Use of this theory to dictate the nature and scope of an inter-district remedy is erroneous for several reasons. First, it was rejected as a basis for crossing district boundaries in Milliken, 418 U.S. at 740, and by this Court in the instant case. 503 F.2d at 78-80. Second, it implies that there is something wrong per se with a majority black school that must be remedied (but see Swann v. Board of Education, 402 U.S. 1 at 24 (1971)) or that there may be no remedy for unlawful segregation if a majority white school cannot be assured. Third, the factual underpinnings for the theory that an influx of any particular percentage of black students will produce resegregation are weak and incomplete, at best, and fail to account for certain recent circumstances ^{39/} which may serve to ameliorate legitimate concerns. Moreover,

^{39/} See our brief in 73-1983, pp. 18-28, for a more complete discussion of the studies and evidence pertaining to resegregation and the "tipping point" theory in the context of the Indianapolis area. For example, the circumstances today may be quite different than in the past if it is true that the massive influx of blacks into urban areas has ended. Also it may be too early to evaluate the influence of the Federal Fair Housing Law, 42 U.S.C. 3601, et seq., and local fair housing ordinances which, as the court below noted, have only recently become applicable to a significant amount of housing. 332 F. Supp. at 662, n. 30. The rapid increase in the number of blacks in Washington and Pike Townships (and decline in I.P.S.) suggest that their influence may be significant. According to intervening plaintiffs' Ex. J, black enrollments increased from 884 in 1968-69 school year to 2121 in 1974-75 in Washington M.S.D. and from 112 to 393 in Pike M.S.D. In I.P.S. the total black enrollment increased year-by-year to a high of 38,542 during the 1971-72 school year. Thereafter, it leveled off, and declined to 36,935 by 1974-75 which is about the same number as when this suit was brought in 1968.

recent enrollment data for I.P.S. schools (Attachment A, hereto) indicate that most of those schools have held racial compositions projected for them -- some well above the percentages designated as "tipping points" by the district court.

It also should be noted that under the district court's plan, the whole burden of avoiding "tipping point" schools is involuntarily thrust upon black children.^{40/} Cf. Cisneros v. Corpus Christi I.S.D., 467 F.2d 142, 153 (C.A. 5, 1972) and cases cited therein (holding that in fashioning transportation plans invidious discrimination on the basis of race, through imposition of the burden of desegregation on minority groups, must be avoided). Finally, the nature of the remedy seems to ignore the principle that, consistently with the requirement of "all-out desegregation", the court should seek the plan which is the least disruptive in terms of moving pupils long distances from their homes. See Swann, supra, at 30-31; 20 U.S.C. 1702(b), 1713.

^{40/} One of the consequences of this may be to disparage unduly the interest of a parent in voting for school board members who control and direct the education of the parent's child. See Kramer v. Union Free School District, 395 U.S. 621 (1969); Milliken, supra, 746, n. 21.

b. Suggested disposition on remand. As previously stated, we believe that a provision permitting the voluntary transfers of black students residing within I.P.S. to the added defendant districts, in conjunction with the final desegregation of I.P.S. schools, would be in tune with the inter-district effects of racial discrimination found by the district court, and otherwise makes sense. Quoting from p. 25 of our brief as appellee in the prior appeal:

. . . [W]here transfers across district lines have been allowed in the past for educational purposes, and where black children have been effectively excluded from the opportunity to attend schools in particular systems and must instead attend schools in a de jure segregated system because housing discrimination has determined where they may attend school, part of the remedy for the de jure segregation may be transfers across district lines. 'Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state imposed stigma of segregation.' Swann, supra, at 26.

Such a provision could be effected by simple directions on remand and serve to expedite the conclusion of this long-pending lawsuit. It may well have significant practical value in the fashioning of a final desegregation plan for I.P.S. since, as we have previously noted in detail, a

only a very modest intrusion into local board autonomy, if substantial number of blacks in I.P.S. reside close to predominantly white, non-I.P.S. schools and (partially because of the awkward geographical outline of I.P.S. (e.g. the "flapping wings" of the "trussed fowl", 332 F. Supp. at 656)) may well have to pass such schools in order to reach the nearest white I.P.S. schools.^{41/} Such a provision also appears to be not inconsistent with Indiana law^{42/} or federal legislation^{43/} and would involve

^{41/} See Brief of United States in Nos. 73-1968-1982 and 1984 at pp. 30-31. This point is well illustrated by an analysis of transportation routes in prior desegregation plans proposed for I.P.S.

^{42/} Besides the administrative mechanism for effecting inter-district transfers established by the Indiana Legislature, Indiana law has long provided for voluntary transfers between districts. The main criterion of that statute is whether the child "can be better accommodated in the public schools of another school corporation of this state," and the transferring school district is required to consider the proximity of schools . . . to the residence of such child desiring the transfer, the kind and character of the roads to each, the means of transportation, if any, to each, [and] the crowded conditions of the schools in either of the two corporations" Burns Ind. Stats. 28-5001.

^{43/} In our view, such a provision would be completely consistent with Equal Education Opportunity Act of 1974. See 20 U.S.C. 1702, 1712, 1713, 1715 and 1756.

only a very modest intrusion into local board autonomy, if reasonable objections could be voiced at all. The contention that an order permitting such voluntary transfers is legally and practically appropriate is further buttressed by the fact that at least five of the virtually all-black housing projects operated by HACI are located within a few blocks of five of the added defendant school districts. See n. 54, infra. Finally, if such a provision is adequately supported by the availability of free transportation (where necessary), and appropriate promotion and notice to students and preparation in receiving schools (see Swann, supra at 26), it, together with the future availability of non-discriminatory housing opportunities may serve to ameliorate the "dilemma" caused by fears of "white flight" which has so preoccupied the search for a remedy.

^{44/} The court made findings on that question in its 1971 opinion. 332 F. Supp. at 662.

4. The District Court's injunctions against HACI. The housing discrimination with which the court below was concerned on remand, as indicated from the discussion above, was not alleged discrimination in the placement of housing within certain parts of IPS vis a vis other parts of IPS.^{44/} The court was concerned with discrimination which tended to isolate black families -- and thus students -- in IPS vis a vis other school districts in Marion County. Specifically, with respect to HACI, the only issue on which evidence was presented concerned alleged discrimination in the placement of family-type low-income public housing projects. And the order of the district court (App. of IPS, p. 30, paras. J and K) related only to future actions of HACI concerning such housing and was tailored to deal only with the question of the continued isolation of black students in IPS as a result of the placement of such housing.

The issue before the district court was not the housing opportunities currently available to black residents of Marion County or the purpose and effect of HACI and MDC policies and practices on the availability of such housing nor the appropriate remedy, if any, to correct such policies and practices. This is

^{44/} The court made findings on that question in its 1971 opinion. 332 F. Supp. at 662.

a school desegregation case,^{45/} and the court below properly limited its consideration to the effect of housing discrimination "upon the de jure segregation of IPS."^{46/} Thus, defendant HACI's discussion of cases such as Shannon v. HUD, 436 F. 2d 809 (C.A. 3, 1970); Gautreaux v. Chicago Housing Authority, 265 F. Supp. 582 (N.D. Ill., 1967); and Crow v. Brown, 332 F. Supp. 382 (N.D. Ga., 1971) aff'd 457 F. 2d 788 (C.A. 5, 1972), and the rationale underlying the relief, if any, granted in those cases largely misses the point.

The record shows that the HACI operates eleven family-type, low-income public housing projects (App. of HACI, p. A19). One of the projects, Lockefield Gardens, was built in 1939 in Center Township in a black neighborhood and at least since 1968 has had 100% black occupancy. (Tr. Vol. I, pp. 88 and 93 (March 18, 1975)). The remaining ten housing projects, however, opened for occupancy

^{45/} As the Supreme Court noted in Swann, supra:

"One vehicle can carry only a limited amount of baggage."
402 U.S. at 22.

^{46/} In its Pretrial Entry of December 13, 1974, the district court described one of the issues on remand as ". . . the effect, if any, of housing and zoning laws, rules, regulations, and customs in Marion County, Indiana, and its various political subdivisions upon the de jure segregation of IPS." (App. of IPS, p. A5).

between June 1968 and June 1971 and contain approximately 1644 family units.^{47/} (App. of HACI, p. A19). In 1968, when most of these projects were being planned, the occupancy of two existing family-type projects, excluding Lockefield Gardens, was approximately 70% black. (Tr. Vol. I, p. 88 (March 18, 1975)). By as early as 1973 (App. of HACI, p. A15) and thereafter (Tr. Vol. I, pp. 72-73 (March 18, 1975)), the occupancy of the family-type projects has been approximately 98% black.^{48/} Using the Housing Authority's estimate of 3.5 children per family (Tr. Vol. I, p. 70 (March 18, 1975)), these projects, if fully occupied, contain approximately 5700 children who at some point will presumably attend public schools.^{49/}

^{47/} Lockefield Gardens has been excluded from this total of units. It is listed as containing 748 units for both family and elderly (App. of HACI, p. A19), but the record indicates that it is presently largely unoccupied as family housing. See, e.g., App. of HACI, p. A25.

^{48/} Wayne Ex. PP, Table III (App. of HACI, p. A15) shows that as of June 1973, HACI operated 13 public housing projects and that two of these had black occupancy percentages of 29.2% and 32.7%. However, those two projects, 17-7 (Barton I) and 17-20 (Barton II) are reserved for the elderly, where there is a greater pool of white applicants. Brief of HACI, p. 8; App. of HACI, p. A19. The remaining 11 projects are designed for family occupancy and each is virtually all-black.

^{49/} HACI has, of course, been aware of the racial occupancy of its projects and the racial composition of the pool of applicants during this period of time. Tr. Vol. 14, pp. 2621-24, July 5, 1973.

The reasons for the placement of every one of these projects within IPS, and the legal consequences, if any, flowing therefrom, were the issues considered and ruled upon by the court below. It is undisputed that HACI, at all times, had the authority under state law to construct public housing five miles beyond the boundaries of the old civil city of Indianapolis. It is also undisputed that in order to get HUD approval for a low-income housing project HACI had to obtain a cooperation agreement with the appropriate local governmental entity in order to ensure the provision of adequate services to the occupants of the project. (Tr. Vol. II, pp. 256-57 (March 18, 1975)).

The criteria utilized by the Metropolitan Development Commission, or its predecessors,^{50/} in recommending public housing sites were:

- (1) availability of municipal services, such as water, sewer, utilities, police and fire;
- (2) availability of public transportation;
- (3) availability of employment within reasonable proximity;
- (4) availability of schools, parks, and shopping areas;

^{50/} Land-use zoning has been a county-wide operation since 1957, applicable both inside and outside city boundaries. Tr. Vol. 9, pp. 1769-70 (June 26, 1973).

(5) consistency with the plan for residential development. 51/

There are, and since 1968 always have been, a large number of sites outside of the IPS boundaries that are suitable for multiple family dwellings. 52/ The reason given by defendant HACI for initially not considering the placement of any public housing projects outside IPS was that they could not guarantee sewer and utilities services to the project since the County Commissioners had refused to enter into a cooperation agreement with HACI. (Tr. Vol. 2, pp. 255-58 (March 19, 1975)). But their exhibits demonstrated that sewer service had been extended from the city into the suburban areas on a number of occasions to facilitate construction of multiple family dwellings, (Tr. Vol. 2, pp. 214-15, (March 19, 1975)) and that police and fire protection had been extended to businesses located outside the city on a contract-type basis. (Tr. Vol. 1, p. 169 (March 18, 1975)). So it would appear that the cooperation agreement with the City of Indianapolis could have been used to satisfy the need for assurance of the provision of such services.

51/ Tr. p. 255, Vol. II (March 19, 1975).

52/ In fact, defendants have relied heavily upon the availability of such housing to demonstrate that there is housing outside IPS available to black persons.

The other reasons given by HACI for not locating public housing outside IPS were also not applied in similar circumstances with respect to other types of multiple family dwellings,^{53/} and, finally, the only claim made was that the projects had to be located in IPS because of the availability of public transportation. (Tr. Vol. 2, pp. 263 (March 19, 1975)). But the projects constructed between 1968 and 1971 are not in the center of Indianapolis; most are located on or within a few blocks of the boundary line between IPS and various defendant suburban school districts.^{54/} The distance between the project sites actually used by HACI and suitable multiple-family dwelling sites in the defendant suburban school

^{53/} E.g. employment opportunities, schools and other public services appeared to be amply available in areas outside IPS. (Tr. Vol. 2, pp. 260-62 (March 19, 1975); 75 MDC 6; 75 MDC 8; 73 Pl. Ex. 12.) If such services were lacking it was not an obstacle to locating other types of public, multi-family housing there.

^{54/} The exchange between the court and a witness noted above with respect to Clearstream Gardens, footnote 34, supra, applies to most of the projects constructed between 1968 and 1971. For example, Rowney Terrace is located ten blocks north of Clearstream Gardens on the same boundary line between MSD Warren and IPS; Raymond Villa is located approximately four blocks north of the boundary line between Beech Grove and IPS; Laurelwood is located in a narrow arm of IPS that extends into, and is surrounded on three sides by, MSD Perry; Eagle Creek is located on the boundary line between IPS and MSD Wayne; and Concord Village is located approximately one-half mile from the Speedway boundary line. See 75 MDC 6; 73 Pl. Ex. 12. Together these five projects contain 802 family units (see App. HACI, p. A19) and using the 3.5 factor referred to supra, it could be estimated that approximately 2,807 black children reside therein, assuming full occupancy.

districts is not a matter of several miles but only a matter of crossing the street^{55/} or constructing a few blocks further south, east, or west of the site actually used.^{56/} Under such circumstances the availability of public transportation could not have been a legitimate reason for choosing a site in IPS as opposed to an available site in one of the defendant suburban school districts.

On this record, the only discernible difference between the project sites used and other available sites was, as noted by the court below, the public school system the children residing in the projects would attend. (See, Tr. Vol. II, pp. 289-90 (March 19, 1973)). Given the historical context in which these project sites were selected and the clear and foreseeable racial impact of the actions of defendants HACI and MDC, the court below properly concluded that "[t]he location of these housing projects . . . has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory,"

^{55/} E.g., Clearstream Gardens and Rowney Terrace.

^{56/} Compare the sites of public housing projects in MDC Ex. No. 6 with the nearby sites in the suburban school districts of Sections 235, 236 (New) and 221(d)(3) and (d)(4) multiple-family housing developments constructed or authorized by defendants HACI and MDC.

HACI, especially since ^{57/} apparently are no plans for any immediate construction of new projects (Tr. Vol. I, p. 88, March 18, 1975.) To the extent such construction is undertaken in . . . to be and remain segregated white schools" (App. of IPS, p. A13).

The relief ordered by the district court concerning future construction of projects in IPS (paragraph j) was directed toward correcting the effects of the past discriminatory location of all family-type public housing projects in IPS (as well as preventing the further impaction of blacks in IPS through similar actions). Since HACI's cooperation agreement with Indianapolis now covers the entire County, with the possible exception of the "excluded towns," and since there are numerous suitable sites for multiple-family dwellings outside of IPS (see MDC Ex. No. 6), that limitation should not unduly burden

^{57/} Defendants contend that the actions of HACI and MDC have not "increased" the number of black students in IPS. (Brief of HACI, p. 21). The district court, of course, made no finding to that effect. The actions of HACI and MDC in locating public housing projects, however, confined a group of persons that was at least 90% black (the composition of the pool of applicants) to realistic housing opportunities in IPS only. That group of persons is the only housing market for which this record discloses the racial composition. Thus, defendants arguments concerning the availability of other federally assisted housing in the suburbs is irrelevant for two reasons: (1) the racial composition of the market for such housing is not directly reflected in the record and to the extent it is implied the market would appear to be predominantly white (see p. 26, supra, footnote 35); and (2) the persons in the above low-income housing market do not qualify for the other federally assisted housing cited by defendants and the only private housing available to them is located in IPS. (Tr. Vol. I, p. 83 (March 18, 1975) and Tr. Vol. II, pp. 265-66 (March 19, 1975)).

HACI, especially since there apparently are no plans for any immediate construction of new projects.^{58/} (Tr. Vol. 1, p. 89, March 18, 1975.) To the extent such construction is undertaken in the future, however, it would serve to eliminate the confinement of the present occupants of the existing projects and the approximately 4000 current applicants for occupancy to housing opportunities solely within IPS. Thus, the relief seems clearly directed to remedying the violation found and within the equitable discretion of the trial court.

The above reasons also support the court's order (paragraph k) with respect to Lockefield Gardens, insofar as the order concerns future renovation for family-type units. The motion to modify filed by defendant HACI, contrary to the suggestion in its Brief, p. 14, does not show that the Lockefield Gardens renovation is part of a metropolitan-wide housing plan.^{59/} The affidavits in support

^{58/} Accordingly, the court's order does not appear to present the apparent legal and practical complications of ordering one city housing authority to construct projects in areas within the jurisdiction of other housing authorities and units of local government as are involved in Gautreaux v. Chicago Housing Authority, 503 F.2d 930 (C.A. 7, 1974) cert. granted, sub nom. Hills v. Gautreaux, No. 74-1047, 44 U.S.L.W. 3010.

^{59/} Should defendant HACI develop such a plan or show that future construction they may wish to undertake would not serve to perpetuate the impact of blacks in the IPS portion of the City of Indianapolis, it might serve as a basis for a modification of the court's order, even if some of the construction of housing projects is to occur in IPS. Cf., Gautreaux v. Chicago Housing Authority, supra.

of the motion (App. of HACI, pp. A23-4, 25-30), show only a continuation of the discriminatory policies and practices which the court order was designed to correct. The only basis given for asking the court to allow an exception for the Lockefield Gardens renovation is that plans have already been made and the expectations of the persons involved may be disappointed. The affidavits do not disclose any unsuccessful efforts by the defendant HACI to explore alternative uses for the committed federal funds or to seek a modification of its quit claim deed to the Lockefield property nor do they disclose any other basis for claiming possible irreparable harm to HACI.^{60/} Indeed, the outcome of this case may affect the reasonable availability of public schools in the Lockefield area and, thus, one of the criteria which defendants have said they consider in locating housing projects.^{61/} The court has, of course, retained jurisdiction to consider future requests for modification of its orders. On the showing made by

^{60/} To the extent that the defendants read paragraph k of the order as requiring the eviction of current residents of family units even if they are unable to acquire adequate housing elsewhere (App. of HACI, pp. A20-A21), we believe they give the order too broad a reading. In denying the motion to modify, the court below only directly addressed the renovation aspects of the motion (App. of HACI, p. A62).

^{61/} See, supra, p. 38-39.

ATTACHMENT A

defendant HACI, however, it cannot be said that the trial court abused its discretion in refusing to modify its order with respect to Lockefield Gardens at this time.

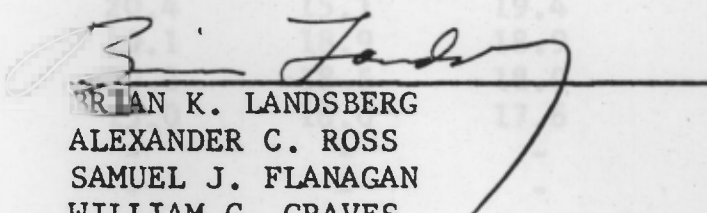
CONCLUSION

For the foregoing reasons, in Nos. 75-1730 to 75-1737, 1765, 1936 and 1964, the judgment of the district court should be vacated, but with directions for appropriate modifications, as suggest above, on remand. In Nos. 75-1965, and 75-2007, the decision below should be affirmed.

JAMES B. YOUNG
United States Attorney

Respectfully submitted,

J. STANLEY POTTINGER
Assistant Attorney General


BRIAN K. LANDSBERG
ALEXANDER C. ROSS
SAMUEL J. FLANAGAN
WILLIAM C. GRAVES
Attorneys
Department of Justice
Washington, D. C. 20530

ATTACHMENT A

I.P.S.				
<u>PERCENTAGE NON-WHITE ENROLLMENT*</u>				
<u>School</u>	<u>1972</u>	<u>Comm.</u>	<u>1973</u>	<u>1974</u>
1	98.6	N.C.	98.6	99.7
2	23.7	21.5	29.3	25.3
3	0.7	27.5	25.6	30.3
4	99.5	39.8	45.6	37.1
5	47.7	N.C.	60.8	75.6
6	-	-	-	-
7	38.8	N.C.	-	-
8	1.7	15.2	13.4	14.7
9	32.1	-	-	-
10	-	-	-	-
11	40.7	N.C.	55.1	64.0
12	30.7	20.8	17.8	-
13	-	-	-	-
14	6.9	15.1	15.3	17.7
15	0.6	27.5	15.1	13.6
16	11.8	-	-	-
17	-	-	-	-
18	0.7	19.2	16.2	15.6
19	3.8	20.4	15.1	19.4
20	11.8	20.1	18.9	18.9
21	9.9	20.2	18.5	18.0
22	9.1	15.0	16.0	17.6
23	-	-	-	-
24	-	-	-	-
25	-	-	-	-
26	93.0	38.0	48.7	42.0
27	86.5	N.C.	89.3	91.3
28	3.0	20.4	18.3	19.1
29	100.0	-	-	-
30	0.7	30.8	16.7	15.7
31	0.0	19.1	15.2	14.1
32	94.1	-	-	-
33	7.7	27.4	24.7	21.9
34	0.6	19.6	19.5	21.4
35	0.0	19.2	15.0	15.6
36	100.0	-	-	-
37	99.0	34.9	44.8	42.1
38	94.2	35.0	38.0	33.1
39	4.2	20.1	16.3	15.9
40	-	-	-	-

<u>School</u>	<u>1972</u>	<u>Comm.</u>	<u>1973</u>	<u>1974</u>
41	99.6	N.C.	99.3	99.4
42	100.0	N.C.	100.0	100.0
43	99.8	N.C.	99.5	99.6
44	99.6	N.C.	99.7	99.3
45	98.4	N.C.	98.3	98.5
46	8.9	24.7	17.5	18.7
47	0.0	24.8	21.7	23.5
48	100.0	N.C.	100.0	100.0
49	5.4	24.7	16.7	16.1
50	0.0	31.0	20.8	20.6
51	88.2	39.9	57.8	61.8
52	77.2	31.0	46.5	48.1
53	44.9	N.C.	64.1	72.8
54	0.0	22.0	16.0	15.5
55	14.7	N.C.	16.9	16.1
56	100.0	N.C.	100.0	99.7
57	5.0	23.1	24.7	21.4
58	0.6	23.2	20.1	20.5
59	18.7	N.C.	31.4	38.7
60	100.0	N.C.	99.8	99.5
61	1.9	19.9	16.8	14.1
62	1.6	15.3	16.9	16.1
63	99.7	N.C.	99.2	100.0
64	99.4	37.9	36.3	34.1
65	4.2	19.7	17.7	10.6
66	95.1	N.C.	96.0	96.5
67	36.6	31.6	38.7	36.7
68	0.3	18.02	20.3	17.9
69	99.2	38.0	50.3	53.1
70	41.0	34.7	46.8	49.5
71	96.7	N.C.	99.1	98.4
72	20.1	N.C.	21.6	20.6
73	81.9	84.72	85.4	88.5
74	23.2	N.C.	20.9	22.4
75	84.6	N.C.	90.4	90.2
76	99.7	N.C.	98.6	99.8
77	1.2	23.0	24.7	24.7
78	0.0	22.1	14.7	12.3
79	0.4	20.0	16.3	16.1
80	13.0	N.C.	16.4	16.1

The first three columns of this chart were set out in the August 1974 opinion at 76-77. The last column represents the enrollment projection for the school year, and is taken from the December 23, 1974. "Comm." refers to the enrollment projections contained in the Commissioners' (Court-adopted) 1973 interim plan (N.C. refers to "no change" and - indicates a discontinued school).

CERTIFICATE OF SERVICE

<u>School</u>	<u>1972</u>	<u>Comm.</u>	<u>1973</u>	<u>1974</u>
81	2.5	20.0	19.6	22.3
82	0.0	20.2	24.1	24.1
83	63.1	N.C.	84.8	87.5
84	6.8	15.2	15.9	20.2
85	12.7	N.C.	13.6	13.0
86	53.2	N.C.	50.0	46.6
87	100.0	29.9	38.6	36.6
88	0.5	15.8	14.7	16.1
89	3.7	18.89	19.1	21.8
90	8.0	15.0	14.8	17.0
91	18.7	N.C.	31.2	36.2
92	4.0	23.18	26.5	31.3
93	1.0	25.7	22.1	25.6
94	0.6	25.7	37.0	38.3
95	1.7	22.4	21.5	24.6
96	0.8	16.4	12.3	11.6
97	25.4	N.C.	29.5	28.6
98	0.2	19.8	16.2	17.1
99	39.7	N.C.	38.0	37.0
100	4.4	15.1	15.1	16.7
101	36.2	N.C.	37.0	37.3
102	1.2	19.9	22.1	25.5
103	3.3	19.8	20.6	22.5
104	45.8	22.4	24.6	-
105	0.4	19.8	19.9	21.8
106	24.0	N.C.	19.9	21.8
107	6.1	21.5	17.7	19.0
108	1.8	17.7	17.3	20.7
109	0.9	19.8	14.8	9.6
110	99.2	N.C.	99.3	99.5
111	37.3	34.3	33.3	30.7
112	68.2	38.0	48.5	47.4
113	6.5	25.7	25.7	30.7
114	52.5	34.0	33.4	34.6

The first three columns of this chart are taken from the table set out in the August 21, 1974 opinion of this Court. 503 F.2d at 76-77. The last two columns represent the non-white enrollment for the schools involved for the 1973-74 and 1974-75 school years, and are taken from IPS' pre-trial submission of December 23, 1974. "Comm." refers to the enrollment projections contained in the Commissioners' (Court-adopted) 1973 interim plan (N.C. refers to "no change" and -- indicates a discontinued school).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served on all the parties in this case by depositing them in the United States mail, postage prepaid, addressed as follows:

Mr. Richard L. Brown
156 East Market Street
Indianapolis, Indiana 46204

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

Mr. William O. Schreckengast
380 Main Street
Beech Grove, Indiana 46302

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

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

Mr. William F. Harvey
735 West New York Street
Indianapolis, Indiana 46204

Mr. Charles G. Reeder and
Mr. Ben Weaver
600 Union Federal Building
Indianapolis, Indiana 46204

Mr. Fred S. White
2430 Indiana National Bank
Tower
Indianapolis, Indiana 46204

Mr. James D. Capehart
2700 Indiana National Bank
Tower
Indianapolis, Indiana 46204

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

Mr. Richard D. Wagner
2860 Indiana National Bank
Tower
Indianapolis, Indiana 46204

Mr. Gray Landau and
Mr. Ronald Shannon
2561 City-County Building
Indianapolis, Indiana 46204

Mr. Lewis C. Bose
1100 First Federal Building
Indianapolis, Indiana 46204

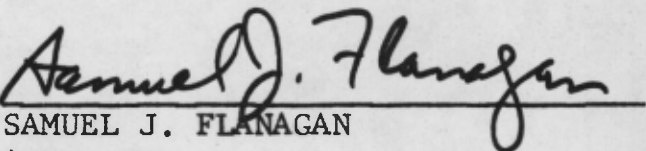
Mr. Donald P. Bogard
Office of the Attorney General
219 State House
Indianapolis, Indiana 46204

Mr. William M. Evans
1100 First Federal Building
Indianapolis, Indiana 46204

Mr. William E. Marsh
735 West New York Street
Indianapolis, Indiana 46204

Mr. Donald A. Schabel
111 Monument Circle
Indianapolis, Indiana 46204

This the 20th day of November, 1975.


SAMUEL J. FLANAGAN
Attorney
Department of Justice
Washington, D. C. 20530