No. 04-11063 –EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SHERNIKA HOLTON, et.al.,

Plaintiffs-Appellants and Cross-Appellees,

v.

CITY OF THOMASVILLE SCHOOL DISTRICT,

Defendant-Appellee and Cross-Appellant.

On Appeal from the United States District Court for the
Middle District of Georgia

BRIEF OF PLAINTIFFS-APPELLANTS AND CROSS APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The appellants in this matter submit the follow list of interested persons for the uses of the judges of this Court:

Derek Black, Sharon Bostick, City of Thomasville School District, Paul Deiseth, Tom Henderson, Jennifer Hightower, Mary Hill, Shernika Holton, Clay Land, Willie Mae Lewis, Audrey Linder, Jerry Lumley, Sandra McIntyre, Paul Robbenault, Eric Ruzicka, Gladys Shotwell, Thomas County Branch of the National Association For the Advancement of Colored People, Lisa Webb, Evelyn Wilkerson, Spencer Wilson.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs'-Appellants request that this Court grant oral argument. This is an appeal from a final judgment that was rendered after a trial that occurred over the course of three weeks and included hundreds of exhibits. Plaintiffs'-Appellants believe oral argument will greatly assist the Court in assessing the application of the law to a voluminous record.

STATEMENT OF JURISDICTION

The Court for the Middle District of Georgia entered an Order on February 5, 2004, directing that judgment be entered in favor of the District in all respects. Appellants subsequently timely filed their Notice of Appeal pursuant to 28 U.S.C. §1291 and F.R.A.P. 4 on March 5, 2004. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUES

I The Court failed to apply established precedent in assessing whether the District's actions that harm its black students violate constitutional standards.

II The Court's factual conclusions are infected by its legal errors, are not supported by the record and are clearly erroneous.

STATEMENT OF THE CASE

Plaintiffs are parents of black students enrolled in the City of Thomasville School District ("District"). On October 2, 1998, plaintiffs commenced this action in the United States Court, Middle District of Georgia. The Complaint alleges that District-wide discriminatory and unlawful polices and practices have resulted in segregated and unequal educational opportunities for the District's black students in violation of the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. §1983 and Title VI of the Civil Rights Act of 1964. The policies and practices at issue affect all schools and grade levels and involve segregation by school and by classroom and inferior instruction and discriminatory discipline.

On August 4, 1999, the Court conditionally certified the case as a class action on behalf of all parents of black students attending District schools. Following extensive discovery, the parties filed cross-motions for summary judgment and defendant moved for an order decertifying the class. On January 1, 2003, the Court denied the District's motions and granted Plaintiffs' motion, holding that any current racial imbalances in the District are presumed to be the result of the District's previous *de jure* system.

The Court tried this matter without a jury from July 21 to August 6, 2003. Following submission of proposed findings of fact and conclusions of law, the Court issued a February 5, 2004 Order, directing that judgment be entered in favor of the District in all respects. Appellants timely filed their Notice of Appeal pursuant to 28 U.S.C. §1291 and F.R.A.P. 4 on March 5, 2004.

STATEMENT OF FACTS

The District is a small independent school district currently operating one high school, one middle school, and three elementary schools. Pl.Ex. 1187a. Until 2002, it

operated four elementary schools (of approximately 300 to 500), all of which were within one mile or less of one another. (Pl.Ex. 1216; Vol.IV 207[1]; Vol.VII 209-10). The District's elementary schools do not have attendance zones. Rather students are assigned to elementary schools through a purported freedom of choice plan in effect since it was required to abandon the explicitly racial assignments of its *de jure* system in 1964. (Pl. Ex. 189; Vol.IV 27-29, 175-76). Within three years of implementing its 1970 desegregation plan and for nearly the past three decades, the District has operated either entirely segregated or racially identifiable elementary schools. In the high school and middle school, it has substantially segregated black and white students into separate and unequal classrooms since they began attending the same schools and has administered segregated student activities and disparate discipline.

The Court found that "racial imbalances presently exist within the District in certain areas," but that they "are not traceable in a proximate way to the *de jure* racially segregated system that existed at the time *Brown I* was decided almost fifty years ago." Order at 20. The District admits that it operated a *de jure* segregated system at least until 1965, DFF at 2, and did not take any effective steps to desegregate its elementary schools until 1970. Only in response to the Office for Civil Rights' ("OCR") threats to withhold funds and initiate litigation did the District propose a desegregation plan. (Pl.Ex. 214; Vol.IV 24-29, 34-35). The first plan in 1965 included "freedom of choice," but that "plan was ineffective and failed to desegregate the District's schools." Order at 22. Thus, "between 1965 and 1970, the District had numerous exchanges with [OCR] regarding the District's compliance." Order at 22. The District resisted desegregation

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[1] This brief will cite to the transcript by first referencing the volume number in Roman numerals and then the page number in Arabic; for example, "Vol.X 95."

with the result that OCR withheld funds and threatened enforcement proceedings several times to obtain responses from the District. (Vol.IV 34-35, 46-48, 101-02).

The District "adopted a desegregation plan in 1970" that OCR accepted, Order at 22-23, but only after OCR enforcement proceedings in 1968, withholding federal funds, and rejection of other plans. (Pl.Ex. 272, 232, 237, 257, 264, 268; Vol.IV 46-48, 52-55, 61-65, 68-74, 76, 78). The District claims that the 1970 plan made it unitary, but the Court disagreed. Order at 52 n.30.

The 1970 plan originally pledged to abandon freedom of choice, which OCR criticized as ineffective and rejected on three previous occasions, and to use an elementary assignment plan to produce enrollments within a 5% variance of the district-wide elementary average. (Pl.Ex. 272; Vol.IV 70-74, 76, 78). However, the District withdrew this commitment and reinstated freedom of choice. (Pl.Ex. 283, 285; Vol.IV 83-84). OCR accepted that plan, but subject to the District's explicit commitment that, if freedom of choice did not eliminate the racial identifiability of the elementary schools, "*alternate steps will be taken,*" and faculty assignments "*will reflect the racial ratio of the faculty in the system as a whole*." Order at 23; Pl.Ex. 283, 285, 286, 291; Vol.IV 83-84, 95-97).

The Court found that "all of the District's schools were racially identifiable prior to 1970," but that after 1970, "with the exception of Harper," the racial proportion in the individual elementary schools "tracked the percentage of black students in the District as a whole." Order at 27. The evidence shows that Harper was a significant exception. Although established as a *de jure* white school, it had become majority black before 1970. (Pl.Ex. 1187a.) At that time, the *de jure* white schools, Jerger, Scott and Balfour, were 20% or less black, and the *de jure* black Dunlap and Douglass schools remained

100% black. *Id.* Under the 1970 plan, the Douglass and Dunlap schools were not used for grades K-4, *id.*, leaving Harper as the only remaining identifiably black grade K-4 school. In the first three years of the 1970 plan, the District increasingly assigned black students to Harper, at a rate of approximately 10% each year, such that it was 82.5% black by 1972-73. Order at 28; P.Ex. 164.

Harper's black enrollment increased by nearly three times the District average, Order at 28; Pl.Ex. 164; Pl.Ex. 1187a, resulting in a 19.3% deviation from the District elementary average, while other schools were at or below the average. Order at 28.

The Court found that the disproportion at Harper prompted exchanges with OCR in 1975, resulting in its stating that no further desegregation was required "at this time." Order at 30-31. More specifically, the record shows that in this exchange, OCR pointed to the dramatic racial disparity between Harper and the District as a whole, referred to the proviso in the 1970 plan that "[i]f the freedom of choice' plan does not eliminate the racial identifiability of each of the four elementary schools, alternative steps will be taken …." and advised the District that "the 'freedom of choice' plan for the four elementary schools is not achieving the goal of the desegregation plan and it will accordingly be necessary that your district devise an alternate plan which will give reasonable assurance of precluding racially identifiable schools." (Pl.Ex. 333 at THO 101640-41; Vol.IV 90-93). OCR also stated that Harper's faculty had become progressively more black, reinforcing "the racial identifiability of Harper Elementary." (Pl.Ex. 333 at THO 101640-41; Vol.IV 90-93, 128-30). Because of Harper's racial disproportions, OCR again recommended enforcement action against the District. (Pl.Ex. 342; Vol.IV 101-02) Forced to revise its plan, the District pledged to make certain elementary school

assignments where necessary to prevent racial identifiability in those schools, but refused to abandon "freedom of choice." (Pl.Ex. 350).

Although OCR "determined that no further desegregation is required of [the District] at this time" in regard to student school assignment, it also stated that the situation at Harper "warranted monitoring." Order at 31. More specifically, OCR determined that: "*Should the current student assignment methods fail to stabilize the racial composition at Harper, additional desegregatory actions may be required of your district*." (Pl.Ex. 350; Vol.IV 102)(emphasis added).

Variances from District Wide Averages

The District contended that it was unitary as a result of the 1970 plan. The Court did not agree, Order at 52 n. 30, but gave great significance to its finding that "for a period of at least six consecutive years . . . all of the District's students in grades 1-4 attended a school that had a percentage of black students that varied no more than 20 percentage points from the District-wide percentage . . . ." Order at 28. The Court found a 20% variance reasonable on the basis of the District's expert testimony. Order at 27. The issue whether the District's schools were desegregated during this period was contested. Plaintiffs' expert witness testified that a +/- 15% variance is the standard used most often throughout the United States and in the Eleventh Circuit, (Vol.IV 115-16, 292-93), a standard Harper exceeded from 1973 until today. Order at 28; Pl.Ex. 1187a. The District's January 2, 1970 desegregation plan recommended a 5% variance standard. (Pl.Ex. 272; Vol.IV 116).

As to faculty, the Court adopted the District's expert's proposed +/- 15% standard. Order at 38. Plaintiffs noted that, at this time, Harper was the only elementary

school with a majority black faculty, Order at 37, and suggested that the standard used most often is a 10% variance, which the District also recommended in 1970, and which the Harper exceeded in 1974. Order at 37; (Vol.IV 117-18; Pl.Ex. 272).

Both party's expert witnesses testified that to represent effective desegregation, assignments that eliminate the racial idenifiability of schools must remain stable and in place for a minimum of five years. (Vol.IV 106-07, 161; Vol.X 25). Plaintiffs noted that OCR determined in August 1975 that the District had not desegregated in student or faculty assignments, (Pl.Ex. 342; Vol.IV 101-02), and that the racial identifiability of the District's elementary schools did not remain stable, but increased over the years following 1975, resulting in the reestablishment of one-race schools. (Pl.Ex. 1187a,1189b; Vol.IV 111-12). The Court found that, "beginning in 1977, racial imbalances in the District's elementary schools gradually began to increase," but "no formal plan was adopted by the District between 1977 and 1995 to address these racial imbalances." Order at 31. Defendant's expert conceded that the racial composition at Harper "did not stabilize" after 1975. (Vol.X 83, 85). And the District proffered no evidence that it ever made any desegregative assignments pursuant to the revised 1975 plan. Consequently, the percentage of blacks enrolled at Harper increased until it reached 99% in 1988, below which it has never fallen. (Pl.Ex. 164, 1187a). Thus, it has failed to meet either the 15% or 20% standard since 1976. (Pl.Ex. 1187a at 1, 13, 1184f; Vol.IV 147-48).

The evidence also shows that shortly after 1975, the District's elementary school assignments reflected a pattern of two identifiably black schools and two identifiably white schools. Pl.Ex. 1187a. The pattern continued with the District eventually operating two all-black schools by 1993-94. *Id.* Based on the imbalances since 1999, the

Court found that "Harper and Jerger are currently racially identifiable schools." Order at 26.

Similarly, the Court found "the District's faculty is currently racially imbalanced," but held the imbalance was not traceable to the *de jure* system because, during the 1970's and early 1980's, the elementary schools "had a percentage of black elementary faculty members that varied by no more than fifteen percentage points" from the District average. Order at 36, 38. The evidence shows that by 1988-89 the District again assigned a majority black faculty only to Harper. Pl.Ex. 164. Indeed, by 1994-95, Douglass and Harper had not only 100% black enrollments, but majority black faculties, Pl.Ex. 164; Pl.Ex. 1187a, while that of Jerger was a mere 7.1%. Pl.Ex. 164.

Demographics During 1970's

Relying on the testimony of the District's expert, Dr. David Armor, the Court found that after 1970, "the neighborhoods around Harper became increasingly black" and that "demographics overtook the Desegregation Plan . . . ." Order at 29. In his testimony, Dr. Armor testified that there was a substantial white population around Harper in 1970, but that by 1980, the area around Harper was 82% black. (Vol.X 26-28). It is undisputed, however, that during this same period the District disproportionately enrolled black students at Harper and assigned to it the only majority black elementary faculty. Pl.Ex. 164. The District presented no evidence that the student or faculty assignment was beyond its control, rather than a function of its decision-making and refusals to abandon freedom of choice. (Vol.IV 33-102).

Racial Segregation In Classrooms, Instruction and Discipline 1970's

The Court did not make findings with regard to any aspects during the 1970's other than faculty assignments and student assignments, and the District did not present

any such evidence. The Court made no findings as to whether the schools were desegregated at the classroom level, although the unrebutted evidence establishes that. OCR cited the District for classroom segregation in December 2, 1970, (Pl.Ex. 294; Vol.IV 133), and that the District continued segregating students by classrooms in the following years. (Pl.Ex. 300 at 2312, 2314, 2317; Pl.Ex. 314 at 2296, 2302-04; Vol.IV 135-37). For example, in the 1971-72 school year at the high school, the racial composition of only five of 50 classes came within 10% of the overall racial composition, only 17 classes came within 20%, and 12 classes were from 80 to 90% black. (Pl.Ex. 314 at 2302-03; Pl.Ex. 300 at 2317). Uncontradicted testimony of witnesses who attended and taught in the District's schools at the time also established that instruction was provided on a segregated basis and that blacks were provided unequal and inferior instruction. (Vol.III 13-17, 20-25, 27-28, 34-35, 38 111-12, 139-141; Vol.IX 147-49). These segregative patterns remained consistent from 1976 to 1999. (Vol.III 38).

The record also demonstrates that in 1972, OCR informed the District of racially unequal application of discipline within the District and requested that the District respond with plans to prevent this. (Pl.Ex. 310; Vol.IV 88). The District presented no evidence that it ever acted to respond to this matter.

Current Racial Segregation and Inequality

Elementary School Assignment

The Court found that, in regard to student populations, "Harper and Jerger are [currently] clearly racially identifiable schools." Order at 33. The Court points to a Task Force that was formed in 1994 as the only post-1977 effort by the District to address student assignment to elementary schools. Order at 31. The Court found that the District has used, "with only a few modifications," the process recommended by a consensus of

the task force. Order at 32. The Court did not note that the District did not implement the recommendation to publish the assignment criteria, (Pl.Ex. 600), nor that black task force members made recommendations, such as having all students for a single grade attend the same school, using a lottery system, or drawing attendance zones that were opposed by white task force members and District administrators. No steps were taken to implement the black members' recommendations. (Vol.I 75-76, 121, 134-35, 319-24, 326-27; Pl.Ex. 575).

The Court found that the District currently assigns students to their elementary school of choice if space allows and, if space is unavailable, the District assigns students based on the following priorities: 1) special education considerations; 2) placement with siblings; 3) residents of the city; 4) proximity among residents of the city; 5) non-residents of the city; and 6) proximity of the non-residents. Order at 32. The Court found the District permits transfers along similar preferences when space allows. Order at 32.

The purported assignment policies, however, are not published, and even the pages alloted in its formal policy materials for student assignment are blank. (Pl.Ex. 316, 456, 506; Vol.IV 177; Vol.VII 183-84). Similarly, the District maintains no records of the manner in which it applies the purported criteria. (Vol.VII 185-86). Indeed, the administrator who managed assignments was unable to explain the basis on which "space," as a criterion, was disproportionately used to assign white students to Jerger. (Vol.X 252-55, 262-67). In short, the record shows that the District's assignment practices are not transparent, verifiable, or measurable. (Vol.VII 177-78, 183-88).

Testimony regarding the criteria for assignments indicates that their structure accommodates the assignment of whites to Jerger. (Vol.VII 235-37; Pl.Ex. 1220). For example, of those students assigned to Jerger because space was available, 19 were white,

but only eight were black. Indeed, 95% of the white students assigned for reasons of space were assigned to Jerger, which contrasts with blacks, only 29.6% of whom were assigned for that reason. *Id.* Also, the District sets aside 5 to 10 seats per grade in schools for newly enrolling students, including non-residents, and between 1997-98 and 2003-04, white county students have annually enrolled in Jerger in large numbers. (Vol.X 274; Pl.Ex. 1243 at 37; Stipulation, Dec. 17, 2003) This occurs while resident black students are denied their school choices, even when they live within walking distance of Jerger. (Vol.III 141-44, 181-85; Vol.I 317-18). The District admitted it gave a preference to Balfour students when Balfour's enrollment was disproportionately white. (Vol.X 257; Pl. Ex. 1187a.) Further, the District admitted it afforded District employees an unstated assignment preference, which results in disproportionate white enrollment. (Vol.X 259-63; Pl. Ex. 1171).

Although geographic proximity to schools is one of the purported student assignment criteria, (DFF at 13), analysis of students' residences revealed proximity was not uniformly applied and was not a factor that contributed to the racial segregation, because: 1) areas more proximate to Scott (majority black) had a higher white school-aged population than areas proximate to Jerger; 2) many white students assigned to Jerger actually lived closer to Scott; and 3) a dense population of blacks reside between Jerger and the white county students assigned to Jerger. (Vol.VII 201-03, 214, 223-25).

The District admitted it has deviated from its purported assignment criteria by using arbitrary, unfair policies. Vol.X 246-52; Pl.Ex. 1244 at 223-25. It claimed to have corrected this but admitted to subsequent deviations to assign whites to Jerger. (Vol.X 278-79; Vol.IX 217). Conversely, the District makes no such exceptions for blacks. Vol.III 58-80, 141-44, 181-85.

Although the District claims to permit transfers, black students are denied appropriate transfer requests (Vol.III 58-60), and the District's database revealed so few transfer requests were granted that there has been no "choice" for blacks. (Vol.VII 227-28, 230, 232-34; Pl. Ex. 1219). Moreover, the District admitted it declined, as a policy, all transfer requests other than those for special education and medical needs, but for two years kept the policy private. (Pl.Ex. 1244 at 226-28**;** Vol.X 277-78; Vol.XI 266).

The District has manipulated and exceeded Jerger's capacity to accommodate White students' enrollment by consistently assigning it the largest student enrollments (and classrooms), even though it is the second smallest school, (Vol.IV 195-96), leading to overcrowding. (Pl.Ex. 1184e; Vol.IV 197-202).

In 2002, the District closed Douglass (an all-black school throughout its history) and reassigned its students to Harper, an all-black school. (Vol.IV 111, 207; Vol.IX 146; Vol.I 285-86; Pl.Exs. 1189b, 1189e). Several other alternatives would have further desegregated, but the District instead created one black, overcrowded school. (Vol.IV 206, 208, 213-14). Moreover, the District denied "freedom of choice" to these students and summarily reassigned them to Harper. (Vol.IV 211, 219). *Id.* Last, the only bus transportation provided for the former Douglass students was to Harper. *Id.*

The Court found the schools are racially imbalanced because of shifting housing and enrollment patterns. Order at 33. However, the elementary schools are not neighborhood schools and, as noted above, the evidence shows that proximity is not consistently applied to school assignment. Moreover, census data show the racial composition of under-18 residents of Thomasville has changed merely 2% since 1990. Pl.Ex. 1216. Similarly, the racial composition of the schools has changed only 5% over that time. Pl.Ex. 1187a. Although Scott has the District's highest percentage of white

children living within one mile, Jerger's enrollment includes the highest percentage of whites. Pl.Ex. 1216, 1187a. In fact, the under-18 population within one mile of Jerger is only 29% white, yet its enrollment is over 60% white. Pl.Ex. 1216, 1187a. Last, the District assigns significant numbers of white, non-City residents to Jerger. Stipulation, Dec. 17, 2003.

Facilities

Placement Of Students Into Classrooms

The Court found that racial imbalances exist in classrooms, but concluded that they are the result of "'ability grouping' or 'tracking'" into levels and classes, and of the District's perception that low-income children, who are disproportionately black, are not "prepared when they first arrive at school." Cite at 33, 34. The Court found that to the extent the District delivers unequal, racially segregated curriculum, it is a result of its grouping. Order at 40.

The District admits to placing white students in classes together. (Vol.XI 86-87, 93-94, 102–03). Indeed, the District produced exhibits that revealed a consistent pattern of one-race classrooms over time. (D.Ex. 850-857). In addition, the District admits to using race during the placement process: "I divide the boys into white boys, black boys, white girls, black girls," (Vol.XI 21), and admits that the end result is predominantly white students in the upper levels and blacks in the lower levels. (Vol.XI 29-30).

Within all of the elementary schools, the District engages in a process of grouping students for instruction and "[a]s a function of being grouped, students also then receive different instruction." (Vol.VI 81). The District's purported criteria for its grouping could not substantiated by expert analysis. (Vol.VI 42-43). The result of this grouping and unequal instruction is "that the white students . . . got a better elementary school

education than the black students." (Vol.VI 40). As the Court stated, the children are never "reevaluated" after "the 'die is cast' as early as kindergarten." Order at 34.

Among the elementary schools, uncontradicted expert analysis revealed that the content and delivery of instruction is unequal. (Vol.VI 63-64, 71-78, 189, 198-200). The District exposes students at the all-black schools to less state curriculum requirements and skills and fails to meet state requirements, while doing the converse at Jerger. *Id.* By the fifth grade, white students at Jerger are much as 1.5 to 2 years ahead of their black peers at Harper and Douglass. (Vol.VI 189, 63-64, 296; also *compare* Vol.VI 198 *with* Vol.VI 293-95). In addition, differential instruction occurs within Jerger and Scott, such that only some students are accelerated. (Vol.VI 190-92, 279-80, 289-91). The result of the differential instruction and acceleration of certain students is to place "them again in a more prepared and an advantaged place . . . as they are ready to transition into middle school," and to exclude other students from a higher quality curriculum later in middle and high school. (Vol.VI 279-80, 296). District administrators acknowledged this fact. (Vol.XI 163; Pl.Ex.1247 at 252-53; Vol.IX 220).

Testimony by Douglass and Harper's principals reveal that the District has been aware of the unequal instruction provided at those schools, has low expectations for the students of those schools, and failed or refused to act to correct the inequalities. (Vol.XII 14, 19-21, 35; Pl.Ex. 549, 605, 767 (each under seal); Vol.III 71, 75-76, 85, 95-101). The superintendent admitted that at Douglass, "[l]ow expectations for student academic performance severely limit student achievement levels," and they "are by far the lowest of any school in the system." (Pl. Ex. 658 under seal).

At the middle school, "there is widespread racial isolation and racial segregation between levels . . . and also between classes within levels." (Vol.VII 85). The Court

found that students are "assigned to classes based upon performance level" and, thus, "attend classes with students of comparable academic ability." Order at 35. However, uncontradicted evidence showed that within "a narrow achievement band," or samples of students with the same or similar standardized exam scores, "white students are more likely to be placed [in] upper levels compared to blacks and blacks are more likely to be placed in lower levels compared to whites." (Vol.VII 352). Thus, the racial segregation in classes at the middle school are not explained by student achievement. (Vol.VIII 6, 341). The Court found that the differences in level and classroom placement are attributable to perceptions regarding low income students and the correlation between poverty and race in the District, although it cited no basis in the record. Order at 34. Plaintiffs presented evidence that socio-economic status did not account for these differences and that "by and large … it's better to be a poor White student in terms of level placement than it is to be a middle class African American student." (Vol.VIII 63).

The evidence also shows that three middle school administrators in the last seven years have all pointed out that these practices are discriminatory and unfair to black students and have suggested that they be eliminated. The first was Mr. Rocker, an Assistance Principal of the middle school. (Vol.II 52-54; Pl. Ex. 695; D.Ex. 375). Other district administrators, including the superintendent, were averse and non-responsive to his concern, (Vol.II 58, 59; Pl.Ex.1252 at 88-89), and although the superintendent recruited Mr. Rocker to become the next principal, he was not promoted (Vol.II 42, 45-46, 58, 84).

The next was middle school principal Sherrell Newton, who expressed concern that the District was segregating black students into separate classrooms and lower levels, and placing white students into separate higher levels. (Vol.II 187-91). Although the

district told her this was the result of students' ITBS math scores, Newton reviewed the ITBS scores and determined that students were being segregated nothwithstanding their scores. (Vol.II 201, 206-07, 222-23). Newton then proposed several alternatives to the current grouping process, including heterogeneous grouping, which would have resulted in the desegregation of classrooms. (Vol.II 223-24). The Superintendent responded that heterogeneous grouping was not an option due to fear of white flight, (Vol.II 232-38), and that such changes were unacceptable because "he had had an agreement of some type with the group from Jerger in terms of how their students were going to be placed into teams." (Vol.II 237-46). Newton wrote the Superintendent that: "A selection process in which criteria and reasons are created to have all White classes is wrong. I will not support this. . . illegal [decision]." (Pl.Ex. 663; Vol.II 249). After only three months, Newton was removed as principal and what action she took was reversed. (Vol.I 143-45; Vol.II 223-24, 232–38; Pl.Ex. 664; Vol.XI 85, 88-89, 92; D. Exs. 850, 851).

Mr. Fuller, as middle school principal, also attempted to change the grouping by placing students into teams by their actual standardized test scores rather than by school, (Vol.IX 220-24), but white parents submitted their own plan and the District refused to implement Fuller's. (Vol.IX 225-27). That was Fuller's final year at the school. *Id.*

Faculty

The Court found "that the District's faculty is currently racially imbalanced," but it is not traceable to the *de jure* system. Order at 36-37. The faculties are and have been rigidly segregated since at least 1997. Order at 36; Pl.Ex. 164. At Harper, the percentage of black faculty was 76.2% and 58.8% during the 2001-02 and 2002-03 school years, while Scott and Jerger's faculty ranged from 8.3% to 11.1% black. *Id.* Thus, the racial identifiability of the faculty also matched the racial identifiability of the student

populations at those schools. This pattern also existed at Harper during the 1970's . Order at 37, 28.

The Court expressed a reluctance to make findings with respect to staff assignments, but found that any minimal imbalance is not traceable to the *de jure* system. Order at 39. However, the evidence upon which the Court relies shows a clear imbalance in staff assignments that correlates with other segregation. Jerger, the white elementary school, has always had a white principal. Pl.Ex. 164. Likewise, Scott, a formerly all-white school, has always had a white principal. *Id.* Conversely, Harper, the all-black elementary school, has had a black principal since at least 1986. Pl.Ex. 164; order at 39.[2] Also, the Court's findings exclude Douglass Elementary, a historically black school, which has had a black principal since 1972. *Id.*

Transportation

The Court found that prior to 2002, with the exception of special education students, the District did not transport students to or from school, but "[a]t the beginning of the 2002-2003 school year, the School District initiated a very limited route for the transportation of Harper students who had previously been assigned to Douglass before it closed" and that these students "were predominantly black." Order at 48. In fact, the District admits, "all of the students transported are black." DFF at 19.

Activities

The Court found "all District extracurricular activities are available to all the District's students without regard to race" and there are "no present racial imbalances" in activities. However, unrebutted evidence demonstrated that the District uses race in the

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[2] The Court lists the principal as white, but its cited exhibit indicates black.

operation of extracurricular activities. (Vol.V 59-61; Vol.III 287-89; 1190d). For approximately 30 years, the District has created voting procedures for its homecoming activities and titles that ensure white students will participate and receive titles notwithstanding the fact that blacks may and do receive more votes. *Id.* In addition, the District has excluded blacks, who are either qualified or similarly situated to white students, from participating in certain academic activities and honors. (Vol.VIII 249; Vol.III 208-15; Pl.Ex. 1245 at 74-75). Imbalances exists throughout activities. (Pl. Ex. 1190a; Vol.V 66-67; Pl.Exs. 1190b,1190d). For instance, the District operates extracurricular activities that are entirely segregated more often than not (44 out of 85 times). (Pl. Ex. 1190d). The exclusion of blacks from certain activities is exemplified by graduation celebrations that are reserved exclusively for white students. (Vol.III 292). The District only made the generalized assertion that activities are open to all students. (DFF at 20).

Discipline

The Court "assume[d] but [did] not decide[] that a statically greater percentage of black students have been subjected to disciplinary action when compared to whites," but found "that the District does not treat black students differently from white students with respect to discipline." Order at 45. The Court also found that there was "no incident in which a black student received harsher punishment than a white student for the same or similar conduct." *Id.* The Court's findings rest upon the testimony of two administrators, the first of which testified that he was personally unaware of discriminatory treatment at the high school or at the middle school, during his single year there, regarding suspensions, (Vol.XI 173-75); the second of which was merely unaware of an occasion of disparate discipline at the high school. (Vol.XII 108). Unrebutted evidence shows the

opposite.

Expert analysis demonstrated that the District's discipline policies are vague and fail to explicitly proscribe prohibited activity and lend themselves to racially discriminatory application. Furthermore, the District delegates wide authority and discretion to teachers, yet fails to train them or establish standards for the appropriate exercise of that discretion. (Vol.VIII 318-25, 333-43, 346-47). The District admitted that there was a serious need for teacher classroom management training because of the high number of discipline referrals for minor offenses, a majority of which were for black students. (Vol.XI 146-47). Similarly, the District's own consultants informed it that it needed to implement corrective action and provide for professional staff development (Pl.Ex. 131), and a self study review team for the middle school recommended it needed to "[develope] a discipline plan to be consistently carried out among administrators and teachers." (Pl. Ex. 1197 at 9). Moreover, the District admitted that white middle school teachers refer black students to administration for discipline and remove them from the classroom under the auspices that the students are being disrespectful, when in fact, the black students were merely trying to explain themselves to the teacher. (Vol.XI 144-46). Similarly, former assistant principal Rocker found that racial disparities in discipline referrals resulted from teachers resolving the discipline of white students within the classroom while sending blacks to the office. (Vol.II 81-84). Also, a significant number of white teachers resisted and refused to implement Ms. Newton's efforts to remedy racial inequalities in discipline. (Vol.II 138-47, 158-59, 170-72).

As articulated by unrebutted expert analysis, the District's inadequate discipline policies and failure to take corrective action, have led to a statistically significant, consistent, high level of racial disproportion in the administration of discipline at all

schools and across all categories of behavior and administrative responses. (Vol.X 130-33; Pl.Ex. 1190o). Moreover, as the severity of punishment increases, blacks are more overrepresented in that punishment. (Vol.X 135-37; Pl.Exs. 1258, 1190f, 1259).

Logistical regression analysis reveals that "regardless of socioeconomic status and regardless of the type of behavior for which black or white students are referred, . . . race remains a highly significant predictor of who will be disciplined in the Thomasville school system," and no possible explanation exists for the racial disparities in discipline other than the fact that discipline decisions are being made on the basis of race. (Vol.X 166-67). Students, parents, and teachers corroborated this several uncontradicted specific instances where black and white students where treated differently for the same or similar conduct. (Vol.VIII 219-22, 254-55; Vol.V 34-41; Vol.III 227-29, 282-83, 291-92; Vol.II 81-84).

STANDARD OF REVIEW

The district court's application of law is subject to de novo review, while its findings of fact are subject to a clearly erroneous standard of review under Fed.R.Civ.P. 52(a). *See Sierra Club v. Martin*, 110 F.3d 1551, 1554 (11th Cir.1997).

SUMMARY OF ARGUMENT

The Court erred in failing apply proper standards regarding unitary status, the presumption of causation in *de jure* segregation, with-in school segregated instruction and intentional discrimination.

Because it applied improper legal standards, the Court's factual conclusions are not directed to proper factual inquiries, and are not supported by the record and are clearly erroneous.

ARGUMENT

I. THE COURT FAILED TO APPLY ESTABLISHED PRECEDENT IN ASSESSING WHETHER THE DISTRICT'S ACTIONS THAT HARM ITS BLACK STUDENTS VIOLATE CONSTITUTIONAL STANDARDS.

A. The Court Failed to Scrutinize the District's Actions and Failures to Act in Accordance With Well Established Standards of This Court and the Supreme Court Regarding Fulfillment of the District's Affirmative Duty.

1. The Court Erred in Failing to Determine Whether the District Achieved Unitary Status, Eliminated the Vestiges of Discrimination to the Extent Practicable, or Had In Good Faith Complied With and Shown a Commitment to Desegregation.

a. A District that operated *de jure* segregated schools has not eliminated its dual system unless it achieves unitary status.

It is well established that a school district's affirmative duty is "to convert to a *unitary* system," because otherwise it remains dual. *Jacksonville Branch, NAACP v. Duval County*, 273 F.3d 960, 965 (11th Cir. 2001) (emphasis in original); *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968). Thus, Courts' inquiry in desegregation cases is directed entirely toward "evaluating whether a school system is 'unitary.'" *Manning v. Hillsborough County*, 244 F.3d 927, 942 (11th Cir. 2001).

b. The Court plainly failed to determine whether the District ever achieved unitary status.

The Court here plainly failed to determine whether the District ever achieved unitary status. At no point did the Court acknowledge its mandate to determine whether the District had converted to a unitary system. Instead, the court stated, "to avoid confusing terminology, the Court has refrained from using the terms 'unitary' or 'unitary status' in describing its findings and conclusions in this case." Order at 52 n.30. Thus, the Court failed to make the key legal inquiry and determination that the law requires in all desegregation cases and erred.

c. The Court failed to articulate or apply this Circuit's standard for assessing unitary status.

Well established precedent directs courts to apply a specific legal standard to determine unitary status. "A Court must . . . 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 . . . desegregation." *Manning*, 244 F.3d at 942. *See also Freeman*, 503 U.S. at 484, 492; *Dowell*, 498 U.S. at 250. A court cannot find that a school district has become unitary unless it finds the district has fulfilled both of these obligations. "To be entitled to unitary status, not only must a school system eliminate the vestiges of *de jure* segregation to the extent practicable, but 'local authorities [must] have in good faith fully and satisfactorily complied with, and shown a commitment to, the desegregation plan.'" *Jacksonville*, 273 F.3d at 974 (citations omitted).

The Court here failed to articulate this standard in regard to this case. Thus, first, it failed to require that the District eliminate the vestiges of discrimination to the extent practicable and, second, it failed to make any assessment of good faith. Instead, the Court only purported to decide whether "the District carried its burden of proving that racial imbalances" were not "traceable in a proximate way to its previous *de jure* system" and whether "current purposeful discrimination" proximately "cause[d] these imbalances." Order at 52. Thus, the Court failed to apply the well established standard for assessing unitary status and erred as a matter of law.

2. The Court Erred In Failing to Give any Effect to, or to Apply to the Facts, the Presumption that Current Segregation Is Causally Related to *De Jure* Segregation, and the District's Burden of Proving that Current Segregation and Inequality in the District is not Traceable to *De Jure* Segregation.

The Court held that "any present racial imbalances in the District are *presumed* to

be the result of previous *de jure* segregation." Order at 4 (emphasis in original). This presumption requires a Court to infer a connection between current racial segregation or imbalances and historical intentional segregation. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 467 (1979); *Dayton*, 443 U.S. at 537, 541; *Keyes*, 413 U.S. at 208. Thus, evidence of current, intentional segregative practices is not required. *See Dayton*, 443 U.S. at 538. In short, a finding of a causal connection between current imbalances and past discrimination is required absent evidence that affirmatively disproves the presumption. *Columbus*, 443 U.S. at 458; *Dayton*, 443 U.S. at 537.

As a result, districts are left "with the burden of proving" that current imbalances are not the result of past or present discrimination. *Keyes*, 413 U.S. at 208. In effect, a district must show that it "has dismantled the past discrimination 'root and branch,'" and created a "break [in] the causal chain." *Johnson v. Bush*, 353 F.3d 1287, 1298-1300 (11th Cir. 2003). Moreover, "it can rebut the prima facie case only by showing that its past [discrimination] did not create or contribute to the current [racial imbalances]." *Keyes*, 413 U.S. at 211; *Dayton*, 443 U.S. at 537.

The burden of proof requires that the District establish two sets of facts. First, the District must establish that it has taken "every reasonable effort . . . to eradicate segregation and its insidious residue," *Jacksonville*, 273 F.3d at 973, and that it has fully complied in "good-faith commitment to the entirety of a desegregation plan" and will not change course "in the future." *Freeman*, 503 U.S. at 499; *Dowell*, 498 U.S. at 249-50. Fulfilling this affirmative duty to dismantle vestiges is necessary to break the causal chain to historical segregation and discrimination. *Johnson*, 353 F.3d at 1297-1300. Second, the District must establish that no further desegregation is reasonably possible because despite the reasonably available steps taken to achieve desegregation, forces

beyond the control of the District have overwhelmed those efforts. *Freeman*, 503 U.S. at 493-94; *Jacksonville*, 273 F.3d at 966. Such a showing is required because the vestiges of discrimination can persist "despite the passage of time and even, in some instances, intervening changes to the policy." *Johnson*, 353 F.3d at 1294. In the absence of these two showings, any remaining segregation is logically traceable to a failure to disestablish dual schooling and is presumed to be the result of the District's failure to take such action. *Jacksonville*, 273 F.3d at 966; *Columbus*, 443 U.S. at 458.

The school boards who have carried their burdens in this Circuit have shown a clear pattern of conduct. For instance, in *Jacksonville*, the Board fully complied with a stipulated agreement and created 71 magnet schools, whose purpose and effect was to attract white students to black schools. 273 F.3d at 967-68. Moreover, it also voluntarily undertook additional desegregation measures, such as capping enrollment, desegregative transfers and attendance boundaries. *Id.* at 968. As a result, the Board increasingly eliminated the racial identifiability in almost all of its hundreds of schools over the years and "brok[e] the pattern of all-black enrollment at [formerly *de jure* black schools] " *Id.* at 968-69. Similarly, the large districts in *Manning* and *Lockett* made desegregative assignments according to strict numerical goals, 244 F.3d at 931-33; 111 F.3d at 840-41, which in *Manning* resulted in 90% of the schools being racially balanced. 244 F.3d at 935.

Moreover, the above boards had long histories of acting in good faith. In *Lockett*, during 30 years of court supervision, the board had never been enjoined or sanctioned or ever failed to comply with a court order, and instead took actions "to further desegregation which went above and beyond" the Court's order and achieved integration at an unparalleled level even though demographic shifts were occurring. 111 F.3d at 843-

44. Similar good faith and consistent compliance existed in *Jacksonville* and *Manning*. 273 F.3d at 974; 244 F.3d at 946. Moreover, in all three cases, the boards had regularly sought input from and consulted with the black community. 244 F.3d at 946; *Jacksonville*, 273 F.3d at 975-76; *Lockett*, 111 F.3d at 844.

a. The Court erred in failing actually to apply the presumption or to impose on the District the burden of proof.

The Court here failed to presume racial segregation and imbalances were the result of past or present discrimination because it failed to require the District to meet its burden of proof. It did not require the district to produce "countervailing" evidence that disproves a connection between the imbalances and past discrimination or that some intervening cause had overtaken its ability to remedy the imbalances. Thus, the Court made no finding that the District had, in good faith, taken all reasonably practical steps to achieve desegregation and disestablish the dual system and its effects, nor did it find that despite undertaking reasonably available efforts, external forces beyond the District's control had overwhelmed its efforts. Moreover, the Court did not require the District to make findings similar to the school boards in *Manning*, *Jacksonville* and *Lockett*. Accordingly, the Court erred in failing to apply the presumption and in failing to impose on the District the burden of providing affirmative proof.

i. Although stating that it was applying the presumption and burden of proof, the Court expressed its hostility to, and disagreement with, that legal standard.

Throughout its opinion, the Court demonstrated its perception that the presumption is unwarranted and expressed its unwillingness to apply it here. In its first discussion of the presumption, the Court stated it had "strong reservations about the

applicability of this legal presumption in the present cases." Order at 4n.3. Similar hostility toward the presumption continues throughout the opinion. Order at 4-5, 27, 19 n.13. *See also* Summary Judgment Order at 4 n.2. In addition, the Court ignored well settled precedent that the presumption applies and instead chose to focus on a concurrence by Justice Scalia and a dissent by Justice Rehnquist that argue the presumption should not apply. Order at 19-20, 19 n.13. Thus, the Court strongly questioned the validity of the presumption and expressed hostility toward the mandate to apply it.

ii. The Court treated the presumption as no more than a threshold to inquire whether current segregation was unlawful.

Both the Supreme Court and this Circuit have stressed that application of the presumption "involves a careful assessment of the facts . . .utilizing sound discretion after such a careful factual assessment." *Lockett*, 111 F.3d at 842; *Freeman*, 503 U.S. at 474; *Jacksonville*, 273 F.3d at 965, 966. This is necessary because the Supreme Court has "made it clear . . . that a connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist." *Keyes*, 413 U.S. at 211. Moreover, a current practice "is not [sufficient] 'simply because it appears to be neutral.'" *Id.* at 211-13. Thus, "the Board's burden is to show that its policies and practices . . . were not factors in causing the existing condition of segregation in these schools." *Id.* at 213-14.

The Court, however, did no more than inquire as to whether current segregation was unlawful or the result of present intentional discrimination. As shown above, whether current practices are unlawful or intentional is not a relevant inquiry under the presumption or a function of overcoming the presumption. Rather, the District must

prove that it has discharged its affirmative duty and that its policies do not create or contribute to the imbalances, whether they be discriminatory or not. *Keyes*, 413 U.S. at 211-13; *Johnson*, 353 F.3d at 1294, 1298.

The Court's inquiry in regard to racial imbalances focused on current intentional discrimination, Order at 36, 40, 42, 44, 45, and whether the District is following state and federal regulations or law. Order at 40-44. In making this inquiry, the Court in immediately finds the imbalances are not traceable to *de jure* segregation. *Id.* at 42, 44, 45. In fact, with the exception of elementary school assignment and faculty assignments during the 1970's, the Court made no inquiry into and made no findings regarding whether the District has taken any action that would break the causal connection between the current racial imbalances and past discrimination.

The Court purported to fully apply the presumption, but even here the Court failed. First, the Court found the elementary schools were desegregated for six years in the early 1970's based solely upon the racial composition of the schools. Order at 28. However, the Supreme Court in *Swann v. Charlotte Mecklenburg,* 402 U.S. 1, 25 (1971), was clear that mathematical ratios are only a starting point in determining whether schools are racially identifiable. The Court here engaged in no other inquiry other than ratios. Second, the Court simply found "the current racial imbalances in the District's elementary schools are not due to any intentional discrimination on the part of the District and are not vestiges of the District's previous *de jure* racially segregated system." Order at 33. Again, whether the District is engaging in intentional discrimination does not establish that it has carried its burden and does not go to the issue of whether the District had taken reasonable steps to eliminate the segregation and break the causal chain.

iii. The Court erred by applying an improper standard for determining whether the District carried its burden of proving that current segregation and inequality in the district is not traceable to *de jure* segregation.

1. The Court did not require the District to show that its actions did not contribute to or create the racial segregation in its schools.

The Supreme Court in *Keyes* demonstrated that Courts must apply the presumption to district wide practices that affect the racial balance of the schools. The Court held that once the presumption is applied, "the Board's burden is to show that its policies and practices with respect to schoolsite location, school size, school renovations and additions, student-attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff, etc., considered together . . . were not factors in causing the existing condition of segregation in these schools." 413 U.S. at 213-14. Although several undisputed district wide policies have been enacted that directly affect school assignment, the Court failed to acknowledge them or require the District to carry its burden in regard to them.

The undisputed policies and practices of the District regarding school assignment include: 1) the closing of the all-black Douglass elementary school and reassignment of the students to the other all-black school; 2) the denial of "freedom of choice" to these students; 3) the reserving of elementary school seats for non-resident students, but in 1998-99, for instance, assigning 80% of the non-residents to the predominantly white elementary school, with 93.8% of those assigned being white, Stipulation, Dec. 11, 2003; and 4) the limitation and denial of transfer requests from the all-black schools and a two year bar on all non-special needs transfers. The Court, however, failed to acknowledge any potential effect of these district wide assignment policies and failed to apply the

presumption to them. Thus, it failed to require the District to carry its burden of showing these policies do not create or contribute to the current segregation in its schools.

2. The Court did not find or require the District to show that demographics were the "substantial" cause of racial imbalances in the District.

The Court found demographic shifts account for the current segregation, *id.* at 33, but the mere existence of demographic changes alone does not rebut the presumption and cannot carry the District's burden. Any purported demographic changes must also be "beyond a school board's control" and "substantially" cause the imbalances to rebut the presumption. *Jacksonville*, 273 F.3d at 966; *Manning*, 244 F.3d at 944. The Court here does not find that demographics were the "substantial" cause, which is particularly important in a small district that does not have neighborhood schools and has instituted several other practices that significantly affect school assignment. Indeed, in all of this Circuit's precedent regarding demographic shifts that rebut the presumption, the school district's have assigned students to school based on attendance zones. Thus, the demographic shift occurred in and between attendance zones. Conversely, under freedom of choice in the District, demographic shifts have no effect on where students can be and are assigned. Moreover, because the District never made desegregative assignments, as the above districts did, it cannot claim that demographics overtook its efforts to desegregate.

Again, not only had these other districts made desegregative assignments through attendance zones, the demographic changes were drastic. In *Lockett*, the board only overcame the presumption because "*dramatic* demographic changes" occurred in the school district, which were caused by several factors beyond the board's control, including "an increase in the number of black school-age children and a decrease in the

number of white school-age children," a decrease in the white fertility rate, the differing purchasing power of whites and blacks, the preference of families to live in neighborhoods that reflect their own race and the location of housing projects. 111 F.3d at 843 (emphasis added). *Dramatic* shifts also occurred in *Jacksonville*, whereby the core city student population became over 96% black, thus creating a racially isolated attendance zones. 273 F.3d at 970. In *Manning*, the demographic changes were so significant that 17 of the schools that were challenged as racially identifiable "would have become racially imbalanced regardless of [the school board's] efforts" to prevent it. 244 F.3d at 937, 945. The instant case, however, bears no resemblance to these cases, as the district has operated only a few schools, all within one mile or less of each other, and demographics remained relatively static since 1990. As discussed later, the only other demographic evidence relates to the 1970's and is flawed. Furthermore, it would not explain current imbalances in any event. Thus, demographics cannot rebut the presumption, as it did in the above cases. The Court, however, failed to apply the presumption and require the District to make similar showings to those in the above cases.

B. The Court Failed Completely to Apply This Court's Precedent Regarding Segregation Within the Curriculum and Instruction of the District.

1. This Court's Precedent Clearly Required the Court to Subject Continuing Segregated and Unequal Instruction in the District to Rigorous Scrutiny.

Well established precedent in this Circuit requires that courts carefully examine forms of within-school segregation in the educational program of school districts under a duty to desegregate, and prohibit such grouping practices unless the district can prove

that the grouping either "is not based on the present results of past segregation or will remedy such results through better educational opportunities." *Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1414 (11th Cir. 1985) (*quoting McNeal v. Tate County Sch. Dist*., 508 F.2d 1017, 1020 (5th Cir.1975)). This precedent obligated the Court to "scrutinize with punctilious care" the district's placement policies "to see they do not result in perpetuating the effects of past discrimination." *McNeal*, 508 F.2d at 1020.

The Court failed to apply this precedent. Instead, "[a]lthough the Court f[ound] that the District's tracking system has had the effect of creating racially imbalanced classes within the District's schools," it subjected that system to no scrutiny other than "find[ing] that it was not the intention of the tracking system to segregate students based upon race," and "that the District does not manipulate the ability tracking system in order to track students based upon their race." Order at 36. Thus, the Court failed to acknowledge the applicable precedent and did not make the required inquiries. Moreover, the Court expressly rejected the notion that it should subject the segregative grouping practices to judicial scrutiny, stating that such an inquiry is "certainly beyond the realm of expertise of the judicial branch." Order at 34n. 22 (quoting *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 536 (7th Cir. 1997)).

It is thus beyond question that the Court failed to apply the law of this Circuit to the facts of this case. Moreover, as demonstrated within, based on the Court's own findings, together with uncontradicted evidence, had the court applied the proper standard of scrutiny, liability and a remedy would have resulted.

2. The Court Erroneously Failed to Examine What It Found To Be Substantially Segregated and Unequal Instruction Provided to Black Students of the District.

a. The Court Made Findings That the Grouping Practices Are Segregative, Are Not Remedial and Perpetuate Inequality Within the District's Educational Program.

The Court made findings "that many of the less academically advanced classes in the District's schools are predominantly black while most of the more academically advanced classes are predominantly white," and that "the current racial imbalances in individual classes are a result of the District's educational policy of 'ability grouping' or 'tracking,'" by which "[t]he District attempts to group students based upon their perceived ability starting in kindergarten." Order at 34. The Court further found that the grouping system was not responsive to students needs and relegated them to inadequate instruction for their educational career. "[C]hildren do not appear to be reevaluated (and thus potentially "re-tracked") during their progression through the system. . . . Therefore, . . . they remain on the "lower ability" track for the duration of their educational careers, absent parental intervention." *Id.* The Court also found that, in middle school, students are grouped on the basis of teacher recommendations and test scores, and in high school "students choose their courses within the limits imposed by the District's tracking system," with the "[u]nfortunate[]"effect that "if a child is 'tracked' in a lower level in elementary school and does not have an active and engaged parent, the District's system perpetuates that student's original track, so that they tend to be tracked in the lower level in middle school, and thus are not prepared for higher level courses in the high school." *Id.* at 35.

These findings make clear that the District's grouping practices are segregative, inflexible and are not remedial, but condemn students in the low levels. Thus, in light of the findings the Court did make, the District's practices fail under application of this

Court's precedent with respect to the requirements that the grouping system must not perpetuate prior inequalities or must address those inequalities as a remedial measure. *Georgia NAACP*, 775 F.2d at 1414.

While the Court's findings establish that the grouping practices perpetuate inequality across the grades, uncontested evidence also establishes that these grouping practices stretch back to the dual system. Specifically, OCR cited the District for segregation and inequality in instructional assignments. There is no evidence that it ever acted to eliminate that system of segregated and unequal instruction, from the inception of schools that housed both races until the present. To the contrary, the record establishes that the District has vigorously refused any suggestions that the grouping practices and corresponding unequal educational opportunities be reformed. The Court also found that current segregation in the elementary schools is reflected in the grouping, in that students in black elementary schools score lower on standardized test scores than the elementary schools with a presence of white students and "[s]ince standardized tests are a significant ability grouping tool, they contribute to the racial imbalances existing in many individual classes." Order at 36 n. 22. Accordingly, the District's segregated grouping practices resulting in unequal educational violates precedent that such practices cannot perpetuate prior and continuing segregation. *McNeal*, 508 F.2d at 1020; *see United States v. Yonkers Bd. of Educ*., 123 F.Supp.2d 694, 705 (S.D.N.Y. 2000) (*citing Freeman v. Pitts*, 503 U.S. at 496).

b. The Court Found That Black Students Substantially Are Afforded An Inadequate Education By the District But Erroneously Concluded That It Could Not Remedy the Inequalities.

Indeed, the Court ultimately found that the District substantially failed to afford

its black students an adequate education. At the same time, it expressed its mistaken understanding as to the constraints on its authority.

> No matter how tempted the Court may be to intervene and attempt to "fix the system," a court is ill-equipped for such a task . . . . The Court has located no provision in the Constitution or . . . federal law that mandates that poor children be guaranteed a high quality education.
>
> The Constitution does require that school systems not engage in intentional discrimination on the basis of race. While the record in this case establishes that many poor black children in Thomasville, Georgia are not receiving what this Court would consider an adequate education, the record is clear that Defendant has not engaged in intentional discrimination based upon race. Therefore, this Court does not have the authority to grant the relief sought by Plaintiffs.

Order at 55 (footnote omitted).

Despite these findings, because the Court did not apply this Court's precedent, it mistakenly thought it was without authority to provide relief in the absence of a finding of intentional racial discrimination. Although plaintiffs demonstrate within that the record establishes intentional race discrimination, as discussed above, intentional discrimination is not a predicate for remedial authority under *McNeal* and *Georgia NAACP*, which do not look to the intent or cause of the mechanism, but to its effect in perpetuating past racial inequities. *Georgia NAACP*, 775 F.2d at 1413; *McNeal*, 508 F.2d at 1020-1021. Thus, the Court erroneously concluded that it could not order a remedy for the segregated and inadequate education afforded to black students. Had the Court applied the proper standards, the record establishes the basis for relief.

C. The Court Failed to Articulate or Apply the Standards for Determining Intentional Discrimination.

In addition to the claim that the District failed effectively to disestablish the dual system it operated in defiance of *Brown*, plaintiffs also stated a claim--and produced direct and circumstantial evidence proving--that the District's actions represented intentional discrimination directly harming its black children

1. Courts Are Required To Determine Whether Race Is A Substantial Motivating Factor In the Actions At Issue Through Considering All Available Evidence and Drawing Proper Inferences.

The Fourteenth Amendment intentional discrimination standard "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body … made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one…. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252, 265-266 (1977).

Indeed, as this Court held in *Williams v. Dothan*, 745 F.2d 1406, 1414-1415 (11th Cir. 1984), intentional discrimination is proven even without a direct showing of ill will, and through consideration of a variety of evidentiary factors, including a history of discriminatory acts and pursuit of policies with knowledge of their foreseeable disparate impact:

> The fifth circuit has long recognized that discriminatory intent may be found to exist even where the record contains no direct evidence of bad faith, ill will or any evil motive. . . . The Supreme Court recognized these realities in its decision in *Arlington Heights* . . . . The Court has subsequently noted that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose," . . . and this court's decision last year in *Dowdell v. City of Apopka* relied on several of these factors in finding that a municipality had acted with discriminatory intent by withholding government services from predominantly black sections of the city. (citations omitted)

Further, where longstanding policies and practices are at issue, "proof of

discriminatory intent behind a specific policy in the past creates an inference that the impermissible purpose continues into the present, despite the passage of time and even, in some instances, intervening changes to the policy. *Johnson*, 353 F.3d at 1294n. 5, citing *Hunter v. Underwood*, 471 U.S. 222 (1985); *United States v. Fordice*, 505 U.S. 717, 747 (1992) (Thomas, J., concurring) (observing that "discriminatory intent does tend to persist through time"); *McMillan v. Escambia County*, 638 F.2d 1239, 1249 (5th Cir. 1981) ("If the system was unconstitutional in its inception and if it continues to have the effect it was designed to have, then the pure hearts of current council members are immaterial.").

In addition to identifying the nature of intentional discrimination and the sources of its proof, the Supreme Court also has clearly instructed that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington*, 429 U.S. 266. Indeed, as noted above, *Arlington Heights* identifies a series of non-exclusive "subjects of proper inquiry in determining whether racially discriminatory intent exist[s]," to which are added those evidentiary sources and factors employed in *Columbus*, *Fordice* and this Court's cases.

Thus, it is clear that properly determining whether intentional discrimination exists necessitates a thorough examination by the fact-finder and, given that "smoking guns" are not to be expected, an inquiry that delves into the variety of evidentiary sources and draws inferences from the record. "The task before the fact finder is to determine, under all the relevant facts, in whose favor the 'aggregate' of the evidence preponderates. This determination is peculiarly dependent upon the facts of each case." *Rogers v. Lodge*, 458 U.S. 613, 621 (1981) *quoting Nevett v. Sides,* 571 F.2d 209, 224 (5th Cir.

1978) (footnote omitted).

2. The Court Failed to Identify Any Standard It Employed In Determining Intentional Discrimination, And Failed To Apply Governing Constitutional Standards To the Evidence, In Concluding That the District Was Free of Intentional Discrimination.

The Court erred in failing to identify any standard that it purported to apply in determining intentional discrimination, much less the intent standard. The decision also fails to identify the various sources of evidence to be examined, inferences to be drawn and factual inquiries to be made. No discussion of the precedents in the area is provided. The opinion contains no more than a single sentence on the subject: "To establish such a constitutional violation, the evidence must be sufficient to support a finding that Defendant has engaged in intentional discrimination based upon race," citing only to *Washington v. Davis* and *Keyes*. Order at 49.

The opinion otherwise discusses "as background" the history of *Brown* and its progeny, focusing on implementation of remedies and the *Keyes* presumption, and concluding that "[t]he focus of today's school desegregation, as evidenced by the case *sub judice*, is whether current racial balances are the *result of practices that were declared illegal almost fifty years ago*." Order at 20 (emphasis added). To the extent this discussion is relevant to the question of intentional discrimination, the Court's discussion evidences its disagreement with the inference of continuing discriminatory intent that arises from past intentional discrimination, and its apparent rejection of the Supreme Court's tracing of current segregation to dual school systems of the 1950s. Order at 18-20&n. 13 (quoting dissent in *Columbus*).

Beyond these sparse references, the Court simply summarily concludes that "the District does not presently engage in intentional discrimination." Order at 20, 33, 36, 40,

42, 44-45, 48-49, 51, 53.[3]

Moreover, with a few possible exceptions discussed below, in reaching its summary conclusions regarding intentional discrimination, the Court failed to consider or apply the *Arlington Heights* and related evidentiary and analytical criteria, failed to make subsidiary findings or draw inferences based on the evidence, and largely failed to reference or discuss the voluminous evidence, particularly that presented by plaintiffs'.

II. THE COURT'S FACTUAL CONCLUSIONS ARE INFECTED BY ITS LEGAL ERRORS, ARE NOT SUPPORTED BY THE RECORD AND ARE CLEARLY ERRONEOUS.

A. Because It Applied Improper Standards, the Court's Conclusions Are Not Directed to Proper Factual Inquiries.

The Court failed to make findings whether the District took all reasonably available steps to achieve desegregation, in good faith and in compliance with obligations, and had eliminated the vestiges of segregation to the extent practicable. Also in failing to state the legal standards for intentional discrimination, the Court failed to articulate any standard of "intentional discrimination" to apply to the facts. Indeed, to the extent the Court discussed precedent, it apparently rejected Supreme Court holdings with respect to important inferences to be drawn and the traceability of intentional discrimination over time. Further, the Court failed to describe or apply governing evidentiary and analytical inquiries required in order properly to make a determination of intentional discrimination. These legal errors shaped and infected the court's fact-finding process and led to its failure to make findings on proper evidentiary subjects, failure to

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[3] In its Conclusions of Law, Order at 52-53, the Court added to its summary conclusions of no current discrimination the concept of "proximate cause:" "The Court also found that current purposeful discrimination did not proximately cause these imbalances." The Court did not explain or discuss the addition of this concept or its relevance.

draw proper inferences, and recognize or acknowledge evidence--including party admissions--establishing intentional discrimination discussed below. *Manning*, 244 F.3d at 944 (application of the wrong legal standard "tainted" entire factual findings).

B. To the Extent that the Court's Conclusions are Fact Findings, They Are Contradicted By the Record and Are Clearly Erroneous

1. The Uncontradicted Record Establishes That the District Has Not Taken All Practicable Steps, In Good Faith, To Dismantle the Dual System and Eliminate the Vestiges of Segregation.

As discussed in the statement of the facts, the District presented no evidence in regard to any *Green* factor during the 1970's other than school building assignments and faculty assignments. Vol.X 106-07. However, in addition to those two factors, OCR specifically cited it for discrimination in discipline and classroom segregation. In addition, the unrebutted evidence showed segregation and inequality in both classrooms and discipline. Thus, in regard to these and all other factors, there is no basis to find the District was unitary in the 1970's.

The District has perpetuated and reestablished segregation and inequality in many respects. Classroom segregation and inequality existed during the 1970's and as the unrebutted evidence shows it continues to exist today. Similarly, OCR cited the District for racially unequal application of discipline during the 1970's and the unrebutted evidence shows statistically significant disparities, for which racial discrimination is the only explanation, continue to exist today. In addition, although for a brief period during the 1970's the District operated schools that both black and white students attended, the District reestablished segregated schools. When this action was filed, the District was operating two all-black elementary schools and a racially identifiable white school, where nearly all of the white students are enrolled. In addition, the District makes segregated

faculty and staff assignments that have specifically correlated with the racial identity of the elementary schools' student enrollment. In effect, the District has returned to the segregated system and dual system it previously operated.

As previously discussed the District has not taken affirmative steps to disestablish this dual system and because of its assignment policies, demographics cannot explain the segregation in schools. Moreover, the Court's findings on demographics during the 1970's are clearly erroneous. This opinion was based upon a comparison of the 1970 census district ED:27 (which was 38% black) and the 1980 census district 9906-1 (which was 82% black). (*Id.*; D.Ex. 553, 554). However, a simple side-by-side comparison of the census maps reveals that the geographical boundaries of these two census districts are dramatically dissimilar. (*Compare* D.Ex. 533 *with* D.Ex. 554). To make a proper comparison, the geographical boundaries of the census districts under consideration must be substantially the same. For the region surrounding Harper, this can be accomplished only by comparing the census districts ED:27, ED:28, ED:29 and ED:30 from the 1970 census, with census districts 9906-1 and 9906-2 from the 1980 census. (*Compare* D.Ex. 533 *with* D.Ex. 554). An examination of the population data for these census districts reveals that there was only a 7% increase in the black population around Harper between 1970 and 1980, hardly a sound basis for concluding that shifts in population were responsible for what was happening at Harper. (P.Ex. 165; Vol.X 97-98). Moreover, the demographic comparison performed by Dr. Armor upon which the Court relied focused on a time period that was not relevant. His data do not reveal the status of the African American population surrounding Harper in the critical time period in the early to mid-1970s. (Vol.X 99). Finally, the analysis failed to recognize that student attendance at Harper cannot be determined by the racial composition of any particular area, precisely

because the District insisted on maintaining "freedom of choice." Thus, there is no basis for the Court's conclusion, which is clearly erroneous. In any event, the District presented no evidence that it took any action in response to the changes in Harper's enrollment.

The Court also found the number of whites enrolled in the District declined substantially during the 1970's, while black enrollment remained stable. Order at 28. However, at the elementary schools, the percentage of Black enrollment increased by less than 9% between 1970 and 1974. (Vol.X 104; Pl.Ex.164). Moreover, the increase during this period was only 0.4% at Scott and 6.7% at Jerger, but the increase at Harper was 22.4%. *Id.* With no attendance zones, any loss of white students (which was low) would be loss from the District as a whole rather than a single school. The District presented no evidence to show why Harper was the only school significantly impacted, nor did it present evidence to show that it had attempted to prevent this, which it previously pledged and was obligated to do (Pl.Ex. 289; Vol.IV 85-86; Pl.Ex. 350). The District presented no evidence that student assignment was beyond its control, rather than a function of its decision-making. (Vol.IV 33-102). As discussed previously, the only evidence in regard to current demographics shows school age population has remained stable since 1990. Thus, the Court's findings are clearly erroneous.

It is uncontested in the record that the District refused to implement reasonably available measures other than freedom of choice regarding elementary student school assignments, despite the consistent ineffectiveness of that approach, OCR's continued insistence that other, more effective means would be necessary, and later suggestions at Task Force of a variety of available measures, such as lotteries or attendance zones. Similarly, it is uncontradicted that there is classroom segregation, identified by OCR and

repeatedly raised by various administrators, and that the District has refused to take available means to address it, for explicitly racial reasons ("white flight"). Moreover, it removed or refused to promote those who attempted change. In addition, the District has tolerated ineffective instruction, low expectations, and unequal resources, books and equipment at the black schools, although it has the authority and duty to correct these measures. In regard to faculty, the assignment/recruitment is controlled through the school board, Pl.Ex. 1243 at 4; Vol.IV 283, yet it has refused to exercise its authority to desegregate. Last, the District has known of misapplication of discipline since OCR noted it, and has been advised by administrators and consultants of the need for specific changes, but it has never taken action. Last, the District has operated racially discriminatory student activity practices since the 1970's, but has refused to abandon them. In all these respects, the District has failed to accept and carry out its affirmative duty to disestablish the vestiges of discrimination through reasonably available measures.

The District has consistently acted in bad faith towards its constitutional obligations. As discussed throughout, the District repeatedly resisted the efforts of OCR, even when funds were terminated. Moreover, when effective remedies have been proposed, including those by Task Force, it has refused to adopt them, and it has taken adverse action against employees who attempted remedies. Thus, the District has shown a consistent pattern of bad faith. Moreover, that bad faith is also demonstrated by the following discussion of intentional discrimination.

2. The Record of Admissions, Uncontradicted Statistical Evidence, and Direct and Circumstantial Evidence Establishes That the District's Actions Represent Intentional Discrimination.

The Court's conclusions of no intentional discrimination on the part of the District, insofar as they can be considered fact findings, are clearly erroneous because

they are not only *not* supported, but are *contradicted*, by the record. The failure to recognize evidence in the record represents errors in applying the law to the facts and render the Court's fact findings clearly erroneous.

a. Admissions.

The record presents at least three sources of admissions that race is a motivating and operational factor in current methods of assigning students to both schools and instruction. Although the Court referred to some of these sources, it inexplicably failed to acknowledge them in its fact findings.

First, the minutes of the Task Force was created to review and make recommendations on "inequities" and "inconsistencies" in the operation of the District, (Pl.Ex. 579, 592), and plainly indicate that alternative methods of student assignments—that would reduce segregation—were opposed by white members of the Task Force and school board and the administration to accommodate the white community. (Pl.Exs. 548, 550, 553, 575, 590). Expressed as "flight" or "white flight" or "white students . . . might go to private school," the minutes unambiguously demonstrate that race was a motivating basis for refusing to adopt those alternatives. (Pl.Ex. 575, 545). These admissions were elaborated upon in the testimony, to the effect that "the white members of the task force were uniformly in favor of maintaining the choice plan." Vol.I 121; Vol.X 242-43.

Second, the Superintendent's statements establish that existing methods of school and classroom assignments were maintained and would not be altered to serve the expressed and perceived interests of the white community. (Pl.Ex. 774 at 2; Vol.X 244-45; Vol.IX 197; Pl.Ex. 1253 at 155-57). Thus, admissions establish, for example, that segregative school assignments would not be altered due to "white flight," and that white

"levels" of math instruction would be preserved, even to the extent of approving the creation of separate, all-black Algebra classes. (Vol.II 237–46).

Third, in testimony elicited by the Court, an administrator admitted that "based solely upon [the] request" of "white parents saying they didn't want their children in the mostly black classes, [I've] moved them." (Vol.XI 86-87).

The Court inexplicably failed to acknowledge admissions directly proving the fundamental fact in the intentional discrimination inquiry—the motive and purpose of actions. This and the failure to appreciate the legal significance of this evidence, represents an unmistakable error in applying governing legal standards, and show that the Court's summary factual conclusions are clearly erroneous.

b. Uncontradicted Statistical Evidence.

Admissions of racial motive in student assignments were substantiated, and the effectiveness of the District's practices in effectuating that motive were demonstrated, through uncontradicted statistical analysis of assignments to separate and unequal "levels." This analysis proved that race, not achievement differences or poverty, accounted for students' grouping into segregated "levels," and that race, not poverty, was a strong predictor of achievement differences between black and white students. (Vol.VII 341; Vol.VIII 63)

Similarly, evidence establishing systematic discriminatory treatment of black students in administering discipline was corroborated by uncontradicted statistical analysis demonstrating that blacks were administered harsher discipline than whites for the same conduct, and that race, not poverty, explained disparities in discipline. (Vol.X 166-67)

This objective evidence, based on the District's own data, was not contradicted.

Indeed, the District proposed and was afforded the opportunity to call an expert witness for the stated purpose of rebutting these statistical analyses but, after his deposition, declined to do so. (Vol.XII 7-8)

The Court failed completely to take account of this uncontradicted statistical evidence, its significance in the intent inquiry and the clear inferences it creates in its fact finding. To the extent the Court recognized this evidence, it considered it only as "sufficient evidence of racial imbalances in certain classes to require the District to rebut the presumption that those imbalances are traceable to the District's previous *de jure* segregated system," or in "[a]ssuming but not deciding that a statistically greater percentage of black students have been subjected to disciplinary action," immediately before deciding, in the next phrase, that "the Court finds that the District does not treat black students differently from white students with respect to discipline." Order at 33, 45.

The Court plainly ignored the specific evidentiary value of this uncontradicted statistical analysis in explaining the importance and role of race in decisions regarding the placement of students into separate "levels" of instruction compared to other objective factors, including achievement and poverty. Instead, the Court based its summary conclusions on a general correlation between race and poverty and unsubstiantiated conjecture, directly contradicted by the District's own data, that poverty, not race, caused the systemic placement of black students substantially into non-academic instruction.

Specifically, the Court found: "Regrettably, a disproportionate number of low income children (most of whom happen to be black) are placed in the lower ability groups. The Court finds that these placements are not being made due to the race of the

student." Order at 34. The Court went on to explain its basis for that conclusion. "When the racial makeup of a community correlates directly with poverty and when poverty correlates with perceived academic readiness, as it does in Thomasville, this 'ability tracking' inevitably leads to ability groups that are racially imbalanced." Order at 35-36. The record evidence demonstrates that this conclusion is unquestionably in error.

First, statistical analysis demonstrates that among students with comparable achievement scores, black students are systematically placed in lower levels. (Vol.VIII 348-49; Pl. Ex. 1212). The data show a consistent patterns of such racial disparities across subjects and years.

Second, statistical analysis demonstrates that race, not poverty, explains the pattern of racially disparate assignments. For example, in 1997-98 7th Grade Language Arts assignments, of all students eligible for free and reduced lunches (low-income students), 82% of black students were assigned to the lowest two levels of instruction, compared to only 9% of white students, and of students not eligible for lunch programs, only 40% of black students were assigned to the highest level of instruction, compared to 98% of white students. (Vol.VIII 64-65; Pl. Ex. 1215). Thus, enormous racial disparities persist within socio-economic groups, and low-income white students are placed in the highest level of instruction at more than twice the rate of middle class black students.

Third, regression analyses demonstrate that race and factors affected by racial bias, such as level assignments and achievement differentials related to level assignment, are more powerful and persistent explanations of the achievement differences between black and white students than poverty. (Vol.VIII 29-33; Pl. Ex. 1213)

Thus, the Court erroneously speculated that perceptions regarding poor students caused racial disparities in level assignments. Yet the Court ignored objective,

uncontradicted, and highly probative evidence of discrimination and inexplicably refused to make findings on the question whether perceptions based on race were responsible for those assignments, but nevertheless concluded that racial discrimination was not a cause. "The Court makes no finding as to whether some placements may be affected by the subtle racism of low expectations. However, the Court does find that intentional racial discrimination is not the reason for placement decisions." Order at 34n. 21. The unequivocal, uncontradicted, objective evidence demonstrating the strong and persistent influence of race, and not poverty, in level assignments, together with other evidence by administrators, parents and students, of the District's low expectations for even highly capable black students, (e.g. Vol.II 201, 206-07, 222-23; Pl. Ex. 658) demonstrate that the Court's speculative conclusion regarding poverty, and its unsupported conclusion regarding race, are directly contradicted by the record and clearly erroneous, as well as an erroneous application of the law to the facts.

c. Direct evidence.

In addition, the record is replete with direct evidence that the District acts with a racially discriminatory motive. This evidence includes the testimony of administrators and teachers who spoke to systematic discrimination in the structure, criteria and assignment of students to instruction, discipline, activities and school enrollments, among others. These witnesses also established that they informed District officials of these intentionally discriminatory practices but were silenced through removal. For example, Vol.II 166; Vol.II 81-84,141-45.

Further, the Court fails to acknowledge that, although the District contended that it operates a "free choice" plan of school assignments, in 2002, when it closed the all-black Douglass Elementary, none of those students were afforded any choice at all.

(Vol.I 248-49). The reassignment of black students *en masse* was accompanied by transportation *only* to the other all-black school. Yet the Court ignores these undisputed facts in concluding that the District makes school assignments on the basis of parental preferences and choice. Order at 32. With respect to transportation, the Court fails even to recognize that transportation is provided on a segregated basis, and completely fails to grasp the obvious discrimination in providing only Black students transportation only to another all-Black school, in concluding that "[s]ince no white students receive transportation services from the District and some black students do, the Court finds the District does not discriminate against blacks on the basis of race with respect to transportation." Order at 48.

The Court does not mention, let alone consider or analyze any of this evidence in connection with its determination of intentional discrimination. Yet the careful consideration of just this type of evidence is central to the "sensitive inquiry" that *Arlington Heights* and other precedent require. Again, ignoring this uncontradicted evidence constitutes not only legal error, but renders the Court's summary conclusions of no intentional discrimination clearly erroneous.

d. Circumstantial Evidence.

The Court similarly fails to acknowledge or discuss overwhelming circumstantial evidence of intentional discrimination in the record. As set for the in the Statement of Facts, there is more circumstantial evidence in the record than can meaningfully be discussed and properly analyzed within the confines of this brief. For the purpose of this argument and to illustrate the legal and factual error in the Court's conclusions it can only be said here that an examination of the record reveals that there is a very substantial amount of circumstantial evidence of intentional discrimination to which the Court does

not even allude, let alone analyze, either in connection with the evidence of intentional discrimination discussed above, or independently, in reaching its summary conclusions of no intentional discrimination.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

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Respectfully submitted,

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