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

ANTHONY T. LEE, et al.,
PLAINTIFFS,
UNITED STATES OF AMERICA,
Amicus Curiae.

versus

CIVIL ACTION NO. 604-E

MACON COUNTY BOARD OF EDUCATION,
et al.,

DEFENDANTS.

BRIEF IN SUPPORT OF THE MOTION
FOR PRELIMINARY INJUNCTION

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

ANTHONY T. LEE, et al.,

Plaintiffs,

UNITED STATES OF AMERICA,

Amicus Curiae and
Applicant for Intervention,

v.

MACON COUNTY BOARD OF EDUCATION,
et al.,

Defendants.

CIVIL ACTION NO. 604-E

BRIEF IN SUPPORT OF
THE MOTION FOR PRELIMINARY
INJUNCTION

STATEMENT OF FACTS

INTRODUCTION

This is an action brought by Negro parents seeking relief against the operation and maintenance of racially segregated public schools in Macon County, Alabama, and throughout the State of Alabama.^{1/} On July 13, 1964 this Court entered an order, which, among other things, enjoined the Governor of the State of Alabama as ex officio President of the State Board of Education, the State Superintendent

^{1/} The original complaint was filed January 28, 1963, naming the Macon County Board of Education, its members and Superintendent as defendants. On February 3, 1964 plaintiffs filed a supplemental complaint adding the State Board of Education, its President, Secretary and members as defendants and asked for statewide relief.

as Secretary and the State Board of Education from:

- a. Interfering with, preventing or obstructing by any means, the elimination of racial discrimination by local school officials in any school district in the State of Alabama;
- b. Approving, authorizing or paying any tuition grant or grant-in-aid under the provision of Chapter 4B [Sections 61(13) - 61(21)] of Title 52 of the Alabama Code for the attendance of any person in a school in which enrollment or attendance is limited or restricted upon the basis of race or color; and
- c. Failing, in the exercise of its control and supervision over public schools of the State, to use such control and supervision in such a manner as to promote and encourage the elimination of racial discrimination in the public schools, rather than to prevent and discourage the elimination of such discrimination.

On August 30, 1965, the United States, which pursuant to this Court's order of July 16, 1963, entered the case as plaintiff and amicus curiae, moved for leave to intervene and to file a supplemental complaint. On August 31, 1966, the Court granted this motion. The United States, by its Supplemental Complaint and accompanying Motion for a Preliminary Injunction, alleges that tuition grants to students attending

private segregated schools under Alabama's present tuition grant legislation (Act Nos. 687, 688, 1965 Regular Session), enacted after this Court's order of July 13, 1964, denies to Negroes of the State of Alabama the equal protection of the laws. The United States prays the Court to enjoin the defendants from paying state tuition grants to students attending private schools which the defendants fail to insure are open to students without regard to race and are operated on a racially nondiscriminatory basis.^{1a/}

A hearing on the Motion for a Preliminary Injunction was held on September 30, 1966. During the course of the hearing it was agreed that the motion would be submitted on two stipulations entered that day and on briefs to be submitted by the parties.^{2/} This brief is submitted pursuant to that agreement.

HISTORY AND PRESENT SETTING OF ALABAMA'S EFFORT
TO ASSIST FINANCIALLY STUDENTS LEAVING THE PUBLIC
SCHOOLS TO ENROLL IN PRIVATE SCHOOLS

On May 17, 1954, the Supreme Court decided Brown v. Board of Education, 347 U.S. 483 (1954) declaring unconstitutional the assignments of pupils on racial grounds in a public school system. Alabama responded with the Pupil Placement Act. Section 8 of that Act authorized the parent or guardian of

^{1a/} For reasons which we shall develop later, we believe that the statute should be enjoined in all respects.

^{2/} There is also pending before the Court the plaintiff's motion for additional relief. That motion is scheduled to be heard on November 30, 1966. This brief deals only with the tuition grant laws, and not with the other issues presented by plaintiff's motion for additional relief.

any child attending a school where the races were commingled to terminate the child's attendance there and provided that "such child shall be entitled to such aid for education as may be authorized by law." Title 52, §61(8), Code of Alabama (Recompiled 1958).^{3/} This section was implemented two years later by the tuition grant provisions of Act No. 527, Regular Session 1957, §61(7) of Title 52 of the Alabama Code (Recompiled 1958). It provided:

If as a result of the closing of a school or schools or otherwise there are children of school age residing within a district for whom no public school is available, who are otherwise qualified for education in public schools, and have not, independently of the ground for discontinuance, elected to attend private schools, the board of education may, in lieu of providing a public school or schools for such children, pay to their parents or guardians, or to a private educational institution designated by the parents or guardians in equal amounts for each such child, such sums from available school or education funds as the board shall determine to be reasonably necessary to enable such children to attend private nondenominational schools selected by their parents or guardians. If any public schools are operated by the board during the term for which any such payments are made, such payments shall not exceed the total amount per pupil allocated or budgeted by the board for the district as a whole for the current term.

In 1963, when this Court ordered the desegregation of the Macon County public schools, an all-white private school, Macon Academy, was organized in Macon County. In February 1964, the State Board of

^{3/} This section of the Pupil Placement Act was enacted as part of the program recommended by the Special Interim Committee of the Alabama Legislature formed in 1954, a committee formed to recommend proposals for delaying or avoiding racial desegregation in public schools. See Lee v. Macon County Board of Education, 231 F. Supp. 743, 749 f.n. 4 (M.D. Ala. 1964).

Education ordered the closing of all public school grades above the seventh grade in Macon County and directed the Macon County Board of Education to provide students at Macon Academy with financial assistance under the 1957 tuition grant act. By its order of July 13, 1964, this Court enjoined such assistance.

Lee v. Macon County Board of Education, supra.

With the enactment of the Civil Rights Act of 1964, the pace of desegregation in Alabama began to increase. In December 1964, pursuant to Title VI of the Civil Rights Act of 1964, the United States Department of Health, Education and Welfare adopted regulations requiring local boards to initiate a plan of desegregation in order to qualify for federal financial assistance. 45 CFR Part 80. As a result, beginning with the 1965 school year, many public school systems in Alabama for the first time adopted desegregation plans.

In this setting the present tuition grant law was born. It was introduced in the State Senate as S. 394 and 395 by Senators Givhan of Dallas and Lowndes Counties, Eddins of Marengo and Sumter^{4/} Counties, Clark of Barbour and Pike Counties and McDow of Autauga, Chilton and Shelby Counties.^{5/}

^{4/} Senators Givhan and Eddins had been among the sponsors of the 1957 tuition grant law as well (Act No. 528, 1957 Regular Session).

^{5/} S.B. 394, 1965 Regular Session. S.B. 395, introduced at the same time and by the same sponsors appropriated \$1,750,000 for tuition grants in 1965-66 and \$2,000,000 for 1966-67.

After passage by both Houses,^{6/} the bills were delivered to the Governor on August 26, 1965. On the same day the Governor sent a message to the Legislature.^{7/} In his message, the Governor stated:

In connection with these problems we commend your enactment of the tuition grant statute. It is designed not with any idea that it could be used to circumvent federal court decrees or to avoid the effects of federal legislation and federal control of our public school system. This legislation was designed purely and simply to implement a choice between educational opportunities already available.

Under the Pupil Placement Act of 1955, a parent may choose to send his child to the school within the child's compulsory attendance district, or a parent may choose to apply for a transfer outside of that attendance district, or the parent may choose in case of a refusal to grant a transfer to attend a private school. These three choices were available in the 1955 Act. The tuition grant statute simply amends the existing law to fix a sum available to those who choose private school education and to authorize the State Board of Education to prescribe rules and regulations.^{8/}

Senate Bills 394 and 395 became effective September 1, 1965 as Acts Nos. 687, 688, 1965 Regular Session. At the same time, all-white private schools

6/ The question has been raised whether the Alabama House of Representatives followed section 62 of the Alabama Constitution in acting on the bills. See statement of Clara Stone Collins, House Journal, August 13, 1965.

7/ House Journal, 1965 Regular Session, Vol. 3 at 3003.

8/ House Journal, 1965 Regular Session, Vol. 3 at p. 3005. The Governor, in referring to the alternatives available, stated that a parent could apply on behalf of his child for a transfer to a public school outside of the attendance district where the child resides. It was by an amendment added in 1966 that transfers outside the district were authorized under the tuition grant statute. See supra at 7.

commenced operation in Greene, Marengo, Hale, Dallas and Perry Counties. In these counties, the adoption of a desegregation plan by the public schools, the opening of an all-white private school, and the effective date of the present tuition grant law occurred almost simultaneously. In Birmingham, Hoover Academy, an all-white private school, commenced operation when the federal court ordered the public schools to initiate a desegregation plan. Hoover Academy was formed "to serve children in the area of the integrated Graymont elementary school." Pl. Ex. 18 at 2/21/64 hearing.

Following the adoption, in May 1966, by the State Board of Education of regulations governing the administration of the tuition grant law, tuition grants were paid to 200 white children attending all-white private schools in Marengo, Dallas and Perry Counties and in Birmingham. After this slow start, Senator Eddins sponsored and the Legislature passed S.B. 65 (Act No. 170, 1966 Regular Session) which relaxed the standards of eligibility of students for tuition grants. Act 687 provided tuition grants for attendance at private schools for public school students whose applications for transfer to another public school in the system in which they lived had been denied. Act No. 170 permits public school students to apply to any public school in the State and, upon rejection of their applications by the Superintendent of that school district, to become eligible for tuition grant payments.^{9/}

9/ Act No. 16, 1966 Special Session, added to the \$2,000,000 already appropriated for tuition grants for 1966-67, \$1,720,000 left over from the 1965-66 tuition grant appropriation.

Every penny paid under the new tuition grant law during the 1965-66 school year was paid to students enrolled in all-white private schools established when the public schools desegregated. It is too early to tell how much money will be paid to students leaving the public schools to attend all-white private schools in 1966-67, but there is more than \$3,700,000 available for tuition grants for 1966-67, enough money to pay grants to 20,000 students. The amount is sufficient to send all 11,000 white students in Dallas, Greene, Hale, Lowndes, Macon, Marengo, and Perry Counties to private schools.

Tuition grants last year were an important source of revenue to the all-white private schools in south-central rural Alabama that have received them. At the Perry Christian School in Perry County the tuition fees are \$90 a year higher for children who receive state tuition grants than for children who do not receive them. Tuition grants there totaled \$6,475 last year, out of a total approximate annual operating expense of \$20,000. At the all-white private schools in Marengo and Dallas Counties the grants ran approximately 10% of the annual costs last year. At Hoover Academy, which is not in south-central Alabama but in Jefferson County, tuition grants constituted about one-sixth of the cost of operating the school last year.

THE TUITION GRANT LAWS

The 1965 and 1966 tuition grant laws were not, in form at least, amendments to the 1957 tuition grant statute, §61(17) of Title 52 of the Code of Alabama

(Recompiled 1958), under which payments to students attending segregated private schools were enjoined by this Court. Lee v. Macon County Board of Education, supra. Instead, they were inserted as amendments to §61(8) of Title 52.^{10/} Prior to the 1965 amendment, that section provided:

Any other provisions of the law notwithstanding, no child shall be compelled to attend any school in which the races are commingled when a written objection of the parent or guardian has been filed with the board of education. If in connection therewith a requested assignment or transfer is refused by the board, the parent or guardian may notify the board in writing that he is unwilling for the pupil to remain in the school to which assigned, and the assignment and further attendance of the pupil shall thereupon terminate; and such child shall be entitled to such aid for education as may be authorized by law.

The legislature, in amending this section, removed the racial purpose from the face of the statute.

The first sentence of the section now reads:

Any other provisions of law notwithstanding, no child shall be compelled to attend any school when in the judgment of the parent or guardian of such child attendance in the school to be assigned will be detrimental to the physical or emotional health of such child or subject the child to hazards to personal safety.

Under the 1957 tuition grant statute, grants-in-aid were to be paid to students "residing within a district for whom no public school is available...."

^{10/} The 1957 tuition grant statute is part of Chapter 4B of Title 52 which authorizes local boards to close the public schools. The 1965-66 tuition grant statute was inserted in Chapter 4A, part of which deals with pupil placement.

Referring to this provision, this Court said (Lee v. Macon County Board of Education, supra at 754):

It is now clearly settled that once the State undertakes the function of providing public education to its citizens it cannot arbitrarily deny such education to citizens in one area of the State while continuing to make public education available to citizens in the other areas [A]s long as the State of Alabama maintains a public school system it cannot make public education 'unavailable' for a class of citizens as was here attempted... while making public education available to a different class of citizens in other areas of the county and State.

To sidestep this pronouncement, the Legislature did not make eligibility for a tuition grant under the 1965-66 statute turn on the unavailability of public schools within the district where the student resides.

The new tuition grant statute provides:

[In any case where the parent or guardian determines that the child's attendance in the school to which he is assigned will be detrimental to the physical or emotional health of the child or subject the child to hazards to personal safety], the parent or guardian of such child shall file written objections with the local board of education and request transfer and reassignment to another school within the jurisdiction of such local board, or to any school within the State of Alabama. If application for transfer and reassignment be made to a school in another school district or school system, the local superintendent shall forward such application for transfer and reassignment to the superintendent of education in such other school district or school system for acceptance or rejection. Such pupil seeking transfer and reassignment may be accepted under the provisions of Section 5 of the Alabama Pupil Placement Act. If the superintendent over such other school district or system shall refuse to admit such pupil, such superintendent shall thereupon advise the local superintendent of such fact, and shall return said application for transfer and reassignment to said local superintendent, and the same shall constitute a denial or refusal of a request for transfer and reassignment hereunder. Upon refusal of any board to grant such a request, the child shall proceed as provided in Section 7

of this Act, or in lieu thereof, submit an application to the State Board of Education for a tuition grant to attend any private non-sectarian school in or outside the school attendance district in which the child resides. Tuition grants approved by the State Board shall not exceed a total of One Hundred Eighty-five Dollars (\$185.00) in any one school year, or a sum to be determined by the State Superintendent of Education to be the cost per pupil in average daily attendance in the public schools of the State, whichever sum shall be less.

* * *

The statute then directs the State Board of Education to promulgate rules and regulations for the administration of tuition grants and makes it a misdemeanor for a recipient of a tuition grant to use the funds for any purpose other than tuition in a school. The statute concludes by requiring the recipient of a tuition grant to enter into an enforceable agreement to reimburse the State Board of Education for the full amount received if the child for whom the grant was appropriated should enroll in a public school within the school year for which the grant was made.

ARGUMENT

1. Since 1954 Alabama has been constitutionally obligated to disestablish its segregated public school system. Brown v. Board of Education, 347 U.S. 483 (1964). Alabama may not, consistent with this obligation, operate and maintain two school systems -- one integrated, one segregated -- giving public school students a choice between the two. Boson v. Rippey, 285 F. 2d 43, 45-46 (C.A. 5, 1960); Kelly v. Board of Education of City of Nashville, 159 F. Supp. 272, 278 (M.D. Tenn. 1958). Nor may Alabama sanction a pupil transfer procedure which has the effect of perpetuating

racial segregation in the public schools. Goss v. Board of Education, 373 U.S. 683 (1963). Nor may the State by enacting a statute induce, encourage or promote private persons to accomplish what it is forbidden to accomplish. As the court said in Hamm v. Virginia State Board of Elections, 230 F. Supp. 156, 157 (E.D. Va. 1964):

The 'separate but equal' racial doctrine was condemned a decade ago in Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). Subsequent decisional law has made it axiomatic that no State can directly dictate or casually promote a distinction in the treatment of persons solely on the basis of their color. To be within the condemnation, the governmental action need not effectuate segregation of facilities directly. Cf. Anderson v. Martin, 375 U.S. 399, 402, 84 S. Ct. 454, 11 L. Ed. 430 (1964). The result of the statute or policy must not tend to separate individuals by reason of difference in race or color.

Similarly, in Hall v. St. Helena Parish School Board, 197 F. Supp. 649, 658 (E.D. La. 1961) affirmed per curiam, 368 U.S. 515 (1962) the court said:

It is true that the Legislature has imposed no inequality, but its instrument encourages it, expressly permits it. And that is equally condemned.

This is a familiar principle of constitutional law. See, Lombard v. Louisiana, 373 U.S. 267 (1963); NAACP v. Alabama, 357 U.S. 449, 463 (1963); Burton v. Wilmington Parking Authority, 365 U.S. 715, 726-27 (1961 (Justice Stewart concurring)); Evans v. Newton 382 U.S. 296, 305-307 (1966) (Justice White concurring). For example, in Anderson v. Martin,

375 U.S. 399 (1964), the Supreme Court held invalid Louisiana's requirement that in all primary, general or special elections the nomination papers and ballots designate the race of candidates for elective office. Fully cognizant that such a requirement did not compel any voter to choose a candidate on the basis of race, that if discrimination was practiced it was done by private persons not the State, the Court wrote (375 U.S. at 402):

The vice lies . . . in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls.
(Emphasis added).

Alabama's 1965-66 tuition grant statute does nothing more than encourage and promote private persons to accomplish what the State is forbidden to accomplish by Boson and Goss - give public school children a choice between

attending an integrated or a segregated school and effect a transfer policy designed to perpetuate racial segregation in the schools of Alabama. Viewed in the context of its history and present setting, it is part of a sophisticated scheme devised and financed by the State to circumvent the Brown decision by encouraging and inducing white students to leave the public school system, when dissatisfied with its nondiscriminatory assignment system, in order to enroll in all-white segregated private schools.

It is not novel for the courts to look beyond the face of a statute examining its history and present setting to determine if it squares with the Constitution. See Hall v. St. Helena Parish School Board, 197 F. Supp. 649, (E. D. La. 1961) affirmed per curiam, 368 U.S. 515 (1962); NAACP v. Potts, 159 F. Supp. 503 (E. D. Va. 1958) reversed on other grounds sub nom Harrison v. NAACP, 360 U.S. 167 (1959); United States v. Louisiana, 225 F. Supp. 353, 361-63 (E.D. La. 1964), affirmed 380 U.S. 145 (1965);

See also, NAACP v. Button, 371 U.S. 415 (1963); ^{11/}
Grosjean v. American Press Co., 297 U.S. 233 (1936).

The history leading up to the passage of the 1965-66 tuition grant statute is set forth in detail in the Statement of Facts. See supra at 3-8. Briefly, tuition grants for students attending a private school in Alabama were a **phenomenon created** out the resistance efforts of the **State Legislature** to the Brown decision.^{12/} See, Lee v. Macon County Board of Education, 231 F. Supp. 743, 749 f.n. 4 (M.D. Ala. 1964). The first such statute was enacted in 1957. It authorized tuition grants for students attending private nondenominational schools in school districts where no public school was available. The 1957 tuition grant statute was a section of Chapter 4B

^{11/} See in particular the concurring opinion of Justice Douglas. 371 U.S. at 445-46.

^{12/} See Report of Alabama Interim Legislative Committee on Segregation in the Public Schools, Legislative Document No. 1, Senate, Regular Session, 1955, p. 8.

of Title 52. This chapter authorized each local board of education to discontinue operating its public school when it found that the continued operation of its public school "will be accompanied by such tensions, friction, or potential disorder or ill will within the school as substantially to impair effective standards or objectives of education of its pupils, or by potential impairment of peace, order and goodwill in the community, school district, or county involved." Section 61(13), Title 52, Code of Alabama (Recompiled 1958). It was pursuant to this chapter that the State Board of Education ordered all grades above the seventh grade in the Macon County public schools closed and directed the County Board to provide financial assistance to students, residing in Macon County where no public schools were available, who were enrolled in private schools. See, Lee v. Macon County Board of Education, supra at 748-49. When this Court enjoined the payment of tuition grants under the 1957 Act to students attending racially segregated private schools, the Legislature devised another scheme calculated to circumvent Brown. Rather than base eligibility for a tuition grant on the unavailability of a public school within the district where the child resides -- a provision this Court found fatal to the 1957 Act -- the Legislature in the 1965-66 tuition grant statute based eligibility on (1) the parent or guardian being dissatisfied with the child's present assignment in public school, and (2) the denial of a transfer application filed by the parent or guardian of the child at any other public school within the State.

But this difference does not save the new statute. Although somewhat different from the 1957 Act, the new statute is but a continued effort on the part of the State to deny Negroes the equal protection of the laws.^{13/}

^{13/} Every penny paid under the 1965-66 tuition grant statute during the 1965-66 school year went to students enrolled in all-white private schools established when the public schools desegregated.

In fact, the tuition grant statute is part of an over-all scheme to establish an all white "private" school system in Alabama. The efforts that have been and are being made are amply illustrated by a televised speech of the Governor given before the Legislature on July 26, 1966, encouraging private contributions to support several private schools established throughout the State. He declared:

[Y]our . . . donations . . . will help people in our State who are being forced to conduct private schools because of the destruction of their public schools.

This group, made up of representatives of the various private schools, will see that your contribution is distributed to these schools on an equitable basis. These people - these parents - are fighting for their freedom too - a freedom that affects all of us and I hope that you will join me in helping those whose schools have been taken away from them.

The tuition grant statute is part of the State's involvement in this scheme.

We think the State's involvement is plain not only from the history we have outlined supra at 16-17 but from the text and the mechanics of the tuition grant statute itself. Eligibility for a tuition grant turns on the parents or guardian of the child withdrawing the child from a public school when in the parent's or guardian's judgment attendance at the public school would be "detrimental to the physical or emotional health of such child or subject the child to hazards to personal safety." Eligibility does not turn on the inadequacy of public educational facilities to accommodate all children of school age in the school district.^{15/} The statute does not manifest State concern for equalizing the opportunity of all children, including the poor, to attend private schools, for the statute does not require a showing of financial need. Nor does the statute exhibit State concern for improving the educational opportunities of special classes of students - those who may be gifted or those who may be handicapped.^{16/} Although

^{15/} See, for example, the Vermont grant-in-aid statute which provides that town districts not maintaining a four year high school may pay tuition costs of students attending an academy located in that town district and offering a four-year high school course. §798, Title 16, Vermont Statutes.

^{16/} See, for example, the New Hampshire grant-in-aid statute which provides for the payment of tuition by school districts for the education of handicapped children when the school district does not provide that service. §186.45, New Hampshire Revised Statutes.

the statute applies only to public school pupils, it may not be invoked by pupils in public schools who wish to attend private schools for reasons like superior instruction, better curricula, smaller classes, and the like that may be offered there. The statute narrows its focus on an extremely limited class of students -- those students whose physical or emotional health would be adversely affected or whose safety might be jeopardized by attending public schools. It is not the State that makes the determination on which eligibility turns but the parent or guardian of the child.

With respect to the narrow class of students to whom the tuition grant statute is aimed, the State not only admits that its resources and facilities are not up to the task of correcting the child's problems but that the child's problems emanate from his attendance at public schools.

We think there is simply no rational basis on which to explain the statute. There is not the slightest suggestion of any kind of emotional or physical health problems emanating from public school attendance that would justify enactment of this statute. Nor is there a suggestion that public school attendance presents a safety hazard. We think there is only one basis on which to explain the statute. It is part of the State's continuous effort to avoid its obligations under Brown, enacted in response to the increased pace of desegregation in the State resulting from federal court decrees and the implementation of Title VI of the Civil Rights Act of 1964. While the

statute is cast in terms of making eligibility for a tuition grant turn on the parent's judgment that the child's attendance at public school will be detrimental to the child's "physical and emotional health," when read in perspective it turns eligibility for a tuition on the parents' dissatisfaction with sending his child to an integrated public school. The 1965-66 statute's predecessor said as much on its face. It authorized the parent or guardian of any child attending "any school in which the races are commingled" to terminate the child's attendance there. Aware of the attitude and feelings of many of its constituents respecting the desegregation of public schools,^{17/} the Legislature simply substituted for the objective test - commingling of the races - the "judgment" of the parent or guardian that now appears in the statute.

^{17/} The 1955 Interim Report at p. 4 states: [T]he overwhelming majority of white citizens of Alabama are unalterably opposed to the idea of permitting the use of the public school system to coerce integration."

In short, the statute is designed for no other purpose than to induce and encourage white children enrolled in the public schools, which are beginning the process of desegregation, to seek admittance to segregated private schools. Through the tuition grant statute, the State seeks to encourage and subsidize private persons to accomplish that which it is forbidden to accomplish - establish two school systems, one integrated, one segregated, giving public school students a choice of attending either and effect a transfer policy designed to perpetrate racial segregation in the schools of Alabama. The statute cannot be squared with the Fourteenth Amendment (Rippy v. Boson, 285 F.2d 43 (C.A. 5, 1960); Goss v. Board of Education, 373 U.S. 683 (1963); Cf. Anderson v. Martin, 375 U.S. 399 (1964)) and, for that reason, must be enjoined.

2. The dictum in Griffin v. State Board of Education, 239 F. Supp. 560 (E.D. Va. 1965) does not call for a different result. In Griffin, plaintiffs attacked Virginia's tuition grant scheme arguing that the use of the grants to attend certain named private schools which had a discriminatory admission policy was inconsistent with the Fourteenth Amendment. The plaintiffs also attacked the statute on its face. The Court said (239 F. Supp. at 565):

Payment of a tuition grant for use in a private school is legal if it does not tend in a determinative degree to perpetuate segregation. The test is not the policy of the school, but the measure in which the grants or grant contribute to effect the exclusion on account of race. Every exclusive school is not a forbidden school. The part played by the grant in effecting the exclusion, to repeat, is the pivotal point.

* * *

Grants for use in an exclusively "white" school within or without Virginia would not be disallowed if the money only insubstantially contributed to the running of the school. * * * On the other hand, if the private school is a creature of, or is preponderantly maintained by, the grants, then the operation of the school is State action, and payment of the grants therefore is a circumvention of the equal protection clause of the Constitution.

In refusing to strike down the Virginia tuition grant law and formulating the above test, the Court in Griffin noted that the statute assailed as unconstitutional was enacted and administered after Virginia's "massive resistance" to school desegregation had been abandoned. Id. at 562.

The same could hardly be said for the Alabama tuition grant statute. As the evidence in this case demonstrates, Alabama has not abandoned its "massive resistance" to public school desegregation.

More fundamentally, the court in Griffin envisaged a perfectly legitimate use of the Virginia statute. The court said (239 F. Supp. at 564):

It must be acknowledged that a parent may be prompted to pick a private school by many reasons other than race consideration. State aid of this preference does not itself evidence racial discrimination.

The Virginia statute authorizes aid to any child of school age who desires to attend a nonsectarian private school. Id. at 563. Unlike the Alabama statute, the Virginia statute is not directed only at children dissatisfied with their public school assignment but is aimed at all children of school age. On the other hand, the Alabama statute is aimed only at public school children and is not intended to be invoked for legitimate reasons. Indeed, the evidence is quite clear that during the 1965-66 school year, it was invoked exclusively by white students leaving the public school system to enroll in all-white private schools established contemporaneously with the desegregation of the public schools to which they were assigned. These differences between the Alabama statute and the Virginia statute are fundamental. For this reason, we do not think that the test formulated in Griffin applies to the Alabama statute.

In any event, the focus of the inquiry should not be on the private institutions receiving state funds by reason of the enrollment of students who qualify for tuition grants. No one doubts that private institutions are beyond the reach of the Fourteenth Amendment if they are not controlled or subsidized in some respect by the State. See, Poindexter v. Louisiana Financial Assistance Commission, ____ F. Supp. ____ (E.D. La., Civ. Action No. 14683, decided August 3, 1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). The focus of the inquiry should be on the State to determine what part it plays in the discriminatory action of private individuals - be they officials of private schools or the students who choose to attend such schools. If the State enacts a statute designed not to aid private education but to induce, encourage and subsidize private discrimination by providing tuition grants to students wishing to leave the public school system to enroll in private schools, it does not escape the reach of the Fourteenth Amendment simply because there are some private schools in which there are a small proportion of students receiving tuition grants.^{18/} Having intimately involved itself in private discrimination, the State may be enjoined. Anderson v. Martin, 375 U.S. 399 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); NAACP v. Alabama, 357 U.S. 449, 463 (1963).

^{18/} We do not suggest that public grants made for a legitimate purpose part of which, as an incidental matter, go to private institutions which discriminate on grounds of race are prohibited by the Fourteenth Amendment. We do think that public grants which are expended for no purpose other than to promote and encourage private discrimination are prohibited by the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons we respectfully request the Court to declare invalid Alabama's 1965-66 tuition grant statute and to enjoin its enforcement in all respects. We believe that if the Court, through an injunction, wrote into the 1965-66 tuition grant statute a provision prohibiting the use of tuition grants in private schools that discriminate on the basis of race, it would subvert the statute's very purpose. The statute was designed, as the Governor said: "to implement a choice between educational opportunities already available." House Journal, 1965 Regular Session, Vol. 3 at 3005. That choice, as we have pointed out, is not between an integrated public education and an integrated private education at State expense. It is a choice between an integrated public education and a segregated private education at State expense.

Moreover, the statute is drawn in language which refers to nothing of legitimate State concern. Take away the basis for qualifying for a tuition grant - the parent's judgment that the child's public school assignment would be "detrimental to the physical or emotional health of [the] child or [would] subject the child to hazards to personal safety" which, when read in light of the conditions that exist in Alabama is nothing more than the parent's dissatisfaction with his child's assignment to an integrated school, - there is nothing in the

statute left to save. This being the case, we believe the only proper remedy is an order enjoining the enforcement of the statute in all respects.

Respectfully submitted,

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APPENDIX

This appendix is a synopsis of tuition grant laws - excepting Alabama - found in a search through the statutory laws of the other 49 states.

In addition to the grants described below, the following states were found to have provision for payment of tuition, and in some cases other costs, for Negroes who attend colleges and universities out of their home state because the advanced training desired is not available in the state-operated Negro colleges:

1. Kentucky Revised Statutes Section 116. 160
2. Mississippi Code Section 672. 5
3. Tennessee Code Section 49-3207 and,
4. Code of Virginia Section 23-10.

In the search through the various state codes and statutes, we attempted to discover all laws providing for state aid for attendance at private schools. Because of the broad scope of the search it is possible that not all pertinent laws were found.

1. Arkansas

The Law

The statute is found in Arkansas Statutes, Sections 80-1545 et seq. This law was enacted in 1959.

Scope of Coverage

The law provides for payment of tuition grants for use in paying cost of instruction in any other public school than the one the student would normally attend or tuition at a non-profit non-sectarian school in Arkansas.

A student becomes eligible for the grant when for any reason beyond his control he is prohibited from attending the public school he normally attends or when the public school he normally attends is integrated. In the latter case the parent must make an affidavit that the student's welfare would be best served by not attending an integrated school.

Amount

The amount paid is the lesser of the per student cost for the preceding year in public school which the student should attend or for the public school that he proposes to attend. If the student is enrolled in a private school, the amount payable is the lesser of the per student cost in the school he normally would attend or his actual tuition cost.

Appropriation

No special appropriation. The act provides for payment from funds made available from time to time to the State Board of Education, including but not limited to the Minimum Foundation Program.

2. Connecticut

The Law

The statute is found in Connecticut General Statutes, Title 10, Section 10-33. It was enacted in 1949.

Scope of Coverage

The law provides for payment of tuition by the board of education of any town which does not

maintain a high school. This payment may be made for the benefit of any child who has completed an elementary school course and who is attending a high school approved by the state board of education.

3. Georgia

The Law

The law authorizing payment of tuition grants is found in Sections 813 et seq. of the Georgia Code. This law was enacted in 1958.

Scope of Coverage

The statute provides for payment to parents of qualified children for tuition at a non-sectarian private school in any state or a public school outside of Georgia but within the United States.

Qualified children are those between six and 19 residing in the state who have not finished or graduated from high school and are otherwise eligible to attend local public schools.

To pay the grants, the board in the particular school district, as well as the local governing authority, must first determine the need.

After this determination is made, the parents may file application with the local boards.

Amount

The amount of the grant is the lesser of the actual amount expended by the parent or the average state cost per pupil in the public schools for the preceding year.

Appropriation

No specific appropriation was made. The money is to come out of the general appropriation to the State Department of Education. The local board of education is required to share in the cost of the grant in the same proportion as it shares in the Minimum Education Program cost.

Other Programs

The Georgia law in Georgia Code Section 812 also provides for grants to parents of "severely mentally retarded children" for obtaining educational services when public schools are not available.

4. Louisiana

The Law

The grant-in-aid law is found in Revised Statutes 17:2951 et seq. It was enacted in 1962.

Scope of Coverage

Payment may be made for education of children in private, non-sectarian elementary or secondary schools in Louisiana.

To be eligible for the grant the child must:

1. Be eligible under Louisiana law for admission to public schools.
2. Furnish a certificate of immunization as required and,
3. Furnish evidence of admissibility to a private school legally constituted and operated under the laws of Louisiana.

Amount of Grant

The Financial Assistance Commission determines the amount to be paid taking into account all factors including expenses of the student. Payment is to be made on a per day of attendance basis with a maximum of 180-day coverage per year.

Appropriation

Louisiana RS 47:318 provides that the first \$300,000 of sales tax received each month is to be credited to the Louisiana Financial Assistance Fund.

5. Mississippi

The Law

The tuition grant law is found in Mississippi Code at Sections 6248-101 et seq. It was enacted in 1964.

Scope of Coverage

The act provides payment for a student attending, or hereinafter to attend, a private non-sectarian school in or outside the locality where he resides.

Every child between age six and 21 who has not finished or graduated from high school is eligible.

Amount

The State Educational Finance Commission establishes the amount, not to exceed \$185 per year.

Appropriation

No figure is readily available but in the first 3/4 of 1965-1966 the Commission paid out \$219,102.85 in grants.

6. New Hampshire

The Law

The statute is found in Revised Statutes 186:45. It was enacted in 1951.

Scope of Coverage

This law provides for the payment of tuition by school districts for the education of handicapped children when the school district does not provide that service.

This tuition can be paid for attendance at either a private or public school.

7. North Carolina

The Law

The tuition grant law in North Carolina is found in the General Statutes of North Carolina, Chapter 115, Sections 274 et seq. It was enacted in 1956.

Scope of Coverage

Payment may be made for attendance at a private non-sectarian school.

Every child residing in the state may apply if 1) no public school is available or 2) he is assigned to a public school attended by a child of another race against the wishes of his parent. If the reason is race, the student

may apply only if he cannot be assigned to a non-integrated public school.

In addition to the above, for a child to be eligible, he must show in the application that he is enrolled or accepted for enrollment in a private school.

Amount

The grant is the lesser of the per day, per student amount of state funds expended on public schools in the preceding year (a maximum of 180 days) or the student's actual expense.

Appropriation

The 1965 appropriation did not reflect a specific amount for this purpose.

8. South Carolina

The Law

The South Carolina statute is found in the Code of Laws of South Carolina, Article 6, Section 297. It was enacted in 1963.

Scope of Coverage

The law states that every child domiciled in the state who is otherwise qualified to attend public schools who has not yet finished or graduated from high school and who desires to attend a private school located within the state shall be eligible for and entitled to a state scholarship grant.

The private school must not be operated or controlled by any church, synagogue, sect or other religious organization or institution.

Amount

The grant shall be the lessor of the per pupil cost to the state or the actual tuition cost at the school.

Appropriation

Act 247, 1965, provided for \$125,000 of the 1964-65 appropriation to be withheld and carried forward to be available in 1965-66.

9. Vermont

The Law

The law is found in Vermont Statutes, Title 16, Section 798. It was first enacted in 1910.

Scope of Coverage

It provides that town districts not maintaining a four-year high school may pay tuition costs of students attending an academy located in that town district and offering a four-year course.

10. Virginia

Source

The Virginia tuition grant law is found in the Code of Virginia Section 22-115.29 et seq. It was enacted in 1960.

Scope

The grant is available for attendance at non-sectarian private schools located in or outside the district where the child resides or public schools located outside the student's district.

To be eligible the student must be between six and 20, and he must not have finished or graduated from high school.

Amount

The state pays \$125 per school year for elementary students and \$150 per school year for high school students.

Additionally, the statute provides that the local city, town or county must pay an amount at least equal to the state's payment. (The local government may pay more, but the maximum total payable by both local and state governments is the actual tuition cost).

The statute provides that if the local authority fails to match the state, the State Board of Education shall authorize payment of the matching amount. This is then reported to the State Comptroller who deducts that amount from any money which may thereafter be due to the local authority.

Appropriation

1965-66 \$1,275,000 (Source, Acts 1964 c. 658, item 634.)

Summary of Tuition Grant Laws

<u>State</u>	<u>Scope of Coverage</u>	<u>Year Enacted</u>	<u>Amount of Tuition Provided</u>
Arkansas	Any student when his school is integrated.	1959	Lesser of per student cost in his district or actual tuition.
Connecticut	Any high school student when town has no high school.	1949	Actual Tuition
Georgia	Any student in district where local authority has determined the need.	1958	Lesser of actual tuition or per student cost in preceding year.
Louisiana	Any student enrolled in private school.	1962	To be determined by Commission.
Mississippi	Every child who has not graduated from high school.	1964	Commission establishes with \$185 maximum.
New Hampshire	Handicapped children where district has no special school.	1951	Actual Tuition
North Carolina	Every child assigned to school attended by another race.	1956	Lesser of per student cost to state or actual tuition.
South Carolina	Any child attending private school.	1963	Lesser of per student cost to state or actual tuition.
Vermont	Students attending academy in district which has no high school.	1910	Actual Tuition
Virginia	Any student attending private school.	1960	State pays \$125-elementary, \$150 - high school to be matched by local authority.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Support of the Motion for a Preliminary Injunction has been served by official United States mail in accordance with the rules of this Court to each of the attorneys for plaintiffs and defendants addressed as follows:

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Dated: October 18, 1966

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