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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS AND CROSS APPELLEES

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ARGUMENT

I. THE COURT ERRED IN FAILING TO APPLY ESTABLISHED PRECEDENT IN ASSESSING WHETHER THE DISTRICT'S ACTIONS VIOLATE CONSTITUTIONAL STANDARDS.

A. The Court Erred In Failing To Determine Unitary Status.

As Plaintiffs previously demonstrated, the Court erred in failing to determine whether the District ever obtained unitary status. The District incorrectly contends that the Court was not required to make this determination. Dist.Br. 32-35.

The District principally argues that a school district should be placed under a desegregation order only if a current constitutional violation or present effects of a past constitutional violation exist. Dist.Br. 33-35. It is, however, undisputed that the District operated an unconstitutional *de jure* system. Thus, the question is whether the District eliminated that constitutional violation by becoming unitary, which can be established only by the District fulfilling its affirmative duty to eliminate the vestiges of segregation to the extent practicable and adopting desegregation in good faith. *Freeman v. Pitts*, 503 U.S. 467, 485, 491 (1992).

The District's assertion that unitary status is an issue only in cases in which a school district has been placed under a desegregation order is erroneous. The objective of school desegregation, whether by court order or voluntary action, has always been to establish unitary, rather than dual, schools. In *Brown v. Board of Education*, 349 U.S. 294, 299, 301 (1955) (*Brown II*), the Court held that "the primary responsibility" to "effectuate a transition to a racially nondiscriminatory

school system" is required of school districts, not courts. *See also Green v. County Sch. Bd.*, 391 U.S. 430, 435 (1968) (quoting *Brown II*, 349 U.S. at 301). Yet, until a formerly "*dual* school" system becomes a "unitary" system, "the Supreme Court has ordered district courts to supervise the desegregation efforts of school boards." *Jacksonville Branch, NAACP v. Duval County*, 273 F.3d 960, 965 (11th Cir. 2001). The Court has never made, nor suggested, an exception to this rule for schools that were operating dual systems but which had not been subject to a lawsuit and a court ordered desegregation plan. All dual school systems are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system." *Id.* at 437-38, 442; *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1, 28 (1971).

B. The Court Erred In Failing To Apply The Presumption To The Facts.

1. The presumption applied to the District.

Given school districts' continuing duty to eliminate dual systems, courts apply the presumption of a constitutional violation to present racial disparities in previously segregated districts until a district court officially *declares* that the district has achieved unitary status. *Swann*, 402 U.S. at 26; *Manning v. School Bd. of Hillsborough*, 244 F.3d 927, 942 (11th Cir. 2001). No legal holding supports the District's suggestion that this presumption is no longer applicable due to the passage of time. Dist.Br. 35-41. The Supreme Court has found that a system with

a "history of segregation" can "creat[e] a natural environment for the growth of further segregation," *Keyes v. School Dist.*, 413 U.S. 189, 211 (1973). Thus, "if the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continue to exist today, the fact of remoteness in time certainly does not make those actions any less 'intentional'" and such segregative results any more constitutional. *Keyes*, 413 U.S. at 210-211. The District also argues that the presumption applies only to the particular school boards or individuals that engaged in discrimination. Dist.Br. 37. The District misreads *Keyes,* in which the Court—assessing a school district that never had a statutory dual system—determined whether to apply the presumption of intentional discrimination in one area of the district to segregation in other areas. 413 U.S. at 191-93, 198, 201, 207-08. The Court found a presumption to apply in those circumstances, but did not address the presumption arising in districts with a "history of segregation," nor vitiate the presumption applicable in those distinct circumstances. *Id.* at 207-09. *See also id*. at 211 (connection between past and present segregation exists "even when not apparent").

The District's reliance on *Georgia Branches of NAACP v. Georgia ("NAACP")*, 775 F.2d 1403 (11th Cir. 1985), is similarly misplaced, as this Court did not purport to announce a rule of general applicability, but only found that, in the specific context of the claims in that case, another rule that did not require

proof of intentional discrimination was inapplicable. *Id*. at 1415-16; *see also infra note* 2.[1] In short, the continued vitality of the presumption repeatedly has been affirmed by the Supreme Court and this Court after the decision in *NAACP* and *Freeman*. *See, e.g., Jacksonville*, 273 F.3d at 966; *Manning*, 244 F.3d at 942; *Lockett v. Board of Educ.*, 111 F.3d 839, 843 (11th Cir. 1997).

2. The Court did not properly apply the presumption.

The District does not deny that the District Court expressed consistent hostility to the presumption and failed to apply the standards identified in Plaintiffs' initial brief, but attempts to defend the Court's failure by claiming that the factors it did not consider are relevant only to the "issue of whether a desegregation decree should be dissolved." Dist.Br. 52. The District misses the purpose of the presumption: to ensure that current imbalances are not the product of *de jure* segregation or its present effects. *See, e.g., Jacksonville*, 273 F.3d at 966; *Manning*, 244 F.3d at 942. That the standards for applying the presumption have been articulated in cases addressing court supervision does not make them any less applicable here, as the presumption applies to ensure that the dual system has been eliminated.

[1] Also, the District incorrectly attempts to rely on Justice Scalia's concurrence in *Freeman.* The Court in *Freeman* applied the presumption. The concurrence suggested only that a time would come when it would not apply. 503 U.S. at 494, 507.

The law requires that a school district disprove traceability by proving that in "good faith" it has taken "every reasonable effort . . . to eradicate segregation and its insidious residue," *Jacksonville*, 273 F.3d at 973, *Bd. Of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991). This is necessary to prove that the presumed causal connection has been broken, *Johnson v. Bush*, 353 F.3d 1287, 1298-1300 (11th Cir. 2003), to ensure that its actions or inaction have not created or contributed to the current imbalances, *Keyes*, 413 U.S. at 211, or, in the alternative, that in spite of action sufficient to break the chain, some independent force beyond its control overtook its actions and is the substantial cause of current imbalances. *Lockett*, 111 F.3d at 843; *Jacksonville*, 273 F.3d at 966. Such proof, as discussed in Plaintiffs' initial brief, is what has been required from every district that, according to this Court, has overcome the presumption. Pl.Br. 23-25. The District Court's hostility toward the presumption resulted in its failure to make the appropriate inquiries and to require the District to produce evidence to carry its burden.

C. The Court Failed To Apply Precedent Regarding Classroom and Curriculum Segregation.

Plaintiffs' opening brief demonstrated that the District has continued segregated and unequal instruction through classroom assignments, and that the District Court failed to apply proper legal standards to those facts. The District admits that the Court did not apply the legal standards of *McNeal v. Tate County School District*, 508 F.2d 1017 (5th Cir. 1975), Dist.Br. 55, but attempts to sidestep

that error by arguing, first, that the Court was not required to scrutinize segregative practices with the "punctilious care" indicated in *McNeal*, and, second, that the Court's unsupported conclusion that no racial imbalances were traceable to the dual system satisfies one of the *McNeal* standards. Dist.Br. 53-55. Both arguments are without merit.

First, the District can cite no authority for, or even define, a watered-down version of the "punctilious" inquiry explicitly required by *McNeal.* Nor does *NAACP* fill this void. *NAACP* held that it was proper to apply the *McNeal* standards, and its discussion of whether current students attended dual schools did not suggest a lesser standard of scrutiny under *McNeal. NAACP*, 775 F.2d at 1415-16.

Second, the District Court's conclusion that no imbalances in the District are traceable to the dual system addresses a distinct legal issue, discussed below, and cannot substitute for the scrutiny and specific standards in *McNeal.* Simply reading the Court's opinion confirms that it did not apply *McNeal*, explicitly or implicitly, and its findings, together with undisputed evidence, demonstrate that the District's assignment practices fail those standards.

In sharp contrast to the findings in *NAACP* that "ability grouping as practiced by [the] defendants . . . is designed to remedy the past results of past segregation through better educational opportunity for the present generation of

black students," and that "low achieving students are being successfully remediated," *id*. at 1415, here the District Court found that the predominately black students assigned to the lowest Levels "are simply perceived as not being prepared when they first arrive at school." The Court concluded that "[t]ragically, it appears that for many of these children, the 'die is cast' as early as kindergarten," and that, "[u]nfortunately, if a child is 'tracked' in a lower level in elementary school … 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 34, 35. Finally, the Court found that "the promise of *Brown*--a promise of educational opportunity for every American … has not been fulfilled for many children who find themselves trapped in an educational system that cannot meet their needs," and that "the record in this case establishes that many poor black children in Thomasville, Georgia are not receiving . . . an adequate education." *Id*. at 54-55. The District clearly fails the *McNeal* standard requiring that its practices "remedy [the] results [of past segregation] through better educational opportunities." *NAACP*, 775 F.2d at 1414 (quoting *McNeal*, 508 F.2d at 1020).

Nor can the District's practices satisfy *McNeal's* proscription that they do "not result in perpetuating the effects of past discrimination." *McNeal*, 508 F.2d at 1020. Dist.Br. 53. The District has preserved the central evil of its dual system—

segregated and unequal instruction—and has perpetuated the effects of that system. "[B]lack children … are not receiving … an adequate education." Order 55. While students "ability grouped" due to their attendance at dual schools was one manner of perpetuation recognized in *McNeal* and discussed in *NAACP*, *McNeal*, and cases it drew upon, also recognized other means by which dual schooling is perpetuated. For example, *McNeal* expressly relied upon *Moses v. Washington Parish School Board*, 456 F.2d 1285 (5th Cir. 1972), which affirmed a holding that the same conditions produced by this District's practices were unconstitutional. "The result was lower sections which were all-black. The district court found this ability grouping to be violative of equal protection particularly in the slower sections which, in an ironic sort of self-fulfilling prophecy, were taught less and learned less." *Id*. Thus, *McNeal* explicitly recognized the perpetuation of dual schooling in classroom assignments that substantially afford black students unequal and inadequate instruction, circumstances not present in *NAACP*. And *McNeal* stated a corresponding standard that classroom assignment methods "should be approved by the district court unless its effect is racial segregation or is *substantially adverse to the quality of education available to some of the district's children*." *McNeal*, 508 F.2d at 1020 (emphasis added). The District's practices plainly fail these standards.[2]

[2] The District argues that the District Court erred in applying the presumption to

D. The Court Erred In Failing To Apply Intentional Discrimination Standards.

In addressing the Court's failure to identify or apply the intent standard, the District asserts Fed.R.Civ.P. 52(a) only requires the Court to "state separately its conclusions of law." Dist.Br. 56. This argument violates the axiomatic principle that courts must state the law they are applying to permit appellate courts to evaluate their judgments for legal error. Rule 52 does not shield courts from legal error review, but requires them to "aid the appellate court by affording it a clear understanding of the ground or basis of [its] decision." *Golf City v. Wilson*

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its classroom assignments, citing *NAACP*. Dist.Br. 38-39. *NAACP's* presumption ruling has no application here. The *NAACP* plaintiffs challenged "ability grouping" systems and did not argue that the presumption "applie[d] directly to the current ability grouping practices." *NAACP*, 775 F.2d at 1415. They instead sought presumed current intent from past acts, which would result in a *per se* bar on any ability grouping that produced racial disproportions. *Id.* at 1412, 1415. This Court decided that those claims properly were decided under the *McNeal* standards that address "ability grouping" without requiring proof of intentional discrimination, and that the *Keyes* presumption did not apply. *Id*. at 1414-16, n.13. Here, Plaintiffs challenge the conditions of segregated and unequal instruction in the District as perpetuating that central feature of the dual system, not an "ability grouping" system. *See* Complaint. The District has an affirmative duty to disestablish those conditions and the presumption applies to those conditions without respect to the prior circumstances of particular students. *See Freeman*, 503 U.S. at 492-93. It is the District that seeks to defend its practices as "ability grouping," notwithstanding that no such system is described to its parents or students or in its written policies or school handbooks, Pl.Ex. 877 at 11-13; Vol.VII 336; Vol.XI 110-15, and its assignments do not group students by "ability." Vol.VII 353-56. The District's mis-characterization cannot deny Plaintiffs the presumption that applies to the current conditions of separate and unequal schooling preserved from the dual system.

Sporting Goods, 555 F.2d 426, 433 (5th Cir. 1977). "[T]he findings and conclusions we review must be expressed with sufficient particularity to allow us to determine rather than speculate that the law has been correctly applied." *Id.*; *Johnson v. Hamrick*, 196 F.3d 1216, 1219 (11th Cir. 1999); *Jefferies v. Harris County*, 615 F.2d 1025, 1032 (5th Cir. 1980) (Rule 52(a) requires discrimination claim to be evaluated under legal framework). Here, the District Court utterly failed to identify the legal standard it purported to apply.

The District does not deny that the Court failed to do so. Rather, the District attempts to avoid this error by arguing that Plaintiffs are asking this Court to reweigh the evidence. Dist.Br. 56. However, this Circuit's precedent provides that findings are to be set aside if they were induced by an erroneous view of the law. *Media Servs. v. Bay Cities*, 237 F.3d 1326, 1330 (11th Cir. 2001); *Blum v. Great Lakes Carbon*, 418 F.2d 283, 287 (5th Cir. 1969). When "factual and legal conclusions . . . reflect the application of an improper legal standard, these conclusions are not insulated by the 'clearly erroneous' standard." *Martinez v. Dixie Carriers*, 529 F.2d 457, 469 (5th Cir. 1976). Extensive undisputed evidence warrants a finding of intentional discrimination under the appropriate legal standard, not through reweighing the evidence, but merely by applying the law to the evidence.

II. THE COURT FAILED PROPERLY TO APPLY PRECEDENT IN EVALUATING THE DISTRICT'S PRACTICES, AND ITS CONCLUSIONS ARE NOT SUPPORTED BY THE EVIDENCE AND ARE CLEARLY ERRONEOUS.

A. Student And Faculty Assignments.

There is no dispute that segregated elementary schools were a feature of the District's dual system, and that "Harper and Jerger are currently racially identifiable schools." Order 26. Given the District's dual system, the Court was bound to find a constitutional violation unless it concluded that the District had, at some point, achieved unitary status. The District's brief agrees that the Court made no finding that it ever achieved unitary status, Dist.Br. 34, does not contend that it took all practicable steps to desegregate its schools, *id.* 51-54 , and offers no factual basis to support the Court's conclusions that it disproved "traceability," or that its current student and faculty assignments are not intentionally discriminatory. Thus, even if the Court had correctly applied the law, the record does not support a conclusion that the District eliminated the dual system by achieving unitary status.

The District agrees that if the presumption applied, it needed to prove that "its past segregative acts did not create or contribute to the current segregated condition of the … schools" to rebut that presumption. Dist.Br. 42 (quoting *Keyes*, 413 U.S. at 211). In determining whether the District met its burden, the Court should have considered whether the District had taken "all practicable steps" to disestablish the dual system, or whether its actions "create[d] or contribute[d] to

the current segregated conditions." *Id.* The Court did not make those determinations. At most, the Court found that in the early 70's the District's elementary schools were within 20% of the percentage of black students in those grades and that in November 1975, OCR conditionally found the District in compliance with Title VI with respect to student and faculty assignments. Order 27-28, 31. The District's brief adds nothing more. Dist.Br. 46-49.

The Court's conclusion and the District's arguments do not satisfy the legal standard. First, the Supreme Court, in *Swann*, 402 U.S. 25, made clear that mathematical ratios are only a *starting point* in determining whether schools are racially identifiable, yet the Court relied solely on a numerical ratio in determining racial identifiability. Moreover, it considered student and faculty assignment separately and for different periods, and failed to consider OCR's citations for student, faculty and classroom segregation and discriminatory discipline from 1970 to 1975. Pl.Exs. 294, 310, 333.

Second, the Court's reliance on the November 1975 OCR letter that the District was then in compliance is misplaced. Although that letter represents the *first* occasion on which OCR found the District in compliance, the Court erroneously treats it as a pronouncement that the District had been in compliance since 1970, and mistakenly credits the District with having effectively desegregated prior to November 1975. The OCR record is quite to the contrary.

As noted above, from 1970-1975, OCR cited the District for racially identifiable student, faculty and classroom assignments and discipline, including a July 1975 finding, four months before the November letter, that student and faculty assignment disparities made Harper a racially identifiable black school. Pl.Ex. 333. Only after the District promised to make changes in student and faculty assignments did OCR send the November 1975 letter. In that letter, OCR stated *for the first time in the history of the District* that, given the District's promises and representations, the District was in compliance with the law. That statement, however, was clearly conditional: "*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). Thus, the reliance of both the Court and the District on the November 1975 OCR letter as evidence of retrospective compliance is clearly wrong, as it required implementation of changes to eliminate existing racial identifiability and set goals that had to be achieved prospectively.

Third, the Court and the District both completely ignore the District's abysmal failure to achieve the results it promised OCR—to stabilize the population at Harper *after* November 1975. Indeed, both parties' expert witnesses testified that for effective desegregation, assignments that eliminate the racial identifiability of schools must remain stable and in place for a minimum of five years. Vol.IV

106-07, 161; Vol.X 25. The five year clock that began running in the fall of 1975 did not advance far. The District's expert conceded that the racial composition at Harper "did not stabilize" after 1975, Vol.X 83, 85, and the very exhibit upon which the Court relied to support its conclusion establishes that Harper was only barely in compliance with the Court's ratio during 1975 and became racially identifiable the very next year and every year since. Pl.Ex. 164; *see* Order 28. In 1975-76, Harper's percentage of black students was only 0.6% below the 20% ratio the Court used; its black enrollment exceeded that ratio in 1976-77 and continued to increase thereafter until it became a 100% black school. Record Excerpt G. At this same time, the percentage of white students at Jerger continued to climb, quickly resulting in the reestablishment of segregated schools. *Id.*; Vol.IV 111-12.

The District proffered no evidence and its brief does not suggest that it ever made desegregative assignments after 1975, and the Court found that it took no action thereafter in the face of the increasingly racially identifiable elementary schools. Order 31. The Court erred because it failed to recognize that the District's critical failure to act *after* November 1975 resulted in segregated elementary schools, and that District actions and failures to act—detailed in Plaintiffs' opening brief—"caused or contributed to the current conditions of segregation."

The presumption also can be overcome, and the burden of disproving traceability can be carried, by evidence proving that current segregation resulted from matters beyond a district's control; that is, that a district's efforts were overwhelmed by outside factors that were the "substantial cause" of current segregation. The Court's findings, Order 33, and the District's argument, Dist.Br. 49, relying on demographic change are erroneous. First, the District's claim, premised *only* on demographic change, must fail. 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 did not find, nor does the District argue, that demographic change was the "substantial" cause of racially segregated enrollment. Nor did the Court find that the racial segregation of the schools was "beyond the control of the district." The District does not argue otherwise, nor could it. Enrollment is not determined by geography, demographics or attendance zones[3]—as in this Circuit's cases finding demographic change to have rebutted the presumption—but by choices under the District's absolute control.[4] Indeed, the

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[3] The census map of the District, in fact, reveals that it is remarkably small and that its elementary schools are either under or approximately one mile from each other. Record Excerpt F.

[4] Nor can demographics be held to substantially cause racially identifiable schools when the population surrounding Jerger is only 29% white, yet Jerger's enrollment is over 60% white, Pl.Ex. 1216, 1187a, and the District assigns

District refused OCR's directions to adopt attendance zones, retaining unconstrained authority to make school assignments. It promised OCR it would use that authority to eliminate racially identifiable schools in connection with the November 1975 OCR letter, but refused to do so. Thus, it is not demographics, but assignment decisions within the District's control, that have resulted in racially segregated schools.

Second, the District's brief does not dispute that the premise for the Court's demographic change finding is based on a factual error in the testimony of the District's expert. Specifically, relying on the District's expert, the District Court compared apples to oranges in erroneously finding that the area around Harper went from 38% black in 1970 to 82% black in 1980. Had the Court compared actually equivalent areas, it would have found that there was only a 7% increase between 1970 and 1980, the period in which the District blamed demographics for its failures to act. Pl.Br. 40-41.

Finally, the evidence not only contradicts the Court's conclusion that the District rebutted the presumption, but demonstrates current intentional discrimination. The evidence for intentional racial segregation includes: first, the mandatory reassignment of the all-black Douglass student body to the all-black

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substantial numbers of white children from outside the city to Jerger. Stipulation, Dec. 17, 2003.

Harper school, Vol.IV 211, 219; second, the purposeful reservation of seats and assignment of white students from outside the City to the identifiably white Jerger school, Vol.VII 224-25; Vol.X 274; Pl.Ex. 1243 at 37; Vol.I 79-87; and, third, decades of systematically segregated elementary student assignments unconstrained by published, measurable or explainable criteria, Vol.VII 178-79, 192-93; Vol.X 252-55; Record Expert G, and matched by segregative faculty and administrator assignments. Pl.Ex. 164.

The Court failed to address these uncontested facts. Moreover, the District's brief makes no response to this evidence, and cannot explain or justify the highly segregated result of its unconstrained student, faculty and principal assignment decisions. Dist.Br. 21-22, 44, 56-58.

B. Classroom Assignments and Curriculum.

The record unambiguously establishes that segregated and unequal classroom instruction has been a feature of the District from the dual system to the present, and that current classroom segregation is, therefore, clearly "traceable" to the dual system. Although in 1970 the District grudgingly adopted a desegregation plan for building enrollments, it never adopted a plan to desegregate classroom instruction within those buildings. Dist.Br. 25-27. Indeed, OCR cited the District for operating racially "isolated" classrooms and courses of instruction. Pl.Ex. 294. The OCR record reveals that this practice continued. Pl.Ex. 300 at 2308, 2312,

2314, 2317; Pl.Ex. 314 at 2302-04, 2396-97; Vol.IV 135-41. The District presented no evidence that it ever took action to disestablish this practice. In fact, a variety of evidence demonstrates that the District continued to segregate students into separate classrooms and provide unequal instruction. Vol.XI 86-87, 93-94, 102-03; D.Ex. 850-57; Pl.Ex. 1263 at 43, 47; Vol.III 37-40; Vol.X 244-45; Pl.Ex. 774 at 2. The District repeatedly resisted all proposals from its administrators to disestablish these "unfair," "discriminatory" and "unlawful" practices, going so far as to remove those who suggested it. Vol.II 54-58, 207, 249, 253-54, 265; Pl.Ex. 663. The District produced no evidence to rebut this proof, nor does it argue that it has ever terminated segregated and unequal instruction. Dist.Br. 25-27, 53-55.

The Court properly recognized that current segregation in a formerly dual system is presumed to be the result of the dual system and that the District had the burden of establishing the contrary. However, the Court erred, first, in failing to begin its analysis of the facts under the assumption that current segregation is causally related to the dual system, Order 33, the functional purpose of the presumption. Second, it failed to undertake *any* analysis of the facts regarding the "traceability" of classroom segregation to the dual system, and of the District's practices that produce those conditions. Third, the Court did not identify or discuss *any* evidence to support its bare conclusion that the District rebutted the presumption of a causal relationship. *Id.* Nor could it have, as the District

presented no evidence that it eliminated its practices of segregating students for unequal instruction or that any such efforts were overwhelmed by factors beyond its control. Indeed, the District's brief does not even mention classroom assignments in its discussion of the bases on which it allegedly rebutted the presumption. Dist.Br. 42-52.

As a result of these errors, the Court reached a conclusion contrary to the facts and without ever making the inquiries required by law. Thus, it rendered the applicable legal standard and the associated presumption and burden nullities. Application of the proper legal standard to this record demonstrates that current classroom segregation is traceable to the dual system through continuous practices producing results that perpetuate the central evil of the dual system--a segregated and unequal education for black students--with or without application of the presumption and burden of proof.

The record also establishes that the District's classroom practices are intentional and purposeful devices to perpetuate segregation and inequality. The Court's failure to consider this evidence represents not only a failure to appreciate and apply the standard for determining intentional discrimination, but further establishes the Court erred as a matter of law in concluding that the District rebutted the presumption.

That the District intentionally segregates students for unequal instruction has been conclusively established. First, District administrators admitted that they assign students to classes on the basis of race so that white children are not enrolled in classes with substantial numbers of black students. For example, the Superintendent refused to allow a building principal to disestablish the practice of assigning predominately white students to advanced classes because "of the possibility that white parents would pull their children out of the system." Vol.X 245; Pl.Ex. 774 at 2; Pl.Ex. 1252 at 88-89; Vol.II 253; Pl.Ex. 1253 at 155-56.[5] Similarly, a building administrator admitted that she reassigned white students to avoid their being in predominately black classrooms. Vol.XI 86-87.

Second, statistical analysis of District data demonstrates that both the District's purported explanation of, and justification for, its placement practices are false, and that there is systemic racial bias in the placement of black students into lower levels that cannot be explained by achievement or socio-economic status. Although the District claims to place students into four separate levels according to achievement quartiles, purportedly to group students of like performance, Dist.Br. 26-27, the District's data show otherwise. First, student achievement scores largely do not correspond with their Level placement. Above-average black

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5 That these practices are not based on educational considerations is made shamefully clear by the Superintendent's willingness to permit black students to enroll in the advanced classes if they were in a separate classroom. Vol.II 246.

students are placed in the lowest Level, Pl.Ex. 1212, table 15, and well-below-average white students are placed in the highest Level. Pl.Ex. 1212, table 17. Second, each Level is composed of students with wide-ranging achievement scores.[6] Vol.VIII 53-54; Pl. Ex. 1212. This is "heterogeneous" grouping, not the "homogeneous" grouping the District claims to create. Third, measured by both achievement scores and prior Level placement, black students are systematically assigned to lower Levels than comparable white students.[7] Vol.VII 339-41; Pl. Ex. 1211.

Contrary to the simplistic analysis of the District Court, Order 34, socio-economic status cannot explain the racial bias in placement, as 91% of poor white students were placed into the highest Level, compared to only 18% of poor black students, and 98% of non-poor white students were placed in the highest Level, compared to only 40% of non-poor black students. Vol.VIII 62-66; Pl.Ex. 1215. In short, the evidence demonstrates that the District does not place students or compose Levels to create groups of similarly performing students, but consistently

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6 For example, students scoring from the 3rd to 10th decile were placed in the highest Level; students scoring from the 1st to 6th decile were placed in the lowest Level; and students scoring from nine of the ten deciles were placed in the two middle Levels. Vol.VIII 53-54; Pl. Ex. 1212.

7 For example, 64% of black students scoring between the 51st and 60th percentile were placed in the lowest two Levels while 84% of white students with the same scores were assigned to the highest two Levels. Pl.Ex. 1212, table 15.

places black students in lower Levels than whites with comparable achievement scores, prior placements and socio-economic status.

The evidence further demonstrates that these placement practices substantially harm black students' achievement and life opportunities. The data show a substantial difference in achievement between black and white students that cannot be explained by differences in socio-economic status or poverty. Vol.VIII 28-33; Pl.Ex. 1213. Rather, the racial disparity is substantially explained by the "mechanisms of level placement and prior learning." Vol.VIII 41-46, 60-61; Pl.Ex. 1213. The District's racially biased placements lead to increased scores for whites and lowered scores for blacks, Vol.VIII 33-40; Pl.Ex. 1213, and expose black students to lowered "quality," "pace," and "coherence" of instruction and "expectations." Vol.VIII 45-46. Because placement in higher Levels is necessary to qualify for college preparatory diplomas, these practices also deny black students access to higher education: in 2000-01, 95% of whites graduated with such diplomas, but only 53% of blacks did so. Vol.VIII 66, 72-74; Pl.Ex. 1238.

The District's brief does not offer specific evidence rebutting Plaintiffs' proof that the District's placement practices are discriminatory and irrational. Instead, it argues only that "[t]he opinions given by Dr. Goldring and Dr. Berends were entirely unreliable." Dist.Br. 58. The District's criticisms, however, relate to minor typographical and photocopying errors that affected a few exhibits. *See,*

e.g., Vol.VII 248-50, 256, 289-90;Vol.VIII 188-90. Moreover, the minor discrepancies in individual exhibits had no impact on any other exhibit or any analysis, Vol.VIII 85, 193-94, because for, each analysis they conducted, the experts drew and filtered the data directly from the original data received from the District. Vol.VIII 81-82, 83, 193-94, 196. Contrary to the District's contentions, on re-direct Plaintiffs' statisticians answered all of the questions raised and reconfirmed the accuracy of the data, exhibits and analyses and assured the Court of confidence in their conclusions regarding the racial segregation within the District's schools. Vol.VII 250, 256, 258; Vol.VIII 187. Therefore, as Dr. Berends testified, Plaintiffs' experts remained "fully confident" of their analysis and conclusions. Vol.VIII 86.

The District also erroneously claims that the District Court agreed with its evidence rather than Plaintiffs'. The Court made findings directly corresponding with Plaintiffs' statistical analysis and testimony, concluding that the District's classrooms are racially imbalanced, that the District's grouping practices cause the imbalances, that the grouping begins and the "die is cast" as early as kindergarten, and that "[t]he inevitable result" is that a disproportionate number of black students "remain on the 'lower ability' track for the duration of their educational careers." Order 33, 34.

The Court's failure to recognize the salience of this statistical evidence, and other evidence regarding the District's classroom segregation, and to act on this evidence by making appropriate findings, cannot be explained in light of the legal standards the Court was bound to apply. The Court's failure to consider this uncontradicted evidence, both in assessing whether the District carried its burden of proof in overcoming the presumption, as well as in determining whether the District is engaged in present intentional discrimination, constitute errors of law. Moreover, the Court's failure to account for this uncontradicted evidence demonstrates that its conclusions are not supported by the evidence and, to the extent they represent findings, are clearly erroneous.

C. Discipline.

Undisputed expert analysis showed significant current racial disparities in the District's discipline practices. Vol.X 130-33, 135-37; Pl.Ex. 1190o, 1258, 1190f, 1259. Unequal treatment of blacks is the hallmark of a *de jure* system, and immediately after the District's purported desegregation plan, OCR cited the District for discriminatory discipline. Pl.Ex. 310; Vol.IV 88.

The District presented no evidence that it ever responded to OCR's citation or otherwise took steps to ensure that black students were treated fairly, Vol.IV 88, or that current disparities are the result of factors beyond its control. The District's sole response is the testimony of two administrators who stated that they were

personally unaware of discriminatory treatment at the high school, or the middle school (in regard to suspensions during a single year). Vol.XI 173-75; Vol.XII 108. This does not purport to explain the disparities, address District action that would break the causal chain, or establish that factors beyond its control overwhelmed any efforts to eliminate the disparities. Thus, the District did not rebut the presumption that the current imbalances are a result of past or present discrimination.

Plaintiffs, however, did not rest their case on the presumption. Rather, Plaintiffs presented evidence of intentional discrimination in discipline against black students. Unrebutted testimony by teachers and students demonstrated disparate discipline of black students who engage in the same conduct as whites. Vol.VIII 219-22, 254-55; Vol.V 34-41; Vol.III 227-29, 282-83, 291-92; Vol.II 81-84. This discrimination occurs through delegation of wide discretion to staff without training or established standards for the appropriate exercise of that discretion, notwithstanding admissions of inappropriate discipline and recommendations that both were needed. Vol.VIII 318-25, 333-43, 346-47; Vol.XI 146-47; Pl.Ex. 131; Pl. Ex. 1197 at 9. Plaintiffs finally presented unrebutted statistical analysis showing that socioeconomic status does not explain the racial disparities and that no explanation other than race exists. Vol.X 166-67. This evidence clearly exceeds the legal standard of intentional discrimination.

D. Student Activities.

The undisputed evidence establishes current racial imbalances in, Pl.Ex. 1190a, b, c, d; Vol.V 66-67, and racially exclusive student activities or events, Vol.III 292, racially disparate treatment, Vol.VIII 249; Vol.III 208-15, and the explicit use of race in certain activities, Vol.V 59-61, Vol.III 287-89. These racial inequities continue features of "the de jure system, [where] black students were separated from white students with respect to extracurricular activities." Dist.Br. 46. Indeed, the evidence traces these practices all the way back to that system. Vol.V 59-62; Pl.Ex. 1190d.

The District is unable to rebut this evidence or the presumption with anything more than the bald statement that "all activities are available to all students without regard to race." Dist.Br. 46. This response does not purport to establish a break in the causal chain or explain the disparities.

Moreover, Plaintiffs did not rest on the presumption, but rather, through the above evidence and more, established current intentional discrimination. For example, the teacher in charge of homecoming activities testified that the District has intentionally discriminated against black students for over 30 years in those activities. Vol.V 59-61, Vol.III 287-89; Pl.Ex. 1190d. Similar discrimination exists in graduation activities. Vol.III 292.

E. Transportation.

The District admits that it only transports black students—those who formerly attended Douglass elementary, Dist.Br. 45-46; Order 48—and that it transports those students to only one destination – the all-black Harper school. Using segregated transportation to accomplish segregated school enrollment is a feature of a dual system and traceable to that system.

The District suggests it carried its burden because it did not previously operate transportation. Dist.Br. 45-46.[8] However, the District's failure previously to provide transportation as a measure to desegregate its schools is hardly evidence that the District has acted to disestablish dual schooling. Indeed, during the 1970s, the Supreme Court held transportation to be an appropriate desegregative tool and rejected plans that failed to provide it. *See, e.g., Davis v. Sch. Commissioners*, 402 U.S. 33, 38 (1971); *Raney v. Bd. Of Educ.*, 391 U.S. 443, 444, 449 (1968); *Monroe v. Bd. Of Commissioners*, 391 U.S. 450, 454, 459 (1968); *Swann*, 402 U.S. at 29-31. Moreover, the District cannot claim that its historical failure to provide transportation and its recent segregated, all-black transportation did not "create or

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8 The District also suggested that its system was in fact desegregative because "only black students benefit . . . ." Dist.Br. 45-6. Although black students might "benefit" from not having to walk to school, the design of the system guarantees that this "benefit" has a segregative effect, unavoidably ensuring that the former Douglass students, who are all black, are placed into the all-black Harper school.

contribute" to racially identifiable schools. Thus, it could not have rebutted the presumption.

Plaintiffs did not rest on the presumption, but showed that the District's transportation practices are intentionally discriminatory. Plaintiffs demonstrated that the District consistently rejected transportation proposals and requests, Vol.I 60-61, 71-73, 205-06, 316, that the only transportation ever offered was to transport students from one all-black school to another, that the District offered these students no desegregative transportation , that it denied them the choice of attending another school regardless of transportation, Vol.IV 186, 208-11, 214-19; Vol.XI 266-67, and that its lack of systemwide transportation denies black students school choice, Vol.VII 191, 211. This evidence satisfies the standards for intentional discrimination, which the Court ignored.

III. THE DISTRICT COURT'S DECISION WITH RESPECT TO COSTS SHOULD BE AFFIRMED.

Rule 54(d)(1) grants district courts the discretion to deny otherwise taxable costs to the prevailing party. *See Crawford Fitting v. J.T. Givvongs*, 482 U.S. 437, 441-445 (1987). The district court need not explain this denial if the reasons for denial are apparent within the court's opinion. *See Allen & O'Hara v. Barrett Wrecking*, 898 F.2d 512, 517 (7th Cir. 1990).

Generally, a court can deny costs when "it would be inequitable under all the circumstances in the case to put the burden of costs upon the losing party." *Lichter*

Foundation v. Welch, 269 F.2d 142, 146 (6th Cir. 1959). "Where it is clear that the action was brought in good faith, involving issues as to which the law is in doubt, the court may in its discretion require each party to bear its own costs although the decision was adverse to the plaintiff." *Chicago Sugar v. American Sugar*, 176 F.2d 1, 11 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950). A losing party's "good faith," in conjunction with "the close and difficult nature of the issue in dispute," justifies denying the prevailing party's costs. *Allstate Insurance v. Mich. Carpenters' Council*, 760 F.Supp. 665, 670 (W.D. Mich. 1991); *see also United States Plywood v. General Plywood*, 370 F.2d 500, 508 (6th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967). The court may require parties to bear their own costs when a case is "close, complex, and protracted." *Remington Products v North American Philips*, 763 F.Supp. 683, 687 (D.Conn. 1991) (citing *McDonnell v. American Leduc Petroleums*, 456 F.2d 1170, 1188 (2d Cir. 1972)).

After nearly three weeks of trial, the district court issued a 27 page opinion, throughout which the Court's reasons for denying costs are implicit. The Court implicitly acknowledged plaintiffs' good faith and socially important argument throughout the opinion. Order 20, 55. The District Court clearly believed that this case involved a matter of important public concern and that the equities of the issue weighed in Plaintiffs' favor.

Lower courts are routinely afforded broad latitude in denying costs. *See Fishgold v. Sullivan Drydock &Repair*, 328 U.S. 275 (1946); *Allstate Ins. v. Jones*, 763 F.Supp. 1101, 1102 (D.C.Ala. 1991). Rule 54(d)(1) grants district courts the discretion to deny otherwise taxable costs to the prevailing party and the district court need not explain this denial if the reasons for denial are apparent within the court's opinion. As reasons for denial of costs are implicit throughout the District Court's opinion, the District's cross-appeal must be denied.

CONCLUSION

For the reasons articulated in Plaintiffs' opening brief and above, this Court should reverse the District Court with respect to its substantive rulings and affirm the District Court with respect to costs.

DATE: August 2, 2004

Respectfully submitted,

s/Paul R. Dieseth

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CERTIFICATE OF COMPLIANCE UNDER RULE 32(a)(7)(B) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Counsel for Plaintiffs-Appellants and Cross Appellees certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure:

1. The reply brief herein on behalf of Plaintiffs-Appellants and Cross Appellees was prepared on a word processing system using Microsoft Word which determines the word count of the brief.

2. The word count of Appellant's brief herein, as reflected in the word processing system used to prepare it, is 6,967 words, not including the words contained in the Table of Contents, Table of Authorities, and Certificates of Counsel.

DATED: August 2, 2004.

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CERTIFICATE OF SERVICE

The undersigned attorney of record hereby certifies that one (1) copy of the foregoing Reply Brief of Plaintiffs-Appellants and Cross Appellees was served by United States Mail on this 2nd day of August, 2004, on the following:

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Further, one original and six true and correct copies of this Reply Brief were sent by First Class United States Mail (postage pre-paid) for filing addressed as follows:

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In addition, an electronic copy of the brief in pdf format was uploaded on the Eleventh Circuit Court of Appeals website.

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