IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 21,632

DONALD PRICE and MELVIN E. PRICE, Minors
by their father and next friend,
JESSEE PRICE, ET AL.,

Appellants

VS.

THE DENISON INDEPENDENT SCHOOL DISTRICT
BOARD OF EDUCATION, ET AL.,

Appellees.

Appeal from the United States District Court
for the Eastern District of Texas.

(July 2 , 1965)

Before BROWN and BELL, Circuit Judges, and HUNTER, District Judge.

BROWN, Circuit Judge:

This appeal on behalf of Negro school children questions the District Court's decision sustaining the adequacy of the Denison, Texas grade-a-year, stair-step plan of desegregation 1/ voluntarily instituted, without threat of lawsuit, on June 23,

1963. For reasons set forth, we vacate the judgment and remand the case to enable the School Board to submit a substantially stepped-up plan under the guidance of the District Court.

Up to spring of 1963 Denison maintained a dual-zoned, totally segregated school system. 2/ On June 24, 1963, the Board in good faith passed the resolution, and in September the first grade was desegregated. Nine years in the making, the plan reached the top of the stairs (12th grade) in 1975, two decades after Brown. The following January (1964) the plaintiffs brought a class suit for swift and sweeping relief. 3/

The District Judge held in light of all the circumstances that this voluntary plan was a "prompt and reasonable start toward full compliance." In his memorandum opinion which acknowledged frankly that constitutional rights of most of the Negro children were being infringed, Judge Sheehy took note of several factors. These included the good faith of the School Board in voluntarily instituting this gradual plan, the fact that several other localities in that same area of the Eastern District of Texas had likewise voluntarily initiated the same stair-step plan and one had done so by court order. And for good reason he pointed to many decisions of this Court, including specifically, Ross v. Dyer, 5 Cir., 1963, 312 F.2d 191, where, dealing with a side issue under the Houston stair-step plan, 4/ we recognized the unusual moratorium on constitutional rights under the "deliberate speed" concept.

Of course, that was a Court-ordered plan instituted in 1960, and many things have happened since then--not the least of which is that five years have gone by. 5/ And for this constitutional right, time alone is of great moment. Already some of these children have graduated. For them delay has meant denial for all time. The time for reviewing or redeveloping the undulating administrative doctrines evolved by us for the implementation of Brown is over. The history, mandatory requirements, and increased tempo of judicial action are completely traced in Lockett v. Board of Educ. of Muscogee Cty. School Dist., Ga., 5 Cir., 1965, 342 F.2d 225. This history tells all that "the rule has become: the later the start, the shorter the time allowed for transition." 342 F2d at 228. 6/

From this history all in this Circuit know other specific things. The first is that, if challenged, a grade a year will not pass muster. Second, the process must work simultaneously from both ends--first grade and last grade. Third, the end is in sight and all grades must be desegregated by the opening of school term fall 1968-69.

Moreover, to this rapidly accelerating pace set by judicial action, added impetus has come from the passage of the Civil Rights Act of 1964 which declares the strong legislative policy against racial discrimination in public education 7/ and then in Title VI implements this in a tangible way by conditioning Federal financial assist nce on compliance. 8/ This was implemented by Department of Health, Education & Welfare (HEW) regulations, 9/ issued pursuant to §602, 42 USCA §2000d-1. These provide that to be eligible for Federal assistance, the applicant must execute an assurance of compliance 10/ which shows (1) that the school system is subject to a final court order of desegregation, or (2) a desegregation plan, determined to be adequate by the Commissioner of Education. Of great importance to our problem is the General Policy Statement, 11/ issued by the Commissioner of Education in April 1965, setting forth requirements which plans submitted under (2) must meet. As to the rate of desegregation, the Policy Statement (Part V.E.) sets the fall of 1967 as the target date for total desegregation for applicant school systems, and for those starting in 1965, the normal specification will be four grades for 1965-66. 12/

In Singleton v. Jackson Municipal Separate School Dist., 5 Cir., 1965, ___F. 2d___[No. 22527, June____, 1965], we accorded these minimum standards a high place in our future handling of school cases totally without regard to whether a school district was seeking (or desired) Federal grants in aid. Judge Wisdom, for the Court, wrote:

> "We attach great weight to the standards established by the Office of Education. The judiciary has of course functions and duties distinct from those of the executive department, but in carrying out a national policy we have the same objective. There should be a close correlation, therefore, between the judiciary's

> standards in enforcing the national policy requiring desegregation of public schools and the executive department's standards in administering this policy. Absent legal questions, the United States Office of Education is better qualified than the courts and is the more appropriate federal body to weigh administrative difficulties inherent in school desegregation plans." ___F.2d at____.

More than that, we put these standards to work. To avoid the temptation to recalcitrant or reluctant school systems to seek judicial approval of a token plan as the basis for Federal aid under alternative (1) for court plans, the Court held the Jackson plan inadequate and directed that a plan modeled after the Commissioner of Education's requirements (note 11, supra) be submitted for the fall of 1965-66.

This signals what will be a frequent approach to these cases as they come to District Courts and thereafter this Court. These executive standards, perhaps long overdue, are welcome. To many, both on and off the bench, there was great anxiety in two major respects with the Brown approach. The first was that probably for the one and only time in American constitutional history, a citizen--indeed a large group of citizens--was compelled to postpone the day of effective enjoyment of a constitutional right. In Ross v. Dyer, 5 Cir., 1963, 312 F.2d 191, 194, we recognized that under "a stair-step plan, Negroes not in the eligible classes continue to suffer discriminatory treatment." That there can be a moratorium on the enjoyment of such rights runs counter to our notions of ordered liberty. Second, this inescapably puts the Federal Judge in the middle of school administrative problems for which he was not equipped and tended to dilute local responsibility for the highly local governmental function of running a community's schools under law and in keeping with the Constitution.

By the 1964 Act and the action of HEW, administration is largely where it ought to be--in the hands of the Executive and its agencies with the function of the Judiciary confined to those rare cases presenting justiciable, not operational, questions.

A word is certainly due for Denison's having initiated its plan voluntarily. Although we conclude that the passage of time and the ceaseless flow of court decisions make the District Judge's approval of the one grade stair-step plan now unacceptable, it is clear that he was convinced--as were we on argument--of the School Board's good faith desire to do what the law requires. That has much significance in fashioning the time, scope, and nature of the relief. But in the final analysis it has limited bearing on the substantive rights accorded and specifically the speed of the plan. The rights of Negro children come from the Constitution, not the attitude, good or bad, of school administrators.

We were impressed with the repeated assurances of the school authorities along two lines. The first was that they mean to comply fully with whatever is required. Second, if we found the present plan inadequate, a peremptory order, either direct or through the District Court, would not be necessary as they desire to submit to the District Court a plan which will meet the standards coming out of this appeal. This is the way it ought to work. We take them at their word. If any differences arise, the District Court can resolve them.

The applicable standard is essentially the HEW formulae for 1965-66, leaving for a later time whether, in this case, the final date is fall 1967-68 or, as in our recent Court decisions, 1968-69. 13/

This leaves the issue of desegregated teacher assignments. 14/ Judge Sheehy was in error in questioning the standing of these plaintiffs to raise this issue. Board of Public Instruction of Duval Cty., Fla. v. Braxton, 5 Cir., 1964, 326 F.2d 616, 620; Augustus v. Bd. of Public Instruction of Escambia Cty., 5 Cir., 1962, 306 F.2d 862; Lockett v. Bd. of Educ. Muscogee Cty., Ga., 5 Cir., 1965, 342 F.2d 225, 229. But on the merits we think it best for the moment to leave this to the District Court for consideration by and with the Board as the imported HEW standards are applied. The whole matter may become academic in any event. For if the Denison School District obtains Federal financial aid, HEW regulations will require adjustment. (See, e.g., General Policy Statement, Appendix, VB.)

To enable the parties to move with dispatch, the judgment is vacated, the cause remanded for consistent action, the mandate to issue forthwith.

VACATED AND REMANDED.

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by their father and next friend,
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FOOTNOTES

1/ The School Board resolved: "[T]hat the Denison Independent School District will integrate the first grade effective September, 1963, progressing an additional grade each year thereafter until complete. Each first grade child may attend the school of his choice within his attendance area."

2/ Appellants' brief describes the school population facilities as follows:

"In February 1964, there were 5,070 students in the District. Only 665 were Negro. Negroes were assigned to three of ten elementary schools and to one each of the system's two junior and senior high schools. Each of the white elementary schools offer grades 1-6 and enroll from 230 to 400 pupils. But the schools designated for Negroes are generally small, and enroll very few pupils. Langston has 36 students and 2 teachers,Walton has 20 students and 2 teachers, and Wim has 93 students and 4 teachers. The Negro Terrill Junior and Senior High School has 109 students and from 15 to 17 teachers, while the white Denison Junior and Senior High Schools contain a total of 2,100 students and 100 teachers."

3/ Named plaintiffs were 16 Negro children (and their parents), each of whom was in a grade higher than the first so that under the Board's plan he or she would never attend desegregated schools. The prayer requested that the segregated school system, in all its particulars, be enjoined, or in the alternative, that the Court order the Board to present "a complete plan for desegregation of all grades

Cont'd. - Footnotes

* * * by the school year 1964-65; including assignment of pupils, teachers, principals, and other school personnel on a non-racial basis; * * * funds, * * * construction, * * * budgets, * * * extra-curricular activities * * *."

4/ The Houston plan has now been substantially accelerated by voluntary Board action. See Houston Post and Houston Chronicle, June 23, 1965.

5/ But in Ross v. Dyer, we sounded a warning that the passage of time would, or might, require a change even for an existing court approved plan. We said:

> "* * * it is now clear that even though the 1960 order prescribes a plan in specific detail, this is not the end of the matter. The District Court of necessity retains continuing jurisdiction over the cause. That means that it must make such adaptations from time to time as the existing developing situation reasonably requires to give final and effectual voice to the constitutional rights of negro children." 312 F.2d at 194.

6/ See Bivins v. Board of Educ. and Orphanage for Bibb Cty., Ga., 5 Cir., 1965, 242 F.2d 229; Armstrong v. Board of Educ. of Birmingham, 5 Cir., 1964, 333 F.2d 47; Davis v. Board of School Commissioners of Mobile Cty., 5 Cir., 1964, 333 F.2d 53; Stell v. Savannah--Chatham Cty. Bd. of Educ., 5 Cir., 1964, 333 F.2d 55; Gaines v. Dougherty Cty. Bd. of Educ., 5 Cir., 1964, 334 F.2d 983. Also, Watson v. City of Memphis, 1963, 373 U.S. 526, 83 S.Ct. 1314, 10 L.Ed.2d 529; Goss v. Board of Educ. of Knoxville, Tenn., 1963, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632; Griffin v. County School Bd. of Prince Edward Cty., 1964, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256; Calhoun v. Latimer, 1964, 377 U.S. 263, 84 S.Ct. 1235, 12 L.Ed.2d 288. Of course most of these cases were decided after the District Judge rendered his decision in this case.

Cont'd. - Footnotes

7/ Act of July 2, 1964, Pub. L. 88-352, Title IV, §§401-07, 78 Stat. 246-49, 42 USCA §2000c.

8/ §Sec. 601. "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Act of July 2, 1964, Pub. L. 88-352, Title VI, §601, 72 Stat. 252, 42 USCA §2000d.

9/ 45A C.F.R. §80(c) (December 4, 1964).

10/ HEW Form 441, provided for this purpose.

11/ General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegration of Elementary and Secondary Schools, HEW, Office of Education, April 1964. See Appendix.

12/ "* * * the grades covered must include the first and any other lower grade, the first and last high school grades, and the lowest grade of junior high where schools are so organized." Policy Statement, VE4a(1).

13/ Grade 3, which will be reached on the voluntary stair-step, should be counted as one of the 4. Under our decisions the 12th grade must also be included. As the School District has separate junior and senior high schools, if the HEW plan (Part VE4a(1), note 12, supra) is followed, the remaining two would be grades 7 and 10. Since there can never be any resegregation, if this were followed this would mean that by fall 1967-68, only grade 6 would remain segregated, as follows: