

No. 23331

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, APPELLANT

v.

FAIRFIELD BOARD OF EDUCATION, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES

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STATEMENT OF THE CASE

Procedural history and status. On July 21, 1965, Negro plaintiffs, residing in Fairfield, Alabama, instituted a school desegregation suit against the Fairfield Board of Education and its members in the District Court for the Northern District of Alabama (R. 14-23). The United States intervened pursuant to section 902 of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2 (R. 24-29). Following a hearing and pursuant to court order, the Board filed a plan for

desegregating its public schools. Thereafter, the Board filed an amended plan, and on August 23, 1965, the district court entered an order approving the Board's amended plan and overruling objections filed by the plaintiffs and the United States (R. 65-66).

On September 8, 1965, the district court entered its findings of fact and conclusions of law (R. 67-71). The court found (1) that it had jurisdiction under 28 U.S.C. 1343(3); (2) that plaintiffs were residents of Fairfield; (3) that the suit presented a proper class action under Rule 23(a)(3) of the Federal Rules of Civil Procedure; (4) that the defendants maintain and operate the public school system of Fairfield; (5) that "the public schools of Fairfield have heretofore been operated on a completely segregated basis" in that "separate schools were constructed, operated, maintained and staffed by Negro personnel for Negro pupils only." (R. 67-70).

On October 22, 1965, the United States noted an appeal to this Court from the district court order approving the Board's amended plan (R. 73).

Summary of the desegregation plan. The plan purports to desegregate the 1st, 7th, 8th, 10th and 12th grades in September, 1965; the 2nd, 3rd, 9th and 11th grades in September, 1966; and the 4th, 5th and

6th grades in September, 1967 (R. 59-66).

Pupils in grades reached by the plan, except the 1st grade, may apply for assignment or transfer "to a school heretofore attended only by pupils of a race other than the race of the pupils in whose behalf the applications are filed" (R. 60-62).

Children entering the first grade are required to report to a designated school in the vicinity of their residence -- a designated Negro school for Negro children and a designated white school for white children. There, the parents of the child may fill out an application requesting the child's assignment to any school serving first graders in the district (R. 60-61).

Assignments and transfers under the plan are to be processed and determined by the Board pursuant to its regulations so far as is practicable (R. 60-62). The regulations establish machinery for filing transfer applications and vest authority in the Superintendent to assign and transfer students in all public schools operated under the jurisdiction of the Board (Att. ¹/₁). There are no criteria either in the plan or regulations to determine which transfers and assignments will be disallowed.

¹/₁ The Board's regulations appear in an attachment to this brief.

Application forms are made available at the offices of the principal of each of the schools. They may be obtained only on request of the applicant or his parent or guardian, in person, and are required to "be delivered to and filed with the Superintendent at his office" during the month of May (R. 61, 154, Att. 2).

For the school year 1965-1966, students whose transfer applications were denied or who chose not to apply for a transfer remained assigned to the schools in which they were enrolled (R. 62).

Students entering the area served by the Fairfield school system for the first time who desire to attend a school the majority of whose students are of a different race from the applicant are required to obtain an application from the school of their choice which, after completion, is to be delivered to the Superintendent (R. 62-63).

The plan contains no section requiring the Board, for the school years 1966-1967 and 1967-1968, to notify the public or students eligible to exercise their rights under it of its provisions.

SPECIFICATION OF ERROR

The district court erred by entering an order approving a school desegregation plan which:

- A. Retains racial assignments of students in grades purportedly desegregated,
- B. Fails to provide specific standards, procedures, and notice for the exercise by students of the right to attend desegregated schools,
- C. Fails to contain provisions designed to eliminate the inferiority of schools traditionally attended by Negroes,
- D. Fails to contain a provision designed to eliminate the facial segregation of faculty and staff,
- E. Fails to guarantee to students who transfer that there will be no racial discrimination or segregation in services, activities and programs provided, sponsored by or affiliated with the school system, and

F. Fails to contain a provision allowing
Negro students in non-desegregated
grades to transfer to schools from
which they have been excluded because
of race.

ARGUMENT

A. The plan retains racial assignments of students in grades purportedly desegregated.

1. The court below found that a dual school system existed in Fairfield in which students had been assigned to schools on the basis of race (R. 69). It is essential, if a school desegregation plan is to conform to the requirements of the Fourteenth Amendment, that it abolish the racial assignment of students in desegregated grades. The plan approved by the district court, however, simply provides that students in desegregated grades may apply for transfer to a school previously attended by students of another race and that, except where such application is made and accepted, "all pupils in all schools of the School System of the City Board will remain assigned to schools to which they are now assigned for the school year commencing September, 1965." (R. 62) In addition, the plan fails to abolish the racial assignment of children not yet in school by providing that Negro children entering the first grade are to report to Negro schools and white children entering the first grade are to report to white

schools, and that "upon such registration, an application may be made by the parents for the child's assignment to any school (whether formerly attended only, or predominately, by White children, or only by Negro children)" (R. 60-61).

In short, the plan retains the dual school system based on race and places the burden of transfer on Negro students in allegedly desegregated grades to leave the Negro schools to which they were assigned. It violates the Fourteenth Amendment because it retains the dual school system (Brown v. Board of Education, 347 U.S. 483 (1954); Lockett v. Board of Education of Muscogee County, 342 F. 2d 225, 228 (C.A. 5, 1964)) and fails to provide a non-racial basis for assignment of students in desegregated grades who fail to apply for transfer (Kemp v. Beasley, 352 F. 2d 14, 22 (C.A. 8, 1965)).

2. The plan is further defective because it permits Negro students who wish to attend a school previously attended solely by white students to do so only after filing applications "in accordance with existing regulations of the

Board" (R. 60-61-62); this requirement is not imposed on white students already attending such schools who wish to remain there. The regulations vest authority for assigning and transferring students in the Superintendent. They provide that the applicant or his parent must obtain an application form by appearing in person before the Superintendent or the principal of the school then attended by the applicant. They empower the Superintendent to conduct interviews with the applicant or his parents, as well as give examinations and tests and conduct investigations which he deems appropriate. Provision is also made for an appeal to the Board from the Superintendent's determination. (See the attachment to this brief.^{2/}) The imposition on Negroes wishing to

^{2/} The Government's exhibit containing the Board's regulations was not allowed to be introduced in evidence in the district court (R. 127-128). While we object to the district court's ruling, we think that this Court may take judicial notice of the Board's regulations. Monk v. City of Birmingham, 87 F. Supp. 538 (N.D. Ala. 1949) aff'd. 185 F.2d 859 (C.A. 5, 1950) cert. den. 341 U.S. 940 (1951); United States v. Clement,

(Cont. on following page)

attend white schools of any requirement not applied to white students attending those schools violates the Fourteenth Amendment. Bush v. Orleans Parish School Board, 308 F.2d 491 (C.A. 5, 1962); Green v. School Board of City Roanoke, 304 F.2d 118, 123 (C.A. 4, 1962); Northcross v. Board of Education of City of Memphis, 302 F.2d 818 (C.A. 6) cert. den. 370 U.S. 944 (1962); Norwood v. Tucker, 287 F.2d 798 (C.A. 8, 1961).

3. The Board, in submitting a plan, as it was entitled to do, elected to employ a method by which the choice of schools was, at least on the surface, to be made by the students. But the Board submitted and the court approved nothing more than a transfer plan superimposed on a system of racial assignments. To be free of racial discrimination, a free choice plan must provide at the very minimum: (1) that all students in desegregated grades be given an opportunity to

(Cont. from preceding page).

231 F. Supp. 913 (W.D., La., 1964) reversed on other grounds (C.A. 5, No. 22492, decided March 14, 1966). We have, therefore, reproduced the Board's regulations in an attachment to this brief.

exercise a choice of schools (Bradley v. School Board, Richmond, Va., 345 F. 2d 310 (C.A. 4, 1965) vacated and remanded 382 U.S. 103 (1965); Revised Statement, 45 CFR 181.43);^{3/} (2) that where the number of applicants applying to a school exceeds available space, preferences will be determined by a uniform non-racial standard (Stell v. Savannah-Chatham County Board of Education, 333 F. 2d 55, 65 (C.A. 5, 1964); Revised Statement, 45 CFR 181.49); and (3) that where a student does not exercise his choice, he will be assigned to a school under a uniform non-racial standard (Kemp v. Beasley, 352 F. 2d 14, 22 (C.A. 8, 1965); Revised Statement, 45 CFR 181.45). The Fairfield plan fails to meet any of these standards.

^{3/} The Department of Health, Education and Welfare recently announced new school desegregation guidelines. 31 Fed. Reg. 5623-34, April 9, 1966. They are cited as Revised Statement and appear in an attachment to this Brief.

- B. The plan fails to provide specific standards, procedures, and notice for the exercise by students of the right to attend desegregated schools.

The plan fails to specify how or where applications for transfer can be obtained, what information must be placed on the forms, who may execute the forms, what criteria will be applied in ruling on applications, or the method of assigning students whose transfers are denied. In addition, the plan is silent as to the rights of non-residents attending school in Fairfield^{4/}.

Specificity in free choice plans is particularly important. Without a description of the procedures to be utilized by Negroes seeking to extricate themselves from Negro schools, or the standards to be applied to applicants, both white and Negro, exercising their right to choose their school, neither the court nor the parties can determine if the choice afforded by the Board will be truly free. If objections are to be made to the manner in

^{4/} The Fairfield system serves some non-residents.

which the Board administers the plan, they will have to wait until the plan is in actual operation. This means that the right of Negro children to be admitted to public schools without regard to race or color might be further postponed.^{5/}

Moreover, omitting basic information from the plan can only result in students and their parents being inadequately notified of their rights under the plan and of the manner in which such rights may be exercised.^{6/} If a free choice plan is to live up to the standards announced by this Court, it must give students entitled to a choice of schools a clear opportunity to exercise that choice. Stell v. Savannah Chatham County Board of Education, 333 F.2d 55 (C.A. 5, 1964).

^{5/} Indeed, already the Board has applied improper criteria to Negro applicants for transfer, requiring another hearing in this case and an order by the district court requiring the admission of one student and requiring four other students to file new applications with the Superintendent. (R. 11-12).

^{6/} The plan contains no notice provisions for the school years following 1965-66.

It cannot do this without spelling out the procedures under which Negro students are to seek reassignment to desegregated schools and without notifying the students and their parents of such procedures.^{7/} See the Revised Statement, 45 CFR 181.42-181.53.

^{7/} For example, for the 1965-66 school year with a total enrollment of approximately 1,779 white students and 2,159 Negro students, 31 Negro students attend schools with white students. See the Affidavit attached to the Memorandum in Support of the Motion to Consolidate and Expedite Appeals filed by the United States in this case.

C. The plan fails to contain provisions designed to eliminate the inferiority of schools traditionally attended by Negroes.

In the hearing below the Government introduced evidence showing that the facilities and curricula in some Negro schools were markedly inferior to those in all white schools (R. 130-134; 163-167; 167-177; 199-221; Pl. Ex. 1; Pl. Ex. 2; Def. Ex. 7; Def. Ex. 10; Intervenor's Ex. 4). An expert on school facilities examined all schools in the system and rated the facilities on a uniform scale of 100 points (R. 167-175). His ratings averaged 55.8 points for white schools and 39.5 points for Negro schools, with one Negro school receiving a rating of 33 (R. 172). The record shows that some classrooms in one of the four Negro schools are divided from each other by torn (R. 173) or half wall partitions (R. 174, 209). The defendants introduced evidence showing the primitive condition of bathrooms at one Negro school, Englewood School (R. 108-109; Def. Ex. 7 and 8). Englewood which serves grades 1-8, has only two teachers for the junior high school grades (R. 216), while there are fifteen teachers at the white junior high school

(Intervenor's Ex. 3). The principal at Englewood has a full teaching load in addition to his administrative responsibilities (R. 217), even though Englewood has no registrar (R. 209). ^{8/} The concrete blocks of which Englewood is constructed contain numerous holes (R. 217). Immediately adjacent to Englewood is an open deep drainage ditch (R. 217).

This evidence, we believe, demonstrates the need for relief that will equalize the educational facilities traditionally attended by Negroes. Although Brown v. Board of Education, 347 U.S. 483(1954), required that school boards move to eliminate the segregation of schools and to that extent repudiated the "separate but equal" doctrine, it did not remove the constitutional obligation of the school boards, during the transition period, to provide Negroes with an education equal to that provided white children. Thus, in Carr v. Montgomery County Board of Education, Civil Action No. 2072N (M.D. Ala., March 22, 1966), Judge Johnson ordered the Board to close seven inferior Negro schools before September 1966 and 14 more such schools by September 1967. He further ordered the Board to provide remedial education to eliminate the effects of past discrimination. In Baird v.

^{8/} All white schools have registrars (R. 209).

Benton County Board of Education, Civil Action No. 6531 (N.D. Miss., August 3, 1965), Judge Clayton ordered the Board to provide uniform curricula and to equalize per pupil expenditures of comparable grade levels. And in Carroll v. Bolivar County Board of Education, Civil Action No. 6531 (N.D. Miss., August 27, 1965), he granted similar relief ordering the Board not only to provide uniform curricula and equal per pupil expenditures at comparable grade levels but also to maintain teacher-pupil ratios at substantially the same levels for comparable grades. In Anderson v. Canton Municipal Separate School District, Civil Action No. 3700(J)(c) (S.D. Miss., August 5, 1965), Judge Cox ordered the Board to install adequate flush type toilet facilities in an ill-equipped Negro school.^{9/} See also, United States v. Carroll County Board of Education, Civil Action No. GC 6541 (N.D. Miss., January 20, 1966).

It is particularly important when the Board chooses to desegregate under a plan which depends upon students choosing their schools that the schools available in the system be substantially equal. The continuing inferiority of schools traditionally attended by Negroes perpetuates

^{9/} Subsequently, Judge Cox modified his order, upon the motion of the Board and the stipulation of the plaintiffs, by allowing the Board to close the ill-equipped school and move the children into another plant (Order of August 21, 1965).

the racial identity of those schools. If the dual system is to be completely abolished, inferior schools which are readily identifiable as Negro schools must be eliminated.

- D. The plan fails to contain a provision designed to eliminate the racial segregation of faculty and staff.

The inclusion of a provision in the plan designed to eliminate race as a factor in the employment and allocation of faculty and staff at this late date is essential.^{10/}

Singleton v. Jackson Municipal Separate School District, 355 F. 2d 865 (C.A. 5, 1966); Bradley v. School Board, Richmond, Virginia, 382 U.S. 103 (1965); Rogers v. Paul, 382 U.S. 198 (1965). As the Court wrote in Singleton v. Jackson Municipal Separate School District, supra at 870:

In view of the necessity that the Jackson School system be totally desegregated by September 1967, we regard it as essential that the plan provide an adequate start toward elimination of race as a basis for the employment and allocation of teachers, administrators, and other personnel.

A desegregation plan, if it is to comply with the rule announced in Singleton v. Jackson Municipal Separate School District, supra, must (1) require the Board to cease its practice of hiring and placing teachers on the basis of race and (2) define a program designed to correct the effects of past discriminatory

^{10/} The Board concedes that teachers are assigned on the basis of race (R. 101, 223). Accordingly, the district court found that the Board staffed schools by assigning white personnel to white schools and Negro personnel to Negro schools (R. 70).

11/
hiring and assignment practices. See the Revised Statement 45 CFR 181.13.

Where a school board is operating under a plan utilizing a freedom of choice (or transfer) method, the desegregation of faculty and staff is particularly important. As the district court said in Kier v. County School Board of Augusta County, Virginia, 249 F. Supp. at 246 (W.D. Va. 1966):

It is not enough to open the previously all-white schools to Negro students who desire to go there while all-Negro schools continue to be maintained as such. Inevitably, Negro children will be encouraged to remain in "their school," built for Negroes and maintained for Negroes with all Negro teachers and administrative personnel. 12/ See Bradley v. School Bd., 345 F. 2d at 324 (dissenting opinion). This encouragement may be subtle but it is nonetheless discriminatory. The duty rests with the School Board to overcome the discrimination of the past, and the long established image of the "Negro school" can be overcome under freedom of choice only by the presence of an integrated faculty.

11/ As the Court said in United States v. Duke, 332 F. 2d 759, 768-69 (C.A. 5, 1964):

An appropriate remedy ... should undo the results of past discrimination as well as prevent future inequality of treatment. A court of equity is not powerless to eradicate the effects of former discrimination.

12/ By maintaining a segregated or substantially segregated faculties and staffs, the board has, in effect, labeled its schools "white" and "Negro." Brown v. County School Board of Frederick County, Virginia, 245 F. Supp. 546, 560 (W.D. Va., 1965); cf. Baldwin v. Morgan, 287 F. 2d 750 (C.A. 5, 1961).

- E. The plan fails to guarantee to students who transfer that there will be no racial discrimination or segregation in services, activities, and programs, provided, sponsored by or affiliated with the school system.

The plan is silent as to the elimination of racial discrimination in services, activities and programs sponsored by or affiliated with the school to which Negro students may transfer. Valid plans must guarantee the absence of racial discrimination or segregation in connection with all programs related to the student's attendance.^{13/} Cf. Singleton v. Jackson Municipal Separate School District, 355 F.2d 865, 870 (C.A. 5, 1966); Revised Statement, 45 CFR 181.14. This is particularly true under a freedom of choice (or transfer) system for any such discrimination or segregation would inevitably inhibit free choice.

It is essential, therefore, that the plan specifies the availability of all activities, services and programs on a nonracial basis and provide that any disqualifications or waiting period which might otherwise apply to newly enrolled students will not apply to students exercising their right to obtain a desegregated education. Revised Statement, 45 CFR 181.14 (b) (1).

^{13/} Indeed, before Brown, where the state provided one school for both races, it was prohibited from discriminating on the basis of race in connection with the school services, facilities and programs. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

- F. The plan fails to contain a provision allowing Negro students in non-desegregated grades to transfer to schools from which they have been excluded because of race.

In Singleton v. Jackson Municipal Separate School District, 355 F. 2d 865, 869 (C.A. 5, 1966), the Court wrote:

The school children in still-segregated grades in Negro schools are there by assignment based on their race. This assignment was unconstitutional. They have an absolute right, as individuals, to transfer to schools from which they were excluded because of their race.

It is true that this Singleton decision was rendered after the order of the district court in this case was issued. But, since the Singleton transfer rule is based on a constitutional principle, and is not merely an aspect of transitional relief, it should have been included in the plan. In any event, it is, of course, proper for this Court now to require its inclusion in the plan.

RELIEF

In Singleton v. Jackson Municipal Separate School District, 348 F. 2d 729 (C.A. 5, 1965), this Court said that "The time has come for foot dragging public school boards to move with celerity toward desegregation." The Court also said (348 F. 2d at 731):

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.

If in some district courts judicial guides for approval of a school desegregation plan are more acceptable to the community or substantially less burdensome than H.E.W. guides, school boards may turn to the federal courts as a means of circumventing the H.E.W. requirements for financial aid. Instead of a uniform policy relatively easy to administer, both the courts and the Office of Education would have to struggle with individual

school systems on an ad hoc basis. If judicial standards are lower, recalcitrant school boards in effect will receive a premium for recalcitrance; the more the intransigence, the bigger the bonus.

The Court emphasized that (348 F. 2d at 731).

"As to details of the plan, the Board should be guided by the standards and policies announced by the United States Office of Education in establishing standards for compliance with the requirements of Title VI of the Civil Rights Act of 1964."

In Price v. Denison Independent School District, 348 F. 2d 1010, 1013-14 (C.A. 5, 1965), this Court repeated its language in Singleton regarding the weight to be given the standards of the Office of Education and then went on to say:

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 -- 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 school 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.

The Court of Appeals for the Eighth Circuit in Kemp v. Beasley, 352 F. 2d 14 (C.A. 8, 1965), discussed this Court's ruling in Singleton insofar as it relates to reliance upon the H.E.W. guidelines. While agreeing "that these standards must be heavily relied upon to determine what desegregation plans effectively eliminate discrimination," the Court of Appeals for that circuit equally emphasized the responsibility of a federal court to exercise its own judgment in determining constitutional issues." The court states its conclusion as follows, (352 F. 2d at 19):

Therefore, to the end of promoting a degree of uniformity and discouraging reluctant school boards from reaping a benefit from their reluctance the courts should endeavor to model their standards after those promulgated by the executive. They are not bound, however, and when circumstances dictate, the courts may require something more, less or different from the H.E.W. guidelines.

Although the Court of Appeals for the Fourth Circuit has not had occasion to consider the effect of the H.E.W. standards, district courts in that circuit have relied on them. See Kier v. County School Board of Augusta County, 249 F. Supp. 239 (W.D. Va., 1966); Wright v. County School Board of Greenville County, Civil Action No. 4263 (E.D. Va., January 27, 1966); Miller v. Clarendon County School District No. 2, Civil Action No. 8752 (D. of S.C., April 21, 1966). In Miller, the most recent of these cases, the District Court for the District of South Carolina said, with reference to the H.E.W. standards:

Those standards have been adopted and approved generally in other forums in this circuit [citing Kier and Wright]. The orderly progress of desegregation is best served if school systems desegregating under court order are required to meet the minimum standards promulgated for systems that desegregate voluntarily. Without directing absolute adherence to the "Revised Standards" guidelines at this juncture, this court will welcome their inclusion in any new, amended, or substitute plan which may be adopted and submitted.

This case, as well as each of the other school desegregation cases now before this Court, illustrate the need for this Court to review present judicial enforcement methods to the end that the orderly transition to desegregation can be accomplished with a minimum of expenditure of judicial energy and with a maximum correlation between current desegregation standards and current desegregation practices. We suggest that this end can best be realized by the adoption of a specific decree to be entered in these cases by the district courts. This is neither a fundamental change in judicial approach nor a departure from established standards for desegregation. It would place in the courts, as it must under our constitutional system the primary responsibility for declaring the rights of the parties, and it would look to the Office of Education, rather than to the school boards, for administrative guidelines affecting desegregation so that (1) the court will not be "in the middle of school administrative problems," (2) uniformity in solving operational problems may be achieved, and (3) an efficient method of supervising school board performance can be realized.

This Court in cases involving voter discrimination has approved the same type of relief here being urged.

See United States v. Ward 349 F. 2d 795 (C.A. 5, 1965), and United States v. Palmer ____ F. 2d ____ C.A. 5, (No. 21646, decided February 8, 1966). In the Ward case the Court in adopting the former decision there proposed (349 F. 2d at 805) said:

[G]ood administration suggests that the proposed decree be indicated by an Appendix, not because of any apprehension that the conscientious District Judge would not faithfully impose every condition so obviously implied, but rather because of factors bearing upon administration itself.

It is not possible, or even desirable, of course to achieve absolute uniformity. But in this ever growing class of cases which have their genesis in unconstitutional lack of uniformity as between races, courts within this single circuit should achieve a relative uniformity without further delay.

Similarly in a recent decision involving jury discrimination this Court has emphasized "the desirability of achieving uniformity of the handling of the substantial number of cases arising in this Court dealing with the same questions of law." Scott v. Walker, ____ F. 2d ____ (C.A. 5, No. 20814 decided March 31, 1966).

The necessary function of the court in desegregation cases is to guarantee that methods adopted for desegregation do not fall below constitutional limits. It is not necessary to this function that the courts define every administrative detail necessarily involved

in day-to-day school administration. Under Title VI of the Civil Rights Act of 1964 the Executive Branch of the federal government must guarantee the fair use of federal funds by prescribing the ordinary administrative details inevitably involved in any workable desegregation plan. For the courts to look to the regulations and guidelines of the Office of Education does not involve the abdication of any judicial function, but instead is a rational method of enforcement of law under a uniform national policy.

Those regulations and guidelines are the product of the expertise of the Office of Education. They reflect the experience and knowledge of persons involved in the day-to-day administration of the schools. The courts do not have the staff, the facilities, or the time to undertake with the same precision the function of defining the workings of the desegregation mechanism.

With these considerations in mind we submit to the Court the proposed decree set forth in the appendix filed in connection with this brief and the

six other school desegregation cases before this Court to which the government is a party. The substantive requirements of the proposed decree derive from the Fourteenth Amendment and the decisions of the Courts. The administrative details are largely drawn from the HEW Guidelines.^{14/}

14/ Recent court-approved plans which draw on the new guidelines are: Carr, United States v. Montgomery County Board of Education, Civil Action No. 2072-N (M.D. Ala., March 22, 1966); Lee, United States v. Macon County Board of Education, Civil Action No. 604-E (M.D. Ala., March 11, 1966) (entered by consent); Harris, United States v. Bullock County Board of Education, Civil Action No. 2073-N (M.D. Ala., March 11, 1966) (entered by consent); United States v. Lowndes County Board of Education, Civil Action No. 2328-N (M.D. Ala., February 11, 1966) (entered by consent); McGhee, United States v. Nashville Special School District No. 1, Civil Action No. 962 (W.D. Ark., March 3, 1966) (entered by consent); Beckett, United States v. School Board of the City of Norfolk, Virginia, Civil Action No. 2214 (W.D. Va., March 17, 1966) (entered by consent). And see Miller v. Clarendon County School District No. 2, D.C.S.C., Civil Action No. 8752 decided April 21, 1966.

We have urged that this Court direct the district courts in these seven cases to enter a specific decree along the line proposed herein. The records in these cases fully support such relief. With the use of this method of individual enforcement there will no longer be occasion for the periodic submission by school boards of "desegregation plans," the hearing of objections to the plans and the submission of amended plans. Instead, the school boards will clearly understand their obligations, and will report to the court on a periodic basis. It may be that supplementary enforcement proceedings will occasionally be necessary, but hearings should be less frequent and should produce more effective results in bringing current practices and current standards closer. There will also be a higher probability that desegregation will proceed more uniformly among school districts under court orders and between such school districts and those desegregating on a voluntary basis under the supervision of the Office of Education.

The courts would continue to have the final responsibility for fixing constitutional standards and for compliance with its decrees. The option is

still open to any school board to come into court to prove that extraordinary circumstances compel modification of one or another of the provisions of the decree. The private plaintiffs and the United States also retain their right, as they must, under our constitutional system and Title IV of the Civil Rights Act of 1964, to come into court when necessary to seek modification of or compliance with any provision in the decree.

Special mention should be made of the faculty provisions in the proposed decree and of the district court decisions that have decreed specific and detailed relief on this subject.

Principally within the past year, district courts have been grappling with the problem of framing practical and effective relief for the desegregation of faculty. Some courts in framing their decrees have focused upon the specific results to be reached by reassignment of teachers who had theretofore been assigned solely upon the basis of their race. Dowell v. School Board of Oklahoma City, 244 F. Supp. 971 (W.D. Okla. 1965), Kier v. County School Board of Augusta County, Virginia, 249 F. Supp. 239 (W.D. Va.

1966). The orders entered in these cases required that the defendant school boards assign any employed teachers and reassign already-employed faculty so that the proportion of each race assigned to teach in each school will be the same as the proportion of teachers of that race in total teaching staff in the system, or at least, of the particular school level in which they are employed. This type of relief is justified on the ground that if faculty members had in the past been assigned without regard to race such assignments would, as a matter of mathematical probability, have yielded this same result.

Other district courts in framing their decrees on faculty desegregation have not been specific as to the number of teachers of each race that should be assigned to each school in order to remove the effects of past discriminatory assignments. These courts have focused upon the mechanics to be followed in removing the effect of past discrimination rather than upon the result as such. Thus, in Beckett v. School Board of the City of Norfolk, Civil Action No. 2214 (E.D. Va., 1966); Gilliam v. School Board

of the City of Hopewell, Virginia, Civil Action No. 3554 (E.D. Va. 1966); and Bradley v. School Board of City of Richmond, Civil Action No. 3353 (E.D. Va. 1966), the courts approved consent decrees setting forth in detail the considerations that would control the school administrators in filling faculty vacancies and in transferring already-employed faculty members in order to facilitate faculty integration.^{15/}

^{15/} The faculty provisions in the Hopewell case, which were filed with the district court on April 8, 1966, read as follows:

The School Board of the City of Norfolk recognizes its responsibility to employ, assign, promote and discharge teachers and other professional personnel of the Norfolk City Public School System without regard to race or color. It further recognizes its obligation to take all reasonable steps to eliminate existing racial segregation of faculty that has resulted from the past operation of a dual school system based upon race or color:

In order to carry out these responsibilities, the School Board has adopted the following program:

1. Teachers and other professional personnel will be employed solely on the basis of qualifications and without regard to race or color.

(Cont. on following page.)

In yet other cases, the district court, while emphasizing the necessity of affirmative steps to undo the effects of past racial assignments of faculty and while requiring some tangible results,

15/ (Cont. from preceding page.)

2. In the recruitment and employment of teachers and other professional personnel, all applicants and other prospective employees will be informed that the City of Norfolk operates a racially integrated school system and that the teachers and other professional personnel in the System are subject to assignment in the best interest of the System and without regard to their race or color.

3. The Superintendent of Schools and his staff will take affirmative steps to solicit and encourage teachers presently employed in the System to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred. Such transfers will be made by the Superintendent and his staff in all cases in which the teachers are qualified and suitable, apart from race or color, for the positions to which they are to be transferred.

4. In filling faculty vacancies which occur prior to the opening of each school year, presently employed teachers of the race opposite the race that is in the majority in the faculty at the school

(Cont. on following page.)

has not been specific either regarding the mechanics or the specific results to be achieved. See Harris v. Bullock County Board of Education, Civil Action No. 2073-N (M.D. Ala. 1966); United States v. Lowndes Board of Education, Civil Action No. 2328-N (M.D. Ala. 1966); Carr v. Montgomery County Board of

15/ (Cont. from preceding page.)

where the vacancy exists at the time of the vacancy will be preferred in filling such vacancy. Any such vacancy will be filled by a teacher whose race is the same as the race of the majority on the faculty only if no qualified and suitable teacher of the opposite race is available for transfer from within the System.

5. Newly employed teachers will be assigned to schools without regard to their race or color, provided, that if there is more than one newly employed teacher who is qualified and suitable for a particular position and the race of one of these teachers is different from the race of the majority of the teachers on the faculty where the vacancy exists, such teacher will be assigned to the vacancy in preference to one whose race is the same.

^{16/} In the Montgomery case the court's decree contained the following provisions on faculty desegregation:

Race or color will henceforth not be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff, with the exception that assignments shall be made in order to eliminate the effects of past discrimination. Teachers, principals, and staff members will be assigned to schools so that the faculty and staff is not composed of members of one race.

In the recruitment and employment of teachers and other professional personnel, all applicants or other prospective employees will be informed that Montgomery County operates a racially integrated school system and that members of its staff are subject to assignment in the best interest of the system and without regard to the race or color of the particular employee.

The Superintendent of Schools and his staff will take affirmative steps to solicit and encourage teachers presently employed to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred.

Teachers and other professional staff will not be dismissed, demoted, or passed over for retention, promotion, or re-hiring on the ground of race or color. In any instance, where one or more teachers or other professional staff members are to be displaced as a result of desegregation or school closings, they shall

(Cont. on following page.)

The proposed decree set forth in the appendix includes a faculty provision in general terms. It does not seem desirable for this Court to compel exact uniformity as to how faculty desegregation should be accomplished in every school district within the Fifth Circuit. The appellate court should not prescribe a detailed faculty provision from which a district court could not depart. District courts should be free to add specifics to meet the particular situation. By its decree, this Court will only be recognizing that there may be differences between large and small school districts and between urban and rural school districts.

At the same time, the decree does require that a reasonable beginning be made and that a reasonable program be achieved in the actual desegregation of the faculty. The decree makes it clear that the school officials are (1) restrained from

16/ (Cont. from preceding page.)

be transferred to any position in the system where there is a vacancy for which they are qualified.

practicing racial discrimination in the hiring and assignment of new faculty members, and (2) are required to take affirmative steps to correct existing results of past racial assignments.

This, we believe, is the minimum to be required in any school desegregation decree. The district courts, however, would be open to the plaintiff and to the United States to seek more specific relief if the facts warrant it.

CONCLUSION

Deference to local responsibility for the administration of school systems is a long established principle in the law of school desegregation -- one that continues to be valid today. However, we think it disserves the principle of local responsibility to place upon school boards the difficult and technical task of articulating judicial standards and formulating workable mechanics for free choice plans. The result is too often an inadequate plan which necessitates further abrasive involvement of the federal courts in local school affairs. Instead, we urge the Court to make the legal obligations of local officials as clear as possible and to utilize the expertise of HEW in the formulation of free choice mechanics. Local responsibility can then be turned to the far more productive tasks of administration and performance.

Respectfully submitted,

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ATTACHMENT A

TRANSFER AND PLACEMENT REGULATIONS
ISSUED BY THE BOARD OF EDUCATION
FOR THE CITY OF FAIRFIELD

1. Except as otherwise expressly provided by law and these regulations and subject to supervision and review by the board, the superintendent of schools shall exercise the authority and responsibility of the City Board of Education of Fairfield, Alabama, with respect to the assignment (including original and all other admissions to the school system), transfer and continuance of pupils among and within all public schools operated under the jurisdiction of the board.

2. The superintendent shall have continuing authority to determine the particular public school to be attended by each child applying for assignment or transfer to the public schools. No child shall be entitled to be enrolled or entered in a public school until he has been assigned thereto by the superintendent or by his duly authorized representative. All school assignments shall continue without change until or unless transfers are directed or approved by the superintendent or his duly authorized representative.

3. Applications for the assignment or transfer of pupils to particular schools shall be directed to the superintendent and shall be delivered to the school principal unless otherwise directed by the superintendent, on forms provided by the superintendent, who will keep supplies of such forms available at the offices of the board. Such forms shall be delivered only on request of and to the applicant student or to his parent or legal guardian, in person, by the principal of the school then attended by such student or by the superintendent of schools.

4. A separate application must be filed for each pupil desiring assignment or transfer to a particular school. Joint applications will not be received or considered.

5. Applications for assignment or transfer of pupils must be filled in completely and legibly in ink or typewriter and must be signed by both parents, if living, or the legal guardian of each child for whom application is made. In case of denial of an application notice thereof will be mailed to the parents or guardian, at the address shown on the

application, which shall be deemed the final action of the board unless a hearing before the board is requested in writing within fifteen days from the date of mailing of such statement.

6. The superintendent may in his discretion require interviews with the child, the parents or guardian, or other persons and may conduct or cause to be conducted such examinations, tests, and other investigations as he deems appropriate. In the absence of excuse satisfactory to the superintendent or the board, failure to appear for any requested examination, test, or interview by the child or the parents or guardian will be deemed a withdrawal of the application.

7. The delivery of such forms shall not constitute a request for hearing by the board. If a hearing by the board is requested with respect to the superintendent's conclusion on an application, the parents or guardian will be given at least five days' written notice of the time and place of the hearing. The hearing will be begun within thirty days from the receipt by the board of the request, but the board may in its discretion postpone the

hearing upon request. Failure of the parents or guardian to appear at the hearing will be deemed a withdrawal of the application.

8. Hearings may be conducted before the board, or before a committee of not less than three members thereof, or a member thereof, or such person as the board may designate as a hearing examiner as provided by law. Hearings will be held at such times and places as the board or its committee or hearing examiner may lawfully determine and may be adjourned from time to time for the convenience of parties, witnesses, or the board or hearing examiner; provided, however, that nothing herein shall preclude any applicant from filing a request for hearing in accordance with Section 7 of the Placement Act and the right to have such hearing held beginning with the time prescribed therein.

9. Unless postponement is requested by the parents or guardian, the board will notify them of its decision within twenty days after the conclusion of the hearing. Exceptions to the decision of the board may be filed, as allowed by law, within five

days notice of the board's decision, and the board shall meet within fifteen days of the receipt of the exceptions to consider the same.

I hereby certify that a copy of the trial and Appendix in this case has been served by official United States mail in accordance with the rules of this Court to the attorneys for the parties addressed as follows:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief and Appendix in this case has been served by official United States mail in accordance with the rules of this Court to the attorneys for the parties addressed as follows:

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