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Pursuant to the order of the Fourth Circuit Court of Appeals, filed March 5, 1970, this memorandum is issued. Previous orders cover more than one hundred pages. The motions and exhibits and pleadings and evidence number thousands of pages, and the evidence is several feet thick. It may be useful to reviewing authorities to have a brief summary of the case in addition to the supplemental facts on the questions of transportation.

Before 1954, the schools in Charlotte and Mecklenburg County were segregated by state law. The General Assembly, in response to Brown v. Board of Education, adopted the Pupil Assignment Act of 1955-56, North Carolina General Statutes, §115-176, which was quoted in the April 23, 1969 order and which is still the law of North Carolina. It provides that school boards have full and final authority to assign children to schools and that no child can be enrolled in nor attend a school to which he has not been so assigned.

"Freedom of choice" to pick a school has never been a right of North Carolina public school students. It has been a courtesy offered in recent years by some school boards, and its chief effect has been to preserve segregation.

Slight token desegregation of the schools occurred in the years following *Brown*. The Mecklenburg County and the Charlotte City units were merged in 1961.

This suit was filed in 1965, and an order was entered in 1965 approving the school board's then plan for desegregation, which was substantially a freedom of choice plan coupled with the closing of some all-black schools.

There was no further court action until 1968, when a motion was filed requesting further desegregation. Most

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white students still attended "white" schools and most black students still attended "black" schools. The figures on this subject were analyzed in this court's opinion of April 23, 1969 (300 F.Supp. 1358 (1969)), in which the background and history of local segregation and its continuing discriminatory nature were analyzed at length. In that order the court ruled that substantial progress had been made and that many of the alleged acts of discrimination were not proved.

However, certain significant findings and conclusions were made which have been of record without appeal for eleven months. These include the following:

1. The schools were found to be unconstitutionally segregated.

2. Freedom of choice had failed; no white child had chosen to attend any black school, and freedom of choice promoted rather than reduced segregation.

3. The concentration of black population in northwest Charlotte and the school segregation which accompanied it were primarily the result of discriminatory laws and governmental practices rather than of natural "neighborhood" forces. (This finding was reaffirmed in the order of November 7, 1969.)

4. The board had located and controlled the size and population of schools so as to maintain segregation.

5. The plan approved and put into effect in 1965 had not eliminated unlawful segregation.

6. The defendants operate a sizeable fleet of busses, serving over 23,000 children at an average annual cost (to state and local governments combined) of not more than $40 per year per pupil.

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7. Transportation by bus is a legitimate tool for school boards to use to desegregate schools.

8. Faculties were segregated, and should be desegregated.

9. Under *Green* v. *New Kent County School Board*, 391 U.S. 430 (1968), there was now an active duty to eliminate segregation.

The board was directed to submit a plan to desegregate the schools.

The order produced a great outcry from school board members and others. It also produced a plan which called for the closing of Second Ward, the only black high school located near a white neighborhood; and it produced no rezoning, no elimination of gerrymandering, and only minor changes in the pupil assignment plan. It did produce an undertaking to desegregate the faculties. The plan was reviewed in the court order of June 20, 1969, in which the court approved the provision for offering transportation to children transferring from majority to minority situations and directed the preparation of a plan for pupil desegregation.

The court also specifically found that gerrymandering had been taking place; and several schools were cited as illustrations of gerrymandering to promote or preserve segregation.

In June of 1969, pursuant to the hue and cry which had been raised about "bussing," Mecklenburg representatives in the General Assembly of North Carolina sought and procured passage of the so-called "anti-bussing" statute, N.C. G.S. 115-176.1. That statute reads as follows:

> "§115-176.1. Assignment of pupils based on race, creed, color or national origin prohibited. —No person shall be refused admission into or be excluded from any public school in this State on account of

race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creed, colors or national origins from the community.

"Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

"*The provisions of this article shall not apply* to a temporary assignment due to the unsuitability of a school for its intended purpose nor *to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment* .

"The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible

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to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit. (1969, c. 1274.)"

The board's next plan was filed July 29, 1969, and was approved for 1969-70 by the order of August 15, 1969. The August 15 order contained the following paragraph:

> "The most obvious and constructive element in the plan is that the School Board has reversed its field and has accepted its affirmative constitutional duty to desegregate pupils, teachers, principals and staff members 'at the earliest possible date.' It has recognized that where people live should not control where they go to school nor the quality of their education, and that transportation may be necessary to comply with the law. It has recognized that easy methods will not do the job; that rezoning of school lines, perhaps wholesale; pairing, grouping or clustering of schools; use of computer technology and all available modern business methods can and must be considered in the discharge of the Board's constitutional duty. This court does not take lightly the Board's promises and the Board's undertaking of its affirmative duty under the Constitution and accepts these assurances at face value. They are, in fact, the conclusions which necessarily follow when any group of women and men of good faith seriously study this problem *with knowledge of the facts of this school system and in light of the law of the land.*"

The essential action of the board's July 29, 1969 plan was to close seven inner-city black schools and to re-assign their pupils to designated white suburban schools, and to

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transport these children by bus to these suburban schools. In addition, it was proposed to re-assign 1,245 students from named black schools to named suburban white schools and provide them transportation.

The total of this one-way transportation of black students only to white schools under this plan was stated to be 4,245 children.

No problem of transportation or other resources was raised or suggested.

The evidence of the defendants is that the property value of the schools thus closed exceeds $3,000,000. For the most part, that property stands idle today.

The "anti-bussing" law was not found by the board to interfere with this proposed wholesale re-assignment and "massive bussing," of black children only, for purposes of desegregation.

The plan, by order of August 15, 1969, was approved on a one-year basis only, and the board was directed to prepare and file by November 17, 1969, a plan for complete desegregation of all schools, to the maximum extent possible, by September 1, 1970.

The defendants filed a motion asking that the deadline to prepare a plan be extended from November 17, 1969, to February 1, 1970. The court called for a report on the results of the July 29, 1969 plan. Those results were outlined in this court's order of November 7, 1969. In substance, the plan which was supposed to bring 4,245 children into a desegregated situation had been handled or allowed to dissipate itself in such a way that only about one-fourth of the promised transfers were made; and as of now only 767 black children are actually being transported to suburban white schools instead of the 4,245 advertised when the plan was proposed by the board. (See defendants'

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March 13, 1970 response to plaintiffs' requests for admissions.)

The meager results of eight months of planning were further set out in this court's November 7, 1969 order, as follows:

"The Situation Today

"The following table illustrates the racial distribution of the present school population:

Schools Readily Identifiable as White

% White	Number of Schools	Numbers of Students White	Black	Totals
100%	9	6,605	2	6,607
98–99%	9	4,801	49	4,850
95–97%	12	10,836	505	11,341
90–94%	17	14,070	1,243	15,313
86–89%	10	8,700	1,169	9,869
	57	45,012	2,968	47,980

Schools Readily Identifiable as Black

% Black	Number of Schools	Numbers of Students White	Black	Totals
100%	11	2	9,216	9,218
98–99%	5	41	3,432	3,473
90–97%	3	121	1,297	1,418
56–89%	6	989	2,252	3,241
	25	1,153	16,197	17,350

Schools Not Readily Identifiable by Race

% Black	Number of Schools	Numbers of Students White	Black	Totals
32–49%	10	4,320	2,868	7,188
17–20%	8	5,363	1,230	6,593
22–29%	6	3,980	1,451	5,431
	24	13,663	5,549	19,212
Totals:	106	59,828	24,714	84,542

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Some of the data from the table, re-stated, is as follows:

Number of schools	106
Number of white pupils	59,828
Number of black pupils	24,714
Total pupils	84,542
Per cent of white pupils	71%
Per cent of black pupils	29%
Number of "white" schools	57
Number of white pupils in those schools	45,012
Number of "black" schools	25
Number of black pupils in those schools	16,197
Number of schools not readily identifiable by race	24
Number of pupils in those schools	19,212
Number of schools 98-100% black	16
Negro pupils in those schools	12,648
Number of schools 98-100% white	18
White pupils in those schools	11,406

"Of the 24,714 Negroes in the schools, something above 8,500 are attending 'white' schools or schools not readily identifiable by race. *More than 16,000, however, are obviously still in all-black or predominantly black schools.* The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision. The black school problem has not been solved.

"The schools are still in major part segregated or 'dual' rather than desegregated or 'unitary.'

"The black schools are for the most part in black residential areas. However, that does not make their segregation constitutionally benign. In previous opinions the facts

respecting their locations, their controlled size and their population have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or *'de facto,'* and the resulting schools are not 'unitary' or desegregated.

"Freedom of Choice

"Freedom of choice has tended to perpetuate segregation by allowing children to get out of schools where their race would be in a minority. The essential failure of the Board's 1969 pupil plan was in good measure due to freedom of choice.

"As the court recalls the evidence, it shows that *no white students have ever chosen to attend any of the 'black' schools.*

"Freedom of choice does not make a segregated school system lawful. As the Supreme Court said in *Green* v. *New Kent County*, 391 U. S. 430 (1968):

> "'* * * If there are reasonably available other ways, such for illustration as zoning, promising speedier and

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more effective conversion to a unitary, nonracial school ysstem, "freedom of choice" must be held unacceptable.'

"Redrawing attendance lines is not likely to accomplish anything stable toward obeying the constitutional mandate as long as freedom of choice or freedom of transfer is retained. The operation of these schools for the foreseeable future should not include freedom of choice or transfer except to the extent that it reduces segregation, although of course the Board under its statutory power of assignment can assign any pupil to any school for any lawful reason."

(The information on the two previous pages essentially describes the condition in the Charlotte-Mecklenberg schools today.)

Meanwhile, on October 29, 1969, the Supreme Court in *Alexander* v. *Holmes County*, 396 U. S. 19 (1969), ordered thirty Mississippi school districts desegregated immediately and said that the Court of Appeals

> "... *should have denied all motions for additional time* because continued operation of *segregated schools* under a standard of allowing all deliberate speed for desegregation is no longer constitutionally permissible. *Under explicit holdings of this Court, the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. Griffin* v. *School Board*, 377 U.S. 218, 234 (1964); *Green* v. *School Board of New Kent County*, 391 U. S. 430, 439, 442 (1968)." (Emphasis added.)

Because of this action and decision of the Supreme Court, this court did not feel that it had discretion to grant the requested time extension, and it did not do so.

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The board then filed a further desegregation plan on November 17, 1969. The plan was reviewed in the order of December 1, 1969. It was not approved because it rejected the goal of desegregating all the schools or even all the black schools. It proposed to concentrate on methods such as rezoning and freedom of choice and to discard any consideration of pairing, grouping, clustering and transporting or other methods. It proposed to retain numerous all-black schools.

The performance results, set out in previous orders, show that the all-black schools lag far behind white schools or desegregated schools.

The court, in an order dated December 1, 1969, reviewed the recent decisions of courts and laid out specific guidelines for the preparation of a plan which would desegregate the schools. A consultant, Dr. John A. Finger, Jr., was appointed to draft a plan for the desegregation of the schools for use of the court in preparing a final order. The school board was authorized and encouraged to prepare another plan of its own if it wished.

Dr. Finger worked with the school board staff members over a period of two months. He drafted several different plans. When it became apparent that he could produce and would produce a plan which would meet the requirements outlined in the court's order of December 1, 1969, the school staff members prepared a school board plan which would be subject to the limitations the board had described in its November 17, 1969 report. The result was the production of two plans—the board plan and the plan of the consultant, Dr. Finger.

The detailed work on both final plans was done by the school board staff.

The high school plan prepared by the board was recommended by Dr. Finger to the court with one minor change.

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This change involved transporting three hundred inner city black children to Independence High School. As to high school students, then, the plan which was ordered by the court to take effect on May 4, 1970 *is* the school board's plan, with transportation added for three hundred students. The proportion of black children in the high schools varies from 17% to 36% under this plan.

For junior high schools, separate plans were prepared by Dr. Finger and by the board. The board plan would have used zoning to desegregate all the black junior high schools except Piedmont, which it would have left 90% black. The Finger plan employed re-zoning as far as appeared feasible, and then provided for transportation between inner city black zones and outlying white schools to desegregate all the schools, including Piedmont.

The court offered the school board the options of (1) re-zoning, or (2) closing Piedmont, or (3) two-way transport of students between Piedmont and other schools, or (4) accepting the Finger plan which desegregates all junior high schools.

The board met and elected to adopt the Finger plan rather than close Piedmont or rearrange their own plan. The Finger plan may require the transportation of more students than the board plan would have required, but it handles the transportation more economically and efficiently, and does the job of desegregating the junior high schools. The percentage of black students in the junior high schools thus constituted will vary from 9% to 33%.

The transportation of junior high students called for in the plan thus adopted by the board pursuant to the court order of February 5, 1970, is essentially the same sort that was adopted without hesitation for 4,245 black children when the seven black inner city schools were closed in 1969.

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For elementary schools the problem is more complicated. Dr. Finger prepared several plans to desegregate the elementary schools and reviewed them with the school staff. It was apparent that even the gerrymandering considered by the board could not desegregate all the elementary schools, and that without transportation there is no way by which in the immediate future the continuing effects of state imposed segregation can be removed. Dr. Finger prepared a plan which proposed re-zoning of as many schools as could be desegregated by re-zoning and which then proposed pairing or grouping of schools. By pairing or grouping, a black school and one or more white schools could be desegregated by having grades one through four, black and white, attend the white schools, and by having grades five and six, black and white, attend the black school, and by providing transportation where needed to accomplish this.

The original Finger plan proposed to group black inner city schools with white schools mostly in the south and southeast perimeter of the district.

The school staff drafted a plan which went as far as they could go with re-zoning and stopped there, leaving half the black elementary children in black schools and half the white elementary children in white schools.

In other words, both the plan eventually proposed by the school board and the plan proposed by Dr. Finger went as far as was thought practical to go with re-zoning. The distinction is that the Finger plan goes ahead and does the job of desegregating the black elementary schools, whereas the board plan stops half way through the job.

In its original form the Finger plan for elementary schools would have required somewhat less transportation than its final form, but would have been more difficult to

put into effect rapidly. The pressure of time imposed by decisions of the Supreme Court and other appellate courts had become such that there was concern lest there be an order from one of the appellate courts for immediate February or March desegregation of the entire system. The school staff therefore, based on Finger's guidelines, prepared a final draft of his plan incorporating pairing, grouping and transporting on a basis which would better allow for early implementation with a minimum of administrative complications, in lieu of his original plan.

The result is that the plan for elementary schools which is known as the "Finger plan" was prepared in detail by the school staff and incorporates the thought and work of the staff on the most efficient method to desegregate the elementary schools.

The time table originally adopted by this court in April of 1969 was one calling for substantial progress in 1969 and complete desegregation by September 1970. However, on October 29, 1969, in *Alexander* v. *Holmes County*, the Supreme Court ordered immediate desegregation of several Deep South school systems and said that the Court of Appeals *"should have denied all motions for additional time."* The Supreme Court adhered to that attitude in all decisions prior to this court's order of February 5, 1970. In *Carter* v. *West Feliciana Parish*, —— U. S. —— (January 14, 1970), they reversed actions of the Fifth Circuit Court of Appeals which had extended time for desegregating hundreds of thousands of Deep South children beyond February 1, 1970. In *Nesbit* v. *Statesville, et al.*, 418 F.2d 1040, the Fourth Circuit Court of Appeals on December 2, 1969, ordered the desegregation by January 1, 1970, of schools in Statesville, Reidsville and Durham, North Carolina. Referring to the *Alexander* v. *Holmes County* decision, the Fourth Circuit said:

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"The clear mandate of the Court is immediacy. *Further delays will not be tolerated in this circuit.*" (Emphasis added.)

In that opinion the Court directed this district court to adopt a plan on December 19, 1969, for the City of Statesville, effective January 1, 1970, which "*must provide for the elimination of the racial characteristics of Morningside School by pairing, zoning or consolidation. . . .*" As to Durham and Halifax, Virginia, courts were ordered to accomplish the necessary purpose by methods including pairing, zoning, reassignment or "*any other method that may be expected to work.*"

In *Whittenburg* v. *Greenville County, South Carolina,* —— F.2d —— (January 1970), the Fourth Circuit Court of Appeals, citing *Holmes County* and *Carter* v. *West Feliciana Parish,* said:

> "More importantly the Supreme Court said emphatically it meant precisely what it said in *Alexander* that general reorganization of school systems is requisite now, that *the requirement is not restricted to the school districts before the Supreme Court in Alexander, and that Courts of Appeals are not to authorize the postponement of general reorganization until September 1970.*" (Emphasis added.)

As to *Greenville,* in a case involving 58,000 children, the Court said that

> "The plan for *Greenville* may be based upon the revised plan submitted by the school board *or upon any other plan that will create a unitary school system.*" (Emphasis added.)

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The Court further said:

> "*The District Court's order shall not be stayed pending any appeal which may be taken to this court,* but, in the event of an appeal, modification of the order may be sought in this court by a motion accompanied by a request for immediate consideration."

Upon rehearing the Fourth Circuit Court of Appeals said on January 26, 1970:

> "*The proper functioning of our judicial system requires that subordinate courts and public officials faithfully execute the orders and directions of the Supreme Court.* Any other course would be fraught with consequences, both disastrous and of great magnitude. *If there are appropritae exceptions,* if the District Courts and the Courts of Appeals are to have some discretion to permit school systems to finish the current 1969-1970 school year under current methods of operation, *the Supreme Court may declare them, but no member of this court can read the opinions in* CARTER *as leaving any room for the exercise by this court in this case of any discretion* in considering a request for postponement of the reassignment of children and teachers until the opening of the next school year.
>
> "For these reasons the petition for rehearing and for a stay of our order must be denied." (Emphasis added.)

The above orders of the Supreme Court and the Fourth Circuit Court of Appeals are the mandates under which this court had to make a decision concerning the plan to be adopted and the time when the plan should be implemented.

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This court conducted hearings on February 2 and February 5, 1970, upon the content and the effective date of the plans for desegregation of the Charlotte-Mecklenburg schools. On February 2nd, Mr. Waggoner, the attorney for the school board, requested the court to adopt a time table under which the elementary schools would be desegregated immediately after Easter (about April 1st) and the junior highs and senior highs would be desegregated in May, about the third week before the end of school. Dr. Self, the school superintendent, requested essentially the same time table.

Dr. Self testified that the job could be done as to all students in the times requested if transportation could be arranged; and he and Mr. Waggoner indicated that by staggering hours of school and by effective use of busses the transportation problem might be solved.

The Supreme Court in *Griffin* v. *Prince Edward County*, 377 U. S. 218 (1964), had held that a school board could and should validly be required by a district court to reopen a whole county school system rather than keep it closed to avoid desegregation, even though levying taxes and borrowing money might be necessary.

In view of the decisions above mentioned and the facts before the court, it appeared to this court that the undoubted difficulties and inconveniences and expense caused by transferring children in mid-year to schools they did not choose would have to be outweighed by the mandates of the Supreme Court and the Fourth Circuit Court of Appeals and that this court had and has a duty to require action now.

On February 5, 1970, therefore, a few days after the second *Greenville* opinion, this court entered its order for desegregation of the schools.

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The time table set in the February 5, 1970 order is precisely the time table suggested by Mr. Waggoner, the attorney for the defendants, in the record of the February 2, 1970 hearing.

Paragraph 16 of the February 5, 1970 order reads:

> "The duty imposed by the law and by this order is the desegregation of schools and the maintenance of that condition. The *plans* discussed in this order, whether prepared by Board and staff or by outside consultants, such as computer expert, Mr. John W. Weil, or Dr. John A. Finger, Jr., are *illustrations of means or partial means to that end.* The defendants are encouraged to use their full 'know-how' and resources to attain the *results* above described, and thus to achieve the constitutional end by any means at their disposal. The test is not the method or plan, but the *results.*"

The above summary is an outline only of the most significant steps which have brought this case to its present position. Details of all the developments mentioned in this summary appear in previous orders and in the lengthy evidence.

Pursuant to the direction of the Circuit Court, this court has made and is filing contemporaneously herewith supplemental detailed findings of fact bearing on the transportation question.

This the 21st day of March, 1970.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge