## Table of Contents

**Section** **Page**

## Table of Citations

## Certificate of Interested Persons and Corporate Disclosure Statement

I, Jerry A. Lumley, Attorney for Appellee City of Thomasville School District, hereby certify in accordance with FRAP 26-1 and R.26.1 that (1) there are no nongovernmental corporate parties to this proceeding, and (2) the following is a complete list of the trial judge, attorneys, persons, associations of persons, firms, partnership, or corporations that have an interest in the outcome of this case.

1. Bevilaqua, Theresa M.;
2. Black, Derek W.;
3. Bostick, Sharon;
4. City of Thomasville School District;
5. Dann, Mark A.;
6. Paul Deiseth;
7. Dorsey and Whitney, LLP;
8. Gaskins, Laverne Lewis;
9. Gross, Leslie M.;
10. Henderson, Thomas;
11. Hightower, Jennifer;
12. Hill, Mary;
13. Holton, Shernika;
14. Howell, W. Kerry;

15. Land, Honorable Clay D., United States District Court Judge;

16. Lawyers Committee for Civil Rights Under Law;

17. Lewis, Willie Mae;

18. Linder, Audrey;

19. Lumley, Jerry A.;

20. Lumley & Howell, LLP;

21. McIntyre, Sandra;

22. Moore, Charles C.;

23. Robbennolt, Paul J.;

24. Ruzicka, Eric A.;

25. Shotwell, Gladys;

26. Thomas Country Branch of the National Association
For the Advancement of Colored People;

27. Walker-Lanier, Betty;

28. Webb, Lisa;

29. Wilkerson, Evelyn;

30. Wilson, Spencer.

This 23rd day of June, 2004.

Lumley & Howell, LLP
350 Second Street
Macon, GA 31201
(478) 745-0111

Jerry A. Lumley
State Bar No. 460866
Attorney for Appellee

## Statement Regarding Oral Argument

The City of Thomasville School District ("the School District") desires oral argument. This case involves the rules a district court should follow when deciding whether to place a school district under a desegregation order and subject it to judicial supervision some 50 years after the Supreme Court's decision in ***Brown v. Board of Education***, 347 U.S. 483 (1954). Obviously, this is a matter that is of great concern to the parties. It is also a matter of concern to school districts that could become involved in similar litigation as well as parties involved in other desegregation litigation. The Court should therefore give the parties an opportunity to make arguments to the Court orally and, in the process, address any questions or concerns the Court may have that have not been addressed in the briefs.

## Statement of Jurisdiction

This Honorable Court has jurisdiction because this is an appeal from a final decision of the United States District Court for the Middle District of Georgia. 28 U.S.C. § 1291.

## Statement of the Issues

1. Whether the District Court applied the proper standards in determining if Plaintiffs' constitutional rights were violated.
2. Whether the District Court's factual findings were infected by legal error or clearly erroneous.
3. Whether the District Court erred by not allowing the School District its costs.

## Statement of the Case

### 1. The Course of Proceedings and Disposition in the Court Below.

Appellants, on behalf of black children attending the public elementary, middle and high schools operated by the School District, filed their complaint on October 2, 1998. (Complaint, Docket No. 1) Appellants contend that the School District operates and maintains a racially segregated school system. Appellants sought relief under 42 U.S.C. §1983 for alleged violations of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and under Title VI of the Civil Rights Act of 1964. 42 U.S.C. § 2000(d). *Id.* Specifically, Appellants sought a permanent injunction which "requires the District to disestablish, in all respects, the racially segregated and unequal school system that exists in the City of Thomasville Schools District." *Id.* The School District timely answered the Complaint denying all material allegations and denying that Appellants were entitled to any relief. (Answer, Doc. No. 5)

On August 4, 1999, the Court conditionally certified this case as a class action defining the class as: "all present and future parents or guardians of African American children enrolled or eligible to be enrolled with the Thomasville City School District." (Order, Doc. No. 85) On January 21, 2003, the Court granted Plaintiff's Motion for Partial Summary

Judgment finding that under Eleventh Circuit precedent any present racial imbalances in the District are presumed to be result of previous *de jure* segregation. (Order, Doc. No. 192) The Court further found that the presumption was rebuttable and that the School District had the burden at trial of showing that any present racial imbalances are not traceable, in a proximate way, to the previous system. *Id.*

The District Court tried this action without a jury beginning on July 21, 2003, and ending on August 6, 2003. After considering the evidence presented at trial, as well as post-trial submissions made by the parties, the Court entered an Order on February 5, 2004, finding for the School District. (Order, Doc. No. 275) Judgment was entered in the School District's favor on February 6, 2004. (Judgment, Doc. No. 276) However, the District Court "directed that each side shall bear its own costs." *Id.* The District Court provided no explanation for not allowing the School District its costs.

## 2. Statement of the Facts.

### A. Organization of the School District's Schools and the School District's Desegregation.

#### i. *De Jure* Racially Segregated Schools.

The School District operated separate schools for black and white students before it implemented its first desegregation plan in 1965. The

grades and races served by each school in the School District at that time were:

| School | Grades | Race |
|---|---|---|
| Balfour | 1-6 | White |
| Douglass Elementary | 1-6 | Black |
| Dunlap | 1-6 | Black |
| East Side | 1-6 | White |
| Harper | 1-6 | White |
| Jerger | 1-6 | White |
| Douglass High | 7-12 | Black |
| MacIntyre Park | 7-12 | White |

(Stipulation of Facts, ¶2).

ii. **The Desegregation Plans and Changes to the Organization of Schools**

In 1964, Congress, concerned with lack of progress in school desegregation, included Title VI in the Civil Rights Act of 1964 to deal with the problem through various agencies of the federal government. Further, Congress directed the Department of Health, Education and Welfare ("HEW") to issue regulations regarding racial discrimination in federally aided school systems and to enforce Title VI and its corresponding regulations. (Stipulation of Facts, ¶2 ). Specifically, HEW was mandated to implement desegregation plans. (Gordon, v. IV, p. 35).

Extended discussions between HEW and school districts regarding desegregation plans were not unusual in the 1960's. (Armour, v. X, pp. 19-20). The requirements of desegregation plans were in dispute during this

time because there was no single set of terms to be applied and the U. S. Supreme Court did not provide any detailed guidelines until 1971. (Armour, v. X, p. 19).

The School District first adopted a desegregation plan in 1965. (Gordon, v. IV, p. 281). After numerous exchanges with HEW, the School District adopted its final desegregation plan ("the Desegregation Plan") in 1970. (Armour, v. X, p. 15). The terms of the Desegregation Plan were as follows:

> By September 1970, all of the schools in the Thomasville City System will be unitized and the following re-organizational steps will have been accomplished:
>
> 1. All pupils in the system in grades 9-12 will attend MacIntyre Park High School.
>
> 2. All pupils in the system in grades 7 and 8 will attend the Middle School, housed in the Douglas Elementary and High School facilities.
>
> 3. All pupils in the system in grade 6 will attend Dunlap School.
>
> 4. All pupils in the system in grade 5 will attend the East Side School.
>
> 5. All pupils in the system in grades 1-4 will attend Balfour, Jerger, Scott and Harper Schools under a "freedom of choice" plan. If the "freedom of choice" plan does not eliminate the racial identifiability of each of the four elementary schools, alternate steps will be taken to give this assurance.

6. The faculty assignments in each school will generally reflect the racial ratio of the faculty in the school system as a whole.

(Plaintiff's Exhibit 291; Armour, v. X, pp. 16-18).

HEW found that the Desegregation Plan would accomplish the purposes of Title VI of the Civil Rights Act of 1964 and approved the Desegregation Plan on July 1, 1970. (Plaintiffs' Exhibit 291).

After the implementation of the Desegregation Plan in 1970, all students in grades 1-4, regardless of race, attended either Balfour, Harper, Jerger or Scott Elementary Schools; all fifth grade students attended East Side; all sixth grade students attended Dunlap; all seventh and eighth grade students attended Douglass; and all high school students attended MacIntyre Park. Thus, beginning with the 1970-71 school year, the School District's facilities were used in the following manner:

| School | Grades |
|---|---|
| Balfour | 1-4 |
| Harper | 1-4 |
| Jerger | 1-4 |
| Scott | 1-4 |
| East Side | 5 |
| Dunlap | 6 |
| Douglass | 7-8 |
| MacIntyre Park | 9-12 |

(Stipulation of Facts, ¶4).

Thomasville High School was opened at the beginning of the 1975-76 school year. At the same time, East Side was closed, Dunlap became the school system's facility for special education and kindergarten children, and MacIntyre Park became the school for fifth and sixth grade students. Thus, beginning with the 1975-76 school year, the School District's facilities were used in the following manner:

| School | Grades |
|---|---|
| Dunlap | Special Education, K |
| Balfour | 1-4 |
| Harper | 1-4 |
| Jerger | 1-4 |
| Scott | 1-4 |
| MacIntyre Park | 5-6 |
| Douglass | 7-8 |
| Thomasville High | 9-12 |

(Stipulation of Facts, ¶5)

iii. **Recent Changes and Present Organization of Schools**

Balfour and Dunlap were closed at the end of the 1992-93 school year.[1] (Stipulation of Facts, ¶6). At the same time, the use of the School District's facilities were reorganized and, beginning with the 1993-94 school year, the facilities were used in the following manner:

[1] Balfour was later reopened to house the School District's pre-kindergarten program and Dunlap was later reopened to house the School District's Alternative School and EXALT program.

| School | Grades |
|---|---|
| Douglass | K-5 |
| Harper | K-5 |
| Jerger | K-5 |
| Scott | K-5 |
| MacIntyre Park | 6-8 |
| Thomasville High | 9-12 |

(Stipulation of Facts, ¶7).

Douglass was closed at the end of the 2001-2002 school year. The School District currently operates three K-5 elementary schools (Harper, Jerger and Scott), one 6-8 middle school (MacIntyre Park), one 9-12 high school (Thomasville High), a pre-kindergarten program (formerly Balfour), and an alternative school program (formerly Dunlap). (Stipulation of Facts, ¶8).

### B. Areas Address by Appellants on Appeal.

In their Complaint, Appellants contended that the School District discriminated on the basis of race in all areas of its operations. On appeal, Appellants only address certain areas. The School District will therefore limit its discussions to the areas addressed by Appellants.

#### i. Assignment of Students to Schools.

The Desegregation Plan desegregated the students in all schools in the School District. (Armour, v. X, pp. 20-21). Students in grades five through twelve were desegregated by the Desegregation Plan because the School

District used only one school to serve each of these grades. (Armour, v. X, pp. 21-22). Students in grades one through four attended one of four elementary schools, Balfour, Harper, Jerger and Scott. The following sets forth the percentage of black students in these grades in the School District during school years 1970-71 through 1975-76 and the percentage of black students in each of the elementary schools during that time period:

| School Year | District (1-4) | Balfour | Harper | Jerger | Scott |
|---|---|---|---|---|---|
| 1970-71 | 56.2 | 53.4 | 52.4 | 60.1 | 54.9 |
| 1971-72 | 62.4 | 58.3 | 72.1 | 68.8 | 56.1 |
| 1972-73 | 65.9 | 57.8 | 82.5 | 66.8 | 61.1 |
| 1973-74 | 67.8 | 64.7 | 83.2 | 68.9 | 59.2 |
| 1974-75 | 66.3 | 66.1 | 85.6 | 66.8 | 55.3 |
| 1975-76 | 67.9 | 73.0 | 87.3 | 63.5 | 56.1 |

(Plaintiffs' Exhibit 164).

Expert testimony was presented at trial that the appropriate standard to be applied in determining whether a school is desegregated with respect to student assignments is whether the percentage of black students at the school varies from the district-wide percentage of black students by plus or minus 20 percentage point. (Armour, v. X, pp. 22-23). As shown above, all of the School District's students in grades one through four attended a school that had a percentage of black students that varied no more than 20 percentage points from the district-wide percentage of black students in those grades for at least six (6) consecutive school years after the Desegregation Plan was

implemented. (Armour, v. X, p. 24, Plaintiffs' Exhibit 164; Defendant's Exhibits 546, 547, 548 and 549).

There was a substantial decline in the enrollment of white students in the School District after the Desegregation Plan was implemented in 1970. (Armour, v. X, pp. 34-35). At the same time, the black enrollment remained fairly stable. (Defendant's Exhibits 550 and 551; Plaintiffs' Exhibit 164). The enrollment in the School District by race during the first eight years following the implementation of the Desegregation Plan was as follows:

| School Year | White | Black | Total |
|---|---|---|---|
| 1970-71 | 2274 | 2438 | 4712 |
| 1971-72 | 2018 | 2554 | 4572 |
| 1972-73 | 1888 | 2598 | 4486 |
| 1973-74 | 1614 | 2604 | 4218 |
| 1974-75 | 1492 | 2595 | 4087 |
| 1975-76 | 1468 | 2499 | 3967 |
| 1976-77 | 1459 | 2487 | 3946 |
| 1977-78 | 1311 | 2520 | 3831 |

(Armour, v. X, pp. 33-35, Defendant's Exhibits 550, 551 and Plaintiffs' Exhibit 164). In addition to changes in enrollment in the School District, changes in the population of the City of Thomasville occurred after the implementation of the Desegregation Plan. In 1970, the black population in the City of Thomasville was concentrated primarily in the southwestern sector of the City. (Armour, v. X, p. 36). Since that time, the concentration

of the black population throughout Thomasville has changed. Specifically, in 1970, Harper was surrounded by some predominantly white communities. (Armour, v. X, p. 37). However, by 1980 the area around Harper had become almost all black and by 1990 there were no white students left in the area. (Armour, v. X, pp. 38, 40, Defendant's Exhibits 553, 554, 555 and 556).

Because of the changes in the black population of the School district and the City of Thomasville, demographics overtook the Desegregation Plan and Harper's enrollment became almost entirely black. (Armour, v. X, p. 41). Any disproportion that may exist with respect to composition of the student body at Harper is a result of these changes in demographics, not the *de jure* segregated school system that once existed. (Armour, v. X, p. 42).

On May 13, 1975, HEW addressed a letter to the School District's Superintendent advising the School District that the United States District Court, in the case of ***Adams v. Weinberger***, had ordered HEW to put the School District on notice "to rebut or explain the substantial racial disproportion in one or more of the district's schools." (Defendant's Exhibit 456). HEW stated the following in its letter to the School District:

> The court defined a racially disproportionate school as one in which a 20 percent disproportion exists between the percentage of local minority pupils in the schools and the percentage in the entire school district.

*Id*.

Several exchanges took place between the School District and HEW as a result of HEW's May 13, 1975 letter. (Def. Ex.'s 458, 459, 461, 464, 466 and 467). Among other things, the School District provided the following explanation of its student assignment procedures:

> Assignment of students to schools with grades 1-4 is based on freedom of choice, with the following exceptions:
>
> 1. If a school reaches capacity, priority is given to the child residing nearest the school.
>
> 2. If a parent or student fails to return the choice form, the student is assigned by school officials to the school nearest the student's home which is not filled to capacity.
>
> 3. In order to maximize the number of whites, thereby decreasing the racial identifiability, at the Harper School, freedom of choice is modified so that:
>
>    a. whites residing in the Harper Area are required to attend Harper notwithstanding their selection of another school; and
>
>    b. priority is given to whites desiring to attend Harper over blacks residing closer to the school.

(Pl. Ex. 350; Defendant's Exhibit 467).

After receiving this and other information, HEW "determined that no further student desegregation is required of [the School District] at this time." On November 17, 1975, HEW found "[the School District] in

compliance with Title VI of the Civil Rights Act of 1964 relative to assignment of students . . . to schools." (Plaintiffs' Exhibit 350). Plaintiffs' desegregation expert agreed that the School District was in compliance with Title VI of the Civil Rights Act of 1964 relative to the assignment of students as of November 17, 1985. (Gordon, v. IV, p. 110).

In 1994, a Task Force was created to make recommendations regarding the assignment of students to elementary schools. (Boykins-Everett, v. X, p. 234). The Task Force consisted of an equal number of black and white members. *Id*. After several meetings, the Task Force reached a consensus regarding the process for assigning students to elementary schools. (Boykins-Everett, v. X, p. 235; Plaintiffs' Exhibit 600). With only a few modifications, the process for assigning students to elementary schools that was recommended by the Task Force in 1995 has been used by the School District since 1995. (Boykins-Everett, v. X, pp. 219, 227).

If space allows, students are now assigned to elementary schools at the kindergarten level in accordance with the stated preferences of the students' parents. (Boykins-Everett, v. X, pp. 221-224). If space does not allow the preferences of all parents to be accommodated, students are assigned to elementary schools at the kindergarten level in accordance with a

priority system. (Boykins-Everett, pp. 225-229). The order of priorities for assignment to elementary schools at the kindergarten level is (1) special education considerations, (2) placement with siblings, (3) residents of the City of Thomasville, (4) proximity among residents of the City of Thomasville, (5) non-residents of the City of Thomasville, and (6) proximity of non-residents of the City of Thomasville. *Id.* After students are assigned to a school at the kindergarten level, they remain at that school for the remainder of their elementary school career unless their parents request to transfer to another elementary school. (Boykins-Everett, v. X, p. 231). If a request to transfer is made, and if space allows for transfers, a priority system is used and the order of priorities used for assigning students at the kindergarten level is used. (Boykins-Everett, v. X, pp. 231-232). Exceptions for critical medical needs and other hardships are made to the process used in the School District to assign students to elementary schools. (Boykins-Everett, v. X. p. 237). Race is not a factor in any decision made by the School District relating to student assignments. (Boykins-Everett, v. X, p. 232).

ii. **Faculty Assignments.**

The Desegregation Plan desegregated the faculties in all schools in the School District as well. (Armour, v. X, p. 51). The faculties of those

schools attended by students in grades five (5) through twelve (12) were desegregated because the School District used only one school to serve each of those grades. (Armour, v. X, pp. 21-22). As noted above, all students in grades one (1) through four (4) attended one of four elementary schools under the Desegregation Plan. The following sets forth the percentage of black elementary faculty members in the School District and in the schools attended by students in those grades during the years indicated:

| School Year | District | Balfour | Scott | Jerger | Harper |
|---|---|---|---|---|---|
| 1970-71 | 44.2 | 42.9 | 43.5 | 31.3 | 45.5 |
| 1971-72 | 43.4 | 46.2 | 36.4 | 37.5 | 45.5 |
| 1972-73 | 47.3 | 46.2 | 42.1 | 40.0 | 54.5 |
| 1973-74 | 43.2 | 42.9 | 36.8 | 35.3 | 41.7 |
| 1974-75 | 45.7 | 42.9 | 36.8 | 41.2 | 54.5 |
| 1975-76 | 41.1 | 40.0 | 40.0 | 41.2 | 45.5 |
| 1978-79 | 41.1 | 35.7 | 42.9 | 37.5 | 38.5 |
| 1979-80 | 43.3 | 38.5 | 40.9 | 35.3 | 46.2 |
| 1980-81 | 39.3 | 36.4 | 39.1 | 35.3 | 42.9 |
| 1982-83 | 36.2 | 30.8 | 43.5 | 35.3 | 35.7 |

(Plaintiffs' Exhibit 164)

Expert testimony was presented at trial that the standard to be applied in determining whether a school is desegregated with respect to faculty is whether the percentage of black faculty members at the school varies from the district-wide percentage of black faculty members for the grade levels served by the school by plus or minus 15 percentage points. (Armour, v. X,

pp. 52-53). As shown above, all of the School District's schools serving grades one through four had a percentage of black faculty members that varied no more than fifteen (15) percentage points from the district-wide percentage of black elementary faculty members for at least twelve (12) consecutive years. (Armour, v. X, pp. 53-56; Defendant's Exhibits 552-A, 552-B, 552-C, 552-D; Plaintiffs' Exhibit 164).

On November 17, 1975, HEW found "…[the School District] in compliance with Title VI of the Civil Rights Act of 1964 relative to assignment of …faculty to schools." (Plaintiffs' Exhibit 350). Plaintiffs' desegregation expert agreed that the School District was in compliance with Title VI of the Civil Rights Act of 1964 relative to the assignment of faculty as of November 17, 1975. (Gordon, v. IV, p. 110).

Teachers are now assigned to teach at a particular elementary school after being interviewed and recommended by the principal of the school to which he or she is assigned. (Gordon, v. IV, pp. 283-284). There are no significant differences between the education levels and experience of the faculties of the School District's elementary school. (Brown, v. XII, p. 150). No evidence was presented that race is a factor in any decision made with respect to faculty assignments.

### iii. **Transportation**

No racial imbalance that favors white students exists in the School District with respect to transportation. Independent school systems in Georgia are not required to transport regular education students. (Cable, v. XI, p. 235-236). Prior to the 2002-2003 school year, the School District had only a limited transportation system that was used to transport special education students and for athletic trips, extracurricular activities and field trips. (Cable, v. XI, p. 236). At the beginning of the 2002-2003 school year, the School District initiated a very limited route for purposes of transporting students that would have attended Douglass (had it still been open) to Harper. (Cable, v. XI, p. 236). All of the students transported are black.

### iv. **Extracurricular Activities.**

All extracurricular activities are available to all of the School District's students without regard to race. (Cable, v. XI, p. 184, 185; Smith, v. XII, pp. 99-104).

### v. **Curriculum; Assignment of Students to Classes.**

The State of Georgia's Quality Core Curriculum is followed in all schools in the School District. (Cable, v. XI, p. 217). The same reading and math programs have been used in each of the elementary schools since at least 1996. (Cable, v. XI, pp. 217-219). At Jerger, some fourth-grade

students have been placed in a class that uses a fifth-grade mathematics textbook, and some fifth-grade students have been placed in a class that uses a sixth-grade mathematics textbook. These assignments have been based upon the students' scores on a mathematics placement test developed by the publisher of the mathematics textbooks used in the elementary schools, math grades, and teacher recommendations. (King, v. XI, pp. 40-41).

At the middle school level, students are assigned to classes on the basis of performance level recommendations made by the students' teachers during the past school year. (Hay, v. XI, p. 51). The middle school students are first assigned to teams consisting of students from all of the elementary schools. (Hay, v. XI, p. 53). Generally, each team is balanced with respect to race, gender, and performance levels. (Hay, v. XI, pp. 55-58).

After the middle school teams are formed, students are assigned to classes within the teams on the basis of performance levels. *Id*. Generally, high performing students on a team are assigned to classes together, middle performing students on a team are assigned to classes together and low performing students are assigned to classes together. *Id*.

The assignment of students to a particular level at the middle school is not a rigid process. Parents can request that their child be placed at a different level and those requests are accommodated. (Hay, v. XI, p. 61).

Because of the team concept, teachers on a team have the ability to assign students to different levels for purposes of instruction. (Hay, v. XI, p. 64). For example, a student that performs at a high level in mathematics but not language arts can be placed in a high performing class for mathematics and a middle performing class for language arts. (Hay, v. XI, pp. 64-65). Further, teachers are able to teach classes containing students of different levels together. (Hay, v. XI, p. 72). Additionally, students move from level-to-level from grade-to-grade. (Hay, v. XI, p. 63).

At the high school level, students select the classes they want to take. (Smith, v. XII, p. 104). After the students at the high school level have selected the classes they want to take, the lists of classes selected by the students are printed and mailed to the students' parents. (Smith, v. XII, pp. 104-105). The parents are asked to call the school if they want to change their child's schedule of classes. *Id*. Parents' requests for changes are honored. (Smith, v. XII, p. 107).

The procedures used in the School District to assign students to classes are consistent with professional literature, research and sound established educational practices. (Brown, v. XII, p. 142). No evidence was presented at trial that any student in the School District has ever been assigned to a particular class because of that student's race.

vi. **Discipline**

The School District does not treat black students differently from white students with respect to discipline (Gene Christie, v. XI, p. 173, 175; Bobby Smith, v. XII, p. 108). No black student has received a harsher punishment than a white student for the same or similar misconduct. *Id*. The School District does not treat black students differently from white students with respect to referrals for discipline. (Christie, v. XI, pp. 173, 175). No black student has received a referral for punishment under the same or similar circumstances that a white student did not. *Id*. No evidence was presented at trial that any student in the School District has ever been disciplined or referred for discipline because of that student's race.

**3. Statement of Standard of Review.**

"In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state its conclusions of law thereon . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed.R.Civ.P. 52(a)

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. [Cit.] This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided

> the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. [Cits.]
>
> This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts. . . . Rule 52(a) "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." [Cit.] *Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed 2d. 518 (1985).
>
> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

***Anderson v. City of Bessemer City***, 470 U.S. 564, 573-575, 105 S.Ct. 1504, 84 L.Ed 2d. 518 (1985).

## Summary of the Argument

The District Court ruled in favor of the School District because it found that no racial imbalances currently existing in the School District are traceable, in a proximate way, to the School District's previous *de jure* racially segregated system. This was the proper standard to be applied in this case.

The School District contends that the District Court should not have applied the ***Keyes*** presumption. The District Court did so and applied it to the benefit of Appellants. The School District then rebutted the presumption and the District Court correctly found for the School District.

Contrary to Appellants' argument, the District Court applied the precedent of this Court in determining that no constitutional violation exists with respect to the assignment of students to classes. As recognized by this Court, ability-based grouping is constitutional. There is no relationship between the School District's grouping practices and the *de jure* dual school system that existed decades ago.

The District Court's factual findings were not infected with legal error and they were not clearly erroneous. To the contrary, ample evidence exits to support these findings.

The District Court erred in disallowing the School District its costs without an explanation. The Judgment should therefore be reversed and this case should be remanded for the District to award costs or explain its reason for not doing so.

## Argument and Citations of Authority

## Appellants' Appeal

### 1. The District Court Applied the Proper Standard

Appellants contend that the District Court applied the wrong standard in deciding this case. As noted by Appellants, the District Court decided not to place the School District under a desegregation order because "[a]ny racial imbalances that presently exist in the District are not traceable in a proximate way to the District's previous *de jure* racially segregated system." See, Feb. 5, 2004, Order, p. 53. Appellants contend that the District Court should have applied the standard used in determining whether school districts operating under desegregation orders have achieved unitary status, i.e. (1) whether the School District had eliminated the vestiges of past discrimination to the extent practicable, and (2) whether the School District had in good faith fully and satisfactorily complied with, and shown a commitment to, a desegregation plan. Appellants' Brief, pp. 21-22. The District Court applied the correct standard in deciding this case.

Unlike the cases relied upon by Appellants, the issue before the District Court was not whether a desegregation decree should be dissolved. A desegregation decree has never been issued with respect to the School District. The issue in this case was whether the School District should be

placed under a desegregation order and subjected to judicial supervision and control. While it is clear that a District Court is required to determine "(1) whether local authorities have eliminated the vestiges of past discrimination to the extent practicable, and (2) whether local authorities have in good faith fully and satisfactorily complied with, and shown a commitment to, the desegregation plan . . ." before dissolving a desegregation decree and withdrawing judicial supervision (***Manning v. Sch. Bd. of Hillsborough County,*** 244 F.3d 927, 942 (11th Cir. 2001)), neither the Supreme Court nor this Court has ever held that a district court is required to make this determination when deciding if a school district should be placed under a desegregation order and subjected to judicial supervision in the first place. To the contrary, the Supreme Court's decision in ***Freeman v. Pitts,*** 503 U.S. 467, 112 S.Ct. 1430, 118 L.Ed. 2d 108 (1992), shows that this is not the proper standard to be applied when deciding whether to place a school district under a desegregation order:

> The authority of the court is invoked at the outset to remedy particular constitutional violations. In construing the remedial authority of the district courts, we have been guided by the principles that "judicial powers may be exercised only on the basis of a constitutional violation," and that "the nature of the violation determines the scope of the remedy." ***Swann****, supra, at 16. A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the constitutional violation*.

***Freeman***, 503 U.S. at 489. (Emphasis added).

As shown by the Supreme Court, judicial supervision and control of a school system in a desegregation case is appropriate only for purposes of alleviating a constitutional violation. If no current constitutional violation exists and if no present effects of a past constitutional violation exist, judicial supervision and control is inappropriate. To conclude otherwise would mean that a school district that has no current vestiges of a *de jure* dual school system could be placed under a district court's control and supervision simply because it operated an unconstitutional system decades ago. Such a result would be entirely inconsistent with well-recognized limitations upon our federal courts:

> Federal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from the violation . . .

***Milliken v. Bradley***, 433 U.S. 267, 282, 97 S.Ct. 2749, 53 L.Ed. 745 (1977).

Thus, the only inquiry for a district court when making the initial decision of whether a school district should be placed under a desegregation order and subjected to judicial supervision and control is whether a constitutional violation, or the effects of a constitutional violation, continues to exist. This is the exact inquiry the District Court made. The District Court found that no constitutional violation and no effects of a constitutional

violation continued to exist. The District Court therefore properly determined that the School District should not be placed under a desegregation order and that it should not exercise control and supervision over the School District.

### 2. The *Keyes* Presumption.

Appellants contend that the District Court improperly applied the presumption described in ***Keyes v. Sch. Dist. No. 1, Denver, Colo.,*** 413 U.S. 189, 93 S.Ct. 2986, 37 L.Ed. 548 (1972) ("the ***Keyes*** presumption"). The School District disagrees. If any error occurred with respect to the ***Keyes*** presumption, it was in Appellants' favor. The District Court's application of the ***Keyes*** presumption therefore provides no basis for relief on appeal.

#### a. The District Court Should Not Have Applied the Presumption.

The Supreme Court stated in ***Keyes*** that the presumption and burden shifting it described was "merely a question of policy and fairness based on experience . . ." ***Keyes,*** 413 U.S. at 209. While policy and fairness principles may have required the presumption to be applied in ***Keyes*** in 1972, the same principles require that the presumption not be applied against the School District in 2004.

A school district is not a living body that thinks and acts on its own. Rather, a school district is a corporate body that is governed by its school

board and supervised by its superintendent and administrators. ***Foster v. Cobb County Bd. of Educ.,*** 133 Ga. App. 768 (1975); ***State Bd. of Educ. v. Elbert County Bd. of Educ.,*** 112 Ga. App. 840 (1965); O.C.G.A. § 20-2-109. In Georgia, school boards now consist exclusively of elected individuals and school superintendents are appointed by school boards. O.C.G.A. §§ 20-2-51 and 20-2-101. The identity of school board members and superintendents changes quite often. School board members are limited to terms of four years and school superintendents cannot enter into employment contracts that exceed three years. O.C.G.A. §§ 20-2-52 and 20-2-101(a).

The Supreme Court stated in ***Keyes*** that the presumption it described was based upon the evidentiary principle that "the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent." ***Keyes,*** 413 U.S. at 207. Given the nature of school districts and the changes in the individuals that govern and supervise them, this evidentiary principle does not apply. The prior act giving rise to the principle (the operation of *de jure* segregated schools) occurred almost 50 years ago. In order for this principle to apply, the Court must accept the position that the mere fact that the individuals who served as school board members, superintendents and

other administrators as long as 50 years ago engaged in intentional discrimination inevitably leads to the conclusion that the individuals who serve in those capacities now are engaging in intentional discrimination. As pointed out above, the Supreme Court stated in ***Keyes*** that the presumption and burden shifting it described was "merely a question of policy and fairness *based on experience* . . ." ***Keyes,*** 413 U.S. at 209. (Emphasis added). Experience certainly does not teach that an act of intentional discrimination by certain individuals nearly 50 years ago must lead to the conclusion that the acts of other individuals today are also motivated by intentional discrimination.

The facts giving rise to the Supreme Court's decision in ***Keyes*** shows that the Court never intended the presumption it described to be used in such an unfair and illogical manner. The Court was clear that the presumption was being applied in ***Keyes*** only because the individuals that had engaged in discrimination in one area of the school system and the individuals that were accused of engaging in discrimination in other areas were one and the same:

> [W]here, as here, *the case involves* ***one*** *school board,* a finding of intentional segregation on its part in one portion of a school system is highly relevant to the issue of the board's intent with respect to other segregated schools in the system . . . [T]here is high probability that where *school authorities* have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated *their* actions in other areas of the system.

***Keyes,*** 413 U.S. at 207-208. (Emphasis added).

The individuals who governed and supervised the School District's *de jure* system are not the same individuals who govern and supervise it today. In fact, many of the people who operated the *de jure* system are no longer living and many of the people who operate the school system now were small children when the *de jure* system existed. Numerous people have filled the roles of school board members, school superintendent and school administrators since the *de jure* system existed. Given these circumstances, it would be entirely unfair to presume that the individuals who are operating the school system now are guilty of intentional discrimination just because the individuals who operated the school system decades ago did so.

This Court has determined that the ***Keyes*** presumption should not be applied in all desegregation cases. In ***Ga. State Conf. of Br. of NAACP v. State of Ga.***, 775 F.2d 1403 (11th Cir. 1985), the Court addressed allegations that the use of achievement grouping in Georgia's public schools was racially discriminatory. The plaintiffs in that case contended that the district court erred by failing "to presume the intent to discriminate in conformance with ***Keyes*** . . ." *Id.* at 1415. The Court ruled, however, that the ***Keyes*** presumption did not apply:

> Because the ***Keyes*** presumption is founded on a school district's immediate past history of segregation, the plaintiffs do not take the position that it applies directly to the current ability grouping practices of the local defendants. . . . This reasoning is not pertinent here where the district court found that no student presently in the certified class had ever attended a segregated school. The fact that the grouping of the predecessors to the members of this class may have been influenced by their attendance at segregated schools is not relevant to the constitutional validity of the grouping systems at issue here. As a result, the ***Keyes*** presumption does not apply . . .

*Id.*

Appellants have never contended that the children of any class member ever attended a *de jure* segregated school. Appellants do not contend that any Board member, superintendent, or other administrator that operated the School District's *de jure* segregated school system is still operating the School District's schools today. The *de jure* segregated school system ceased to exist almost four decades ago. As recognized in ***Ga. State Conf. of Br. of NAACP,*** the District Court should not have applied the ***Keyes*** presumption in this case because there is no "immediate past history" of *de jure* segregation.

In his concurring opinion in ***Freeman***, Justice Scalia recognized that the time for setting aside the ***Keyes*** presumption has come:

> Our post-***Green*** cases provide that, once state-enforced school segregation is shown to have existed in a jurisdiction in 1954, there arises a presumption, effectively irrebuttable (because the School District cannot prove the negative), that

any current racial imbalance is the product of that violation, at least if the imbalance has continuously existed. See, *e.g.*, ***Swann***, *supra*, 402 U.S. at 26, 91 S.Ct. at 1281; ***Keyes***, 413 U.S. at 209-210, 93 S.Ct. at 2698.

In the context of elementary and secondary education, the presumption was extraordinary in law but not unreasonable in fact. "Presumptions normally arise when proof of one fact renders the existence of another fact 'so probable that it is sensible and timesaving to assume the truth of [the inferred] fact... until the adversary disproves it.'" ***NLRB v. Curtin Matheson Scientific, Inc.***, 494 U.S. 775, 788-789, 110 S.Ct. 1542, 1550, 108 L.Ed.2d 801 (1990), quoting E. Cleary, McCormick on Evidence §343, Page 969, 3rd Ed., 1984). The extent and recency of the prior discrimination, and the improbability that young children (or their parents) would use "freedom of choice" plans to disrupt existing patterns "warrant[ed] a presumption [that] schools that are substantially disproportionate in their racial composition" were remnants of the *de jure* system. ***Swann***, *supra*, 402 U.S. at 26, 91 S.Ct. at 1281.

But granting the merits of this approach at the time of ***Green***, it is now twenty-five years later. "From the very first, federal supervision of local school systems was intended as a *temporary* measure to remedy past discrimination." ***Dowell***, 498 U.S. at 247, 111 S.Ct. at 637 (emphasis added). "We envisioned it as temporary partly because "'[n]o single tradition in public education is more deeply rooted than local control over the operation of schools.'" ***Milliken v. Bradley***, 418 U.S. 717, 741, 94 S.Ct. 3112, 3125, 41 L.Ed.2d 1069 (1974)(***Milliken I***), and because no one's interest is furthered by subjecting the nation's educational system to "judicial tutelage for the indefinite future," ***Dowell***, *supra*, 498 U.S. at 249, 111 S.Ct. at 638; see also, ***Dayton Bd. of Education v. Brinkman***, 433 U.S. 406, 410, 97 S.Ct. 2766, 2770, 53 L.Ed.2d 851 (1977); ***Spangler v. Pasadena City Bd. of Education***, 611 F.2d 1239, 1245, n.5 (9th Cir. 1979)(Kennedy, J. concurring). But we also envisioned it as temporary, I think, because *the rational basis for the extraordinary presumption of causation*

> *simply must dissipate as the de jure system and the school boards who produced it recede further into the past*. Since a multitude of private factors has shaped school systems in the years after abandonment of *de jure* segregation - normal migration, population growth (as in this case), "white flight" from the inner cities, increases in the costs of new facilities - the percentage of the current makeup of school systems attributable to the prior, government-forced discrimination has diminished with each passing year, to the point where it cannot realistically be assumed to be a significant factor.
>
> *At some time, we must acknowledge that it has become absurd to assume, without further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools*. We are close to that time. While we must continue to prohibit, without qualification, all racial discrimination in the operation of public schools, and to afford remedies that eliminate not only the discrimination but its identified consequences, we should consider laying aside the extraordinary, and increasingly counterfactual, presumption of ***Green***. *We must soon revert to the ordinary principles of our law, of our democratic heritage, and of our educational tradition*: *that plaintiffs alleging equal protection violations must prove intent and causation not merely the existence of racial disparity* (*cits*); that public schooling, even in the South, should be controlled by locally elected authorities acting in conjunction with parents, (*cits*); and that it is "desirable" to permit pupils to attend "schools nearest their homes," , 402 U.S. at 28, 91 S.Ct. at 1282.

***Freeman***, 503 U.S. at 505-07, 112 S.Ct. at 1253-54. (Emphasis added).

More that ten years have passed since Justice Scalia wrote this opinion. There should be no further delay in setting aside the use of this outdated presumption particularly in cases such as this.

### b. The School District Rebutted the Presumption.

Even if the District Court should have applied ***Keyes*** presumption, the District Court correctly ruled in favor of the School District because it rebutted the presumption at trial. The School District can rebut the presumption "by showing that its past segregative acts did not create or contribute to the current segregated condition of the . . . schools." ***Keyes,*** 413 U.S. at 211. A showing that current racial imbalances are not "traceable, in a proximate way" to the *de jure* system satisfies this requirement. ***Freeman v. Pitts,*** 503 U.S. at 494. As shown by the evidence below, the School District met its burden at trial.

#### i. Changes in the School District.

The School District showed that it has changed considerably since the time they *de jure* system was operated. A comparison of the School District with respect to the *Green* factors addressed by Appellants on appeal as the School District existed under the *de jure* system to the School District as it exists now shows that the *de jure* system is not the cause of any racial imbalance that might exist in the School District today.

**Student Assignments.** The School District had a substantially larger enrollment under the *de jure* system than it has now. Further, white enrollment has decreased dramatically since the days of the *de jure* system

while black enrollment has increased. In the school year before the School District implemented its final Desegregation Plan, 1969-70, 4712 students were enrolled in the School District. (Plaintiff's Proposed Findings of Fact, pp. 14-15, Chart). By the 2002-03 school year, this figure had decreased by 1040 students to 3672. *Id.* Of the 4,712 students enrolled in the School District in the 1969-70 school year, 51.7%, or 2436, were black and 48.3%, or 2276, were white. *Id.* During 2002-03 school year, 73.6%, or 2703, of the School District's 3,672 students were black and only 26.4%, or 969, of the students were white. *Id.* Thus, the number of black students enrolled in the School District increased by 267 between the 1969-70 and 2002-03 school years while the number of white students decreased by 1307 during the same period of time.

Under the *de jure* system, separate high schools existed for black students and white students. (Stipulation of Facts, ¶ 3). Since 1970, all students, whether black or white, have attended the same high school. (Stipulation of Facts, ¶'s 4, 5, 7 and 8). Under the *de jure* system, separate schools existed for black students and white students in grades 1-8. (Stipulation of Facts, ¶ 3). From 1970 to 1993, the School District used one school to serve all students in grades 5-8, whether white or black.

(Stipulation of Facts, ¶ 4, 5, 7 and 8). This has continued to be true with respect to students in grades 6-8 from 1993 to the present.

Under the *de jure* system, students in grades 1-5 were assigned to schools according to their race. (Stipulation of Facts, ¶ 3). That has not been true since at least 1970. Beginning in 1970, all students in grades 1-4, whether white or black, were assigned to Balfour, Jerger, Scott and Harper Schools. (Armour, v. X, pp. 15-18; Plaintiffs' Ex. 291). All four of these schools were "white" schools under the *de jure* system. (Stipulation of Facts, ¶ 3). However, beginning in 1970, the enrollment of all four elementary schools became majority black and was still majority black as late as the 1982-83 school year. (Plaintiffs' Proposed Findings of Fact, pp. 14-15, Chart).

Today, the School District has three elementary schools, Harper, Jerger and Scott, that serves students in grades 1-5. (Stipulation of Facts, ¶ ¶'s 6-8). Unlike the *de jure* system, race is not a factor in the process the School District uses to assign students to elementary schools. (Boykins-Everett, v. X, p. 232). Rather, a race-neutral process based upon the recommendations of a bi-racial Task Force is used. (Boykins-Everett, v. X, pp. 219-227).

**Faculties.** Under the *de jure* system, the School District's racially separated schools had all-black and all-white faculties. (Plaintiff's Proposed Findings of Fact, ¶ 1). This aspect of the *de jure* system has not been in existence since at least 1970. Beginning in 1970 and continuing for at least 12 school years, the School District assigned its faculty such that the percentage of black faculty members at each school in the School District varied no more than 15 percentage points from the district-wide percentage of black faculty members for the grade levels served by that school. (Armour, v. X, pp. 53-56; Def. Ex.'s 552-A, 552-B, 552-C, 552-D; Pl. Ex. 164). The School District no longer has all-black or all-white faculties at any of its schools and race is not a factor in teacher assignments. Teachers are assigned to schools on the basis of a recommendation of the leadership of the school to which he or she is assigned. (Gordon, v. IV, p. 283, 284).

**Transportation.** The School District did not have a transportation system under the *de jure* system. Today, the School District has a limited transportation system that is used for special education students, athletic events, extracurricular activities, field trips and transporting students to Harper. (Cable, v. XI, p. 236). While all students benefit from the transportation system with respect to its use for special education, athletic events, extracurricular activities and field trips, only

black students benefit from the system with respect to its use to transport students to school. (Cable, v. XI, p. 236).

**Extracurricular Activities.** Under the *de jure* system, black students were separated from white students with respect to extracurricular activities. Today, all extracurricular activities are available to all students without regard to race. (Cable, v. XI, p. 184-185; Smith v. XII, pp. 99-104).

### ii. The Desegregation Plan and its Effect.

The School District adopted a Desegregation Plan that was approved by HEW on July 1, 1970, after HEW found that the Desegregation Plan would accomplish the purposes of Title VI. (Pl. Ex. 291; Armour, v. X, pp. 15-18). The Desegregation Plan provided that single schools would be used for grades 5-12 and that students in grades 1-4 would be assigned to either Balfour, Harper, Jerger and Scott under a "freedom of choice" plan. *Id.* The Desegregation Plan's student assignment plan was not a true "freedom of choice" plan, however. Under the Desegregation Plan, the School District was required to take alternate steps if the "freedom of choice" plan did not eliminate the racial identifiability of the four elementary schools. *Id.*

Either the "freedom of choice" plan or the alternate steps taken by the School District under the Desegregation Plan eliminated the racial identifiability of the elementary schools. Beginning in 1970, the percentage

of black students attending each elementary school varied no more than 20 percentage points from the district-wide percentage of black elementary students for six consecutive school years. (Pl. Ex. 164; Armour, v. X, pp. 22-24; Def. Ex.'s 546-549). It is well recognized that the proper standard to use to determine whether a school is desegregated with respect to student assignments is a plus or minus twenty percent variance from the district-wide ratio of black to white students. *See* ***Reed v. Rhodes,*** 1 F.Supp.2d 705, 716 (N.D. Ohio 1998), aff'd. 215 F.3d 1327. "The plus or minus twenty percentage point range adopted by this Court is within constitutional limits." ***Stell v. Bd. of Public Educ. of City of Savannah,*** 724 F. Supp. 1384, 1401 (S.D. Ga. 1988). This Court has accepted this standard. ***Manning,*** 244 F.3d at 935 (11th Cir. 2001). Further, it is recognized that a school district that has achieved the objectives of desegregation for three years may be determined to have unitary status. ***Lee v. Etowah County***, 994 F.2d 1416, 1422 (11th Cir. 1992)(decision vacated on other grounds); ***United States v. Texas Educ. Agency***, 647 F.2d 504, 508-09 (5th Cir. 1981), *cert. denied*, 454 U.S. 1143, 102 S.Ct. 1002, 71 L.Ed.2d 295 (1982). The School District achieved the objectives of desegregation with respect to student assignments under the Desegregation Plan for at least six consecutive school years. (Armour, v. X, pp. 24, 29-31; Pl. Ex. 164; Def. Ex.'s 546-549).

The Desegregation Plan also required faculty assignments in each school to generally reflect the racial ratio of the faculty in the school system as a whole. (Armour, v. X, pp. 15-18; Pl. Ex. 291). The School District successfully implemented the Desegregation Plan with respect to faculty assignments. As noted above, beginning in 1970 and continuing for at least 12 school years, the School District assigned its faculty such that the percentage of black faculty members at each school in the School District varied no more than 15 percentage points from the district-wide percentage of black faculty members for the grade levels served by that school. (Armour, v. X, pp. 53-56; Def. Ex. 552-A, 552-B, 552-C, 552-D; Pl. Ex. 164). Thus, The School District achieved the objectives of desegregation with respect to faculty assignments for at least twelve consecutive school years after the Desegregation Plan was implemented. (Defendant's Proposed Findings of Fact, ¶ C.7.c.xviii). This was well beyond the three years that is required for a school system to achieve unitary status.

### iii. HEW's Findings.

The School District's desegregation efforts under its Desegregation Plan were such that, on November 17, 1975, HEW found the School District in compliance with Title VI of the Civil Right Act of 1964 with respect to student and faculty assignments. (Pl. Ex. 350). Even Plaintiff's

desegregation expert agreed that the School District was in compliance with Title VI with respect to student and faculty assignments in 1975. (Gordon, v. X, p. 110). HEW's findings must be given considerable weight. ***Chevron U.S.A. v. Natural Resources Defense,*** 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed. 694 (1984).

**iv. <u>Changes in the City's Population</u>**

In addition to changes in enrollment in the School District, changes in the population of the City of Thomasville occurred after the implementation of the Desegregation Plan. In 1970, the black population in the City of Thomasville was concentrated primarily in the southwestern sector of the City. (Armour, v. X, p. 36). Since that time, the concentration of the black population throughout Thomasville has changed. Specifically, in 1970, Harper was surrounded by some predominantly white communities. (Armour, v. X, p. 37). However, by 1980 the area around Harper had become almost all black and by 1990 there were no white students left in the area. (Armour, v. X, pp. 38, 40, Defendant's Exhibits 553, 554, 555 and 556).

**v. <u>Passage of Time.</u>**

The passage of time has always been recognized as an important factor in determining whether the presumption has been rebutted. "[A]t some point in time the relationship between segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention." ***Keyes,*** 413 U.S. at 211. "As the *de jure* violation becomes more remote in time . . . it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system." ***Freeman,*** 503 U.S. at 496.

> As time passes, the ability of district courts to discern what inequities are the direct result of past segregation diminishes. Indeed, it becomes far more likely that as time goes by, current problems are the result of new factors, unrelated to past practices, and outside the district court's jurisdiction.

***U.S. v. Bd. of Public Instruction of St. Lucie County,*** 977 F.Supp. 1202, 1206-07 (S.D. Fl. 1997).

All of these factors – the changes that have taken place in the Schools District, the changes in the City of Thomasville's population, the implementation of the Desegregation Plan, the School District's successful compliance with the Desegregation Plan, HEW's findings, the absence of imbalances with respect to facilities and transportation, the long-time absence of intentional discrimination with respect to any ***Green*** factor and

the passage of time – establish that the School District rebutted the ***Keyes*** presumption. Thus, even if the presumption is applied, the District Court correctly ruled that the School District should prevail.

There also is no merit to Appellants argument that the Court erred by finding racial imbalances among the schools are the result of demographic factors. "Where a defendant school board shows that demographic shifts are a substantial cause of the racial imbalances, the defendant has overcome the presumption of *de jure* segregation." *Manning*, 244 F.3d at 944. The School District made this showing (See **Changes in City's Population** above). Moreover, the School District showed that these changes, along with numerous other changes that have occurred over the past three decades, broke any causal link between *de jure* segregation and current racial imbalances. The District Court therefore did not err in ruling for the School District.

Appellants contend that the School District could overcome the presumption only by establishing that it had taken "every reasonable effort . . . to eradicate segregation and its insidious residue"; that it had fully complied in a "good-faith commitment to the entirety of a desegregation plan"; and that it would not change course "in the future." (Appellants' Brief, p. 23). According to Appellants, application of the presumption in

this case required "a careful assessment of the facts . . . utilizing sound discretion after such a careful factual assessment." Appellants contend that the District Court failed to properly assess the facts and utilize its sound discretion after doing so.

Neither the cases relied upon by Appellants, nor the language quoted by Appellants from those cases, support their argument. Again, those cases, and the language quoted by Appellants, address the issue of whether a desegregation decree should be dissolved and whether judicial supervision should be withdrawn. Unlike the cases relied upon by Appellants, the issue in this case is not whether a desegregation decree should be dissolved. Rather, the issue is the showing that must be made by a school district in order to overcome the ***Keyes*** presumption and avoid being placed under a desegregation decree in the first place. Neither the Supreme Court nor this Court has ever said that a school district can overcome the presumption in cases such as this only by making the same showing required to have a desegregation decree dissolved. To the contrary, the Supreme Court has shown that the District Court was correct in determining that the presumption is overcome by a showing that current racial imbalances are not "traceable, in a proximate way" to the *de jure* segregated school system that once existed. ***Freeman,*** 503 U.S. at 494.

### 3. The District Court Properly Applied Precedent of this Circuit with Respect to Assignment of Students to Classes.

Appellants contend that the District Court erred in finding for the School District with respect to the assignment of students to individual classes within the School District's individual schools. According to Appellants, the District Court was required to "scrutinize with punctilious care" the School District's placement practices. Appellants' Brief, p. 31. There was no error by the District Court.

Appellants cite ***McNeal v. Tate County School District***, 508 F.2d 1017 (5th Cir. 1975) to support their argument. A review of ***McNeal*** shows that the District Court was not required to exercise the same degree of review that was articulated by the Court in that case. The Court made it clear in ***McNeal*** that the rule it articulated was only to be used in that case and cases similar to it:

> From these holdings, we synthesize the rule *for this case* to be that the court must assay the present district plan of student assignment which results in racial segregation with a punctilious care, to see that it does not result in perpetuating the effects of past discrimination.

***McNeal***, 508 F.2d at 1020 (Emphasis added). This case is different from ***McNeal.*** ***McNeal*** was decided nearly 30 years ago and at a time not long after school districts operated racially-segregated dual school systems. The school district in ***McNeal*** had been ordered to desegregate its schools and, as

part of the court-ordered desegregation, the school district had been enjoined from maintaining segregated classrooms. ***McNeal,*** 508 F.2d at 1018. As later recognized by this Court, this history provided the basis for the decision in ***McNeal***:

> The student population in ***McNeal***, however, included black students who had attended inferior segregated schools. The ***McNeal*** court's concern was that the prior "lack of educational quality would predictably cause students from the inferior system to immediately be resegregated within the lower classroom sections." *Id.* at 1020.

***Ga. NAACP,*** 775 F.2d at 1415 (5th Cir. 1985).

As recognized by this Court in ***Ga. NAACP,*** the reasoning of the Court in ***McNeal*** is not pertinent here. *Id.* There is no contention that any child of any member of the class that was certified in this case ever attended school in the School District when a dual school system was operated. Further, Appellants argument that ability grouping was used some more that thirty years ago after the Desegregation Plan was implemented has no relevance: "The fact that the grouping of the predecessors to the members of this class may have been influenced by their attendance at segregated schools is not relevant to the constitutional validity of the grouping systems at issue here." *Id.* Thus, as recognized in ***Ga. NAACP,*** the District Court was not required to exercise the same level of scrutiny with respect to the

School District's practices relating to the assignment of students to classes that was exercised in ***McNeal***.

This Court has recognized that "despite any resulting numerical racial disproportionality, achievement grouping is permissible in a school district that has not been declared fully unitary 'if the school district can demonstrate that its assignment method is not based on the present results of past segregation . . .'" ***Ga. NAACP***, 775 F.2d at 1414. The evidence showed, and the District Court found, that any racial imbalances in the School District's classes are not traceable to the previous *de jure* segregated system operated by the School District. While the District Court may not have used the precise language this Court used in ***Ga. NAACP,*** the result is the same – there is no relationship between any current racial imbalances in the School District's classrooms and the dual school system operated in the School District decades ago. Thus, there was no error in the District Court denying relief to Appellants on the basis of the School District's practices relating to assignment of students to classrooms.

4. **The District Court's Determination of Intentional Discrimination**.

Appellants contend that the District Court erred "in failing to identify any standard that it purported to apply in determining intentional discrimination, much less the intent standard." Appellants' Brief, p. 37.

Appellants, however, fail to cite any authority for its position that the District Court was required to identify such a standard in its Order. There is no such authority. The District Court was only required to "find the facts specially and state separately its conclusions of law thereon . . ." Fed.R.Civ.P. 52(a).

The District Court's Order and the facts set forth by the School District above, show that the evidence supported the District Court's finding that the School District did not engage in intentional discrimination. In effect, Appellants are asking this Court to weigh the evidence again. As recognized by the Supreme Court it would be improper for this Court to do that. The trial conducted in the District Court was "the main event . . . rather than a tryout on the road. [Cit.] For these reasons, review of factual findings under the clearly-erroneous standard – with its deference to the trier of fact – is the rule, not the exception." ***Anderson v. City of Bessemer City,*** 470 U.S. at 575.

**5. <u>The Court's Factual Findings Were Proper</u>.**

Appellants' arguments that the District Court erred with respect to its factual findings are meritless. First, as shown above, there were no legal errors by the Court. Thus, it cannot be concluded that the District Court's factual findings were infected by legal errors as argued by Appellants.

Second, Appellants arguments amount to nothing more than Appellants' dissatisfaction with the District Court's agreement with the School District's evidence rather than Appellants.

While the School District will not address all of Appellants' arguments relating to their contentions about the District Court's factual findings, one argument deserves mention. Appellants complain about the District Court's failure to accept the statistical evidence Appellants submitted. A review of the evidence shows that the District Court had good reason to not accept this evidence. Appellants' "educational statistics experts" were Ellen Goldring and Mark Berends. Appellants relied upon Dr. Goldring and Dr. Berends to support their contentions that the School District segregates black students from white students in instructional groups and level placements. The opinions given by Dr. Goldring and Dr. Berends were entirely unreliable. Both admitted that the data they relied upon in forming their opinions contained numerous errors. (Goldring, v. VII, pp. 248, 250, 252, 253, 274, 289; Mark Berends v. VIII, pp. 82, 83, 84, 92-93, 98, 101, 109, 111, 112, 113, 114, 115, 116, 117, 123). For example, a figure Dr. Berends relied upon indicated that one plus one equals eight. (Berends, v. VIII, p. 113). Another figure he relied upon contained twenty mathematical calculations. Nineteen were wrong. (Berends, v. VIII, p.

119). In fact, so many errors existed in their data that Dr. Goldring and Dr. Berends both testified that exhibits that had been submitted to the Court in connection with their testimony were unreliable. (Goldring, v. VII, pp. 258; Berends, v. VIII, p. 114, 116, 117). Dr. Berends went so far as to admit that reliance upon his opinions would be misplaced. (Berends, v. VIII, p. 119). Aside from containing errors, the exhibits presented in connection with Dr. Berends' testimony contained data that contradicted data contained in exhibits presented in connection with Dr. Goldring's testimony. (Berends, v. VIII, p. 120 Plaintiffs' Exhibits 1210 and 1236).

The District Court had the opportunity to listen to the evidence, observe the demeanor and tone of voice of the witnesses, and determine the evidence that was reliable and the evidence that was not. For this reason, the decision of the District Court is not to be disturbed unless it is clearly erroneous. As shown above, there was ample reason for the District Court to not rely upon the statistical evidence submitted by Plaintiffs. Similarly, the evidence cited by the Court in its Order and the evidence cited by the School District in the facts set forth above, show that the District Court had ample reason to decide this matter in favor of the School District. The District Court's decision was supported by the evidence and was not "clearly erroneous". This Court should not reverse it on appeal.

## Cross Appeal

Rule 54(d) of the Rules of Civil Procedure provides that "costs other than attorney's fees shall be allowed as of course unless the court otherwise directs." Fed. R. Civ. P. 54(d). "[W]here the trial court denies the prevailing party its costs, the court *must* give a reason for its denial of costs so that the appellate court may have some basis upon which to determine if the trial court acted within its discretionary power. *Cit.* Thus, although the district court has discretion to deny a prevailing party costs, such discretion is not unfettered." ***Head v. Medford*, 62 F.3d 351, 354 (11th Cir. 1995).**

There is no question that the School District was the prevailing party for purposes of Rule 54(d). The School District prevailed on all issues. Even so, the Court "directed that each side shall bear its own costs." Further, the Court provided no explanation for not allowing the School District to recover its costs.

As the prevailing party, the School District is "entitled to [its] costs unless the district court has some special reason to deny the costs." *Id*. at 355. Further, it is error for a district court to disallow the costs without an explanation. *Id*. at 354. The judgment in this case should therefore be REVERSED and this case should be REMANDED to the District Court to award costs or to explain its decision to award no costs. *Id.*

## Conclusion

The District Court's factual findings in favor of the School District were not "clearly erroneous" and any legal error committed by the District Court benefited Appellants. With the exception of the District Court's failure to allow the School District its costs, the School District respectfully requests this Honorable Court to leave the District Court's Order and Judgment undisturbed.

This 23rd day of June, 2004.

Jerry A. Lumley
State Bar No. 460866
Attorney for Appellee
Thomasville City School District

Lumley & Howell, LLP
350 Second Street
Macon, GA 31201
(478) 745-0111

## Certificate of Compliance

I, Jerry A. Lumley, Attorney for Appellee Thomasville City School District, hereby certify in accordance with FRAP 32(a)(7)(C), that Appellee's Brief complies with the type-volume limitation set forth at FRAP 32(a)(7)(B). According to the word processing system used to prepare Appellee's Brief, the number of words in Appellee's Brief is 12,276.

This 23rd day of June, 2004.

_____

Jerry A. Lumley
Attorney for Appellee,
Thomasville City School District

## Certificate of Service

I, Jerry A. Lumley, hereby certify that I have this day served the foregoing **Brief of Defendant-Appellee and Cross-Appellant** upon counsel for all parties in this action by placing a copy of same in the United States Mail with adequate postage affixed to assure delivery addressed to:

Derek Black
Lawyers' Committee for Civil Rights
Under Law
1401 New York Avenue, NW
Suite 400
Washington, DC 20005

This 23rd day of June, 2004.

Jerry A. Lumley
Attorney for Appellee,
Thomasville City School District