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METROPOLITAN SCHOOL DESEGREGATION

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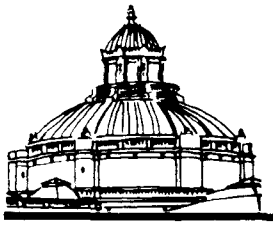

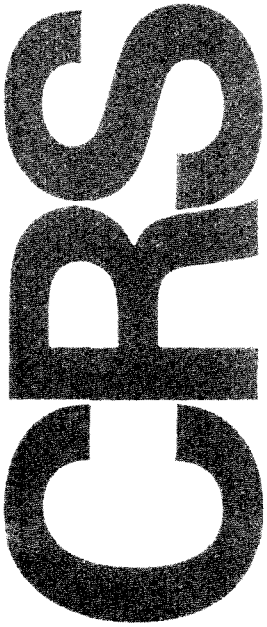

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ABSTRACT

Desegregation of schools in multi-school district metropolitan areas has been proposed to achieve racial balance in inner city schools. The courts have been hesitant to impose this remedy except where governmental action has been taken to foster segregation. Some contend that a better alternative would be to use educational remedies. Limited congressional options are available.

CONTENTS

SUMMARY

Interest in desegregating schools throughout multi-district metropolitan areas has increased as a result of litigation in the Federal courts concerning cross-district integration of students in the Detroit, Indianapolis, Louisville, and Wilmington metropolitan areas. Experience with school desegregation efforts involving a central city school district and its suburban independent school districts is very limited. Throughout the Southeast, school districts generally cover larger geographical areas than in other regions of the Nation. In these districts, various examples can be found of school desegregation efforts involving a central city and its surrounding suburbs; however, these areas have involved only one school district. This paper has been devoted to a discussion of school desegregation in metropolitan areas with multiple school districts; the intent is not to address the full range of issues related to school desegregation or school busing for integration.

The increasing minority race school-age populations and the declining white school-age populations in some central cities have resulted in several cities approaching the point that a majority of the enrollment is comprised of minority students (referred to as "majority-minority" pupil enrollments). This demographic condition has resulted in some persons questioning the merits of metropolitan desegregation efforts and proposing that "educational remedies," or the expansion of educational programs and opportunities in the neighborhood school, be the social goal rather then inter-district desegregation. However, other persons have used this demographic condition as justification for proposing metropolitan

desegregation. These desegregation advocates point to the evidence that single unit school districts serving metropolitan areas can desegregate their schools, but not that several school districts serving a metropolitan area will seek to integrate their schools. The decentralized governance structure of American public education is premised on the assumption that local citizens will make decisions about the operation of schools in their own self-interest and citizens in each of several school districts in a metropolitan area, and citizens in each school district may not view school desegregation as being in their self-interest.

Concerns about metropolitan school desegregation are related to family choice of residence, administrative feasibility, magnitude of busing school children, implications for local control of schools, and educational effects. "White flight" from the community and from the schools appears to take place during the early stages of desegregation, but research suggests (1) that the moving of families may not be greater than if the school desegregation plan had not been in effect, and (2) that many students return to the public schools after the initial desegregation period. Studies indicate that administrative procedures for desegregation can be developed, but logistical problems increase when several school districts are involved. Observers contend that busing for students in a metropolitan desegregation effort may not be any greater than in many rural and suburban districts at the present time.

One concern is that parents fear a potential loss of control and contact over the schools attended by their children, but parents in many large cities also feel that they are isolated from the central school administration and the school board. Limited studies of student achievement in metropolitan-area desegregated schools suggest that white students have not been adversely affected and that minority

students have benefitted. An additional potential benefit is the opportunity to increase educational programs and expand student services.

Legal precedents in the Federal courts concerning metropolitan school desegregation are limited, but the critical element appears to be the existence of evidence that governmental action has been taken to foster or maintain school segregation in the metropolitan area. When the courts have viewed school segregation as being fostered by such actions as the formation of school districts, location of public housing, and inter-district transfer of minority students, districts have been merged by court order.

The Congress has various public policy options concerning metropolitan desegregation; however, the ultimate responsibility for the conduct of schools resides with the individual States rather than with the Federal Government. In view of this established legal principle, the Congress could take "no action". Another option is Federal funding for "research and dissemination activities" to raise the level of public understanding of the issue. A third option would be to fund "demonstration programs" for school districts to participate in inter-district desegregation activities. Support can also be found for a fourth option that would provide direct aid for "educational remedies" to improve educational opportunities in inner city schools; however, increased desegregation of schools would not be the direct result. Excluding the "no action" option, each choice would represent a positive Federal action, but the option remains for the Congress to prohibit the use of Federal funds for any activity designed to support or promote metropolitan or inter-district desegregation activities.

This paper consists of three sections. Reports and research studies about metropolitan desegregation are summarized in the first section. Legal precedents are discussed in the second section. A brief discussion of alternative courses of action for the Congress is presented in the last section.

SOCIAL AND EDUCATIONAL IMPLICATIONS OF METROPOLITAN SCHOOL DESEGREGATION

BACKGROUND

The pace of school integration has moved at different rates in different localities over the 25 years since the Brown decision of the U.S. Supreme Court. Much attention has been devoted to integrating the previously dual school systems for black and white students that existed in the Southeastern States. Progress has been made in integrating the schools in that part of the Nation, but pockets of segregation remain throughout the Nation.

Recently, the focus has been on the older urban areas throughout the Nation, for the concept of the neighborhood school has contributed to the maintenance of segregated schools because of the housing patterns in most large cities. The attainment of racially-mixed schools in many urban areas has been further thwarted by the continuously shifting population patterns, as the white school age population has declined and the minority school age population has increased.

Urban school districts thus find themselves confronted with an increasing minority population and declining socio-economic and educational background levels for the white families who continue to use the public schools. The result is that the white parents who are most threatened by the minority community are the ones with the students in the public schools. Since 1920 there has been a steady increase in the segregation of children in the urban North by social class. 1/

1/ Havighurst, Robert J., Education in Metropolitan Areas, Allyn and Bacon, New York, 1966, p. 59.

During this period the percent of minority students has also increased. Movement is in the direction of the majority of the school enrollment in many urban areas consisting of minority children, often referred to as a "majority-minority" enrollment.

Segregated School Districts

For political, social, and economic reasons, families tend to sort themselves out in the selection of residencies. This sorting out process often results in a pattern of racial segregation in housing that is reflected in the segregated schools. In States with county units or similar organizational patterns that result in geographically larger school districts, the challenge to integrate the schools can then be resolved on an intra-district basis. However, outside the Southeast with its large school districts, the suburban school districts cover less area and often are relatively homogenous in their economic characteristics. The degree to which a community is integrated then depends upon the historical housing policies, the clustering of homes with similar prices, and the efforts that have been made to assure equitable treatment for minority home buyers and renters. Throughout the Nation, one can find a limited number of suburbs in which fair housing practices have been in effect for a long time; these are often the ones with the integrated schools while their neighboring suburbs remain segregated. The tendency to locate subsidized housing in central cities has also contributed to the overall pattern of racial and economic organization. This suggests that the structure of school segregation may have been more related to housing decisions than to school districting or other direct educational decisions.

In 1977, the U.S. Commission on Civil Rights issued a "Statement on Metropolitan School Desegregation" which stated that the challenge of large city desegregation was compounded not by the segregated schools, but by the segregated

school districts. 2/ The influx of minorities, the exit of whites, and the aging of the remaining whites have contributed to the increasing percentage of the school population that is minority in the large citites. Cities with high minority percentages will naturally find that they still have racially identifiable schools even under a perfect balance of children by race among the schools in the city. Often the adjoining suburbs have a school age population in which minority percentages are near the reverse of the pattern in the city school districts. The Commission indicated that substantial integration could only be accomplished in some metropolitan areas through inter-district assignment of students to bring about actual integration of schools.

The Commission's report recognized the progress that had been made in integrating schools during the previous decade, but the report noted that "millions of minority children remain in segregated schools." In further discussion, the report indicated that to a very great extent the remaining problems of segregation were concentrated in the large cities, i.e., in the 26 largest cities, 3 of every 4 black children were assigned to "intensely segregated schools." 3/ Further discussion in the report stated that the South had a better record on overall desegregation, but that similar conditions existed among all regions of the Nation in terms of the racial isolation in the larger cities.

Educational Remedies

The appropriateness of racial balance as the principal policy goal of private and government civil rights groups has been subjected to critical examination in a recent article: 4/

2/ Asher, Steven E., "Inter-district Remedies for Segregated Schools," Columbia Law Review, Vol. 79, October 1979, p. 1168; U.S. Commission on Civil Rights, Statement on Metropolitan School Desegregation, The Commission, February 1977, p. 8.

3/ U.S. Commission on Civil Rights, p. 6.

4/ Bell, Derrick, A., Jr., "A Reassessment of Racial Balance Remedies-I," Phi Delta Kappan, November 1980, p. 177-178.

> Continuing pressure for racial balance under all conditions, regardless of its cost and disruptive potential, and regardless of the fact that educational benefits to be obtained are unproven, is dangerous.
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> . . . There is a world of difference, though, between "separate but equal" schools--established over the objection of blacks and maintained to insure the inferior character of the education they provide--and institutions designed for and responsive to the very educational needs of black children who either by parental choice or legal barriers are unable to attend desegregated schools.

The growing number of minority children in many urban school districts suggests that busing will not result in the desired level of racial balance in many inner city schools. In the search for an alternative to extensive busing, "educational remedies" have been suggested as a substitute for racial balance in the efforts to improve educational opportunities for black students. The Federal courts have accepted this alternative for improving educational programs and services in litigation involving Detroit and Atlanta.

Various research efforts in recent years have contributed to the identification of successful urban schools serving minority children. 5/ From these studies, some conditions or characteristics have been developed that provide direction for those seeking to use the "educational remedies" route: 6/

(1) They have strong administrative leadership.
(2) They have a climate of expectation in which no child is permitted to fall below minimum standards.
(3) The school's climate is orderly without being rigid, quiet without being oppressive.
(4) The acquisition of basic school skills takes precedence over all other school activities.
(5) School energy and resources can be diverted from other business in furtherance of the fundamental objectives.
(6) There is some way to frequently monitor pupil progress.

5/ Irvine, Jacqueline Jordan, and Russell W. Irvine, "A Reassessment of Racial Balance Remedies-II," Phi Delta Kappan, November 1980, p. 180-181.

6/ Edmonds, Ronald, "Effective Schools for the Urban Poor," Educational Leadership, October 1979, p. 22.

In several areas of the Nation, outstanding minority segregated high schools have been identified. 7/ In the 1950s and 1960s, those schools were successful on the criteria of student achievement, school climate, and school-community relations; however, the composition of the student body in many of those schools has changed in the intervening period.

One of the difficulties in relying upon conditions in successful minority segregated schools in the pre-Brown era as a source of possible "educational remedies" is that societal goals have changed in the past two decades; currently, schools are expected to provide educational opportunities for all youth, irrespective of race, rather than those only with high abilities and aspirations. A broader range and more comprehensive set of educational programs and services are required to provide adequate educational opportunities for this expanded pupil population.

The unresolved issue is whether or not "educational remedies" provide an alternative to the contemporary racial balance strategy that assumes black children must attend schools with white children to be assured that they will have access to the same quality of education. The basic position of the policymakers in the civil rights movement has been that effective education cannot be achieved in a racially-isolated school, but this cannot be achieved in some areas without a restructuring of school governance systems and expansion of the area in which schools are to be subjected to balance racial criteria. 8/

One of the reasons that interest groups have sought racial balance among schools in individual school districts is illustrated in the findings from a study of the allocation of resources in the Los Angeles Unified School District

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7/ Sowell, Thomas, "Patterns of Black Excellence," The Public Interest, Spring 1970, p. 53.

8/ Bell, Derrick A., Jr., "A Reassessment of Racial Balance Remedies-I," p. 179.

for the 1977-78 school year. 9/ Schools with predominantly black or Hispanic pupil populations received fewer fiscal resources from regular funds, had teachers with lower levels of experience and training, and attended schools staffed by faculties with more minority teachers and substitutes than other schools whose enrollment was predominantly white. When adjustments were made for Federal funds and special State funds, the schools with predominantly minority enrollments did have more favorable pupil-teacher ratios; in fact, when only regular funds were considered, the ratios were slightly more favorable in the minority schools. The study indicated that the differences likely were related to variations in the average teacher salary; the minority schools had teachers who likely would receive a lower salary on the salary schedule because of lower levels of training and experience. In the analysis of per pupil funding for the 1976-77 school year, expenditures in the minority schools from regular funds were less than average for the entire school district.

The report concluded that two types of remedies were available--(1) allocate more dollars to the minority schools so that they would have more inputs in terms of additional staff or other resources or (2) transfer teachers so that the balance of training and experience among the various schools would be improved. The research was based on data from school years prior to the recent court-ordered busing in the Los Angeles school district and provides some additional insights into the rationale for the busing of school children among schools to achieve racial balance. The study also indicates some of the difficulties that would be encountered if educational remedies should replace racial balance as the vehicle for improving educational opportunities for minority school children, for the assumption under educational remedies is that disproportionate resources would be provided to minority children.

9/ Choy, Ronald K. H. and Bernard R. Gifford, "Resource Allocation in a Segregated School System: The Case of Los Angeles," Journal of Education Finance, Vol. 6, Summer 1980, p. 34-50.

Educational Governance

Few would question the contention that metropolitan desegregation has the potential of disrupting traditional patterns of school assignment and educational governance. Most metropolitan proposals either suggest an eventual merger of school districts or dramatic changes in pupil assignment procedures. All pupils to be served in a school district would not be residents of the district unless all involved districts merged into a single school district. Consequently, some of the justification for the district's existence would be removed, for portions of the decision-making power of local school boards would be transferred to a pupil assignment authority responsible for achieving racial balance in an area larger than individual school districts. Citizens will naturally be reluctant for the local school district to become involved in an extensive interdistrict plan that would require reassignment of a significant number of pupils. This arrangement would eliminate some of the basic rationale for the existence of separate school districts. Then the issue becomes the appropriate number of pupils to be served by a school district.

The appropriate size of a school district has been a subject of continuing controversy. Few would quarrel with the contention that a school district should have a sufficient number of pupils to offer comprehensive educational programs and services, but a rather wide difference of opinion exists as to the optimum number of pupils required to offer the desired program and services. Some have suggested that the number might be as small as 10,000 pupils, and others have indicated that 50,000 pupils is the optimal number. These numbers are not based on empirical research, and would be influenced by population density and the internal administrative organization of the district. By delegating authority and decentralizing decision making, sub-districts can be formed that approach the level of autonomy accorded to independent school districts.

One point of controversy is the tendency for the school board and central administration to be isolated from individual schools and citizens; communication and parental participation are two of the principal challenges in large school districts. Another issue is the size level at which the district reaches the point of diminishing returns when additional pupils or increased geographical area no longer result in a decrease in unit cost, but result in an incremental increase in cost. High administrative costs and problems with communication and coordination between parents and schools and the central administration are among the major concerns related to the optimal size of school districts.

Assuming acceptance of the social goal of eliminating the vestiges of segregation, the rationale for the concept of metropolitan desegregation is illustrated in the following statement: 10/

> If past experience is a guide, desegregation in big cities will not come easily. Plans limited to the central city seem calculated to stir both race and class resentments. The message received by many is that working class whites and blacks are expected to bear the entire burden of social change and that more affluent whites, who are viewed as doing the prescribing, somehow manage to exempt themselves from the prescription.
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> Nor are plans limited to the central city likely to prove lasting. This is not because (as Professor Coleman first had it) desegregation plans contain the seeds of their own destruction. Rather, the instability of central city desegregation is attributable to the fact that the forces leading to white suburbanization are continuing and powerful. Until these forces are reversed or until minority families participate in the movement, intra-city school desegregation will not be a stable or lasting remedy.

One factor that has slowed the pace of metropolitan desegregation efforts is that the courts are primarily concerned with the interpretation of the law, and the intent of the law even in a broad interpretation is concerned only with ending--and eliminating remaining vestiges of--illegal segregation, not implementing

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10/ Taylor, William L., "Metropolitan Remedies for Public School Discrimination," The Urban Review, Vol. 10, No. 2, Summer, 1978, p. 185.

a successful plan for integration. When one considers the problem in metropolitan areas, the challenge becomes even greater if the goal is to bring about the racial integration of the schools. Orfield has indicated that limiting efforts to districts with few white students means in effect that there is no remedy, for long-term demographic trends seem to guarantee continued segregation in the inner cities and a speeding up of the normal process of ghetto expansion with the subsequent increase in minority percentage of the school population. 11/

TYPES OF METROPOLITAN DESEGREGATION

Efforts to achieve metropolitan desegregation can be subdivided into two categories i.e., those that take place within a single school district and those that involve two or more school districts. The first is in those school districts that comprise a geographical area consisting of a city and its immediate suburbs (this is referred to as a metropolitan area). Examples are Dade County (Miami, FL): Hillsborough County (Tampa, FL); Charlotte-Mecklenburg (Charlotte, NC); Clark County (Las Vegas, NV); Jefferson County (Louisville, KY); and Nashville/Davidson County (Nashville, TN). These school districts are county units that include a central city and the surrounding suburbs. They are under the same type of judicial review concerning desegregation as any other school district, but they are different in that they comprise a larger geographical area and consist of a city with its suburbs and, in some instances, a portion of the surrounding rural area.

The second category of metropolitan desegregation effort involves an urban school district with its adjacent suburban school districts, and on occasion the involved districts may extend beyond those that are immediately adjacent.

11/ Orfield, Gary, Must We Bus? Segregated Schools and National Policy, The Brookings Institution, Washington, D.C., 1978, p. 406.

In the metropolitan desegregation litigation involving Detroit, several school districts and more than one county were included; the same conditions existed in the Indianapolis case. The Wilmington case included only a major portion of one county but several school districts. In addition to these instances that have been under litigation, voluntary efforts have been initiated in Boston, Milwaukee, and Rochester (NY). Typically, these programs have involved a central city with its suburbs, and the transfer of pupils has normally been a one-way process with the the minority pupils in the central city being bused to the suburbs. The number of pupils involved has usually been small, and typically a financial incentive has been provided for the receiving school districts. Pupils have volunteered for the program, and the purpose has been to reduce ethnic isolation for both minority and majority pupils.

IMPACT OF METROPOLITAN DESEGREGATION

Parents and interested citizens may have a variety of positions about the overall impact of metropolitan desegregation even though they may support the social goals. They may have questions about the impact that desegregation will have on the racial composition of the communities, i.e., the degree to which increases will be evident in "white flight" or the movement of white families to areas even farther from the central city that are not affected by the desegregation efforts. Another of their concerns is the administrative feasibility of metropolitan desegregation--the uncertainty of whether the task can be accomplished in that large a geographical area. The magnitude and costs of busing school children that would be required and the ability of citizens to exercise local control over the schools are also areas of interest. Different positions are also expressed about educational advantages that the metropolitan desegregation effort would have over intra-district desegregation.

White Flight

One point of continuing controversy is the impact that school desegregation decisions have on residential patterns. Various research studies have somewhat contradictory findings because of problems associated with changing demographical patterns and the lack of data concerning motives for certain actions. A popularly held contention is that decisions to desegregate the schools are followed by the exit of white parents to school districts that either have not desegregated their schools, have no minority students, or have a small percent of minority students. The historical background of the contention can possibly be traced to the "block busting" techniques that were used when black families began to move into all white residential areas.

The concept of "white flight" can be viewed from two different perspectives. First, white residents of an area move to another area in which the percent of minority population is less. Second, the residents do not move, but students leave the public schools for segregated private schools. Parents may be placing their children in private schools, but still maintaining their residences in the community. Data concerning this behavior are very limited, for only a relatively few interviews have been conducted to determine the reasons for parents leaving the community or transferring their children to private schools. 12/ Much of the discussion has been related to the movement of residents, and the often unstated assumption has been that the integration of schools has contributed to the degree of white flight.

Of the various research efforts on the impact of metropolitan desegregation, possibly the most controversial was that of Coleman. 13/ After analyzing

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12/ Green, Robert L., and Thomas P. Pettigrew, Public School Desegregation and White Flight: A Reply to Professor Coleman, U.S. Commission on Civil Rights, Washington, D.C. (unpublished), December 1975, p. 11.

13/ Coleman, James S., "School Desegregation and Loss of Whites from Large Central-City School Districts," School Desegregation: The Courts and Suburban Migration, U.S. Commission on Civil Rights, Washington, D.C. 1975, p. 118.

desegregation data for the 22 largest central-city school districts for the period 1968 to 1973, Coleman contended that the integration of schools has contributed to the flight of the white population. His conclusion was that desegregation brings about a decline in the white population, but this statement must be placed in the context of the shifting demographical patterns in inner cities over an extended period of time. Those trends suggest that the white population has been declining independent of the status of school desegregation in urban areas. Coleman suggests that the challenge of school desegregation then becomes one for metropolitan areas rather than being restricted to the city with its changing characteristics. Keppel has supported Coleman's contention by indicating that short-term desegregation solutions must consider metropolitan plans, but be contended that the long-term solution is to be found in housing and transportation policies. 14/

Rossell 15/ has challenged the white flight contention, and indicated that the movement of whites to the suburbs does not appear to be accelerated by the degree of efforts being made to desegregate the schools. In a study comparing conditions in 86 northern school districts in 1967 with those in 1972, Rossell found that, of the 10 districts that had implemented a significant degree of desegregation, only 2 showed a significant increase in white flight. Further, in one of these two districts, other factors may have contributed to the population movement. This research is in contrast with work by Coleman suggesting that desegregation has contributed to white flight. Rossell contends that Coleman failed to consider the degree of desegregation in school districts and may have confused parental efforts to maintain residential segregation with parental responses to court ordered desegregation or locally instigated voluntary programs to integrate schools.

14/ Keppel, Francis, "Education in the Eighties," Harvard Educational Review, Vol. 50, No. 2, May 1980, p. 151.

15/ Rossell, Christine H., "White Flight", Integrateducation, Vol. XIII, No. 6, November/December 1975, p. 3-10.

Weinberg et al have also suggested that Coleman's interpretation of the data may have been incorrect; they contend that the data strongly suggest that "migration of whites to the suburbs has brought about the school desegregation, but not that desegregation leads to white migration from cities." 16/ One of the problems with the Coleman assumptions is that effective desegregation had not taken place in many of the urban areas during the time periods of his analysis. Weinberg et al further state that data are not available as to the reasons for the movement of whites from the cities. They also point out that the movement of whites from the cities has been at a rather constant rate without significant increases during the period of school desegregation. In further discussion, Weinberg et al indicate that the relative percent of white enrollment in urban school districts may continue to decline because of the higher birth rate of the black population and the aging of the white urban population.

Rather than referring to white flight, a better choice might be to refer to white going and white returning. 17/ This distinction is becoming more important in view of some recent demographic indicators that suggest a slowing of the white flight and a possible reversal of the movement from the cities. However, the returnees may be less likely to have school aged children or to even contemplate a family.

One interesting report concerning the white flight of students to private schools is concerned with Mississippi. White students appeared to be more prone to leave the schools specifically when the control of the governance structure for the county or the schools appeared to be shifting to blacks. Even more interesting is the report from the Mississippi State Department of Education that white

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16/ Weinberg, Meyer et al, Three Myths: An Exposure of Popular Misconceptions About School Desegregation, Southern Regional Council, Atlanta, September 1976, p. 64.

17/ Harris, Joan R., "Stopping White Flight," Society, May/June 1977, p. 44.

flight appears to have stabilized and was actually declining. Reportedly, white children returned to the public integrated school because of its greater educational program opportunities. 18/

The experience of Louisville/Jefferson County (KY) in the integration of the city schools with those in the suburban county does not suggest massive white flight out of the newly formed school district even though a degree of unrest accompanied the integration of the schools. Cunningham et al 19/ indicate that some persons were willing to state that they moved out of the county because of the court ordered integration and resultant busing of school children, but the percent was a small proportion of the white enrollment in the county. Housing vacated by those who left often was occupied by white parents with school age children, so the impact on the racial composition of the school enrollment appears to have been minimal. The study indicated that the mobility rate was consistent with that of the previous 10 years and that "the existence of residential white flight should not be assumed" as a result of the integration of the Louisville/Jefferson County (KY) schools.

Analyses of population mobility in metropolitan areas suggest a relatively constant movement with changes in the racial composition of the inner city and movement between the inner city and the suburbs. The possibility of desegregation may have hastened the relocation. This pattern appears to have existed in school districts with over 20 percent minority, especially in those districts

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18/ Weinberg, Meyer, " School Desegregation and Planned Deprivation," Integrateducation, Vol. 13, No. 3, May/June 1975, p. 115.

19/ Cunningham, George K., William L. Husk, and James A. Johnson. "The Impact of Court Ordered Desegregation of Student Enrollment and Residential Patterns (White Flight)," Journal of Education, Vol. 160, No. 2, Boston University, May 1978, pp. 35-46.

under mandatory court order. 20/ It appears that some studies have related "white flight" to school desegregation when actually the schools in the inner city had not been desegregated. The exit movement may have been in anticipation of desegregation but, in any event, the result has been an increase in minority percentage of the inner city school population.

Where data are available, research studies indicate that the pace of movement between the inner city and the suburbs has not increased as a result of desegregation. 21/ Other than the Mississippi study referred to above, research studies are not available to indicate the long term trends in the white flight movement to the private schools from the public schools. The costs and reduced curricular and extra-curricular activities in some private schools may be sufficient to bring about the return of some students, but others may consider that the benefits are greater in the private schools.

With regard to the interaction between segregated housing and segregated schools, an interesting position was postulated in a recent study conducted under the auspices of the National Institute of Education. 22/ In a field analysis of desegregation in 14 areas throughout the Nation, the theory was advanced that school desegregation contributes to the eventual decline of housing segregation and that busing eventually becomes unnecessary as the level of housing segregation is decreased. The sample consisted of seven matched pairs of cities, one group with the suburban area and the other with only the central city area.

20/ Green, Robert L., Public School Desegregation, pp. 34-37; and Armor, David J., White Flight, Demographic Transition, and the Future of School Desegregation, Rand Corporation, Santa Monica, California, 1978, pp. 40-41.

21/ Hodgkinson, Harold L., and Ray C. Rist, School Desegregation in the 1970's: Problems and Prospects, National Institute of Education, Washington, D.C., July 1976, p. 6.

22/ Pearce, Diana, Breaking Down Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns, Center for National Policy Review, School of Law, The Catholic University of America, Washington, D.C., November 1980, p. 67.

Extensive reliance was placed upon real estate listings in local newspapers and personal interviews. The conclusions and policy implications suggest that metropolitan desegregation efforts can be used to breakdown segregated housing patterns, but the major difference between the "segregated" and "desegregated" school districts in the study was that the desegregated ones were geographically larger and included suburban areas around a city while the segregated districts encompassed all or a portion of the central city. Consequently, the study did not include any areas in which efforts had been made to achieve inter-district metropolitan school desegregation. The report indicates that the data are "highly varied in terms of . . . source, type, and quality." Information was obtained both from relatively balanced sources and from advocacy group newsletters. The relevance of the sample of metropolitan desegregation efforts and lack of consistent and systematic data sources limit the value of the study in this discussion.

The generally accepted position appears to have been expressed by the U.S. Commission on Civil Rights. The Commission's report indicated that, in those instances where metropolitan desegregation has been implemented and sufficient time has elapsed for trends to have developed, the incidence of white flight appears to have been in students leaving the public schools for private schools rather than the relocation of families. Evidence analyzed by the Civil Rights Commission suggests that the children who leave begin to return within a few years and the citizens accept the desegregation after several years. 23/

Administrative Feasibility

Various questions have been raised concerning metropolitan school desegregation efforts. One concern is whether or not it is administratively feasible to

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23/ U.S. Commission on Civil Rights, Statement on Metropolitan School Desegregation, The Commission, February 1977, p. 57; and Armor, David J., White Flight, Demographic Transition, and the Future of School Desegregation, Rand Corporation, Santa Monica, California, 1978, p. 41.

desegregate schools in a metropolitan area. Different alternatives have been proposed to bring about the integration of the schools. One would involve retaining the existing school district organizational structure and assigning pupils to schools in other school districts in order to achieve racial balance in the schools. The litigation in Indianapolis, Kansas City, Richmond and the original Detroit case was proposed for this purpose. This alternative is also being used in the voluntary efforts in Massachusetts, New York State, and Wisconsin. School governance structures would remain the same, but children would be bused to schools in other school districts, and funds transferred to pay for the additional educational burden assumed by the receiving school district.

Another alternative would be to consolidate the school districts in an area into one school district; this new district would then be subject to the same legal constraints as existing school districts. The district would have the duty to follow Federal court precedents and eliminate the vestiges of segregation. Examples of this approach include (1) the merger of the school districts in the northern portion of New Castle County in Delaware as a result of the Wilmington case in the Federal Courts, (2) the dissolution of the Louisville City Schools and their assumption by Jefferson County in Kentucky with the result being a county unit, and (3) the voluntary merger of the two former districts to form the Nashville/Davidson County school district in Tennessee.

Other examples of school districts that encompass a metropolitan area may be found in Evansville/Vanderburgh County (IN), Dade County (FL), Duval County (FL), and Clark County (NV). The first district was formed as a result of a school consolidation referendum in the area. The others resulted from the State organizational structure for schools in such States as Florida, West Virginia, Nevada, and Louisiana.

Most discussion concerning metropolitan desegregation has been related to an inner city with its suburbs in which all are located in a single State. However, there are a number of multi-State metropolitan areas, i.e., Cincinnati, Chicago, Kansas City, Louisville, New York City, Philadelphia, St. Louis, and Washington, D.C. Interstate metropolitan desegregation programs for these areas would pose a much greater logistical challenge than intrastate ones. Each State has its own set of statutes governing the powers of local school districts and the operation of schools. In some cases, the quality of the educational program might vary among the States, and variations will exist in the level of expenditure per pupil, fiscal requirements, staffing qualifications, and educational program and service standards. In a few instances, currently existing school districts do include territory in more than one State. They typically represent only a small portion of the total enrollment of the State and began and have been maintained as a result of local initiative. The entire area has a homogenous quality of similarity rather than the heterogeneity that characterizes metropolitan areas consisting of an inner city with one or two rings of suburbs.

The concept of desegregation on a metropolitan basis would have the potential of reducing the degree of racial isolation, but there may be some operational problems with determining the boundaries of metropolitan areas. Typically, they are not conterminous with geographically defined governmental units; their reasons for being and reference points are economic activity, transportation patterns, and employment opportunities rather than a unit of government such as a county. The litigation in Indianapolis, Detroit, Richmond, and Kansas City involved more than one county and even more than one State in the Kansas City effort. Thus, an unanswered question in a scenario of metropolitan desegregation plans is "How large will the area eventually be?" Currently, the litigants seek to integrate the "majority-minority" schools in the central cities with the "majority-majority"

schools in the suburban areas. Some proposals have limited the efforts to the suburban areas immediately adjacent to the cities, but others have extended to the more distant suburbs. In the absence of defined boundaries, it appears as though the area could be extended to the point that vestiges of segregation could be reduced to almost any desired level.

Accepting the premise that the State is the agency with the ultimate responsibility, the extreme position would be that an entire State could be subject to the desegregation effort. Thus, the concept of "reasonableness" might be the only constraint that would prevent imposition of racial balance standards on school enrollments for an entire State. The magnitude of busing might be little greater than under some current court orders, for the State could be divided into zones in which racial balance standards would be applied. Zones are currently used in some of the large school districts as a means of reducing the magnitude of pupil busing and still desegregating the schools. Without the possibility of the reasonableness constraint, the scenario can be extended even further when one considers the possibility of interstate movement of pupils in those metropolitan areas that cover more than one State.

In terms of administrative approaches that might be used to accomplish metropolitan desegregation, most States permit the transfer of pupils among school districts with the receiving district being provided with transfer tuition payments for the students. In fact, this device was formerly used in some States to maintain segregated schooling for minority children. Another approach would be for the school districts in an area to consolidate as was the case in Wilmington; one problem with this alternative is that districts are not likely to merge in this manner except under court order or legislative mandate. Pride in the local district, the desire to maintain the status quo, and the threat of the "unknown" are among the reasons that citizens are reluctant to see their school districts lose its identity and be consolidated into a larger district.

Magnitude of School Busing under Metropolitan Desegregation

The focal point of public attention in metropolitan desegregation efforts has often been the busing of school children. Frequently, the assumption has been that busing requirements will be greater under metropolitan plans than under intra-district plans, and that children will spend excessive amounts of time on the buses.

The report of the U.S. Commission on Civil Rights indicates that busing will not be "far more burdensome" under a metropolitan plan than "those that exist within a district (whether for desegregation or other purposes)." 24/ The Commission contends that a large proportion of public school children is already transported to school on buses, that only a small percent of busing is for desegregation, that busing is safe, and that the costs are low. 25/ Interestingly, plans for busing children in Detroit and Richmond indicated that the travel time would not be greater than for children in rural areas. 26/ Reportedly, school facilities also could be utilized better in those cases where schools are located near school district boundaries. The Commission stated that the need for busing to desegregate on a metropolitan basis might be less than the need for busing to desegregate within the school district. 27/

The increase in magnitude of busing attributable to desegregation is very difficult to ascertain, for in most school districts some amount of busing will have been taking place prior to the desegregation decision. Routes and stops can be arranged to provide for maximum convenience or maximum efficiency, and the

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24/ U.S. Commission on Civil Rights, p. 51.

25/ Ibid., p. 51.

26/ Ibid., p. 54.

27/ Ibid., p. 55.

cost will vary depending upon which decision is made. Students can be transported from their homes directly to the school that they will be attending or they can be transported to a central point and then reloaded on "express" buses to their school. There will be differences in costs and time depending upon the choice.

Parents of children who have not previously been transported will often view any amount of busing as excessive, and those whose children were previously bused for fifteen minutes will view a thirty minute trip as excessive; however, children in suburban and rural school districts may be bused for considerably longer than those involved in metropolitan desegregation programs. As with those who express their frustration over governmental spending by voting against bond referenda for schools or operating levies, parents who are opposed to desegregation can seize upon the busing issue as an identifiable point of complaint. 28/

Implications for Local Control of Education

The concept of local control of schools is one of the more emotional educational concerns. The issue in desegregation may not be the loss of local control over school decision making; the greater concern may be the fear of Federal control over the local school system. 29/ Irrespective of the overt or covert reasons for expressing the local control concern, the issue remains a rallying point for those who desire to maintain the status quo.

The historical pattern in America is that schools in many communities were started as a result of local interest. Only in the period since the mid-1800s did the current governance structure for education begin to emerge. With the

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28/ Smith, Philip I., "Voluntary Participation and Public Opinion in Milwaukee School Desegregation," Integrateducation, Vol. XV, No. 6, November/December 1977, p. 90.

29/ Hodgkinson, Harold L., School Desegregation, p. 7.

absence of mention of education in the Federal Constitution, responsibility for education then was assumed by the individual States. Governance structures vary among the States in terms of the number of school districts and the relative autonomy that is provided local school officials. The result is that local control of schools exists only to the degree that the State through its constitution and legislature delegates certain powers to the governing bodies of the local school districts. The relative amount of local control varies among the States and appears to be more related to tradition than any other identifiable factor. Another response is that local control exists to the degree that citizens have and exercise the privilege of participating in decisions affecting the education of their children. Urban school districts are often so large that citizens participation is limited to voting in school board member elections, operating levy referenda, or school bond elections.

With the individual school, the concept of local control often refers to informal contacts, communications, and activities that exist between the school's patrons and the school staff. Because of the proximity of the neighborhood school, both staff and patrons may feel that a sense of community exists between the school and its patrons. They may also feel that this atmosphere is difficult to develop when pupils are bused to schools in other communities and continuity in school attendance has not been maintained. As a human relations aspect in the integration process, local school officials have often taken steps to develop and maintain interaction between school patrons and school staff when traditional patterns of school attendance have been disrupted.

In most larger urban areas, a degree of isolation exists between the individual schools and the central administrative offices and the school board. This

problem has been addressed in many of the large cities by subdividing the school district into administrative areas or sub-districts. For example, the new school district in Wilmington has four geographical areas through which the district is administered.

Educational Effects

Experience with metropolitan desegregation has been largely limited to the county unit districts in the previously dual systems in the South and a few voluntary programs with a limited number of participants. In the county unit systems, observers indicate that the programs have been somewhat successful; however, some critics may contend that they have been successful because of the legal pressures placed on the commmunity.

One facet of the problem is illustrated by the statement in the report of the U.S. Commission for Civil Rights indicating that parents view the schools more positively and that educational outcomes are better when the majority of the students are not from disadvantaged backgrounds. 30/ This may be one of the strong underlying rationales for the interest in metropolitan desegregation plans, for many of the large cities have a student population that is approaching majority disadvantaged in terms of income.

Children participating in the voluntary plans in Boston and Rochester appear to have been positively influenced. They evidently have stronger incentives to stay in school, have higher aspirations concerning higher education, and have developed contacts beyond those that would have been available in the inner city. 31/

30/ U.S. Commission on Civil Rights, pp. 58-59.

31/ Ibid., p. 60.

Detailed analyses of the effect of desegregation on student achievement have addressed four questions: 32/

(1) How does desegregation affect academic achievement?
(2) What is the effect on a child's self-concept and career aspirations?
(3) How does desegregation influence the manner in which children of different races relate to each other?
(4) How do teachers and students relate to each other?

Achievement. Research studies concerning student achievement indicate that black children learn more in desegregated schools than in segregated schools. The research also indicated that white students continue to learn at the same rates. Gaps in achievement had been narrowed, and patterns of decline were not found for either group of students. 33/ The general findings are supported by an analysis of research by the National Institute of Education in which achievement in 48 desegregated schools was studied. In 29 instances, minority achievement increased; in 19 cases, no effect was discernible; and in no instances, was there found evidence of decline. 34/ Various studies have indicated the positive points were that desegregation and educational growth were found to be compatible and that the "no growth" outcome might be considered as positive since it reversed a trend toward declining black achievement. 35/

In the quest for quality education, the courts and sociological research appear to be in agreement that quality education for minority children cannot be achieved in a segregated school environment. However, various researchers, such

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32/ Crain, Robert L. and Rita E. Mahard, "Desegregation and Black Achievement," Law and Contemporary Problems, School of Law, Duke University, Summer, 1978, p. 17-56; Hodgkinson, Harold L., School Desegregation, p. 6-7; and Weinberg, Meyer, Three Myths, p. 15-21.

33/ Ibid.

34/ Hodgkinson, Harold L., School Desegregation, p. 6.

35/ Crain and Mahard, "Desegregation and Black Achievement," p. 47-50; Hodgkinson, Harold L., School Desegregation, p. 6-7; and Weinberg, Meyer, Three Myths, p. 17.

as Coleman and Jencks, have indicated that the impact of the family is so great that the schools can make little difference. This position has been challenged by Cremin who has contended that the real message in the work of Coleman and Jencks is not that the school does not make a difference in the life of a child, but that the family makes a powerful difference. 36/ He points out that schooling has such prominence in the current concept of education that the school receives virtually all of the blame or the praise for the educational outcomes. Even though children may enter the educational system with varying levels of ability and irrespective of the success that the school may have in reducing the disparities, the school is blamed for the disparities that exist when the child leaves the school.

Self-concept and Career Aspirations. Research in this area is somewhat limited, but there are certain common findings that provide information about some commonly held concerns. Research findings do not support the contention that black self-concept is damaged when black and white children attend the same school. 37/ The analyses also indicated that black students in inter-racial schools and desegregated schools appeared to be more resilient and capable of autonomous action than had been supposed; this countered the contention that the the self-concept of the black child was too fragile to cope with the strains of desegregation. 38/ Findings from various studies suggest that there have been some problems in adjustment when black and white students come together in the

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36/ Cremin, Lawrence A., Public Education, Basic Books, New York, 1976, p. 68.

37/ Crain and Mahard, "Desegregation and Black Achievement," p. 47-50; Hodgkinson, Harold L., School Desegregation, p. 6-7; and Weinberg, Meyer, Three Myths, p. 17-21.

38/ Ibid.

desegregated setting, but they do indicate that a constructive relationship has been worked out in the typical situations. 39/

Teachers and Students. The number of formal studies on relationships between students and teachers is rather limited, but reports did indicate that black staff in administrative and teaching roles were viewed as positive factors in improving the learning opportunities for black children. A key factor was the degree to which the black teachers were perceived to be a net addition to the quality of the school's staff. The evidence did not support the contention that teachers of one race could not effectively teach children of another race. 40/

An interesting facet of metropolitan desegregation is that possibilities exist for educational opportunities to be increased for all students. In most cases, a sufficient critical mass of students would be in the metropolitan area to justify and support a variety of special programs and classes. Educational opportunities could be enhanced for all students; the larger student body would permit special offerings in traditional low demand areas. Student psychological services could be increased and programs could be expanded for the gifted and the handicapped. In addition, the larger school district might be better able to provide a broader range of vocational programs.

ALTERNATIVES FOR METROPOLITAN DESEGREGATION

Various alternative solutions have been suggested to bring about metropolitan desegregation. In the absence of mandatory court orders, decisions to desegregate on a metropolitan basis then become voluntary. The choices may not result in immediate integration over a large area, but Armor has indicated that

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39/ Ibid.

40/ Ibid.

voluntary plans could have the advantage of reducing the social costs attributable to a reversal in the erosion of public confidence in education that often accompanies large scale mandatory desegregation. 42/ Among the approaches that might be used are the following: 43/

Reorganization of the School District Structure

The geographical boundaries of local school districts could be changed by the State so that each district has a specified level (or range) of racial balance. If this were done, the integration problem then would be an intra-district issue and could be resolved under current legal precedent.

Creation of Special Metropolitan Units

In the same manner that inter-district service and taxing units were formed for a limited purpose, a special metropolitan unit could be established whose purpose would be to assign pupils to schools within the multi-district unit in a manner that would bring about racial balance in the larger geographical area. This might infringe upon some of the traditional prerogatives of local school districts, but would accomplish the goal of desegregating the schools.

Shared Services

Local school districts have a history of contracting among themselves for specific programs, i.e., gifted, handicapped, and vocational education. The concept of special purpose schools, alternative schools, or magnet schools located throughout a metropolitan area is illustrative of one possible approach.

42/ Armor, David J., White Flight, p. 47.

43/ Rashman, Mary, Metropolitan School Desegregation, Education Commission of the States, Denver, Colorado, March 1979, pp. 17-19; and Hodgkinson, Harold L., School Desegregation, pp. 16-17.

Traditional assignment policies related to schools and school district boundaries might be waived so that students could select the schools they wish to attend. Programmatic emphases in a series of schools could vary so that students would be able to select the school that was most compatible with their interests. In all likelihood, some controls would need to be established to assure that the special schools did not become racially imbalanced.

One of the limitations of this approach is that such programs have traditionally been limited to high school or special needs pupils; elementary school pupils would be minimally affected under the shared services approach. However, one approach that has been used to address the segregation problem in elementary schools is clustering or pairing of schools and then cross-busing students to achieve racial balance between or among the areas. This option is available to local districts on a voluntary basis, but has been used in only a few instances.

Voluntary Inter-district Transfers

Voluntary transfer programs are in effect in Massachusetts, New York, and Wisconsin at the current time. The programs have been somewhat limited and essentially one way (central city to suburb), but they reportedly have been reasonably successful in providing educational benefits to the children directly involved. The combination of a voluntary transfer program and the magnet school concept might provide the quantity of leverage needed to bring about a sufficient interchange of students so that such programs would move beyond tokenism. Magnet schools could be located at various sites throughout the metropolitan area, and evidence would then become available concerning the power of these schools to attract students. At that point, determinations could be made as to the administrative and programmatic feasibility of inter-district assignment of students. The current experience in the large school districts in the Southeast might be

construed as metropolitan desegregation of schools, but each is a single large school district rather than a multi-school district metropolitan area.

Many of the concerns relative to metropolitan desegregation efforts are related to the geographical size of the school district. Efforts such as Wilmington and the county unit districts in the Southeast have resulted in large school districts with only one governing body; however, shared services, voluntary programs, and metropolitan plans provide the option of maintaining some type of local governance structure for schools and still bringing about integration of the schools in a metropolitan area.

LEGAL HISTORY OF METROPOLITAN SCHOOL DESEGREGATION

In the years since the Supreme Court's seminal decision in Brown v. Board of Education 44/ the law of school desegregation has undergone a process of continuous evolution, both with regard to legal standards for proving unconstitutional segregation and the scope of appropriate remedies. Brown ruled that the Equal Protection Clause forbade State statutes that required or permitted, by local option, separate schools for black and white students. For the next two decades, all desegregation cases to reach the Supreme Court involved such "dual school systems," mainly in the South, with a long history of racial separation pursuant to explicit governmental policy. In these cases, the "State action" necessary to invoke equal protection safeguards was manifestly present; existing segregated conditions within a school district that had, prior to Brown, practiced segregation by statute were presumed to be unconstitutional "vestiges" of the former dual school system. 45/

During the same period, the nature of the obligation placed on school officials evolved from the mere cessation of overt racial assignment, the target of Brown, to elimination of the "effects" of the former dual system. In Green v. County Board of Education, the Court held school officials to have an "affirmative duty" to abolish the "last vestiges" of a dual school system, including all

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44/ 347 U.S. 483 (1954).

45/ Swann v. Board of Education, 402 U.S. 1 (1971); Wright v. Council of City of Emporia, 407 U.S. 451 (1972); United States v. Scotland Neck Board of Education, 407 U.S. 484 (1972)

"racially-identifiable" schools. 46/ Schools could be racially identifiable by comparison with other schools in a geograhical area if the racial composition of the student bodies or staffs or the quality of the physical facilities, curricula, or personnel differed significantly. Although there is no duty to make schools identical in all respects, there is a presumption against schools that diverge markedly from the norm defined by these criteria. Thus, the Court in Swann v. Board of Education held that such differences between schools in a former statutory dual system establish a prima facie case that school officials are continuing to discriminate or that they have failed to remedy fully the effects of past discrimination. 47/

Beginning in the early 1970s, as the judicial focus shifted from school systems segregated by law at the time of Brown to systems in the urban North without a prior history of State sanctioned segregation, new doctrinal approaches became necessary. First, because the origins of "northern-style" segregation could not be traced to a prior regime of statutory dual schools, additional standards for determining the existence of forbidden "State action," or so-called "de jure segregation," had to be developed. Second, in many parts of the South, the remedial framework for system-wide or metropolitan desegregation was established long before Brown by a tradition of county-wide school systems. By contrast, the boundaries of northern school systems were frequently drawn along township or municipal rather than county lines, with metropolitan areas often

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46/ 391 U.S. 430, 438-9 (1968). In Green, the Court declared that "[s]chools boards. . . operating State-compelled dual school systems [are] nevertheless charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination [is] eliminated root and branch." This affirmative duty requires the "school board today. . . to come forward with a plan that promises realistically to work, and promises realistically to work now." See, also Alexander v. Holmes County Board, 396 U.S. 19 (1969).

47/ 402 U.S. 1, 25-27 (1971).

encompassing many independent school districts. Further complicating the desegregation process is the fact that many inner city systems are predominantly black, while the suburban school districts are largely, often overwhelmingly white. In the face of this demographic reality, northern litigants have increasingly sought metropolitan solutions to segregation problems, either by consolidating school districts or by transferring students between city and suburban schools.

Six years ago, in Milliken v. Bradley, 48/ the Supreme Court for the first time delineated the circumstances under which school district lines could be disregarded in formulating remedies for unconstitutionally segregated school systems. By a narrow five to four margin, the Court reversed a lower court order requiring a metropolitan area plan for the Detroit schools, which were found to be unlawfully segregated. But in doing so the Court outlined when such a remedy might be appropriate. In essence, the majority held that a prerequisite for inter-district relief was not only "a current condition of segregation resulting from intentional State action," but also a violation that was of an inter-district character. Thus, in the Detroit case the scope of the remedy exceeded "the nature and extent of the constitutional violation," which was confined to Detroit. 49/

The Decision in Milliken v. Bradley

By its rejection of a proposed inter-district remedy for segregated schools in Detroit and its suburbs, the Court's 1974 decision in the Milliken case raised

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48/ 418 U.S. 717 (1974). Milliken however, was not the first inter-district desegregation case to reach the Supreme Court. In 1973, the Court summarily affirmed, by a four-to-four vote (Judge Powell abstaining), a Fourth Circuit decision voiding a three-county desegregation plan for the Richmond, Virginia area. Bradley v. State Board of Education, 412 U.S. 92 (1973). The court of appeals had found that inter-district relief was warranted only where the defendants were shown to have "conspired" to segregate schools across county lines. However, because the Supreme Court was evenly divided and issued no opinion in the Richmond case, and Milliken articulates other, broader grounds for an inter-district remedy, the affirmance may be regarded as having no precedential value.

49/ 418 U.S. at 744.

some initial doubts about the future of metropolitan desegregation. In that case, the district court found that the Detroit school board had committed numerous acts of de jure segregation within the Detroit school district, including the use of optional attendance zones in transition neighborhoods, refusing to assign white students to underutilized, predominately black schools, and constructing and closing schools in a manner to promote segregated attendance patterns. However, none of the violations, with the exception of a single contract in the late 1950s for the education in Detroit of students from a predominantly black suburb--who were refused admission to nearby white suburban high schools--had resulted in inter-district segregation. Nor did the court hear evidence or make specific findings that any school district outside Detroit had otherwise engaged in unconstitutional activity, or that the State of Michigan had drawn school district lines with the intention of fostering segregation. Nevertheless, the district court held that effective desegregation could not be accomplished within the corporate limits of the city. It then designated 53 suburban districts plus Detroit as the appropriate "desegregation area." The district court order was affirmed on appeal to the Sixth Circuit.

The Supreme Court reversed, five to four, holding that a Federal court is not empowered to impose such a remedy unless acts of the State or local school districts have been a substantial cause of inter-district segregation. The Court ruled that while school district lines may be bridged on a showing of constitutional violation having an "inter-district" effect, "the notion that school districts lines may be casually ignored or treated as mere administrative convenience is contrary to the history of public education in this country." The Court considered as controlling a principle set forth in Swann that "the scope of the remedy is determined by the nature and extent of the constitutional violation." Inter-district relief was properly available only where it was demonstrated that

the constitutional violation embraced more than one school district. In the words of the Chief Justice:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the State or local school districts, or of a single school district have been a substantial cause of inter-district segregation. Thus, an inter-district remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where districts lines have been deliberately drawn on the basis of race. In such circumstances, an inter-district remedy would be appropriate to eliminate the inter-district segregation caused by the constitutional violation. Conversely, without an inter-district violation and inter-district effect, there is no constitutional wrong calling for an inter-district remedy. 50/

Thus, the majority in Milliken concluded that, absent a finding of inter-district violation and effect, the district court was not empowered to order inter-district relief merely because agencies with state-wide authority were found to be involved in maintaining segregation in the Detroit schools.

> The constitutional right of Negro respondents residing in Detroit is to attend a unitary school system in that district. Unless petitioners drew the district lines in a discriminatory fashion, or arranged for white students residing in the Detroit district to attend schools in [suburban districts], they were under no constitutional duty to make provisions for Negro students to do so. The view of the dissenters, that the existence of a dual system in Detroit can be made the basis for a decree requiring cross-district transportation of pupils cannot be supported on the grounds that it represents merely the devising of a suitably flexible remedy for the violation of rights already established by our prior decisions. 51/

Milliken thus indicates that an inter-district remedy is appropriate only if there is a showing that school authorities or the State have contributed to significant inter-district segregation by purposeful, racially discriminatory action. The majority found it unnecessary to determine whether governmental

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50/ 418 U.S. at 744-45.

51/ 418 U.S. at 745.

policies in housing acted to contain blacks in Detroit. "[T]his case does not present any question concerning possible State housing violations." 52/ Similarly, Justice Stewart, concurring, found that the record failed to show that the "racial composition of the Detroit school population or the residential patterns within Detroit and in the surrounding areas were in any significant measure caused by governmental activity." 53/ But in addition to intentional gerrymandering of school district lines, Justice Stewart clearly indicated that, in his view, "purposeful, discriminatory use of housing or zoning laws" may serve as a basis for inter-district remedial relief. "Were it to be shown, for example, that State officials had contributed to the separation of the races. . . by purposeful, racially discriminatory use of State housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring lines might be appropriate. 54/

52/ 418 U.S. at 728, n. 7.

53/ 418 U.S. at 756, n. 2 (Stewart, J., concurring).

54/ 418 U.S. at 755 (Stewart, J., concurring). In a subsequent ruling, Milliken II, the Supreme Court affirmed a district court order, entered on remand from Milliken I, requiring the Detroit School Board to implement compensatory programs in the areas of reading, in-service teacher training, testing and counseling as part of a plan to desegregate the city's schools. The Court also affirmed the requirement that the costs of those programs be borne equally by the School Board and the State. 433 U.S. 267 (1977).

In so doing, the Court noted that the remedial plan did not break new legal ground; rather, plans going beyond mere pupil reassignment had been expressly approved in Swann and earlier decisions. Where the record warrants, such relief can be ordered, and the district court did not abuse its discretion in going beyond the proposals proffered by school authorities. Citing its earlier opinion in Milliken I, the Court stated that "where, as here, a constitutional violation has been found, the remedy does not 'exceed' the violation if the remedy is tailored to cure the 'condition that offends the Constitution.'"

Additionally, the Court ruled that the Eleventh Amendment did not bar the district court from ordering the State to share costs because, under Edelman v. Jordan, 415 U.S. 651 (1974), a decree requiring the payment of State funds" as a necessary consequence of compliance in the future with a substantive Federal-question determination" is perfectly proper. The Court also concluded that there was no merit to petitioners' claims that the relief ordered violates the Tenth Amendment or principles of federalism.

POST-MILLIKEN CASES INVOLVING INTER-DISTRICT OR METROPOLITAN SCHOOL DESEGREGATION REMEDIES

Since Milliken, both Federal and State courts have held inter-district remedies proper in eight cases, 55/ and the Supreme Court summarily affirmed the order in one of these. 56/ In addition, by denying review in the Indianapolis case on the opening day of its 1980 term, 57/ and to a metropolitan busing order in Wilmington the term before, 58/ the Supreme Court may have provided further impetus for metropolitan desegregation efforts. The remainder of this section will consider these post-Milliken inter-district cases for the guidance they provide with respect to the principles set forth in the Detroit case.

55/ Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), aff'd mem., 423 U.S. 963 (1975), on remand 416 F. Supp. 328 (D. Del. 1976), aff'd as modified 555 F. 2d 373 (3d Cir. 1977), cert. denied 434 U.S. 880 (1977), rehearing denied, 434 U.S. 944 (1977), 447 F. Supp. 982 (D. Del.), aff'd 582 F. 2d 750 (1978), cert. denied 100 S. Ct. 1862 (1980); United States v. Board of School Commissioners, 419 F. Supp. 180 (S.D. Ind. 1975), aff'd 541 F. 2d 121 (7th Cir. 1976), vacated and remanded 429 U.S. 1068 (1977), 573 F. 3d 400 (7th Cir. 1978), cert. denied 439 U.S. 824 (1978), on remand 456 F. Supp 193 (S.D. Ind. 1978); Newburg Area Council, Inc. v. Board of Education, 510 F. 2d 1358 (6th Cir. 1974), cert. denied 421 U.S. 931 (1975), unreported decision on remand, aff'd 541 F. 2d 538 (6th Cir.), cert. denied 429 U.S. 1074 (1976); United States v. Missouri, 515 F. 2d 1365 (8th Cir.) (en banc), cert. denied 423 U.S. 951 (1975); Berry v. School District, 467 F. Supp. 721 (W.D. Mo. 1978) (ordering defendants to submit remedies for inter-district violations); School District v. Missouri, 460 F. Supp. 421 (W.D. Mo. 1978) (refusing to dismiss plaintiff's suit for inter-district relief on defendants' motion under Fed. R. Civ. P. 12(b)(6)), appeal dismissed, 592 F. 2d 493 (8th Cir. 1979); Morrilton School Dist. No. 32 v. United States, 606 F. 2d 222 (8th Cir. 1979), cert. denied 48 U.S.L.W. 3535 (S. Ct. 2/19/80); Tinsley v. Palo Alto Unified School District, 91 Cal. App. 3d 871, 154 Cal. Rptr. 591 (1979) (avoided Milliken in upholding plaintiff's suit by predicating relief on State constitutional grounds).

56/ Evans v. Buchanan, 393 F. Supp. 428 (D. Del), aff'd mem., 423 U.S. 963 (1975).

57/ Metropolitan School District of Perry Township v. Buckley, No. 79-1975, cert. denied 49 U.S.L.W. 3238 (S. Ct. 10/07/80).

58/ Delaware State Board of Education v. Evans, 100 S. Ct. 1862 (1980).

Indianapolis, Indiana

The Indianapolis litigation began in the 1960s as a traditional intra-district desegregation suit. It evolved over nearly two decades to a metropolitan-wide case, eventually involving eight suburban school districts, several State officials, and the Housing Authority of the City of Indianapolis (HACI). The case was among the first after Milliken which dealt with the limitations imposed, and the possibilities left open, by that decision for metropolitan relief.

In its first ruling following Milliken, the Seventh Circuit reversed in part an inter-district remedy in United States v. Indianapolis Board of School Commissioners. 59/ The evidence initially presented in the district court was very similar to that in the Detroit case. Tracing the long history of racial segregation in the Indianapolis Public Schools (IPS), the court found that the system was de jure segregated as a result of the board's gerrymandering of attendance zones, segregation of faculty, use of optional attendance zones, discriminatory school construction, site selection, and feeder patterns. 60/ Thereafter, the district court permitted the Buckley plaintiffs, representing a class of black school children, to enter the case as intervenors and ordered the addition, as defendants, of the State of Indiana and 10 suburban school districts, both within and outside of Marion County, to consider the appropriateness of a metropolitan remedy.

Although numerous de jure violations were proven in the city school district, there was no showing that they had contributed to inter-district segregation. Nor was there evidence that the suburban districts had committed any acts

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59/ 503 F. 2d 68 (7th Cir. 1974), rev'g 368 F. Supp. 1191 (S.D. Ind. 1973) cert. denied 421 U.S. 929 (1975).

60/ 332 F. Supp. 655 (S.D. Ind. 1971), aff'd, 474 F. 2d 81 (7th Cir. 1973), cert. denied, 413 U.S. 920 (1973).

of de jure segregation within their own borders. The district court declined to rule, initially, on the intervenors' contention that the "Uni-Gov" Act, enacted by the State Legislature in 1969 to permit a consolidation of the city government with that of Marion County, had the effect of perpetuating segregation by excluding school districts from the merger of governmental functions. 61/ At the end of a second trial, however, the court held that the discriminatory acts of the Indianapolis board could be imputed to the State of Indiana, and found that the State Board of Education and other State agencies had, by acts of "commission and omission," practiced de jure segregation. The court weighed possible desegregation remedies and concluded that meaningful desegregation in Indianapolis could not be achieved by a remedy limited to the city schools because it would accelerate "white flight" to the suburbs. 62/

The Seventh Circuit reversed and remanded the case one month after the Supreme Court decision in Milliken. The court of appeals held that the district court order was invalid to the extent that it applied to school districts outside of Marion County, because Milliken required that acts of de jure segregation with

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61/ The "Uni-Gov" Act, and companion legislation passed by the Indiana Legislature in 1969, carved an exception out of a 38 year-old law on local government consolidations so that Indianapolis could merge with its surrounding suburbs in Marion County for all major purposes except school districting. As a result of this merger, Uni-Gov succeeded to most of the functions of the city and county governments and of numerous special service districts. Under Indiana law prior to 1969, the consolidation of the city and county functions would automatically have resulted in concommitant expansion of the IPS. But 16 days before final passage of Uni-Gov, the legislature repealed the prior law as applied to cities of the first class, of which Indianapolis was the only one in the State, with the effect of separating for the first time the boundaries of IPS and the City of Indianapolis. Accordingly, the IPS could thereafter enlarge its territory only by agreement with the losing district, or by annexation. Both were subject to "remonstrance" and the law further provided that any annexations not yet effective were, in the district court's phrase, "cancelled by legislative fiat." Thus, a metropolitan government for all Marion County was created while the school systems of the city and county remained intact.

62/ 368 F. Supp. 1191, 1198 (S.D. Ind. 1973).

inter-district effects must be found before an inter-district remedy can be ordered. Passage of the Uni-Gov Act provided a possible basis for such a finding, but the suburbs outside Marion County were not included in Uni-Gov and so were not affected by the Uni-Gov Act's exclusion of school district consolidation. As to the school districts within Marion County, the appeals court vacated and remanded for further proceedings to "determine whether the establishment of Uni-Gov boundaries without a like re-establishment of the IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with Milliken." 63/

On remand, the district court found that Uni-Gov's exclusion of school district consolidation was a violation of the Equal Protection Clause. 64/ Further, this violation had the requisite inter-district segregative effect to trigger an inter-district remedy under Milliken, because Marion County would have had a single school system but for the exclusion of school district consolidation from Uni-Gov. In addition, the court found that the suburban Marion County governments:

> . . . have resisted school consolidation, they have 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. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and inhabitants of such areas have been to discourage blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court. 65/

The district court also held that HACI, which had jurisdiction five miles beyond the city limits, had perpetuated the segregation of blacks in the IPS territory.

63/ 503 F. 2d 68, 80 (7th Cir. 1974), cert. denied 421 U.S. 929 (1975).

64/ 419 F. Supp. 180 (S.D. Ind. 1975).

65/ 419 F. Supp. at 182-83.

The court therefore ordered an inter-district remedy which included an injunction prohibiting HACI from further construction of public housing within the city. 66/

The Seventh Circuit affirmed both with respect to Uni-Gov and the district court findings of public housing violations. In regard to the former, the appeals court stated that "[t]he record fails to show any compelling State interest that would have justified the failure to include IPS in the Uni-Gov legislation." Admitting that there were legitimate considerations of school system size, the loss of citizen participation, and increased taxes for excluding schools from Uni-Gov, the court nevertheless stated that "[t]hese considerations, although not racially motivated, cannot justify legislation that has an obvious racial segregative impact." As to housing, the court found that all public housing projects for families, in which 98 percent of the residents were black, were restricted to the inner city of Indianapolis. The suburbs resisted building any public housing outside the city, and this affected the disparate racial composition of the schools in the city and suburban area. 67/

66/ Pending the outcome of appeals, the district court in an unreported memorandum of decision on August 1, 1975 ordered limited inter-district relief requiring the transfer of black students from IPS grades one through nine in such numbers that each transferee suburban school would have a 15 percent black enrollment. The suburban school defendants were ordered to accept the transfers for the 1975-76 school year and each year thereafter. The decision indicated that the order would require the transfer of 6,533 students in grades one through nine from IPS to suburban schools for the fall of 1975, with the number increasing over the next four years, as high school students were included, until approximately 9,925 black students would be transferred to the suburban school districts. However, this initial order was never implemented as the defendant schools on August 22, 1975 sought and obtained a stay of the order from the Seventh Circuit Court of Appeals. Thereafter, on August 20, 1976, Justice Stevens further delayed implementation of inter-district desegregation of Marion County schools by continuing the stay pending review by the U.S. Supreme Court. Metropolitan School District of Perry Township v. Buckley, No 76-212 (U.S., August 20, 1976).

67/ On the issue of the housing remedy, the court of appeals stated: "It is obvious that there is a close relationship between the racial balance in housing and the racial balance in schools. . . . The record supports [the lower court's] findings and clearly shows a 'purposeful, racially discriminatory use of State housing.' Milliken v. Bradley . . . (Stewart, J., concurring) . . . Accordingly, the district court did not abuse its discretion in enjoining the Housing Authority from building additional projects within IPS." 541 F 2d. 1222-23.

The dissenting judge on the Seventh Circuit panel, Judge Tone, objected that the majority failed to properly apply Washington v. Davis which, he asserted, precluded a finding of constitutional violation based solely on the disproportionate racial impact of otherwise neutral State action. He took issue with the district court's findings of racial discrimination in the exclusion of school district consolidation from Uni-Gov and in HACI's building low-income housing projects only in IPS territory. Indicating possible agreement, the Supreme Court, as noted above, vacated and remanded the appeals court ruling for reconsideration in view of the Davis and Arlington Heights case, without an explanatory opinion. 68/

On remand, the court of appeals reaffirmed that the passage of Uni-Gov and its companion legislation met the requirements of Milliken and could therefore provide a predicate for a metropolitan remedy if the district court found that the Indiana legislature acted with a racially discriminatory intent or purpose. 69/ In this regard, the court adopted an "objective" standard, inferring a forbidden purpose or intent from acts of the legislature having "natural and forseeable" segregative consequences. The district court was directed, therefore, to make additional findings as to the intent of the legislature in enacting Uni-Gov and to consider, in addition, whether HACI and county planning authorities "acted with an invidious purpose in limiting the construction of public housing to IPS." 70/

68/ Board of School Commissioners v. Buckley, 429 U.S. 1068 (1977).

69/ 573 F. 2d 400 (7th. Cir. 1978).

70/ 573 F. 2d at 414. With respect to the alleged housing violations, the appeals court stated that "an inter-district desegregation remedy is appropriate if the following circumstances are shown to exist (given the fact that there is a vast racial disparity between IPS and the surrounding school districts within the 'new' City of Indianapolis): (1) that discriminatory practices have caused segregative residential housing patterns and population shifts; (2) that State action, at whatever level, by either direct or indirect action, initiated, supported, or

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The latest district court ruling made the specific findings required by the Seventh Circuit and reinstated its interim order of August 1, 1975, to apply to the 1978-79 and subsequent school years. 71/ As a preliminary matter, the court reviewed the historical record and found that until the 1950s, blacks had been subjected to a regime of segregated treatment in regard to housing, education, and other public facilities within the State. Unlike most States in the north and west, Indiana had until 1949 practiced segregation by act of the State legislature, just as was true in the southern and border States prior to Brown. More importantly, however, the legislative history of the Uni-Gov Act disclosed active involvement of city and county officials at each stage of the proceedings, with the exemption of IPS motivated by expressed public opposition to inclusion of schools, rather than any legitimate educational or governmental reason. Accordingly, it was "perfectly obvious" to the court that the legislature's actions:

> . . . were done, at least in part, with the racially discriminatory intent and purpose of confining black students in the IPS school system to the 1969 boundaries of that system, thereby perpetuating the segregated white schools in suburban Marion County. 72/

Similarly, the district court reasserted that HACI had the authority under State law to build housing projects in adjacent suburban areas within five miles of the

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(continued) contributed to these practices and the resulting housing patterns and population shifts; and (3) that although the State action need not be the sole cause of these effects, it must have had a significant rather than a de minimus effect. Finally, an interdistrict remedy may be appropriate even though the State discriminatory housing practices have ceased if it is shown that prior discriminatory practices have a continuing segregative effect on housing patterns (and, in turn, on school attendance patterns) within the Indianapolis metropolitan area." 573 F. 2d at 409.

71/ 456 F. Supp. 183,191 (S.D. Ind. 1978). See note 66 (supra). However this order has not apparently been implemented to date.

72/ 456 F. Supp. 188.

city limits, and that its failure to do so was motivated by a desire to confine blacks to the inner city.

> Against this backdrop of racial discrimination, can it be said to be a mere benign coincidence that HACI and the Commission located all public housing projects within IPS boundaries? This court thinks not and specifically holds that the actions of such official bodies in locating such projects within IPS, as well as the opposition of the suburban governments to the location of public housing within their borders, were racially motivated with the invidious purpose to keep blacks within pre-Uni-Gov Indianapolis and IPS, and to keep the territory of the added suburban defendants segregated for the use of whites only. The Court of Appeals has already agreed that the record shows a 'purposeful, racially discriminatory use of State housing. . .' 73/

In addition to reinstating its original 1975 order requiring "one-way" transfers from IPS to the suburban districts, the district court required the State to fund a comprehensive in-service training program for teachers and staff of the receiving suburban schools. Most recently, the Supreme Court denied review of the district court's "one-way" busing order for Indianapolis on the opening day of the 1980 term. 74/

Wilmington, Delaware

Besides the Indianapolis case, perhaps the most widely publicized litigation since 1974 involving a metropolitan desegregation remedy is the Wilmington case. Proceedings to desegregate the Wilmington school system date back to the 1953 ruling in Gebhart v. Belton, 75/ which, together with cases from other States that were segregated by law, formed the basis of the Supreme Court's historic ruling in Brown v. Board of Education. Another suit, Evans v. Buchanan, was filed in 1957 charging failure to dismantle the dual school system in compliance with the Brown decisions. Subsequently, in the course of that litigation,

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73/ 456 F. Supp. at 189.

74/ 49 U.S.L.W. 3238 (S. Ct. 10/07/80).

75/ 33 Del. 144 (1952).

spanning more than two decades, the city of Wilmington entered the case as a plaintiff, and suburban New Castle County districts were joined with the State as defendants.

Following the Supreme Court ruling in Milliken, the Evans court ordered the joinder of the suburban school districts for consideration of evidence supporting an inter-district remedy. 76/ Significant in the district court's view was the pattern of historical interdependence between the city school system and those in the county. For many years, the only high school in the area that accepted black students was located in Wilmington and blacks in the county were required to transfer to the city school. In addition, before Brown suburban students of both races had, for a variety of reasons, been transferred across district lines to Wilmington, and in recent years, the State had subsidized inter-district transportation of students to private and parochial schools. The effect of these early line crossings was not fully explained by the court. But it did note that the concentration of predominantly white private and parochial schools in suburban New Castle County made it likely that the current subsidized transfers enabled white students to flee the Wilmington district, and thereby "undoubtedly served to augment the racial disparity between Wilmington and the suburban public school population." 77/ Furthermore, after Brown abolished the State's former statutory dual school system, the district court found that "white flight" caused by the use of optional attendance zones in the Wilmington district may likewise "have affected the relative racial balance in housing and schools in Wilmington and the suburbs." 78/ Whether or not racial motivation could be inferred from these causal effects was not considered by the court, however.

76/ 393 F. Supp. 428 (D. Del. 1975).

77/ 393 F. Supp. at 437.

78/ 393 F. Supp. at 436.

As in the case of Indianapolis, the Evans court also found that governmental housing policies had resulted "to a significant degree [in] the increasing disparity in residential and school populations between Wilmington and its suburbs in the past two decades." 79/ The court pointed to the discriminatory effects of official housing policies in the following areas as a factor contributing to interdistrict segregation of students: FHA mortage policies; enforcement of racially-restrictive covenants; publication of a discriminatory manual by the State real estate commission; concentration of public housing in the city even though the Wilmington Housing Authority had jurisidiction to site units in part of the surrounding county; and the failure of the county housing authority to build any units since its creation in 1972. "The specific effect of these policies was to restrict the availability of private and public housing to blacks in suburban New Castle County at a time when housing became increasingly available to them in Wilmington." 80/

The most critical factor in the court's analysis, however, related to the segregative effects of the Educational Advancement Act of 1968, a Delaware school reorganization statute, which explicitly excluded the Wilmington District from a general reorganization of Delaware school districts. Although the district court concluded that the provisions excluding the Wilmington district from school reorganization were not purposefully, racially discriminatory, this did not end its inquiry. The court noted that "statutes that do not explicitly deal with race but have a pronounced racial effect, . . . can also establish suspect racial classifications." 81/ It further stated that "where a statute, either explicitly or effectively, makes the goals of a racial minority more difficult to achieve than

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79/ 393 F. Supp. at 438.

80/ Ibid.

81/ 393 F. Supp. at 441.

other related governmental interests, the statute embodies a suspect racial classification and requires a particularly strong justification." 82/

The court therefore held that the Educational Advancement Act, although racially neutral on its face, "had a significant racial impact on the policies of the State Board of Education," and thereby constituted an "inter-district violation" under Milliken. In effect, the statute prevented a predominantly black school district from being reorganized into a predominantly white school district while other districts within the State were able to consolidate. Neither the State's asserted interest in preserving an historic school district boundary, nor promotion of administrative efficiency by maintaining school districts with relatively small enrollments, could justify the exclusion of Wilmington where about half of all black students in Delaware live and unremedied violations--racially identifiable schools persisting in a system formerly segregated by law--remained. On this basis, the district court concluded that the General Assembly had, in contravention of Milliken, "contributed to the separation of races by redrawing school district lines," and ordered the preparation of Wilmington-only and inter-district plans. The Supreme Court affirmed this decision without issuing an opinion. 83/

In May 1976, the district court ordered the adoption of an inter-district plan involving 11 suburban school districts. 84/ This decision was affirmed by the Third Circuit Court of Appeals, and the State Board of Education was ordered to submit a plan. 85/ After a series of delays and the failure to produce an

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82/ 393 F. Supp. at 441.

83/ 423 U.S. 963 (1975).

84/ 416 F. Supp. 328 (D. Del. 1976).

85/ 555 F. 2d 373 (3d Cir. 1977).

acceptable plan, implementation was postponed until September 1978. The Supreme Court refused to review this decision, clearing the way for implementation of the plan approved by District Judge Murray M. Schwartz on January 9, 1978. 86/

The district court plan employed a "9-3" approach involving all students in the desegregation area while insuring the use of Wilmington schools for the full-grade span, including at least one of the city high schools. Basically, the plan required use of three-year consecutive grade reassignments and busing for students living in predominantly white suburban districts, and nine-year reassignments for students in the predominantly black Wilmington district. In addition, the court's detailed remedial order required the State to provide money for a variety of educational programs to overcome the effects of segregation and to prevent resegregation. 87/ Also necessitated by the State legislature's inaction,

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86/ 434 U.S. 880 (1977). Judge Schwartz previously rejected a "10-2" grade-center approach (with 2 grades in Wilmington and 10 grades in the suburbs) developed by the New Castle County Planning Board of Education that would have left white students in their neighborhood schools for 10 years and black students for 2, with Wilmington schools never used for primary grades or senior high school, despite a location of a Wilmington high school that was "ideal" for desegregation purposes. The court found that the board's plan deferred to sentiment against busing younger students, but was apparently insensitive to busing younger black students. While Judge Schwartz found some disproportionate racial burden unavoidable because of the smaller capacity of schools that were then predominantly black, he said that the burden should not be excessive where a practical alternative exists.

Also rejected was a plan proposed by the State Board of Education dubbed "reverse volunteerism" whereby every Wilmington black student would be reassigned to existing suburban districts with the absolute right to transfer back to the Wilmington district. This approach was unacceptable because it "carried with it the tacit assumption that only--and that all--black students benefit from transferring to a white environment, and not vice versa," and because it was "totally ineffective" as a remedy for an inter-district violation of the nature and extent found by the court in this case.

87/ Included in this portion of the decree were in-service training of administrators, faculty, and other staff; special programs for reading and communication skills that do not employ resegregative practices; curriculum and materials free of bias and reflecting cultural pluralism; effective, nondiscriminatory counseling to prevent resegregation and to promote nondiscriminatory offering of vocational training and college preparatory programs; nondiscriminatory policy on new school construction, additions, and closings; human relations programs for students and teachers; a nondiscriminatory disciplinary code, procedures, and practices; and the reassignment of staff to eliminate racial identifiability of faculties.

the district court "with deep seated reluctance" confronted the difficulties arising from the widely disparate local tax rates in the 11 school districts that were consolidated for purposes of desegregation. Faced with "imminent peril" if nothing were done, the court set a maximum rate for the reorganized system within the range of rates previously existing in the separate districts, leaving the actual rate for determination by the new school board. The court further noted, however, that "the Delaware legislature may raise or lower the tax authorization established here" provided that it does not imperil the desegregation process. 88/ Finally, the court declined to set up a mechanism for monitoring implementation but retained jurisdiction of the case until the system is deemed completely unitary, as demonstrated over a reasonable period of time. 89/

On a final appeal, the Third Circuit affirmed the plan for student reassignment and ancillary relief adopted by the district court and that court's rejection of alternative plans proposed by State and county officials. 90/ In re-evaluating the extent and continuing impact of the inter-district violation previously found in Wilmington and New Castle County, the appeals court ruled that

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88/ The district court order conferred on the reconstituted county board the authority to establish, levy and collect taxes for the current operating expenses up to a maximum authorized rate of $1.91 per $100 of assessed property valuation. The new board was also permitted to set a tax rate of up to $.32 for tuition, debt service, and minor capital improvements. The board established a tax rate for current operating expenses of $1.68, within the confines of the court's order, but the Delaware legislature thereafter passed a law directing the State Board of Education to establish a tax rate for the consolidated district, which was eventually set at $1.585, or 9-1/2 cents lower than the county board rate. The district court later denied the State Board's application for an injunction against enforcement of the county board rate because the court found that the legislature's action provided "a taxation scheme likely to frustrate or imperil the desegregation process in the single school district." 455 F. Supp. 692, 695.

89/ 447 F. Supp. 982 (D. Del. 1978).

90/ 582 F. 2d 750 (3d Cir. 1978), cert. denied 48 U.S.L.W. 3097 (S. Ct. 8/21/79).

the plan satisfied the remedial duty imposed by Swann and Milliken and conformed to the "incremental segregative effect" standard of Dayton I.

> That the 'condition that offends the Constitution' was found to be inter-district in nature and extending throughout the 11-district area required that the remedy be congruent with the affected geographic area. Given the pervasive nature of the condition and the extensive area implicated by the findings of the three-judge court, the court fashioned a remedy that was prima facie reasonable, to-wit, a plan that sought to root out segregative effects in the inter-district area, a plan designed 'to extirpate the de jure segregation and dual school systems in Northern New Castle County, . . . and to restore the school system to the status it would have enjoyed but for the constitutional violations'. In our view, once this showing was made, the burden passed to the defendant-appellants to demonstrate by evidence and testimony that the proffered plan was 'arbitrary, fanciful, or unreasonable,' by specifying in what respects the reach of the plan exceeded the grasp of the conditions created by constitutional violations. The defendant-appellants failed to meet this burden. 91/

However, the appeals court vacated the district court order of May 5, 1978, which had refused to enjoin the county board from enforcing a tax rate for the consolidated school system in excess of that established by the State board pursuant to the Act of the State legislature. 92/ In effect, the Third Circuit concluded that the district court had failed to accord "the requisite deference to which legislative judgment in the field of taxation are entitled." 93/ The district court was

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91/ 582 F. 2d at 766. The appeals court found the defendants' arguments that the plan exceeded the remedial limits imposed by Dayton I inappropriate for three other reasons. First, it found the Dayton I claims a "belated attempt" to relitigate an issue already conclusively resolved by prior proceedings in the case, including the Supreme Court's affirmance of the finding of an inter-district violation. In addition, Dayton I was distinguishable in that the system-wide remedy in that case was based on three "relatively isolated" violations of "questionable validity," whereas the record in Wilmington disclosed "pervasive de jure interdistrict segregation" throughout the desegregation area. Finally, unlike Dayton I, these "firmly established constitutional violations" had the effect of perpetuating segregation in a school system formerly segregated by law. See, Dayton Board of Education v. Brinkman, (Dayton I), 433 U.S. 406 (1977).

92/ See note 88 (supra).

93/ 582 F. 2d at 778.

directed to hold additional hearings to determine the adequacy of the rate established by the State legislature in accordance with the "presumption of regularity and constitutionality" mandated by relevant judicial decisions. The appeals court indicated that only if the amount allocated was "substantially insufficient" to operate the system would the State's action "clearly be unacceptable as interfering with the operation of the desegregation decree." 94/

Louisville and Jefferson County, Kentucky

When the Supreme Court decided Milliken, it also vacated and remanded for reconsideration in light of that decision an appeals court order to desegregate the Louisville and Jefferson County school systems. 95/ In Newburg, the Sixth Circuit had held that a finding of contiguous dual school systems in the city and surrounding county justified the imposition of an inter-district remedy. In ordering the district court to eliminate "all vestiges of State-imposed segregation," the Sixth Circuit had declared that "State-created school district lines [are] to impose no barrier in accomplishing such purpose".

The suit to desegregate schools in the Louisville metropolitan area began as separate actions against the city and county school systems seeking relief in the form of a merger of the Louisville district with two other districts in the county. The district court, in an order entered prior to Milliken, dismissed both lawsuits on the grounds that it lacked authority to require crossing school district boundaries and that, in any event, segregation within the systems was the consequence of residential housing patterns and not the unlawful actions of school officials.

94/ 582 F. 2d at 780.

95/ Newburg Area Council, Inc. v. Board of Education, 489 F. 2d 925 (6th Cir. 1973), vacated, 418 U.S. 918, modified and reinstated, 510 F. 2d 1358 (6th Cir. 1974), cert. denied, 421 U.S. 931 (1975).

The Sixth Circuit reversed, holding that the school districts were de jure segregated and that school attendance policies based on geographical zoning were not adequate to remedy the unconstitutional conditions. Specifically, the court noted that prior to 1954 both the city and county school boards operated separate schools for black and white students as then required by Kentucky law. It also found that these schools remained racially identifiable to the present, and that segregated conditions had been aggravated by school board practices related to new school construction and student attendance policies. For example, pointing to an elementary school in the county that had remained segregated since before Brown, the court concluded that vestiges of the dual school system were not eliminated as long as the school remained all black.

> Since the Jefferson County Board has not eliminated all vestiges of State-imposed segregation from the system, it had the affirmative responsibility to see that no other school, in addition to Newburg, would become a racially identifiable black school. It could not be 'neutral' with respect to students on assignments at [the other elementary schools]. It was required to insure that neither school would become racially identifiable. 96/

In addition, it appeared that county board policies had led to "under-utilization" of certain black schools while other facilities in nearby white neighborhoods were operated with enrollments greater than capacity.

Similarly, the Louisville board was found, inter alia, to have maintained an "open enrollment" policy which had the effect of aggravating segregation by enabling white students who were assigned to black schools to transfer out. Despite so-called "integration plans" adopted in the intervening years by the Louisville Board of Education, the court found that over 80 percent of the schools in Louisville remained racially identifiable in a school system that was 50 percent white. Since the effects of the pre-Brown State-imposed segregation still remained in the

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96/ 489 F. 2d at 929.

Louisville school system, the Sixth Circuit also reversed the trial judge's dismissal of the suit against the Louisville board and remanded both cases for further proceedings.

Meanwhile, the Supreme Court issued its ruling in Milliken prohibiting an order for inter-district relief in the absence of a constitutional violation with inter-district effects. Because the order in the Louisville and Jefferson County cases covered all school districts in Jefferson County, the Supreme Court vacated the order and sent the case back to the Sixth Circuit for reconsideration in light of Milliken. 97/

On remand, the Sixth Circuit reinstated its order. 98/ In support of the conclusion that an inter-district remedy was appropriate, the court emphasized certain factors distinguishing Louisville and Jefferson County from the situation in Detroit. First, the court noted that the boundary lines between the Louisville and Jefferson County school districts had been frequently disregarded in the past to aid segregation, while Milliken involved only one such instance. In addition, the expansion of the municipal boundaries of Louisville without concurrent expansion of the city school district had resulted in a substantial number of white Louisville residents attending schools in the county. The Sixth Circuit also observed the importance of the county as the primary unit of government in Kentucky and that there were only three school systems involved, not 53 separate districts as in the Detroit metropolitan area. Thus, a metropolitan remedy would be considerably less complex to administer than it would have been in Milliken.

Most important, however, was the fact that unlike Detroit, both the Louisville and Jefferson County school districts were "equally guilty in failing to

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97/ 418 U.S. 918 (1974).

98/ 510 F. 2d 1358 (6th Cir. 1974).

eliminate all vestiges of segregation mandated by the same Kentucky statute." Because of this, the court reasoned that it could not allow the school districts to remain separate where the effect would be to impede disestablishment of the dual school systems.

> A vital distinction between Milliken and the present cases is that in the former there was no evidence that the outlying school districts had committed acts of de jure segregation or that they were operating dual school systems. Exactly the opposite is true here since both the Louisville and Jefferson County School Districts have. . . failed to eliminate all vestiges of State-imposed segregation. Consequently, as contrasted with the outlying Michigan districts, they are guilty of maintaining dual school systems. 99/

This latter rationale suggests that a finding of contiguous dual school systems may provide an independently adequate justification for an inter-district remedy, regardless of the extent to which segregative acts in one district affect the racial composition of schools in an adjoining district.

Subsequently, the inter-district aspect of the Louisville case was effectively mooted when the Louisville Board of Education voted to dissolve itself and consolidate its territory with that governed by the Jefferson County School Board. 100/ Thereafter, proceeding on an intra-district basis, the district court on July 30, 1975 ordered a county-wide desegregation plan to be implemented in the fall, and dismissed the Anchorage Independent School District because there was no evidence that it had discriminated. 101/ The plan, developed with the aid of Jefferson County

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99/ 510 F. 2d at 1359.

100/ Following the appeals court's 1974 decision, the Louisville school district was dissolved pursuant to a procedure authorized by the Kentucky statutes and the State Board of Education ordered the Jefferson County Board of Education to merge with the Louisville district to establish a new county school system that would be 81 percent white. However, had the Louisville board not voted to relinquish its jurisdiction, it appears likely that the court would have required implementation of an inter-district remedy. Consequently, the litigation may have had the effect of prompting administrative action to consolidate the two principal districts into a single metropolitan whole.

101/ In 1977-78, the Anchorage Independent Schools enrolled slightly over 300 pupils in grades k-9 and the combined enrollment of the public schools in Louisville and Jefferson County exceeded 114,000 pupils in grades k-12.

districts in St. Louis County, Missouri. Until 1937, the present Kinloch School District constituted a single system that operated separate schools for black and white students pursuant to a Missouri law that required segregation in the public schools. When the city of Berkeley was incorporated in that year, the Berkeley District was detached from the present Kinloch District, creating two almost completely segregated school districts, Kinloch (black) and Berkeley (white). Inter-district segregation had been enforced by formal transfer arrangements between the districts until 1954. The district court found that the educational opportunities in the present Kinloch School district were vastly inferior to those in the rest of St. Louis County, and that this inferiority was "a direct and forseeable consequence of the creation and maintenance of Kinloch as a small, all-black school district." 105/

Racial motivation with respect to the detachment of Berkeley from Kinloch was inferred from the fact that Missouri required dual school systems by statute at the time, and the fact that the school district boundaries themselves were inexplicable on nonracial grounds. County educational officials had favored the reorganization of Kinloch District, as had studies commissioned by the State and county which "uniformly recommended that the Kinloch District be consolidated with other school districts." Anticipating voter rejection, however, neither the State nor the county had included the Kinloch District in various consolidation plans proposed for the county. "[I]n exercising their powers of school district reorganization, State, and county school officials have, because of the race of resident students, treated Kinloch District differently from other similarly situated school districts." 106/ In short, racial considerations were found to have entered

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105/ 363 F. Supp. at 743.

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into the decision not to reorganize the Kinloch District, and "State and county officials acted on these considerations to the detriment of the Kinloch students." The segregative effects of these actions had persisted: the black district had only a handful of white students at the time of trial, and its assessed tax valuation per pupil, buildings, equipment, and faculty salaries were markedly inferior to the other districts.

Subsequent to the trial, the district court entered an order enjoining the defendants from operating the schools in St. Louis County in a discriminatory fashion, and requiring the submission of reorganization plans which would eliminate segregation in those schools. The plan submitted by the defendants and approved by the court provided for the consolidation of the Kinloch and Berkeley districts with a third, considerably larger district, Ferguson-Florissant. Consolidation of only Kinloch and Berkeley was rejected because it would not have resulted in significant desegregation and was not financially viable due to low assessed property valuations in the two districts. The approved remedy would necessitate some increase in the number of students bused but, the court found, involved no health or safety hazards.

Measured against the standards laid down by Milliken, the district court concluded that the proposed inter-district remedy was appropriate in this particular situation. Milliken found an inter-district remedy suitable only in the presence of an inter-district violation or a violation having inter-district effects. The situation in St. Louis County was a vestige of a formerly State-mandated dual school system and was also "a continuing effect of racially discriminatory State actions on the part of the defendants." 107/ Although not a party to the creation of the black Kinloch District, the court justified the inclusion of Ferguson-Florissant on the basis that the rejection by Ferguson voters of a proposed plan

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107/ 388 F. Supp. at 1059.

for consolidation with Kinloch had been racially motivated. 108/ Focussing on one major distinguishing factor, the court noted that as compared to the 53 school districts included in the proposed desegregation plan for Detroit, the three district remedy would not cause any significant disruption of public education or any deviation from Missouri law, thereby meeting the equitable objections voiced in Milliken.

The consolidation plan was affirmed by the Eighth Circuit, but another portion of the district court decree dealing with tax levies to support the consolidated district was modified on appeal. Testimony before the district court indicated that a maximum tax rate of $6.03 per $100 valuation would be required to operate the new district, but that it would be impossible to obtain voter approval for that level of funding. The State Board of Education therefore recommended that the maximum rate not exceed $5.38 per $100 valuation, the then current rate in Ferguson-Florissant District, with the remainder financed through the State legislature. In modifying the district court order which had opted for the higher rate, the Eighth Circuit held that while it was within the judiciary's power to require tax levies to implement a school desegregation plan, nevertheless "deference should be given to the plan submitted in good faith by the State and county officials and which is largely accepted by the court." 109/ The rate in the consolidated school district was therefore reduced to $5.38 per $100 valuation.

108/ 388 F. Supp. at 1060; 363 F. Supp. at 748-49.

109/ 515 F. 2d at 1373.

SUMMARY

Lower court decisions since Milliken demonstrate that, despite the apparent limitations on inter-district relief imposed by the Supreme Court in the Detroit case, judicial remedies to desegregate schools in an entire metropolitan area may be appropriate in certain circumstances. Basically, three distinct types of practices that may form a pattern of constitutional violations justifying inter-district relief have been identified by these decisions: school board policies that result in actual district line crossings by students; legislative or administrative reorganizations of school districts, consolidations, or detachments that intensify segregation within affected districts; and actions by local housing authorities that affect the residential location of families with school children within a metropolitan area.

The Wilmington and Louisville cases illustrate this first type of "inter-district" violation where school officials in two or more districts act in concert to segregate students across district lines. For example, the Evans court stressed historical arrangements of city/county cooperation for the education of students in the Wilmington metropolitan area; in particular, the fact that for many years county blacks had been transferred to an all-black city high school. In addition, before Brown, suburban students of both races had, for a variety of other reasons, been transferred across district lines to Wilmington, and the State had contributed to "white flight" from the city public schools by subsidizing inter-district transportation of students to private and parochial schools in the county. Similarly, in Newburg, the Sixth Circuit noted that boundary

lines between the Louisville and Jefferson County school districts had frequently been disregarded in the past to aid segregation, while Milliken involved only one such instance.

Although Milliken, by rejecting the theory that State officials may be held vicariously liable for all acts of a local school board, severely weakened the viability of certain types of "State action" arguments as justification for inter-district relief, some forms of action at the State vis-a-vis local level may still support a claim for such relief. For example, when State legislative or administrative action related to the organization, consolidation, or detachment of school districts results in increased segregation, this may provide a basis for finding an inter-district violation under Milliken. The court in Evans relied primarily on the State legislature's passage of the Educational Advancement Act, excluding Wilmington from a general reorganization of Delaware school districts, as the basis for an inter-district remedy. In United States v. Missouri, the separation of one district into black and white districts in 1937, and the refusal by State and local officials to include the black district in subsequent consolidation plans for the county, was held to justify their reconsolidation almost forty years later. In Milliken, the Supreme Court specifically referred to "line drawing" of this sort as one acceptable ground for an inter-district remedy. 110/

A second type of line drawing problem is presented when school district lines do not conform to governmental boundaries for other purposes, and the effect of this discrepancy is increased segregation within city and suburban school systems. In the Indianapolis case, the State legislature approved a plan organizing all governmental services on a metropolitan basis except for schools, which remained divided between city and suburbs. In Louisville, the boundaries

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110/ 418 U.S. at 745.

of the Louisville School District were drawn well inside the city limits, allowing 10,000 students, mostly white, to live in the city but attend county schools. 111/ The mismatches were found to be prima facie evidence of a segregative purpose whose effects justified inter-district relief. It follows from the Louisville and Indianapolis cases that unless the defendant State or local officials can demonstrate that the determination of governmental boundaries was based solely on legitimate non-racial reasons, an inter-district remedy may be appropriate. 112/

Another type of line drawing that may provide a basis for finding an inter-district violation involves the consolidation of school districts. In Morrilton School District No. 32 v. United States 113/ a series of three major school district consolidations in Conway County, Arkansas, mandated by the State Legislature prior to 1950, had the effect of combining a number of small segregated districts into a few larger, but still segregated, districts. In an en banc decision, the Eighth Circuit unanimously held that because the consolidation program failed to remedy, and effectively preserved, the de jure segregation enforced by a statute in Arkansas until 1954, it constituted an inter-district violation justifying further consolidation of the districts to achieve desegregation. The court's reasoning anticipated the Columbus and Dayton II decisions, where a history of past de jure

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111/ Newburg Area Council, Inc. v. Board of Education, 510 F. 2d 1358, 1361 (6th Cir. 1974), cert. denied 421 U.S. 931 (1975).

112/ The difficulty with this approach may lie in the requirement of finding a discriminatory purpose. There may be legitimate reasons, such as economies of scale, for providing some services but not others on a metropolitan basis. Indeed, the Milliken court itself stressed the importance of the factor of local control over education as militating against imposition of inter-district remedies. However, when most services are provided regionally, the exclusion of school districts from an overall plan of government consolidation may become more suspect, and it may be more difficult for defendants to defeat a prima facie case by showing that they acted exclusively for non-racial reasons in not consolidating schools.

113/ 606 F. 2d 222 (8th Cir. 1979), cert. denied 48 U.S.L.W. 3535 (S. Ct. 2/19/80).

segregation and the continuing failure to eliminate its effects warranted a broad intra-district remedy. In addition, there is language in Morrilton to suggest that, even in the absence of statutorily enforced segregation prior to 1954, the the consolidation program would have justified an inter-district remedy because it had led to discontiguous districts serving widely scattered areas. Since this pattern lacked apparent educational justification, the court felt that the intent of the consolidations could be viewed as "discriminatory." 114/

The Wilmington and Indianapolis cases also illustrate that State action contributing to significant inter-district residential segregation, by control of land use or construction of public housing, may also justify metropolitan relief of school segregation indirectly caused thereby. In Evans, the district court adopted the housing discrimination theory suggested by Justice Stewart in Milliken, where he referred to purposeful State manipulation of housing or zoning laws, to find an inter-district violation based on the discriminatory policies of various officials involved in public and private housing. Regional housing authorities that built all public housing units within the city when they had authority extending into the suburbs were also found to have committed inter-district violations in Indianapolis. Although such practices may constitute an inter-district violation, the casual relationship between housing policies and inter-district school segregation may not be as apparent as in the case of district line crossings and reorganizations. This is suggested by Justice Stewart's assertion in Milliken that the concentration of black residents in Detroit was due to "unknown and perhaps unknowable factors." Another difficulty in using State or local housing or zoning laws as a basis for finding an inter-district violation is the necessity of showing a discriminatory purpose. Certain zoning and housing laws

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114/ 606 F. 2d at 227.

that have the effect of segregating blacks in urban areas may have been designed to preserve open space, lessen the burden on municipal services, or accomplish other legitimate purposes that may preserve them from constitutional challenge. 115/ Nonetheless, the post-Milliken cases demonstrate that a litigation strategy based in part on housing violations may succeed in certain circumstances. 116/

It should be noted, however that the post-Milliken cases in which lower courts have ordered inter-district relief all involved school districts that had operated statutory dual school systems in the past, and where the effects of pre-1954 de jure segregation had lingered without remedy. Although not directly confronted with the issue, the Supreme Court's decisions during its 1978-79 term in Columbus Board of Education v. Penick 117/ and Dayton Board of Education v. v. Brinkman (Dayton II) 118/ leave open the possibility that such a "vestiges" rationale could likewise be used to obtain inter-district relief in school districts without a prior history of statutorily enforced racial separation of students. In Milliken where only intra-district violations in a single school district were proven the Court was unwilling to presume the existence of inter-district violations. 119/ By contrast, it is arguable that once the plaintiffs in such a case have established a single or repeated inter-district violations

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115/ See, Arlington Heights v. Metropolitan Housing Development Corp. 429 U.S. 252 (1977).

116/ See, also Hills v. Gautreaux, 425 U.S. 284 (1976) n. 75 (supra).

117/ 443 U.S. 449 (1979).

118/ 443 U.S. 526 (1978).

119/ While the opinions of both the Chief Justice and Justice Stewart, concurring, emphasized that Milliken did not involve contiguous dual school systems, the Court did not expressly consider whether a showing of contiguous intra-district violations, but without evidence of inter-district effect, might be sufficient in and of itself to justify the imposition of an inter-district remedy. To date, the only decision to suggest that it would is the Sixth Circuit ruling in the Louisville case (Newburg, supra) but that aspect of the court's ruling was largely dicta since there were other grounds to support the findings of an inter-district violation. See, 510 F. 2d at 1361.

with significant unremedied effects, the vestiges "presumption" of Columbus and Dayton II might be applied to shift the burden of proof to State and local defendants regarding other segregation between the districts' school. For example, if cooperative transfers of students for a segregative purpose, or significant housing violations, are proven, it could be presumed that the identified officials committed other violations having similar effects. Thus, while northern litigants may be less able than their southern counterparts to trace current segregation to an historical statutory source, the theory of unremedied vestiges of past segregative action (i.e., the continuing failure of State officials to remedy the effects of their past misdeeds), borrowed from the intra-district context, could lessen the plaintiffs' burden of showing that other, more subtle forms of discrimination led to segregated schools in more than one district.

Finally, by relying on State constitutional provisions, the courts in at least two cases have avoided the barriers posed by Milliken to inter-district relief. An intermediate California State court, Tinsley v. Palo Alto Unified School District, 120/ found that inter-district relief could be justified under Article I, Section 7, of the California constitution, which established a State guarantee of of equal protection. In Tinsley, the district court of appeals upheld on demurrer the plaintiff's request for the integration of students from a black-majority elementary school district in the San Francisco suburbs with those from a neighboring white-majority elementary school district. The court began its analysis by noting that the California Supreme Court, in Crawford v. Board of Education, 121/ had held de facto intra-district segregation to be a violation of the State constitution's

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120/ 91 Cal. App. 2d 871, 154 Cal. Rptr. 591 (1979).

121/ 17 Cal. 3d 280, 551 P. 2d 28, 130 Cal. Rptr. 724 (1974) (Los Angeles County Schools).

equal protection guarantee. The court then held that Crawford applied to de facto segregation across district lines, as long as the districts were adjoining. Having found a violation of State constitutional law, the court rejected the defendant's argument that Milliken was binding precedent.

In Berry v. School District, 122/ a Federal district court in Michigan based resort to an inter-district remedy on Article VIII, Section 2, of the 1962 State constitution, which orders "every school district [to] provide for the education of its pupils without discrimination. . ." Although the provision is addressed to "school districts," the court concluded that it imposed an affirmative duty on "all State and school authorities," the Governor, and the attorney general. Dereliction by State officials of this duty to remedy local de jure segregation, the court held, constituted a violation of State-wide scope justifying inter-district relief. The court thus relied on the State constitution to achieve the same ends sought by the plaintiffs in Milliken: characterization of the violation as State-wide to allow for inclusion of more than one school district within scope of the remedy.

In conclusion, while Milliken places restrictions on the courts' authority to order inter-district or metropolitan remedies in school desegregation cases, such relief may still be available in a wide range of cases. Line crossings, boundary changes and residential population shifts brought about by official discrimination may all satisfy Milliken's requirement of an inter-district violation. Both the Wilmington and Louisville cases appear to depart from strict adherence to Milliken, suggesting a relaxed application of the discriminatory intent test, and that where there is some combination of de jure violations within the included districts, breaches of district lines, and an absence of equitable restraints based on local

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122/ 467 F. Supp. 630 (W.D. Mich. 1978).

control and administrative difficulties, rigorous inquiry into inter-district segregative effects may not be required. Additional developments in the law can be expected, particularly in regard to the applicability of Columbus and Dayton II to multidistrict litigation seeking metropolitan-wide desegregation of northern urban areas. Finally, it is possible that claims based on State constitutional grounds will more frequently be used to supplement the Federal law in the future.

CONGRESSIONAL RESPONSE

The options for Congress in responding to the metropolitan desegregation proposals could range from legislative prohibitions on the use of Federal funds for segregated activities to "incentive" programs for the development and support of metropolitan desegregation efforts. Advocates for State's rights and the maintenance of the status quo might favor legislative prohibitions or "no response" as a means of minimizing the pressure to move in the direction of metropolitan plans. The basic policy options for congressional activity include the following:

Research and Dissemination. Several metropolitan desegregation efforts have been underway for a sufficient period of time to justify research and evaluation activities as to their effectiveness, impact on school governance, student achievement gains or losses, impact of educational programs and services, social benefits, public acceptance, and additional costs associated with the desegregation efforts. Independent research efforts would provide some of the types of information that the public seeks when considering the possibility of initiating voluntary programs or when confronted with the possibility of mandatory court orders. After completing the research projects, summaries of the findings and related materials could be prepared and made available to interested parties.

Demonstration Programs. The previously mentioned research and dissemination efforts could be conducted without providing funds for demonstration programs; however, if the determination should be made that it is in the national interest to promote metropolitan desegregation efforts, funds could be provided for

a series of demonstration programs in different locations throughout the Nation. Under the Emergency School Assistance Act, funds have been provided for magnet schools and other demonstration programs designed to foster desegregation; however, funds have been limited and not available to school districts under Federal court orders to desegregate. Examples of possible programs include magnet schools, alternative schools, pairing and clustering of elementary and junior high schools, and technical assistance with pupil transportation, teacher in-service training, community relations, and fiscal management.

Supplemental Aid. Another possible approach from the Federal level would be to provide direct support to local school districts that participate in metropolitan desegregation efforts. Funding could be for the same types of activities as under demonstration programs. One difference would be that districts would not be subject to the restrictive selection criteria that would be necessary under demonstration programs. This approach could be used as an incentive if the Federal interest would move beyond the research, dissemination, and demonstration phases into a more general and continuing support level.

No Response. Even though the term may have negative connotations, this approach may be a viable Federal option because of the contention that education is a State responsibility and a local function. Under these assumptions, there is no direct Federal responsibility for education. Consequently, federally funded programs are discretionary, and issues such as equal protection and elimination of the vestiges of segregation can be resolved through the Federal judicial system without congressional action.

Educational Remedies. Even though various observers have contended that educational opportunities are reduced in "majority-minority" schools, some urban school districts may have little choice except to devote their efforts to seeking ways through which educational opportunities for minority children might be

enhanced, whether or not they maybe able to attend desegregated schools. In the absence of either a significantly large group of majority race students in the urban school district or governmental action designed to foster desegregation in these metropolitan areas, a racial balance similar to that of the general population may not be possible because of the proportional number of minority students in the inner city school district. Therefore, to increase the educational opportunities for children, the alternative may be to allocate resources and provide other types of support to compensate for the absence of educational opportunities that would be comparable to those received in schools with a racial balance more representative to that of the entire Nation. This option would result in some type of direct aid to inner cities with high concentrations of minority students. Significant amounts of funds are allocated to these areas under current Federal compensatory education programs, including those under Title I of the Elementary and Secondary Education Act, but these funds are considered to be insufficient and programs have been primarily limited to elementary schools.

Legislative Prohibitions. If the intent is to prevent the Administration from taking action in support of metropolitan desegregation, provisions designed to prohibit the agencies from taking action or from providing Federal funds to promote or foster metropolitan desegregation could be included in either the authorizing legislation for the Department of Education and its various programs or the appropriations legislation.

This approach has been used by the Congress since 1974. During that period, various amendments to curtail or prohibit pupil busing for desegregation have been enacted as a part of education legislation. The first was incorporated as a part of the Education Amendments of 1974 and prohibited any Federal agency from ordering the implementation of a desegregation plan requiring the transportation of students beyond the schools closest or next closest to their homes that provide

the appropriate grade level or type of education for those students (P.L. 93-380). The broad language was narrowed by an additional amendment that indicated the provisions of the amendments were not intended to modify or diminish the authority of the Federal courts to enforce fairly the United States Constitution.

The second type of action consisted of amendments to appropriations legislation intended to forbid the use of funds either directly or indirectly to require the transportation of any student to a school other than the one that is nearest the student's home and that offers the courses of study pursued by the student (beginning with the fiscal year (FY) 1976 and 1977 appropriations Acts for the Departments of Labor and HEW, P.L. 94-206 and P.L. 94-439). Under interpretation by the Justice Department, these amendments were construed to apply solely to the transportation of students under a remedial plan, as opposed to those under an original assignment plan; thus empowering Federal agencies to withhold funds from segregated districts operating a neighborhood assignment plan.

In the FY 1978 appropriations Act for the Department of Health, Education, and Welfare (HEW) (predecessor agency to the current Department of Education), an amendment was included that forbade the HEW from requiring, either directly or indirectly, the transporting of any student to paired or clustered schools (P.L. 95-205). (Similar language was included in the FY 1979-80 appropriations Act and also in the proposed legislation for FY 1981.) These provisions were challenged in Federal court, but the court indicated that the provisions were not unconstitutional on the face. The possibility of subsequent court challenges on the application of the provisions was left open.