IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

v.

GARY L. PENICK, et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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I.

Although the Respondents' Brief disputes that the courts below violated the mandate of *Dayton* by employing legal presumptions to extrapolate a systemwide violation and remedy from isolated instances, it fails to support its argument with any analysis of the opinions below. An examination of those opinions will disclose, as Justice Rehnquist has already noted, that the lower courts' employment of legal presumptions violates the mandate of *Dayton.*

As was the case in *Dayton,* there is a hiatus in this case between the limited liability findings of the trial court, and its remedial requirement that every school be racially balanced. There was no attempt by either the trial court or the appellate court to connect isolated instances, some of which occurred more than 50 years ago, with the present racial composition and distribution of the Columbus school population. Unlike *Dayton,* however, this hiatus is not unexplained, since both courts acknowledged the employment of legal presumptions to reach a conclusion of systemwide effect which otherwise could not be supported in fact.

Of course, the district court's liability decision preceded the decisions of this Court in *Dayton, Brennan* and *Omaha,* all of which required a detailed factual inquiry into the current impact on the racial composition of schools from past instances of unconstitutional conduct. This current impact was required to be demonstrated in fact and not to be merely presumed. However, although the district court's liability opinion stated that the court was constrained to adhere to the Sixth Circuit's approach in *Brinkman v. Gilligan (Dayton III),* 539 F.2d 1084 (1976), of extrapolating systemwide liability and remedy from isolated violations, the district court later failed to see any significance in this Court's subsequent disapproval of that approach when it vacated and remanded the Sixth Circuit's decision, stating that *Dayton* did not provide "new and clear instructions." [A. 93.] Instead, when presented with the opportunity to make the required inquiry into incremental segregative effect, the trial court explicitly refused to do so.

Nonetheless, despite the fact that *Dayton* was decided *after* the trial court rendered its liability decision, and despite the trial court's explicit refusal to conduct the mandatory *Dayton* inquiry, the Respondents argue that the district court's liability opinion indicates that the court

anticipated the *Dayton* decision and conducted the mandatory inquiry without the improper employment of legal presumptions. Respondents' Brief, p. 10.

This strained argument is belied by the trail court's own findings that: (1) school construction policies conformed to "objective" criteria [A. 13-14]; (2) only in "some instances" could school site selection have had an impact on racial composition [A. 21-25]; (3) segregated housing patterns, the primary cause of racially imbalanced schools, were caused by discriminatory acts of others [A. 57]; (4) even in the absence of any unconstitutional acts by school officials, all schools would not be racially balanced [A. 74.]; and (5) there was no requirement that the impact of segregative acts by school officials be separately determined from the impact of other causes of racial imbalance in schools [A. 58.]. These findings, standing alone, would compel the conclusion that the incremental segregative effect of specific unconstitutional actions by school officials could not have extended to every school in the system, and that schools would not have been racially balanced in the absence of these actions. Furthermore, the fact that a significant number of schools on the periphery of the Columbus system, recently annexed into the district, were not a part of the system at the time of these alleged violations, compels the conclusion that the violations had no effect in these schools.

Without the use of legal presumptions, it would have been impossible for the district court to make these factual findings the foundation for a judgment of systemwide liability and a remedy requiring *all* schools to be racially balanced. To assert that this result indicates an application of the principles of *Dayton* is simply incredible.

The Sixth Circuit recognized that the only way in which the limited violations found in this case could be found to have "caused" systemwide racial imbalance is through the employment of a legal presumption of system-

wide impact. [A. 198.] As Mr. Justice Rehnquist recognized, the use of such presumptions is inconsistent with *Dayton, Brennan* and *Omaha.*

II.

The Respondents have also urged that the lack of support for the lower courts' finding of a cause and effect relationship is excusable, since the relationship can be presumed unless the defendants can prove to the contrary. Respondents' Brief, pp. 9, 20, n. 13. However, even if the defendants in this case had been afforded the opportunity to make such a showing to the trial court, the court's conclusion that it would be "impossible" to separate the effect of school board discriminations from those of others would have made the opportunity meaningless. Moreover, the attempt to explain away the absence of an inquiry into the incremental segregative effect of school board discriminations by allocating the burden of proof to the defendants is inconsistent with the clear mandate of *Dayton* that the trial court conduct a "detailed factual inquiry" into this issue.

Even if the district court had conducted the inquiry, however, it would have been improper to allocate the burden to the defendants. If any burden of proof is to be allocated, it should be allocated to the plaintiffs, since the existence of a causal relationship is an element of the plaintiff's constitutional claim.

The case authority cited by the Respondents fails to lead to a contrary conclusion. For example, in *Village of Arlington Heights v. MHDC,* 429 U.S. 252 (1977) this Court did not place upon the defendant "the burden of demonstrating in what respects the current effects of his long-standing violation are more limited than the probable or intended consequences." Respondents' Brief, p. 20, n. 13. The cited language refers to the burden of

proof of discriminatory *intent*, and not to the proof of effect:

> Proof that the decision by the Village was motivated in part by a *racially discriminatory purpose* would not necessarily have required the invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted *even had the impermissible purpose not been considered.* If this were established the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of discriminatory purpose.
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> *Arlington Heights*, 429 U.S. at 271, n. 21. (emphasis added).

Thus, the burden of proof of *purpose* may shift to the defendants once the plaintiffs have made a threshold showing. The burden shift is justified because of the difficulty of conclusively proving that a discriminatory state of mind motivated a public official in his actions. But as the Court recognized in *Dayton*, the *effect* of intentionally discriminatory action is more easily susceptible to proof. Shifting the burden of proof to the defendants on this issue is therefore not justified.

III.

Although the Respondents' Brief asserts that the Petition in this case presents merely factual issues for resolution by the Court, there is actually little dispute concerning the subsidiary fact findings made by the district court. It is in the inferences drawn from those facts, and in the application of legal presumptions to those facts, as well as in the legal conclusions adopted by the courts below, where the error in their decisions lies and the question for review is presented to this Court.

In cases of such legal error, this Court's review of ultimate fact findings, inferences, and mixed findings of fact and law are not governed by the "clearly erroneous" rule, nor the "two court rule." *Keyes v. School District No. 1*, 413 U.S. 189, 198, n. 9 (1973). The Court's power to review the issues presented in the Petition is therefore plenary.

In attempting to characterize this case as involving only factual issues, the Respondents' Brief has also embellished upon and expanded the trial court's factual findings. For example, the district court did not find that the existence of five predominantly black schools in 1954 resulted in "keep[ing] most white and black children in racially separate schools." Respondents' Brief, p. 4. On the contrary, the district court's actual findings concerning pre-1954 violations were confined to only five schools, and the court found that "substantial racial mixing of both students and faculty" existed in other schools in the system. [A. 10.]

The Respondents have also engaged in a *post hoc* attempt to supplement the trial court's findings. The liability judgment rests solely upon specific findings concerning the existence in 1954 of what the district court characterized as an "enclave" of five black schools, and upon a small number of post-1954 actions which the court of appeals characterized as "isolated". The Respondents' characterization as these findings as mere "examples" of "systemwide" conditions ignores the total absence of findings of other instances of allegedly unconstitutional conduct in the opinions below. In the absence of such findings, this Court can only assume that there were no other violations.

Similar attempts to embellish, expand, characterize, or supplement the actual findings of the trial court appear throughout the Respondents' Brief. Rather than addressing each distortion, we would simply urge the Court to

examine these assertions critically, comparing them to the actual findings appearing in the opinions of the courts below.

CONCLUSION

A critical examination of the Petition, briefs, and the decisions of the courts below will establish that this case does not present a mere factual dispute to the Court, but concerns the appropriate legal standards to be applied in the determination of liability and remedy in school desegregation cases. Instead of conducting the mandatory *Dayton* inquiry, both courts "employed legal presumptions of intent to extrapolate systemwide violations" from isolated instances. [A. 213.] The adoption of this legal standard below clearly conflicts with this Court's decisions in *Dayton, Brennan,* and *Omaha.*

Furthermore, the adoption of a legal standard of "foreseeable effect" in the determination of discriminatory intent is contrary to the decisions of this Court in *Washington v. Davis* and *Arlington Heights,* and conflicts with decisions in other circuits.

Justice Rehnquist's decision granting a stay of the lower courts' judgments in this case noted that the Sixth Circuit's most recent decision in the Dayton litigation, *Brinkman v. Gilligan,* No. 78-3060 (6th Cir. July 27, 1978) [A. 219.], also violated the mandate of this Court's decision in *Dayton Board of Education v. Brinkman,* 433 U.S. 406 (1977). [A. 212-214.] A petition for a writ of certiorari to review the Sixth Circuit's decision in that case was filed in this Court on October 13, 1978. *Dayton Board of Education v. Brinkman,* Case No. 78-627.

The review of both the Columbus and Dayton cases would provide a vehicle for the development of more specific rules to guide the district courts in the determination of liability and remedy in school desegregation cases. Specific guidance from this Court is necessary to

correct the varying and inconsistent adjudications which have characterized school desegregation litigation. The impact in Ohio alone would be significant, where cases involving the Cleveland, Cincinnati, Youngstown, and Akron school districts are currently pending in the lower courts.

Consequently, this Court should issue a writ of certiorari to review the judgments below.

Respectfully submitted,

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Dated: November 21, 1978