No. 99-60846

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOAN ANDERSON and JUDY LYNN ANDERSON, minors, by their mother and next friend, Mrs. Bessie Anderson; JUANITA BENNETT, MARY LEE BENNETT and ARCHIE LEE BENNETT, minors, by their father and next friend, Mr. James Bennett; et al.,

Plaintiffs-Appellants

and

UNITED STATES OF AMERICA,

Intervenor Plaintiff-Appellant

v.

THE CANTON MUNICIPAL SEPARATE SCHOOL DISTRICT, et al.,

Defendants

SCHOOL BOARD OF MADISON COUNTY; ROBERT E. COX, Superintendent of Education; HAROLD E. DACUS, Assistant Superintendent of Education; M.L. DEWEES, President; HAROLD H. WHITE, JR., Secretary; E.L. HENDERSON; M.C. MANSELL; E.W. HILL,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

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TABLE OF CONTENTS

ARGUMENT:

THE DISTRICT COURT ABUSED ITS DISCRETION IN APPROVING MCSD'S PLAN TO LOCATE THE NEW HIGH SCHOOL IN RIDGELAND 1

A. Locating The High School In Ridgeland Perpetuates An Unfair Travel Burden on Black Flora Students 3

B. The Alternative Site At Route 463 Is A Practicable Location For A New High School, And Is Better Suited For Reducing The Travel Burden That The Present System Imposes On Flora Students 7

C. The District Court's Approval Of MCSD's Plan Would Be An Abuse Of Discretion Even Under Rufo Standards 17

CONCLUSION 19

STATEMENT OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES: **PAGE**

Arvizu v. Waco Indep. Sch. Dist., 495 F.2d 499 (5th Cir. 1974) 5

Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) 12

Diaz v. San Jose Unified Sch. Dist., 861 F.2d 591 (9th Cir. 1988) 5

Green v. County Sch. Bd., 391 U.S. 430 (1968) 17

Harris v. Crenshaw County Bd. of Educ., 968 F.2d 1090 (11th Cir. 1992) 12-13

Lee v. United States, 914 F. Supp. 489 (N.D. Ala. 1996) 8

CASES (continued): **PAGE**

Pitts v. Freeman, 755 F.2d 1423 (11th Cir. 1985) 13

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) 18

Singleton v. Jackson Mun. Sep. Sch. Dist., 419 F.2d 1211 (5th Cir. 1969), cert. denied, 396 U.S. 1032 (1970) 5

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). 9, 13, 17

Tasby v. Estes, 517 F.2d 92 (5th Cir.), cert. denied, 423 U.S. 939 (1975) 11

United States v. Unified Sch. Dist. No. 500, 974 F. Supp. 1367 (D. Kan. 1997) 7

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 13, 17

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ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION IN APPROVING MCSD'S PLAN TO LOCATE THE NEW HIGH SCHOOL IN RIDGELAND

The Madison County School District (MCSD) has raised numerous points in response to the United States' brief. MCSD, however, fails to overcome the United States' primary contention that the district court abused its discretion by approving the

aspect of MCSD's plan for new school construction that locates the new high school in Ridgeland and thus perpetuates an undue transportation burden on black students traveling from Flora. MCSD also fails to overcome evidence showing that in seeking to reduce overcrowding in schools, MCSD officials failed to consider its obligations under prior consent orders and the Constitution, thus contributing to the plan's failure to further desegregation.

The district court approved MCSD's plan to locate the new high school in Ridgeland because it determined that the plan "does not * * * negatively affect[] desegregation in the [school] district," and there was "[no] reasonable prospect for further desegregation" (Order at 126).[1/] The district court, however, abused its discretion in approving the plan on these bases. For reasons fully shown in our opening brief, MCSD's plan effectively perpetuates an undue travel burden on the predominant number of black students commuting from Flora. Furthermore, there is at least one feasible alternative site proposed by the United States and private plaintiffs that would substantially reduce

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[1/] "Order at __" refers to pages in the district court's Memorandum Opinion and Order (dated Sept. 21, 1999), that is Tab 2 of the United States' Record Excerpts. "U.S. Rec. Exc. Tab ___" refers to the tabbed items in the United States' Record Excerpts filed with its opening brief in this appeal. "Tr. __" refers to pages of the transcribed hearing in the district court held from May 17 to May 25, 1999. "Plt. Exh. __" refers to the United States' and private plaintiffs' numbered exhibits. "R. ___" refers to the numbered record documents listed in the district court docket sheet that is Tab 1 of the United States' Record Excerpts. "MCSD Br. ___" refers to pages in the brief filed by appellee MCSD in this appeal. "U.S. Br. ___" refers to pages in the opening brief filed by the United States in this appeal.

overcrowding for high school students in Zones II and III, as well as make more equitable the unfair travel burden endured by black students commuting from Flora, but school officials failed to give this, or any other, location any meaningful consideration.

A. Locating The High School In Ridgeland Perpetuates An Unfair Travel Burden On Black Flora Students

MCSD makes numerous arguments (MCSD Br. 27-33) to support its contention that the transportation burden on black students in Flora is not inequitable. These arguments are wholly without merit and cannot justify approval of a plan that does nothing to diminish the inequitable travel burden.

1. The district court found that students traveling to Madison Central High School from the predominantly black Flora community endure as much as a 2-1/2 hour bus ride each way (Order at 84). Students traveling from Flora are picked up as early as 5:50 a.m. for an 8:15 a.m. arrival at Madison Central High School (Plt. Exh. 136; Tr. 213-215 (Bailey)). By comparison, students from Ridgeland travel by bus at most 50 minutes to Madison Central High School (Order at 83), with most students picked up as early as 7:30 a.m. for an 8:15 a.m. arrival at the high school (Plt. Exh. 135; Tr. 210-213 (Bailey)). When MCSD officials developed the plan for locating the new high school in Ridgeland, they were unaware that Flora students endured such a lengthy bus ride to and from school (Tr. 208-210, 214 (Bailey); Tr. 761, 765-766 (Miller); Plt Exh. 136). MCSD's Director of Facilities James Reeves testified that he had not evaluated the school district's

bus routes and was unaware of the transportation burden on black and white students prior to selecting a site for the new high school (Tr. 881). MCSD consultant Gary Bailey testified that he had not made any detailed determination of the relative transportation burdens experienced by black and white students, and that he did not know how many black students commuted to Madison Central High School from Flora (Tr. 56, 59).

MCSD's failure to develop a plan that addresses the inequitable travel burden is symptomatic of the failure of school officials to take into consideration their desegregation obligations in formulating the plan for new school construction. School officials testified that they had either failed to review the school district's desegregation orders prior to developing the plan for new school construction (Tr. 55 (Bailey); Tr. 349, 440 (Bridge); Tr. 740-741 (Miller)), or failed to assess the effect that the bond issue would have on desegregation (Tr. 507 (Jones)).

2. MCSD argues (MCSD Br. 28) that the travel burden imposed on black Flora students is not linked to its proposal to locate the new high school in Ridgeland, but rather the result of a 1990 consent order that closed the predominantly black high school in Flora, consolidated the Flora and Madison-Ridgeland attendance zones, and transferred Flora high school students to Madison Central High School (R. 2919). The fact that the 1990 consent order required that Flora students be transferred to Madison Central High School has little bearing in assessing MCSD's

current proposal for locating the new high school in Ridgeland. When the parties agreed to close the high school in Flora and transfer Flora students to the newly constructed Madison Central High School, Madison Central was the most centrally located between the two communities. In 1990, the parties agreed to, and the district court approved, the closure of predominantly black Flora High School. The issue that the parties now face is where to locate a new school that will further desegregation not only from the standpoint of student enrollment, but that will also facilitate a reduction in the commuting time for Flora students whose transportation burden is grossly inequitable compared to that of other students in the county. MCSD is obligated to transfer students on a "nondiscriminatory basis." Singleton v. Jackson Mun. Sep. Sch. Dist., 419 F.2d 1211, 1218 (5th Cir. 1969), cert. denied, 396 U.S. 1032 (1970), and to otherwise "ensure that the burdens of desegregation are distributed equally and without discrimination." Diaz v. San Jose Unified Sch. Dist., 861 F.2d 591, 596 (9th Cir. 1988); Arvizu v. Waco Indep. Sch. Dist., 495 F.2d 499, 508 (5th Cir. 1974). Indeed, locating the new high school in Ridgeland -- only 2-1/2 miles from the existing Madison Central High School -- does not equitably distribute the burden of desegregation when the predominant number of black Flora students will continue to travel a long distance to attend high school at Madison Central.

3. MCSD argues (Br. 29-31) that the plan should be approved in any event because locating the new high school in Ridgeland

does not adversely affect the travel burden on black students in Flora because they will continue to attend Madison Central High School. MCSD also argues (Br. 29-30) that the Ridgeland location will reduce the travel burden for a significant number of black students who live in Ridgeland. MCSD's argument is inherently flawed, however, because it fails to recognize that locating a new high school in Ridgeland <u>does</u> have an adverse affect on students commuting from the predominantly black Flora community because it <u>perpetuates</u> an inequitable transportation burden on these students. Flora high school students experience the longest commute as compared to other high school students at Madison Central. Locating the new high school in Ridgeland will perpetuate this undue burden, and would reduce the already nominal commute for students in the predominantly white Ridgeland community who, under the current commuting arrangement, are not burdened at all.

The district court found that locating the new high school at Route 463 would reduce the commute for Flora students by 5.4 miles, or 13 minutes by bus (Order at 105). Based on this finding, MCSD argues (MCSD Br. 31) that the alternative site at Route 463 proposed by the United States and private plaintiffs would not significantly reduce the travel burden on Flora students. However, as MCSD admits (MCSD Br. 31), the commuting time for the Flora students can be reduced by adding more buses to the routes serving Flora. As the United States pointed out in its opening brief (U.S. Br. 39), the way to significantly reduce

the travel burden on black Flora students is not to locate the new high school even farther from these students who are already unduly burdened. Rather, it would be to locate a school closer to these students suffering the burden and also increase the number of buses transporting students to the new school.

The 2000 consent decree (dated April 24, 2000) agreed to by the parties requires MCSD to, consistent with the district court's order, reduce the commuting times for Flora high school students to 45 minutes each way and provide an explanation to the district court for students whose commute exceeds 45 minutes. This development in the litigation does not undermine the United States' argument that the Route 463 site is the most suitable location for the new high school. There is nothing in the district court record showing that MCSD has put into place sufficient school buses and bus routes that will ensure this significant reduction in commuting times for Flora students. In any event, the best way to ensure that Flora students are spared any further possibility of such a lengthy commute would be to locate the new high school at the Route 463 site, closer to the Flora community.

B. The Alternative Site At Route 463 Is A Practicable Location For A New High School, And Is Better Suited For Reducing The Travel Burden That The Present System Imposes On Flora Students

1. MCSD argues (MCSD Br. 33-40) that the alternative site at Route 463 proposed by the United States and private plaintiffs is not a feasible location for the new high school. MCSD argues (MCSD Br. 34-35) that the Route 463 location is "remote" and "has

inadequate infrastructure and services." In making these determinations, however, school officials failed to fully analyze the feasibility of locating the high school at the Route 463 site, as no meaningful assessment was ever completed by MCSD officials responsible for developing the school district's plan for any alternative site for the new high school. The United States' expert witness, Kelley Carey, prepared a comprehensive report on the feasibility of the Route 463 site (U.S. Rec. Exc. Tab 5). Expert Carey is a demographer and school facilities planner with 25 years of experience in desegregation matters, and his work has been recognized in a published federal district court opinion (see Lee v. Macon County Bd. of Educ., 914 F. Supp. 489, 490-491 (N.D. Ala. 1996)). After analyzing the feasibility of the Route 463, expert Carey determined that it was a suitable location for the new high school (U.S. Rec. Exc. Tab 5, pp. 18-21).

Expert witness Carey explained (U.S. Rec. Exc. Tab 5 at pp. 20-21) that locating the new high school at Route 463 would result in many fewer black students living more than ten miles from their high school, and fewer high school students overall traveling over ten miles to high school. Based on student enrollment figures from the 1998-1999 school year, 1,865 students attended Madison Central, of whom 1,338 (72%) were white and 500 (27%) were black. Using concentric rings to measure the travel distances of students, Carey determined that by locating the new high school in Ridgeland, 20% of high school students living

within five miles of their school would be black (343 black and 1,345 nonblack); 28% of students living within 5-10 miles of their school would be black (109 black and 275 nonblack); and 74% of students living over ten miles of their school would be black (153 black and 54 nonblack). By comparison, Carey found that by locating the new high school at Route 463, 22% of students living within five miles of their high school would be black (286 black and 1,296 nonblack); 32% of students living within five to ten miles of their high school would be black (307 black and 638 nonblack), and 32% of students living more than ten miles from their high school would be black (12 black and 26 nonblack) (U.S. Rec. Exc. Tab 5, p. 20). Carey observed that while more students would live within five miles of the proposed high school in Ridgeland, that location "disregard[s] the largely rural nature of the school district territory," and results in a disproportionate number of black students traveling more than ten miles to high school (U.S. Rec. Exc. Tab 5, p. 21). In fact, Carey stated that many of these black students "live on the other side of Flora, away from Madison Central [High] School, and travel over 20 miles to school each way" (U.S. Rec. Exc. Tab 5, p. 21). Thus, the Route 463 site is not remote with respect to reducing the travel burden on the predominant number of black students commuting from Flora.

Indeed, the history of this case substantiates the Supreme Court's observation in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 20 (1971), that "[p]eople gravitate toward

school facilities, just as schools are located in response to the needs of people." Following the closure of Flora High School, and the construction of the new Madison Central High School in 1991, there was a significant increase in residential growth in the Madison area adjacent to Ridgeland (Order at 104). The district court stated that "when Madison Central was constructed, the travel burden was equitably distributed" between students traveling from Madison, Flora, and Ridgeland, "and that it has now become inequitable only as a result of the post-construction population explosion in the southern part of the county" (Order at 104 (emphasis omitted)).

2. MCSD insists (MCSD Br. 35) that the Route 463 site cannot accommodate the necessary infrastructure and public services necessary for a high school. Expert witness Cary researched the site thoroughly and testified that sewer services could be provided at the site with "on-site waste lagoons," and that two county schools already get sewer service in that fashion (Tr. 1007). Carey also determined that the Route 463 site has access to water through the Bear Creek Water Authority (Tr. 1007). Carey testified that police and fire service is fully accessible by virtue of Route 463, which is a main highway through the county (Tr. 1008-1009).

3. MCSD argues (Br. 36-39) that the substantial growth in Madison and Ridgeland alone warrants locating the high school in Ridgeland. However, substantial growth in Ridgeland cannot be the sole reason for placing the new high school in that

community. The new high school must be located at a site that will further desegregation by reducing the travel burden on the black Flora students. MCSD argues (MCSD Br. 39) that Ridgeland will become increasingly populated by black residents in the future, and that presumably a new Ridgeland High School would eventually benefit a large number of black students. MCSD's speculative assessment is based on its unsubstantiated supposition that black residents will disproportionately occupy apartment complexes that are planned for construction in Ridgeland. The district court, however, made no findings on the future racial makeup of the Ridgeland community, and the United States and private plaintiffs dispute MCSD's assertion that there will be an increasing number of black families moving into Ridgeland (Order at 99 & n.48).

4. MCSD argues further (MCSD Br. 39, 49-51) that the Route 463 site is "inferior" to MCSD's preferred site at Ridgeland. There is, however, ample evidence that the Route 463 site is an economically feasible site for locating the new high school (<u>supra</u>, p. 10; see also U.S. Br. 20-21, 37-41). MCSD, however, misses the point of this issue on appeal. As a school district under a desegregation order, MCSD is obligated to consider alternative sites that will further desegregation. <u>Tasby</u> v. <u>Estes</u>, 517 F.2d 92 (5th Cir.), cert. denied, 423 U.S. 939 (1975). MCSD failed to satisfy that obligation because school officials gave no meaningful consideration to any high school site other than Ridgeland. For instance, every cost assessment of new

school construction prepared by MCSD assessed only the cost of building a new high school in Ridgeland (see Def. Exhs. 8, 9, 11, 12, 19, 20, 22, 23, 27, 29, 31, 33, 36). MCSD facilities director, James Reeves, testified that when he was hired by MCSD in 1996, he was assigned the responsibility of preparing a report on the bond issue that was filed with the State of Mississippi (Tr. 818; Plt. Ex. 41). The report, finalized and filed in December 1996, reflected that the bond issue proposed the construction of a new high school in the Ridgeland community (Tr. 818-820; Plt Exh. 41). Morevover, when MCSD consultant Bailey was retained to develop the plan for new school construction, the school district's intent to locate the new high school in Ridgeland was a foregone conclusion. The contract that MCSD entered into in November 1997 with Gary Bailey to retain his services states that Bailey would be responsible for developing a plan for a "New Ridgeland High School" (Def. Exh. 36; see also Tr. 1584-1585).

5. MCSD's claim (MCSD Br. 40-41) that its plan was developed "with desegregation in mind" is baseless, and its claim (MCSD Br. 40) that school officials "had absolutely no intention of re-establishing a dual school system" is irrelevant to the applicable standard for reviewing the plan. Discriminatory intent is not the standard for assessing the appropriateness of MCSD's plan for new school construction. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979). Until unitary status is achieved, MCSD must avoid any action that has the "effect of

perpetuating or reestablishing a dual school system" (Harris v. Crenshaw County Bd. of Educ., 968 F.2d 1090, 1094 (11th Cir. 1992)), and must take "affirmative steps to eliminate the continuing effects" of the dual system. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 291 (1986). "[F]uture school construction * * * [should] not serve to perpetuate or re-establish the dual system." Swann, 402 U.S. at 21. "[W]hen the school board fails to consider or include the objective of desegregation in such decisions as whether to construct new facilities," that constitutional duty is violated. Pitts v. Freeman, 755 F.2d 1423, 1427 (11th Cir. 1985).

While MCSD argues (MCSD Br. 40-41) that school officials recognized their constitutional duty, the evidence wholly supports the district court's conclusion that school officials were unaware of their desegregation obligations when formulating the plan for new school construction generally, and in particular as it relates to selecting a site for the new high school. As the United States showed in its opening brief (U.S. Br. 10, 14, 15, 30), and as found by the district court, MCSD officials failed to review the district court's desegregation orders, and had no understanding of the school district's desegregation obligations (see Order at 125 (school officials "have never even read the desegregation orders and judgments and none seems to have any comprehension of their import")). Moreover, MCSD officials did not prepare a pupil locator map — a fundamental practice in desegregation planning — prior to selecting the

Ridgeland site (Tr. 346 (Bridge)). Thus, in selecting the Ridgeland location, school officials failed to engage in proper desegregation planning that would reduce the transportation burden on Flora students.

6. MCSD argues (Br. 45-47) that its enrollment projections were reasonable because they were based on a five-year average enrollment change at each of the schools. MCSD's expert, however, overprojected future enrollment. These significant overprojections will result in greater resources dedicated to the Ridgeland area, and fewer resources for Flora students and others assigned to attend high school at Madison Central.

MCSD states (MCSD Br. 46-47) that its consultant Gary Bailey "used his best judgment and his experience based on actual historical enrollment data to make enrollment projections." Bailey estimated that the student enrollment at Madison Central would increase by 10.4% annually. Applying this yearly average increase to the 1998-1999 student enrollment figure of 1,859, yields a student enrollment of 3,047 by the 2003 school year.

United States expert Carey, however, prepared five-year projections of enrollment by school and by grade. Expert witness Carey's projection of enrollments consisted of "examining actual data on live birth trends, comparing those numbers for each year to the number showing up in that cohort group at the appropriate year after their birth" (U.S. Rec. Exc. Tab 5, p. 5). Carey's report explained that

> [a] cohort group is a numerical group either born in a year or constituting a grade group. School enrollment

> projections use the concept of cohort groups above the first grade. In that context a cohort numerical group moves up from grade to grade[,] from year to year.

U.S. Rec. Exc. Tab 5, p. 5. Carey reports that the use of cohort groups "serves several enrollment projection needs," such as the following:

> 1. It tracks the impact upon enrollments from growth or decline in births within the school district * * *.
>
> 2. It exactly reflects the results of growth and decline of student enrollment, providing reliable trends for projection * * *.
>
> 3. It overcomes the problem of an inconsistent relationship between such items as building permits and school enrollments * * *.
>
> 4. Cohort survival factors tell us who actually has arrived into the school system, what grades were affected, and what rates of growth or decline in enrollment resulted as reliable indicators of future changes in enrollment at each grade * * *.
>
> 5. Historical and documented cohort survival factors from grade to grade are an invaluable indicator of how enrollments are growing or declining, as they also represent a combined impact of in-migration and out-migration at each school in the system * * *.

U.S. Rec. Exc. Tab. 5, pp. 5-6.

Applying the cohort survival analysis to live birth figures for the Madison and Ridgeland areas, United States expert witness Carey "project[ed] 2,473 students for the area served by the present Madison Central High School for year 2003, increasing from 1,859 in 1998-1999" (U.S. Rec. Exc. Tab 5, p. 15). By comparison, MCSD consultant Bailey's projections for future student enrollment exceeded Carey's projections by about 574 students. Carey reported:

> current and projected demographics indicate[] that of the 614 [student] increase in high school enrollment over the next five years at Madison Central High, only 212 or 34.6% of the growth can be attributed to the proposed Ridgeland High School zone. Most of the growth in high school enrollment, that is now in the pipeline and documented, is due to enrollment growth in Madison and to the north and northwest of Madison. The growth expected north of Ridgeland is about double the growth indicated to occur within Ridgeland.

U.S. Rec. Exc. Tab 5, p. 15. Based on expert witness Carey's estimation that future growth within the next five years will occur principally north and northwest of Madison and Ridgeland, he concluded that student demographics would dictate that locating a new high school in Ridgeland would not be prudent and would result in an "imbalanced allocation of facilities capacity" (U.S. Rec. Exc. Tab 5, pp. 16-18).

7. Moreover, contrary to MCSD's claim (MCSD Br. 49-51), the Ridgeland site is <u>not</u> the best location for the new high school because it would hinder the county's ability to meet demographic shifts. Expert witness Carey studied the student demographic patterns of the area, and found that "[t]he existing Madison Central High School guards the entrance to th[e] [southern] funnel [area of the county] from the rest of the school district" (U.S. Rec. Exc. Tab 5, p. 17). Locating the new high school in Ridgeland would make it "imprudent to plan for a future zone that bypasses the existing school in order to justify the location of a new one," and would complicate the county's ability to meet future demands (U.S. Rec. Exc. Tab 5, p. 17).

> With the residential growth continuing to the north of Ridgeland, there will be need for classrooms at Madison Central High. Meanwhile, a surplus of space would slowly

> develop at Ridgeland High School. Because all of the area to the south of the proposed Ridgeland High School zone is in the City of Jackson, the only way to use that excess space would be to extend the Ridgeland zone north, wrapping it around Madison Central High School's zone. Otherwise, the excess space is wasted, and there develops a premature need for an additional high school.

U.S. Rec. Exc. Tab 5 at p. 17.

C. The District Court's Approval Of MCSD's Plan Would Be An Abuse Of Discretion Even Under Rufo Standards

1. MCSD argues (MCSD Br. 52-56) that the district court was correct in approving its plan despite the fact that it does nothing more than avoid a negative effect on desegregation. The standard articulated by the district court for assessing the appropriateness of MCSD's plan was incorrect because MCSD has a "constitutional duty to take affirmative steps" that will further satisfy the school district's desegregation obligations. Wygant, 476 U.S. at 291 (emphasis added), citing Swann, 402 U.S. at 15; Green v. County Sch. Bd., 391 U.S. 430, 437 (1968). Throughout its opinion, the district court is critical of MCSD's plan and questions the prudence of the school district's decisions. With respect to locating the new high school in Ridgeland, the district court stated that "[c]onstructing a high school half the size of the existing Madison Central which leaves little actual growing room at Madison Central does not seem particularly prudent" (Order at 125). The district court found that school officials were "ambivalen[t] and ignoran[t]" with respect to formulating a plan that will further desegregate the school district (Order at 126). These findings, coupled with the fact that MCSD's plan does nothing to alleviate the undue travel

burden on Flora students, warrant rejecting the plan.

2. In addition, there is no basis for MCSD's contention (MCSD Br. 59) that its plan for locating the new high school in Ridgeland satisfies the standard for modifying consent decrees set out in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992). Under Rufo, the party seeking to modify a consent decree must show that "changed factual conditions make compliance with the decree substantially more onerous," or that a decree is "unworkable because of unforseen obstacles." Id. at 384. MCSD seeks to modify prior consent orders to permit construction of a new high school to accommodate the increasing number of students residing in Zones II and III of the county school district. Indeed, the United States does not dispute that overcrowding in the county warrants construction of a new high school (see Order at 91). However, having thus established that student overcrowding warrants modification of the consent decree, "the district court [must] determine whether the proposed modification is suitably tailored to the changed circumstance." Id. at 391. In making this assessment, "three matters should be clear." Ibid. "[A] modification must not create or perpetuate a constitutional violation," or "rewrite a consent decree so that it conforms to the constitutional floor," and the district court should "defer to local government administrators * * * to resolve the intricacies of implementing a decree modification." Id. at 391-392.

In this case, MCSD's proposed modification does not satisfy

Rufo. MCSD's proposal to locate the new high school at the Ridgeland site will perpetuate an inequitable travel burden on Flora students, and will do nothing to further desegregation (despite the feasibility of an alternative site that would reduce the travel burden on Flora students). Thus, even under the standards articulated in Rufo, the district court's approval of the modification was an abuse of discretion.

CONCLUSION

For the foregoing reasons, the district court's order approving MCSD's plan to build a new high school in Ridgeland should be reversed, and the case remanded to the district court with instructions to require MCSD to develop a new plan for locating the new county high school at a location that will reduce the travel burden for the Flora students.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

I hereby certify that this reply brief complies with the type volume limitation set out in Fed. R. App. Pro. 32(a)(7)(B)(ii). The brief was prepared using WordPerfect 7.0, and contains 4,844 words.

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2000, two copies of the Reply Brief For The United States As Appellant and one disk containing the Reply Brief's text were sent by first-class mail, postage prepaid, to each of the following persons:

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