

Landsberg

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ANTHONY T. LEE, et al.,

Plaintiffs,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor
and Amicus Curiae,

CIVIL ACTION NO. 604-E

versus

MACON COUNTY BOARD OF
EDUCATION, et al.,

Defendants.

BRIEF OF THE UNITED STATES
IN SUPPORT OF
MOTION FOR FURTHER RELIEF

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I. INTRODUCTION

A. The Nature of this Proceeding.

This is a proceeding for relief supplementing this Court's Order of March 22, 1967, in which the plaintiffs and the United States ask the Court to require the defendants State Board of Education and State Superintendent of Education to exercise their supervisory powers over 76 county and city school systems to require them to take action pursuant to the decision of the United States Supreme Court in Green v. Board of Education of New Kent County, 36 U.S.L. Week 4476 (1968), to bring about the prompt, complete and effective dismantling of their dual school systems.

The motion of the United States is based on the finding of this Court in its opinion of March 22, 1967, that the State Superintendent and the State Board of Education exercise widespread control over each local school system, and are therefore in a position to require the local systems to take action to desegregate their schools.

The plaintiff's motion was filed on June 7, 1968, and the Government's motion was filed on July 15, 1968. A hearing on the motions was originally set for July 30, 1968, and was postponed until August 22, 1968, on motion of the defendants.

This brief is submitted in response to the Court's instructions that the evidence be fully developed and briefs submitted prior to the hearing set for August 22, 1968.

B. The Government's Case.

The Government's motion is based in major part on the existing record in this case consisting of facts concerning the individual school systems contained in various School Directories, Choice Period Reports, Equalization Reports, Enrollment and Faculty Reports, and school bus route maps either introduced in evidence or filed with the Court by the State Superintendent of Education. Appendix A to this brief is derived from these record sources and presents in tabular form for each of the 76 school systems the following information:

- 1) System-wide figures, by race, showing the number of schools, total enrollment, and amount of student desegregation during the 1967-68 school year, and corresponding information for the 1968-69 school year;
- 2) System-wide figures, by race, showing the number of full time teachers in the system, the number of desegregating teachers, and the number of schools having faculty desegregation during the 1967-68 school year;
- 3) System-wide figures, by race, showing the anticipated number of desegregating teachers for the 1968-69 school year;
- 4) A breakdown, by school and by race, of the enrollment and the number of full-time teachers in the system for 1967-68, and the number of choices granted for 1968-69;

5) The number of classrooms and permanent teaching stations at each school, and

6) The capacity at each school.

The Government will also rely on the depositions of individual superintendents and the deposition of Superintendent Stone taken by the defendants in preparation for this hearing. Summaries of these depositions are set forth in Appendix B.

By way of additional preparation for the August 22 hearing, the United States prepared and sent to Dr. Stone and the superintendents of 58 of the 76 systems covered by this motion maps (on which is set forth certain information from Appendix A) and specific recommendations for action to eliminate the dual systems which, in the judgment of the Government, can be taken this fall without undue administrative difficulty. To help identify the issues remaining unresolved, the Government asked Dr. Stone to advise by August 19, 1968:

1. Which of the steps listed will each system take voluntarily for the 1968-69 school year?

2. If there are steps listed which a system either refuses to take or asserts it cannot take for the 1968-69 school year, please set forth the steps which the system states it will not take and detailed reasons therefor.

3. If a school system is prepared to take alternative steps which will have substantially the same effect as the steps listed, please so indicate.

In response to this communication, counsel for Dr. Stone requested the superintendents of the 58 systems to reply directly to the Assistant Attorney General in charge of the Civil Rights Division. By the close of business on August 20, 1968, the United States had received responses from 49 systems. Each

of these responses has been summarized and analyzed and the results are set forth separately, system by system, in Appendix C to this brief. Also included, as part of Appendix C and drawn to reflect the analyses of the facts submitted by the individual systems, are proposed specific steps which, in the judgment of the United States, Dr. Stone should require such systems to take this fall to fulfill their responsibility to disestablish their dual school systems.^{1/}

C. The Government's Position as Set Forth in This Brief.

The March 22, 1967, order of this Court required 99 local school systems not previously subject to a Court order to adopt and implement a model plan embodying a "freedom of choice" method of student assignment as an initial step toward the elimination of the dual school system. The United States alleges that 76 of these 99 school systems^{1a/} have failed to eliminate the dual school system and that for each of them freedom of choice holds no prospect of attaining the goals set out by this Court in its March 22, 1967 order. It is the position of the United States that there are available alternatives to the freedom of choice method of student assignment now in effect in these 76 systems which will eliminate the dual school structure more speedily and more effectively.

^{1/} For the convenience of the Court, we set forth as Appendix D the text of the decision and order of the Court of Appeals for the Fifth Circuit in Adams v. Mathews, No. 26501, decided August 20, 1968.

^{1a/} The remaining 23 systems subject to the March 22 order either do not presently operate any previously all-Negro schools or have given adequate assurances that substantial steps to eliminate their dual systems will be taken this fall and that full elimination will be completed by the beginning of the 1969-70 school year. One additional system included in the original 76, Tusculumbia, has also given such an assurance.

In this brief the Government will present (1) facts which show that freedom of choice is not working to dis-establish the 76 dual school systems covered by this motion, (2) facts showing that there are available and feasible alternatives to freedom of choice, (3) legal argument showing defendants' legal obligation under Green v. Board of Education of New Kent County, supra, and Robert L. Adams and United States v. Charles F. Mathews, No. 26,501, C.A. 5, decided August 20, 1968, to implement alternatives to freedom of choice and (4) proposed relief, both immediate and prospective, which the Government believes is required by the facts and the law.

II. FREEDOM OF CHOICE HAS FAILED TO BRING ABOUT THE PROMPT AND EFFECTIVE DISESTABLISHMENT OF THE DUAL SYSTEMS BEFORE THIS COURT.

A. The Inadequacy of Freedom of Choice Is Demonstrated by the Progress of Desegregation in the 76 Systems.

1. Each of the 76 systems maintains at least one all-Negro school.

Prior to this Court's March 22, 1967, order, the 76 school systems included in the Government's motion operated approximately 350 all-Negro schools which housed 129,869 students. For the coming school year these systems plan to operate 267 all-Negro schools serving 102,641 children.

During the 1966-67 school year, 97.5% of Negro students in the 76 systems attended all-Negro schools. Based on the Choice Period Report filed for the 1968-69 school year, approximately 91.9% of the Negro students in the 76 systems will attend all-Negro schools this fall.

2. The pace of student desegregation is too slow.

1963-69 will be the fourth year of freedom of choice for most of the 76 systems; the change in results from year to year shows that there is little promise of disestablishing the dual system under this method of student assignment. In the four years the percentage of Negroes attending desegregated schools in the 76 systems progressed in the following steps: 0.3% (1965-66), 2.5% (1966-67), 5.0% (1967-68), and 8.1% (1968-69). Even with this rate of progress continuing (or even with the rate of progress in the two years under the Decree in this case continuing), the abolition of the dual system is not in sight. Moreover, it cannot be assumed that there will be a steady increase each year in the number of Negroes choosing to attend desegregated schools:

- In 35 of the 76 systems with all-Negro schools, this fall's increase in the number of Negroes choosing predominantly white schools is less than that of a year ago.^{2/}

^{2/} See Appendix A. These systems are: Autauga, Bibb, Calhoun, Cherokee, Clarke, Colbert, Coosa, Covington, Dale, Dallas, Elmore, Escambia, Fayette, Greene, Henry, Houston, Lauderdale, Limestone, Pike, Randolph, St. Clair, Shelby, Tallapoosa, Walker, and Washington Counties, and the city systems are Alexander City, Andalusia, Auburn, Demopolis, Eufaula, Florala, Opelika, Talladega, Thomasville and Tuscaloosa.

-- Five school systems reported choices which would mean less desegregation in 1968-69 than there was in 1967-68.^{3/}

-- Thirty-eight systems will have less than 25 more Negro students in predominantly white schools next year than enrolled at such schools for 1967-68.^{4/} Of these 38 systems, 21 will have fewer than 25 more desegregating students this fall than they had two years ago. For the 1968-69 school year, 27 school systems will have fewer than 5% of the Negro students attending desegregated schools and 13 of the systems will have less than 2% of the Negroes in such schools.^{5/}

3/ See Appendix A. These systems are: Clarke County, Fayette County, Houston County, Shelby County, and Auburn City System.

4/ See Appendix A. These systems are: Bibb, Calhoun, Chambers, Cherokee, Chilton, Clarke, Clay, Coffee, Colbert, Coosa, Covington, Escambia, Fayette, Greene, Henry, Houston, Marengo, Randolph, Shelby, Sumter, and Washington Counties, and the city systems in Anniston, Athens, Auburn, Brewton, Demopolis, Elba, Eufaula, Florala, Lanett, Linden, Marion, Opelika, Ozark, Talladega, Tallassee, Thomasville and Troy.

5/ See Appendix A. These systems are: Baldwin, Butler, Chambers*, Chilton*, Clarke*, Conecuh, Coosa, Dallas*, Escambia*, Greene, Henry*, Lee, Marengo*, Monroe*, Pickens, Randolph, Russell, Shelby*, Sumter* and Washington Counties, and the city systems in Athens, Elba*, Lanett, Linden*, Opelika, Selma and Thomasville*. In those systems followed by an asterisk less than 2% of the Negro students attend desegregated schools.

B. The Defendants and the Individual School Superintendents Seek to Retain Freedom of Choice in Order to Postpone the Disestablishment of the Dual School System.

Despite their former protestations that freedom of choice was unworkable, and would in effect destroy public education in Alabama, the defendants and the individual superintendents now cling to this artificial device because they are confident it will, in most cases, insure the retention of the dual system or indefinitely postpone its dissolution. This attitude is demonstrated in the depositions of the individual superintendents and of Dr. Stone, in the individual superintendents' general failure to take adequate steps to eliminate the racial nature of schools through faculty assignments and in the responses of the individual superintendents to the Government's proposals of reasonable and feasible alternatives to pure freedom of choice.

1. Testimony of the individual superintendents.

The depositions of 42 local superintendents were taken during the week of June 24-28, 1968, (summaries of these depositions have been prepared by the United States and are included as Appendix B to this brief). These superintendents testified that white students have not and will not choose to attend Negro schools.^{6/} For example, the Eufaula Superintendent testified that "the white people would rather go to the white schools and have double shifts."^{7/} The superintendents also testified

^{6/} See, e.g., the depositions of O. Zeanah (Andalusia) at pp. 19-21, Allen (Lamar) at p. 31, Thornton (Lauderdale) at pp. 17-18, and Cunningham (Walker) at p. 22.

^{7/} Deposition of Carter (Eufaula) at p. 34.

that they could not or did not plan to abandon Negro schools.^{8/}

The thrust of the superintendents' testimony is that under freedom of choice the dual system will not be eliminated until every Negro child chooses to enroll at a previously white school or until there are so few choices to attend the Negro schools that they cannot be economically operated.

In his deposition, State Superintendent Stone set forth the theory that the enrollment of a substantial number of Negro students in a desegregating school may cause that school to "tip"^{9/} and become all-Negro. His theory is based on his opinion that after the number of Negro students enrolled at a particular school reaches a certain point or percentage, the white children will begin to leave the school and eventually cause it to become all or almost all Negro. Dr. Stone testified that, in his opinion, the tipping point for the public schools in Alabama is about 15%. He said that it may increase in subsequent years, but that this is the figure for 1968-69.^{10/}

Dr. Stone's "tipping" theory was advanced to support the retention of freedom of choice. From his testimony it is clear that he favors freedom of choice because it acts as a restraint on the enrollment of Negro students in previously white schools: (a) under freedom of choice, not enough Negroes will choose white schools to bring them to

^{8/} See, e.g., the depositions of Williamson (St. Clair) at p. 22 ff., and Marshall (Lee) at pp. 24-25.

^{9/} This expression was used by Dr. Stone to describe the conversion of a desegregated school to an all-Negro school. See Stone Dep., generally.

^{10/} Stone Dep., pp. 108-109.

the alleged tipping point, or (b) under freedom of choice, even if Negro choices amount to a significant percentage of enrollment, the white students will not leave the public school system because they can choose another school which has to them a more desirable percentage of Negro and white students.

Both these reasons are open admissions that freedom of choice will not abolish the dual system.^{11/} Indeed, by allowing whites to flee when a certain number of Negroes choose their school, free choice actively promotes and sustains the dual system.

2. The individual superintendents have failed to take adequate steps to assign teachers so as to eliminate the racial identity of the schools.

The testimony of the individual superintendents and the schedule of proposed faculty desegregation attached to Dr. Stone's deposition show that as a general rule there has been no substantial faculty desegregation. Indeed, faculty assignments across racial lines have remained virtually static in many systems.

Several superintendents testified that there will be no change in 1968-69 in the amount of desegregation of their faculties.^{12/} Others testified as to minimal increases. The Bibb Superintendent testified, that the number of white

^{11/} Such reasons for limiting desegregation have been consistently rejected by the Supreme Court, most recently in Monroe v. Board of Commissioners of the City of Jackson, No. 740, O.T. 1967, decided May 27, 1968, and they cannot provide a foundation for decision by this Court.

^{12/} See, e.g., Dep. of Cunningham (Walker County) at pp. 9-10.

teachers in Negro schools, 3, would be the same and the number of Negro teachers in white schools would increase from 6 to 7.^{13/} The attachment to Dr. Stone's deposition shows that the following systems plan an increase of 2 or less desegregating teachers for this fall:

Baldwin*	Henry*	Demopolis
Bibb	Houston	Elba*
Butler	Marengo*	Floralda*
Chambers	Marion*	Florence
Cherokee*	Marshall	Jacksonville
Clarke*	Randolph*	Linden
Clay	Russell*	Marion
Coffee	St. Clair*	Ozark
Coosa	Talladega*	Phenix City
Covington	Tallapoosa	Piedmont
Dale*	Walker*	Selma
Escambia	Andalusia*	Tallassee
Fayette*	Attalla*	Tuscumbia
Geneva*	Brewton	

Those systems marked with an asterisk will have the same number of desegregating teachers or less.

3. Individual superintendents' response to proposals of methods of desegregation other than freedom of choice.

A common theme runs throughout the responses of the local superintendents to the alternative steps proposed by the Government: freedom of choice should be retained because it limits the amount of desegregation. The Assistant Superintendent of the Morgan County schools, George Nancarrow, wrote as follows:^{14/}

Our lay public has accepted our plan to this date, but we feel it would be very difficult for us to sell the public at this time on closing the two [Negro] schools. We feel if we have sufficient time, the situation can be solved successfully.

^{13/} Dep. of McKinzey at pp. 9-11.

^{14/} Letter to Assistant Attorney General, Civil Rights Division, dated August 14, 1968.

Other responses make clear that the operation of free choice is both expensive and burdensome. Thus, the Superintendent of the Colbert County schools said:^{15/}

Also, contracts of employment have been entered into with teachers, white and colored, specifying the school and term for which they were employed. We have no right to break these contracts and we definitely do not need all of the teachers employed if the action suggested by you is put into effect at this time.

Superintendent Morse Haynes of Chambers County explained:^{16/}

We gave the Negro students a second opportunity to choose the school they wanted to attend. They all chose to attend Phillips High School at Five Points, Alabama, which is about fifteen miles from the furthest student. We accepted their request and granted their choice to attend Phillips, thereby going to undue hardship and expense to furnish transportation to the school of their choice. These same students exercised their choice again in the spring of 1968 under our Freedom of Choice plan as ordered by the Court and again they chose Phillips High School. We feel that to assign these students to Chambers County High School now would be an undue burden on the students and the Chambers County Board of Education as well.

The only reasonable explanation for the position of these superintendents is that despite its burdens and extra expense, free choice should be retained because it preserves the predominantly white schools.

15/ Letter to Assistant Attorney General, Civil Rights Division, August 16, 1968, p. 2.

16/ Letter to Assistant Attorney General, Civil Rights Division, August 16, 1968, p. 3.

C. Those School Systems Under this Court's Decree Which Have Made Substantial Progress To Date in Abolishing the Dual System Have Done So by Methods Other Than Freedom of Choice.

1. Thirteen systems have closed all of their all-Negro schools.

Since the entry of this Court's Order on March 22, 1967, 13 of the 99 school systems named in that Decree have disestablished the dual system of schools.^{17/} These systems have not eliminated the dual system by utilization of freedom of choice, but rather by closing their all-Negro schools and assigning the pupils to formerly white schools.

2. Forty-two other systems have closed at least one all-Negro school in whole or in part and such closings have contributed significantly to the progress of desegregation in those systems.

In addition to the systems that have closed the last of their all-Negro schools, 42 systems continue to have Negro schools, but have eliminated all or part of one or more of such schools in those 42 systems. There were approximately 7,744 Negro children enrolled in the all-Negro schools which were closed in whole or in part in these 42 systems. The testimony of the superintendents on deposition demonstrates that the proportion of Negroes from closed schools who choose formerly all-white schools

^{17/} These 13 systems are: Blount, Cleburne, Cullman, DeKalb, Etowah, Franklin, Jackson, Marion Counties, and the city systems in Carbon Hill, Muscle Shoals, Oneonta, Scottsboro, and Tarrant. Eight city systems, Cullman, Daleville, Fort Payne, Jasper, Mountain Brook, Opp, Roanoke, and Winfield, and the Winston County system have never operated Negro schools but in some instances Negroes in these city systems have attended Negro schools run by county systems.

is significantly higher than the proportion of Negro students generally who choose formerly all-white schools. For example, the Superintendent of the Andalusia schools testified that of a total of 130 Negro students in his system who have chosen formerly all-white schools for this fall, between 100 and 110 were formerly in a Negro school that was closed.^{18/} In 1967-68, the number of desegregating students in Walker County increased from 84 to 382 after the superintendent closed 4 Negro schools and assigned the Negro students to formerly all-white schools.^{19/} In contrast, the number of desegregating students this fall in Walker County will be 417, an increase of only 35. The St. Clair Superintendent testified that approximately 40% of the children who were in closed Negro schools chose to go to formerly all-white schools. This compares to an overall percentage of 20% of the Negroes in St. Clair County choosing formerly all-white schools.^{20/}

Of the 24 school systems with more than 10% of the Negro students in formerly white schools, only eight have not closed at least part of a Negro school. In the 11 systems with more than 20% of the Negroes in desegregated schools, there is just one system that has not closed all or part of at least one Negro school.

^{18/} Dep. of O. Zeanah (Andalusia) at p. 47. See also Dep. of Payne (Dale) at pp. 17-20, Dep. of Leeman (Decatur) at p. 19, and Dep. of Williamson (St. Clair) at pp. 22-25.

^{19/} See Choice Period Report and Dep. of Cunningham (Walker) at pp. 13-17.

^{20/} See Choice Period Report and Dep. of Williamson (St. Clair) at p. 24.

III. EDUCATIONALLY SOUND AND EFFICIENT STEPS ARE AVAILABLE AS ALTERNATIVES TO THE FREEDOM OF CHOICE METHOD OF SCHOOL DESEGREGATION.

A. The Techniques Available.

Many inefficiencies are inherent in the dual system,^{21/} and school officials have a great variety of available choices whereby they can remedy these deficiencies and convert to a unitary system. The desegregation of schools can be accomplished by consolidating existing schools, by re-assigning students on the basis of geographic zones, by re-aligning grades at two or more schools (often called "pairing") or by a combination of some or all of these methods.

Consolidation, whether or not in the context of school desegregation, usually involves the elimination

^{21/} See, e.g., statements of Superintendents quoted at p. 12 supra.

The dual system inefficiently utilizes space and teachers when each of two neighboring schools has a small student enrollment in a particular grade, and one teacher in one classroom could teach the two classes if they were combined. Similarly, if one school has few students in a grade and the other's equivalent grade is overcrowded, the overcrowding can be relieved by combining the two. Other educational and economic inefficiencies caused by the dual system include upkeep and maintenance of separate school plants, duplication of libraries, instructional materials, and equipment and facilities, and limitations upon the ability to offer a wide variety of courses because of the dispersment of students and teachers.

The typical rural school system containing a substantial number of Negro students has two school centers in each town large enough to support a school. For example, Geneva County has two 12-grade schools in the towns of Samson, Geneva, Hartford and Slocomb. In each case there is a previously all-white school with between 840 and 1100 students and in each case there is an all-Negro school with between 247 and 303 students. Only one of the Negro schools has even half the state recommended minimum for a 12-grade school. This means that some classrooms are empty, some students are taught along with students of another grade level, there are too few high school students for elective courses to be offered, and facilities are duplicated or are available to one group of students and not to another.

of part or all of one or more schools. For example, if one of two schools serving the same grades has capacity for the students attending both schools, one could be eliminated and all students assigned to the other.

Geographic zoning involves assignment of students on the basis of the location of their residences. If two schools (one white and one Negro) with the same grades are serving the same general area and there is little or no residential segregation, attendance zones can be drawn for each of the schools so as to desegregate both.

Grade re-alignment entails the use of the same number of schools but a reduction in the number of grades taught at each school. For example, if there are two twelve-grade schools (one white and one Negro) serving the same general area, the grade structure of the schools could be changed so that one serves grades 1 to 6 and the other serves grades 7 to 12.

A combination of two or three of the above methods may be used in some situations. If, for example, a school system has, in the same general area, a white 1-6 school, a Negro 1-6 school, a white 7-12 school, a Negro 7-9 school and a Negro 10-12 school, all three methods might be used by zoning the two elementary schools and consolidating and re-aligning the grades at the three secondary schools so that one serves grades 7-8, one serves grades 9-12 and the other is eliminated.

The techniques of consolidation, zoning and grade re-alignment outside the context of school desegregation

are familiar to Alabama school officials. Dr. Stone^{22/} and several local superintendents^{23/} testified about the considerable amount of consolidation (of white schools with other white schools and Negro schools with other Negro schools) that has taken place in Alabama during the past few years. And before conversion to a freedom of choice method of student assignment, geographic zones were used in Alabama -- Negro students were required to attend the closest Negro school and white students went to the white school for their zone. Numerous school systems have also had recent experiences with the re-alignment of grade structures. This suggests both that this is an educationally sound device and that it is administratively feasible. The following chart, inserted here by way of illustration, shows recent changes in the predominantly white schools in the Auburn System:^{24/}

<u>School</u>	<u>Grades Served</u>		
	<u>1965-66</u>	<u>1966-67</u>	<u>1968-69</u>
Auburn High School	7-12	9-12	9-12
Sanford JHS	(not yet built)	1-8	5-8
Woods	1-6	1-6	1-4
Dean Road	1-6	1-6	1-4
Wright's Mill	1-6	1-6	1-4

^{22/} Stone Dep., of July 29, 1968, pp. 22-23.

^{23/} See, for example, the depositions of Carroll (Covington Co.) at p. 6, Leeman (Decatur) at pp. 10-11, Thornton (Lauderdale Co.) at p. 10, and Price (Tallapoosa Co.) at pp. 9-11.

^{24/} Source: For 1968-69, the Choice Period Report; for other years, the School Directories published by the State Department of Education.

In 1966-67, the Elba System changed its two formerly all-white schools from a 1-6, 7-12 to a 1-5, 6-12 structure. In 1965-66, Ft. Payne changed two of its formerly all-white schools from 1-6 and 1-8 to 1-4 and 5-8 respectively. And in 1966-67, Troy changed two formerly all-white schools from 6-9 and 10-12 to 6-8 and 9-12.^{25/}

The method of desegregation which local officials may deem appropriate for each of the districts involved in this litigation depends, of course, on numerous local variables. These include, inter alia, whether any of the schools in the district have unused space (either empty classrooms or classrooms which could become empty if under-sized classes were combined), whether mobile classrooms can be used,^{26/} whether school plants are located near each other, whether there are immediate plans for new construction, whether there are schools whose capacity or enrollment is less than the State-recommended minimum,^{27/} what are the

^{25/} Similar grade re-alignments have been made in the past five years in the formerly all-white schools in Anniston, Attalla, Autauga County, Butler County, Chambers County, Cherokee County, Chilton County, Clay County, Dale County, Elmore County, Fayette County, Florence, Oneonta, Ozark, Russell County, Tallassee and Walker County. See the School Directories for 1964-65, 1965-66, 1966-67 and 1967-68 and the Choice Period Report for 1968-69.

^{26/} Mobile classrooms add great flexibility because they enable schools to be used beyond their capacity. They can be used both in the consolidation of schools and in the re-alignment of grades.

^{27/} In such cases, the desirability of eliminating the school or expanding it would take precedence over other alternative uses. This is illustrated by Calhoun County (see map attached to August 6, 1968, letter to Dr. Stone). The Brutonville and Choccolocco Schools are too small to have the minimum recommended number of students for any grade division. Thus, their continued use without expansion should not be considered in converting to a unitary system. However, there is room in nearby predominantly white schools for the Negro students now attending the small schools.

relative conditions of the school plants,^{28/} and how the residences of the students are distributed throughout the system. Obviously, to the extent that variables which expand the possible alternatives are present, the variables which limit alternatives become less restrictive.

B. Significant Steps Can Be Taken This Fall Without Undue Administrative Difficulty

On August 6, 1968, the United States mailed to the State Superintendent and to the local superintendents involved lists of specific steps which, in our judgment, can be carried out immediately with a minimum of administrative difficulty in 58 of the 76 systems before the Court. These steps and the basis for our recommendations are described below:

1. Consolidation

The simplest method of desegregating schools is consolidation since it requires the re-assignment of only a group of readily identifiable students from one school building to another. The record in this case shows that there are 49 systems (of the 76 named in the pending motion) where it is possible for all or some grades of one or more Negro schools to be closed and the students assigned to formerly all-white schools.^{29/} Appendix A to this brief

^{28/} A system with two high schools serving the same area may be compelled to use one building as a high school in preference to another because of the condition of the buildings.

^{29/} These systems are: Autauga, Bibb, Calhoun, Chambers, Cherokee, Chilton, Clarke, Clay, Coffee, Colbert, Conecuh, Coosa, Covington, Dale, Fayette, Geneva, Henry, Houston, Lamar, Lauderdale, Limestone, Marshall, Monroe, Morgan, Pickens, Pike, Randolph, St. Clair, Shelby, Tallapoosa, Tuscaloos, Walker and Washington Counties; Andalusia, Athens, Brewton, Decatur, Demopolis, Elba, Florala, Florence, Jacksonville, Lanett, Marion, Sylacauga, Talladega, Tallassee, Troy and Tuscumbia cities.

contains maps^{30/} of each of the 76 systems on which there is set out the name and approximate location of each school, the race of the school's students, its grade structure, its capacity, its enrollment for the 1967-68 school year and its projected enrollment for the 1968-69 school year.^{31/} The opportunities for consolidation can be seen in the information supplied on the maps in Appendix A.

These examples will illustrate the facility with which consolidation can achieve substantial desegregation:

(1) Cherokee County's only Negro school has an enrollment of no more than 405, and the four formerly all-white schools in the same town have a minimum unused capacity of 750.

(2) Conecuh County has a Negro school serving grades 1-9 with a maximum of 285 students enrolled, and it also has a formerly all-white school nearby which serves grades 1-12 and has room for at least 330 more students.

(3) Monroe County buses Negro high school students past two formerly all-white high schools that have more than enough room for the bused Negro students.

Consolidation can be readily implemented and it has obvious and immediate benefits in terms of increased efficiency and utilization of facilities which are presently

30/ On four of the "maps" of city systems (Andalusia, Florala, Jacksonville and Tuscumbia), the schools are listed without their location being shown.

31/ These maps are identical to those mailed to Dr. Stone and the individual superintendents on August 6, 1968, except where certain corrections have been made and marked in red. They were attached to the Government's suggestions for feasible steps to be taken this fall. Appendix A also contains copies of suggested desegregation steps as well as additional statistical materials relating to each system derived from the previous records and reports in this case.

standing idle. This should offset any increased transportation costs or the moving expenses involved in transporting sufficient desks, chairs and other equipment from the closed school to the consolidated school. The limited consolidation of white and Negro schools accomplished to date by certain school systems demonstrates the ease and feasibility of using this alternative to freedom-of-choice in disestablishing the dual system.^{32/}

In addition to the complete or partial closing of schools, there is available to at least 18 school systems a limited form of consolidation which entails the assignment of Negro students who live in an area served by a formerly all-white school to that school (where there is space available) rather than to the more distant all-Negro schools at which they are presently enrolled.^{33/} There is no administrative difficulty involved in taking this step. In numerous instances this type of consolidation can be combined with the closing of a school to give local officials more flexibility. In Autauga County, for example a Negro school serving grades 10-12, is located near a formerly all-white school which has space for 100 additional students.

^{32/} See pp. 13-14, supra.

^{33/} See the maps and suggestions for proposed consolidation set forth in Appendix A. These 18 systems are: Autauga, Calhoun, Chambers, Colbert, Coosa, Houston, Lamar, Lee, Monroe, Randolph, Russell, St. Clair, Shelby, Tallapoosa and Tuscaloosa Counties and Andalusia, Anniston and Opelika cities.

These grades of the Negro school might be eliminated if the remaining 50 Negro students may be accommodated at various other formerly all-white schools near their homes. ^{34/}

2. Other steps

The record in this case shows that some systems can implement certain measures other than consolidation without undue difficulty. These fall into two categories: (1) Steps which were recommended to the school systems by Dr. Stone in the Spring of 1968, and which the systems have had ample time to consider and effectuate, ^{35/} and (2) Steps such as grade re-alignment which are similar to those taken by the systems in the past for reasons other than desegregation. ^{36/}

^{34/} See the map and materials in Appendix A relating to Autauga County.

^{35/} See Appendix A, recommended steps for Clarke County (re-alignment of grades at two schools) and Houston County (re-alignment of grades at two schools).

^{36/} See Appendix A, recommended steps for Athens, and Troy. Each of these systems has undertaken similar changes in grade structure in prior years. See note 25, supra. Grade re-alignment was recommended for the Piedmont system because of the small number of students (162) in the 12-grade Negro school last year.

IV. A FREEDOM-OF- CHOICE METHOD OF STUDENT ASSIGNMENT
IS CONSTITUTIONALLY IMPERMISSIBLE FOR EACH OF THE
SCHOOL DISTRICTS NOW BEFORE THE COURT

The standards governing the constitutional adequacy of a freedom-of-choice plan of student assignment were recently established by the Supreme Court in Green v. County School Board of New Kent County, 36 Law Week 4483, 88 S. Ct. 1968 (May 27, 1968), and were definitely construed by the Court of Appeals for the Fifth Circuit in Adams v. Mathews, No. 26501 (C.A. 5, August 20, 1968). In the Green case and in two companion decisions decided on the same day,^{37/} the Supreme Court determined that freedom of choice was an impermissible method of student assignment "if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial system. . . ." 36 Law Week at 4479.

This Court in formulating its earlier decree in this case also defined the constitutional obligation of the school boards "to disestablish in each of the local county and city systems in Alabama. . . the dual public school system to the extent it is based upon race or color" and "to take whatever corrective action is necessary to disestablish such a system." Lee v. Macon County Board of Education, 267 F. Supp. 458, 478 (M.D. Ala. 1967).

^{37/} Raney v. Board of Education of Gould School District, 36 Law Week 4480, 88 S.Ct. 1700 (May 27, 1968); Monroe v. Board of Commissioners of City of Jackson, 36 Law Week 4480, 88 S. Ct. 1700 (May 27, 1968).

In approving the use of freedom of choice "for the time being," this Court warned that such a plan "is not an end in itself; it is but a means to an end," and recognized that "it may well be that the freedom of choice method of desegregation will not fully and completely disestablish the dual public school system based upon race." ^{38/} Id at 479. At the conclusion of its discussion of free choice, this Court stated, Id at 480:

In short, the measures of a freedom of choice plan--or, for that matter, any school plan designed to eliminate discrimination based upon race--is whether it is effective. If the plan does not work, then this Court, as well as the State of Alabama school officials--both state and local--is under a constitutional obligation to find some other method to insure that the dual school system of public education based upon race is eliminated. In adopting this plan, therefore, we stress again that it may be only an interim plan. Its success will be periodically judged in the light of the criteria herein set out. For this and all other purposes, jurisdiction will be retained.

Moreover, this Court then pointed out that "the United States Supreme Court has not yet ruled on the freedom of choice method of ending racial segregation in the field of public education." Id. at 479, n. 28.

^{38/} These statements show the identical treatment of freedom of choice by this Court and the Court of Appeals for the Fifth Circuit. In United States v. Jefferson County Board of Education, 372 F. 2d 836 (C.A. 5, 1966), affirmed on rehearing en banc, 380 F. 2d 385 (C.A. 5, 1967), cert. den. 389 U.S. 840, the Court of Appeals clarified the obligation of school districts to disestablish their dual, racial systems by whatever means are "reasonably related to accomplishing this objective," not just by freedom of choice, which "is not a goal in itself" but by trying "other tools" if freedom-of-choice has not been effective. 380 F. 2d at 390.

Since that time, the Supreme Court has spoken and the Fifth Circuit has interpreted its mandate. The principles of the Green decision were incorporated in the Court's order in Adams v. Mathews, No. 26501 (C.A.5, August 20, 1968), in which the Fifth Circuit held that the "constitutional standards as established in Green" require, "as a matter of law," that an existing desegregation plan be deemed unacceptable "[i]f in a school district there are still all-Negro schools, or only a small fraction of Negroes enrolled in white schools, or no substantial integration of faculties and school activities. . . ." The Court held that hearings on school desegregation cases were entitled "to the highest priority" and that the duty of a district court is to require the school board "to shift immediately to other alternatives" if that is administratively feasible, and, where that cannot be done immediately, to "formulate and submit to the court, by November 28, 1968, a plan to complete the full conversion of the school district to a unitary non-racial school system for the 1969-70 school year."

The evidence of record in this case establishes that all the 76 school systems named in the pending motion satisfy at least one, and most satisfy two or three, of the disjunctive tests announced in the Adams decision. It must be said of all the districts that "there are still all-Negro schools" and in most there are "only a small fraction of Negroes enrolled in white schools [and]. . . no substantial integration of faculties and school activities." Under the standards set down in Adams, therefore, it is

entirely clear that freedom of choice is impermissible for each of these school systems.

The statistics ^{39/} on the small percentage of Negro student desegregation, the lack of white student desegregation, and continued existence of the all-Negro schools show the failure of freedom of choice. The analysis of the failure of freedom of choice set forth in the preceding section of this brief shows that the most dramatic failure is its total ineffectiveness to desegregate the traditionally Negro schools. These schools remain all-Negro, and they remain inferior.

In a number of the school systems under this Court's order, a relatively high percentage of the Negro students are attending predominantly white schools. Certain Alabama school systems, not involved in this motion, have actually eliminated all of their Negro schools without the loss of white support, and without experiencing the mass withdrawal of white students from the public schools. Yet the defendants speculate that this will occur generally if our motion is granted. Ignored in this argument is the need for Negro confidence in the school system; it is, after all, the Negro children who have been - and still are - relegated to inferior status as a result of the dual systems.

^{39/} In another case decided after Green, the Court of Appeals in Acree v. County Board of Education of Richmond County, Georgia, C.A. 5, No. 26369 (July 18, 1968) held that, where "on the undisputed statistics presented to us it is clear that. . . the 'freedom of choice' plan, has not worked" it becomes the duty of the school board, "not only under the Supreme Court decisions above referred to, but under our Jefferson decree to take additional important and effective steps" (pp. 2-3 of the slip opinion). The Court of Appeals called attention "to the extremely important obligation which is once more placed on the Board to assume its full responsibility to do all that is reasonably feasible, and now, to bring an end to the dual system of white and Negro schools in Richmond County (page 5 of the slip opinion) (emphasis by the Court).

The unpopularity of desegregation with the white community makes it difficult for Negroes to carry the burden of desegregation. When it is least likely that white parents will send their children to school with Negro children, it is impossible for Negroes alone to desegregate the school system -- yet that is what freedom of choice requires the Negroes to do. The defendants urge the continuation of freedom of choice by alleging the very circumstances under which that method is least likely to be effective.

In the Green and Raney cases, supra, where the same arguments were made, freedom of choice was held to be unacceptable. In finding invalid a free transfer provision that allowed white students to avoid attending predominantly Negro schools, the Supreme Court in Monroe v. Board of Commissioners of City of Jackson, 36 Law Week 4480, 88 S. Ct. 1700 (May 27, 1968), expressly rejected the proffered justification that "without the transfer option it is anticipated that white students will flee the school system altogether." 36 Law Week at 4482 (emphasis by the Court). In so doing, the Supreme Court repeated the admonition it had given in Brown II: "It should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." 349 U.S. at 300.^{40/}

^{40/} See also Cooper v. Aaron, 358 U.S. 1, 16, (1958); Griffin v. School Board, 377 U.S. 318 (1964); Meredith v. Fair, 313 F. 2d 341, 343 (C.A. 5, 1962); Lee v. Macon County Board of Education, 267 F. Supp. 458, (M.D. Ala. 1967) aff'd sub nom, Wallace v. United States, 389 U.S. 215.

The right of Negro students to a desegregated education must be enforced; the presumed withdrawal of white support cannot justify the denial of that right. The consequences of the exercise or vindication of a constitutional right must be dealt with in ways other than the denial of the right itself. Feiner v. New York, 340 U.S. 315 (1951).^{41/}

The problems that exist in school desegregation must, of course, be recognized and met. But their solutions must be found in educational tools and methods that assist rather than delay the desegregation process. Administrative problems must be met and solved, not just avoided. Where there is fear of a loss of significant community support, the community must be educated to accept compliance with the law, and measures may be taken to assure the community that the educational quality of the school system will not suffer. Since the disestablishment of the dual system usually results, as we have shown, in the more efficient use of educational resources, complete desegregation can itself help to improve the entire school system and thus help to earn the support of the entire community - both black and white - for the public schools.

^{41/} Similar arguments to support state action to establish or uphold racial segregation have been rejected in other kinds of cases. See, e.g., Buchanan v. Warley, 245 U.S. 60 (1917), where an ordinance requiring residential segregation was invalidated despite the argument that it was necessary as part of the city's legitimate concern in preventing racial conflict and preserving the public peace. The Court there stated: "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." 245 U.S. at 81.

THE RELIEF

The United States has received and reviewed the responses which the superintendents of 49 school systems have made to the proposals which were set forth in the government's letter of August 6, 1968, as feasible steps to be taken this fall to eliminate the dual school systems in the various districts. We have also reviewed and analyzed once again in light of these responses the feasibility and reasonableness of each of the proposed alternative steps.

Through this process, we have weeded out a few proposed steps which, on the facts presented by the superintendents or on the basis of our independent review, were shown not to be feasible for accomplishment this fall. We have identified a second group of proposals with respect to which the superintendents have raised issues of fact. Finally, we have identified the balance of the proposed steps as to which, in our view, there is no issue of fact with respect to their feasibility for accomplishment this fall. The responses to this last group of proposals consist primarily of conclusory statements without supporting facts that the systems are fulfilling their legal responsibilities by operating under freedom of choice and that at this time of year any change would be unwarranted and disruptive. Also included in this category are the steps proposed with respect to systems from which no response was received.

We set out this analysis of the proposed steps and responses separately for each system in Appendix C.

We respectfully request this Court to order the defendants, the State Board of Education and the State Superintendent, to require each of the 58 school systems to take those steps which are identified in Appendix C as feasible for accomplishment this fall, unless this Court should lift such order with respect to particular steps on the basis of facts presented by the defendants on or before August 29, 1968, showing that such steps cannot feasibly be accomplished this fall without overriding administrative hardship.

The United States requests that it be given until August 31, to submit responses to any such facts presented by the defendants.

With respect to those steps as to which our review indicates a reasonable disagreement as to the facts, we request the Court to order the defendant Dr. Ernest Stone (1) to review each such proposed step and the facts indicating its feasibility for accomplishment this fall; (2) to require implementation this fall of all such steps as to which he has not been presented with facts showing that accomplishment would entail overriding administrative hardship; and (3) to report to this Court on or before October 1, 1968, as to the action taken with respect to each such proposed step and, where a system is not required to take a step

this fall, a detailed statement of a facts found to warrant delay.

The United States further respectfully requests this Court to order the defendant Dr. Stone, in accordance with the decision in Green v. County School Board of New Kent County, supra, as interpreted in Adams v. Mathews, supra, to require each of the 76 systems which still retains a free choice method of student assignment to submit to him for filing with this Court by November 28, 1968, a plan to complete the full conversion of the system to a unitary, non-racial system for the 1969-70 school year. We request this Court to require Dr. Stone to secure submission of such plans on a time schedule which will enable him to evaluate them and to make recommendations for necessary changes to the superintendents so that the plans submitted to the Court on November 28, 1968, will have his full approval.

The motion of the United States for supplemental relief sought adoption of alternatives to free choice which would complete the elimination of the dual school systems in 76 counties commencing this fall. Under the circumstances the motion did not request specific relief with respect to the assignment of faculty and staff. Insofar as this Court permits any of these 76 systems to continue to operate a free choice method of student assignment, the United States respectfully requests that Dr. Stone be ordered to require such systems to fulfill their obligations under Section VI of

the Decree of March 22, 1967, covering desegregation of faculty and staff, as that provision is interpreted in light of the decision of the Court of Appeals for the Fifth Circuit in Montgomery County Board of Education v. Carr, No. 25865 (C.A. 5, decided August 1, 1968).

Respectfully submitted,

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