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

ALABAMA NAACP CONFERENCE OF BRANCHES,
et al.,

Plaintiffs,

UNITED STATES OF AMERICA,

Amicus Curiae
and Plaintiff,

CIVIL ACTION NO. 2457-N

v.

GEORGE C. WALLACE, et al.,

Defendants.

SUPPLEMENTAL BRIEF OF THE UNITED STATES

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

ALABAMA NAACP CONFERENCE OF BRANCHES,	)	
et al.,	)	
	)	
Plaintiffs,	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Amicus Curiae	)	
and Plaintiff,	)	
	)	
v.	)	C.A. No. 2457-N
	)	
GEORGE C. WALLACE, et al.,	)	
	)	
Defendants.	)	
	)	

SUPPLEMENTAL BRIEF OF THE UNITED STATES

In the course of oral argument on February 3, 1967, the Court asked counsel to address themselves in supplemental briefs to two questions: first, whether the distinction between de jure segregation and de facto segregation is sound, and, second, whether the failure of the President to formally approve the guidelines renders them invalid. We submit this brief in response to that request.

I. The Distinction between De Jure and De Facto Segregation

Defendants maintain that the guidelines are invalid because they violate sections 401(b)^{1/} and 407(a)^{2/} of the Civil Rights Act of 1964. In response, counsel for plaintiffs argued, in part, that these sections were not intended, nor should they be construed, to limit the power of the Commissioner of Education to require the correction of de jure segregation, and that since the guidelines are confined solely to that task, they do not exceed whatever limitations are imposed on the Commissioner's power by those sections. It was maintained that, at the most, these sections are a limitation of the Commissioner's power to take corrective action with respect to de facto segregation, with which the guidelines do not attempt to deal and which is not in any way involved in this

^{1/} "'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." 42 U.S.C. 2000c(b).

^{2/} "[N]othing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." 42 U.S.C. 2000c-6(a)

litigation. It was in response to this line of argument that the Court asked whether the distinction between de facto and de jure segregation was meaningful.

At the outset it should be noted that sections 401(b) or 407(a) do not purport to limit the authority of either the Executive or Judicial Branch to take action to correct segregation in the public schools that is prohibited by the Constitution. These sections were merely included to disclaim any intention to create a statutory source of authority to remedy "racial imbalance" in the public schools, which was viewed as a form of segregation not prohibited by the Constitution. As Senator Humphrey stated, the pertinent language in §407(a) was included "to preclude an inference that the title confers new authority to deal with 'racial imbalance' in schools. ..." 110 Cong. Rec. 12714 (1964). The text of §407(a) clearly manifests this intention. It states that nothing contained therein shall empower the judiciary or executive officers from entering orders to achieve racial balance or shall "otherwise enlarge the existing power of the court to insure compliance with constitutional standards". With respect to the judiciary, it might even be doubtful whether Congress could properly limit the general equity powers of the federal courts in

a manner to prevent them from ordering a school board to take such measures as may be necessary and proper to remedy segregation that is violative of the Constitution. Cf. Yakus v. United States, 321 U.S. 414, 460, 468 (dissenting opinion of Rutledge, J.); Estep v. United States, 327 U.S. 114, 125 (concurring opinion of Murphy, J.), 132 (concurring opinion of Rutledge, J.). Nor do we believe that sections 401(b) and 407(a) limit the authority of the Attorney General to commence suits to eliminate constitutionally forbidden segregation in public schools or limit the authority of the Commissioner of Education to bring an end to constitutionally forbidden racial segregation in public schools that are federally assisted.^{3/} While Congress has greater power to curtail the activities of these federal officials than it does to curtail the remedial powers of the federal courts, we find no indication in the legislative history that, in these sections, Congress sought to treat the Executive differently than it treated the Judiciary or that it intended to limit the great remedial purposes of the Civil Rights Act by limiting the authority of the Executive to take appropriate action in eliminating racial segregation that is prohibited by the Constitution. With respect to

^{3/} As explained more fully in our principal brief in this case (pp. 23a-28), the percentage of Negro transferees used in the guidelines (45 C.F.R. §181.54) is not an attempt by the Commissioner to correct "racial imbalance," but merely an index guiding him in selecting those freedom-of-choice desegregation plans which his office will most carefully review.

the Commissioner of Education, such segregation would be, by definition, a form of racial discrimination, which is prohibited by section 601 in all federal assisted activities and which the Commissioner is authorized and directed to remedy in section 602. See also Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4 Cir. 1963).

Congress believed that there is a distinction between de jure and de facto segregation, and embodied it in the statute. Although the precise phrase "de facto segregation" was not used, the term used, "racial imbalance," was viewed by Congress, as it is by the general public, as a synonym. As Congressman Cramer said in explaining the pertinent language in section 401(b):

The purpose is to prevent any semblance of congressional acceptance or approval of the concept of "de facto" segregation or to include in the definition of "desegregation" any balancing of school attendance by moving students across school district lines to level off percentages where one race outweighs another.

110 Cong. Rec. 2280(1964)

This distinction was made because of the congressional understanding of the existing state of constitutional doctrine. Congress was acting on the presumption that the Court of Appeals for the Seventh Circuit correctly stated the course of judicial decision in Bell v. School City of Gary, Indiana, 324 F.2d 209 (7 Cir. 1963)

that a school board was under no constitutional duty to correct de facto segregation or racial imbalance. That Court held that if school attendance zone lines are drawn without regard to race, but rather on the basis of such factors as density of population, travel distances, safety of the children, school operating costs, and convenience to parents and children, the zone lines are constitutionally valid even though there is a racial imbalance in the schools due to the residential patterns and the use of such criteria. The opinion of the Seventh Circuit was explicitly mentioned in the course of the congressional debate, and Senator Humphrey said by way of explaining section 407(a):

The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems. The natural factors, such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language of section 4.

110 Cong. Rec. 12717 (1964)

De jure segregation was understood to be segregation that is the result of an official policy of the school board to separate the races in the public schools, to have one set of schools for Negro students and Negro teachers, and another set of schools for white

students and white teachers. Brown v. Board of Education left no doubt as to the unconstitutionality of that type of segregation.

We stress that although we recognize that Congress perceived a distinction in the state of the case-law with respect to the unconstitutionality of de facto and de jure segregation, we do not propose that school boards in the South be held to a different constitutional standard than those in any other part of the Country. Every school board in the United States is subject, we believe, to the same constitutional obligation -- to eliminate racial discrimination in the operation of its school system. This is the teaching of Blocker v. Board of Education of Manhasset, 226 F. Supp. 208, remedy considered on rehearing, 229 F. Supp. 709 (E.D. N.Y. 1964). There the Court found the school board had engaged in racial discrimination in establishing a single disproportionately small attendance zone for one school, providing a single school for a disproportionately small student body, and adhering to a rigid policy of not permitting students to transfer out of that zone, where, as a result of those policies and practices and residential segregation, virtually all the Negroes in the community were assigned to that school and all the students in the school were Negro. This was segregation by

official state action that was forbidden by the Constitution and it would make no difference whether, for other purposes, it was called "de facto" or "de jure" or whether it occurred in a school system in New York rather than one in Alabama. In either case, corrective action must be taken.

While the ultimate constitutional standard is the same for the Nation, it must be recognized, however, that the application of this standard to different facts will produce different results. Different practices require different remedies. For example, a school board that has been operating under an official policy to segregate the races, and pursuant to that policy has assigned teachers to the schools on a racially segregated basis, might be required to take steps not required of a school board that has not implemented such a policy, even in the unlikely event that the racial distribution of the faculties among the various schools in the two systems is the same. Similarly, any school board that has determined the site, the capacity and the grades of a school in such a manner so as to perpetuate racial segregation, should be required to take steps to eliminate the segregation attributable to its discriminatory action, even though similar steps would not be required of another school board that did not engage in such

discriminatory conduct, but which, solely because of other factors, such as the use of geographical criteria and the existence of residential segregation, also maintained some schools which were attended solely by Negro students. We believe that the record in this case shows that all the student and faculty segregation in the public schools in Alabama is attributable to the racial discriminatory action of the local school boards and the defendant state officials, and that the enforcement program of the Commissioner of Education and the relief we propose in Lee v. Macon County Board of Education are appropriate means for eliminating the effects of that action.

II. The Requirement of Presidential Approval

Section 502 of Title VI confers a rule-making power on the Secretary of the Department of Health, Education and Welfare, and it imposes a procedural requirement that all exercises of that rule-making power be approved by the President. It authorizes and directs each federal agency extending federal financial assistance to issue "rules, regulations or orders of general applicability" to implement the prohibitions against racial discrimination contained in that Title, and it also provides that "[n]o such rule, regulation, or order shall become effective unless and until approved by the President." We contend that the guidelines are not an exercise of this rule-making power, but a mere statement of the enforcement policies of the Commissioner of Education, and that thus they need not be approved by the President. Our position is supported, we believe, by traditional administrative law doctrine, by an analysis of the evolution and nature of the guidelines, and by a review of the legislative history relating to the requirement of presidential approval.

A. The traditional distinction between
"Legislative Regulations" and "Inter-
pretative Regulations."

Exercises of a rule-making power granted to an administrative agency by Congress have, according to traditional administrative law doctrine, been called "legislative regulations." See generally 1 Davis, Administrative Law §§5.01-5.11 (1958). Legislative regulations are said to have "the status of law", which means that they are "binding" on individual parties, and even on a court if it is determined by the court that they are (a) within the grant of the rule-making power, (b) reasonable, and (c) issued pursuant to proper procedure.

Traditional administrative law doctrine also recognizes another category of agency announcements, which for lack of a better term have been called "interpretative regulations." The phrase "interpretative regulation" is misleading because what is involved is not a "regulation", a rule of law, but rather a judgment or view of the agency on a particular question and it is also misleading because the distinction between a "legislative regulation" and a so-called "interpretative regulation" is not one related to the content of the agency announcement. The content of a so-called interpretative regulation could equally be contained in a legislative regulation. The

essential difference between a legislative regulation and an interpretative regulation is "whether or not it is issued pursuant to a grant of law-making power."

1 Davis, Administrative Law p. 302 (1958). An interpretative regulation is, as we understand it, a judgment or policy statement of the agency that is not formally expressed in a rule or regulation issued pursuant to the statutory rule-making power of the agency.

We claim no more status for the guidelines than that of so-called interpretative regulations, and it is therefore important to note their characteristics in some detail.

First, and most importantly, because so-called interpretative regulations are not an exercise of whatever rule-making power may be given to an agency, they, unlike legislative regulations, do not have the "status of law" nor are they "binding." They are subject to plenary review by a court, and a court can substitute its judgment for that of the administrative agency on the issue resolved in the interpretative regulations. The so-called interpretative regulations are "authoritative" in only two respects: (a) They guide the enforcement action of the administrative agency. Although the agency is theoretically free to disregard

or alter these statements of policy in specific cases, or at any time in the future, in the interest of fairness and of establishing continuity and confidence in its enforcement program, as a practical matter, they are a generally reliable guide to what the agency's enforcement action will be and what the agency thinks it should be.^{4/} (b) The so-called interpretative regulations have the power to persuade the judiciary. They represent the judgment of the administrative agency, and the courts can look to them for guidance. Their authoritativeness in this respect will vary depending on such factors as the extent to which the subject matter is within the special competence of the administrative agency, its consistency with prior administrative pronouncements and with standards announced by the courts in construing the same or similar concepts, the experience of the agency, the thoroughness in the consideration of the regulation by the agency, and the fairness and informativeness of the procedures used by the agency in formulating its position. See generally

^{4/} The practical impact of the "interpretative regulation" on the conduct of the effected parties does not alter their nature. For example, in Frozen Food Express v. United States, 351 U.S. 40, 44, 45 (1956), the Supreme Court recognized that a so-called interpretative regulation of the Interstate Commerce Commission, which was issued as "Report" entitled "Determination of Exempted Agricultural Commodities", would have "an immediate and practical impact on carriers", since the carriers could act contrary to the policies stated in Report only "at the risk of incurring criminal penalties." See Jaffe, Judicial Control of Administrative Action, pp. 405-406 (1965), discussing the case.

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)

(involving the "Interpretative Bulletins" of the Administrator of the Wages and Hours Division of the Department of Labor, from which Congress, in enacting the Fair Labor Standards Act of 1938, withheld a general rule-making power).

Second, in issuing so-called interpretative regulations no formal procedures, including the procedures ~~which~~ prescribed by statute for the exercise of the statutory rule-making power need be followed. Section 4 of the Administrative Procedures Act, for example, expressly states that the notice and hearing requirements imposed by that statute for rule-making shall not apply to "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice."^{5/} The procedural requirements may be ignored, and the agency may be relieved of the necessity of complying with them only at the cost of lessening the authoritativeness of its ruling or judgment.

^{5/} 5 U.S.C. 1003(a) (1964 Ed.) The Senate Committee indicated that it understood the technical meaning of the phrase "interpretative rules." See Senate Committee Print, Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 18 (1946). The distinction between legislative and interpretative regulations was well recognized in the scholarly literature at the time. See, e.g., Lee, Legislative and Interpretative Regulations, 29 Geo. L.J. 1 (1940); and Rep. Att'y. Gen. Comm. Ad. Proc. 90-100 (1941), quoted in American President Lines, Ltd. v. Federal Maritime Commission, 316 F.2d 419, 422 (D.C. Cir., 1963).

The scope of judicial review is substantially broadened because these rulings or judgments are not issued pursuant to the rule-making power in conformity to the procedural requirements for exercising that power.

Third, the so-called interpretative regulations may be published in many forms. They may consist of general policy statements of the agency, press releases, letters of opinion, speeches, pamphlets, handbooks, bulletins, or instructions, or they may find more formal expression and actually be designated "regulations" by the administrative agency. The mere fact that the policy or judgment of the agency is of general applicability and is published in the Federal Register or in the Code of Federal Regulations does not alter their nature, making them an exercise of a statutory rule-making power. For example, the Interpretative Bulletin of the Wage and Hour Division, the classic example of the so-called interpretative regulation involved in Skidmore v. Swift & Co., is of general applicability, stating the administrator's views as to the coverage of the Act, and is published in the Code of Federal Regulations.^{6/}

^{6/} See 29 C.F.R., Parts 775 and 776. For other examples as to the form of so-called interpretative regulations see generally 1 Davis, Administrative Law, p. 290 n.20 ("The Federal Register for September 27, 1946, contains a large compilation of SEC interpretative regulations and related materials, called releases, letters or opinion of officers, letters of the Commission, statements of the Commission, and the like"), p. 305 ("Nearly all the regulations issued by the Secretary of Agriculture under the Food and Drug Act of 1906 concerning standards for food were interpretative--merely a 'guide for officials of this department in enforcing the Food and Drug Act'"), and p. 311 (discussing the fact that both interpretative and legislative regulations of the Treasury Department are published in the Federal Register and the Code of Federal Regulations).

The nature of this traditional administrative law category called "interpretative regulations" can be further illustrated by discussing a leading case, Gibson Wine Co., Inc. v. Snyder, 194 F.2d 329, decided in 1952 by the Court of Appeals for the District of Columbia, a court that has played a prominent role in the formulation of administrative law in our country. That case involved a challenge to the ruling of the Deputy Commissioner of Internal Revenue, who was charged with the administration of the Federal Alcohol Administration Act.^{7/} The pertinent statute granted him a rule-making power, but required that exercises of that power be approved by the Secretary of the Treasury. A formal regulation had been issued sometime

^{7/} Section 2(d) of the Federal Alcohol Administration Act, 49 Stat. 977 (1935) provides:

The Administrator is authorized and directed to prescribe such rules and regulations as may be necessary to carry out his powers and duties. All rules and regulations prescribed by the administrator shall be subject to the approval of the Secretary of the Treasury.

The Court of Appeals, 194 F.2d. at 330 n.2 states:

The Federal Alcohol Administration and the office of the Administrator were abolished and their functions transferred to the Alcohol Tax Unit of the Bureau of Internal Revenue and the Deputy Commissioner of Internal Revenue in charge of that unit.

ago with the approval of the Secretary, but that regulation merely stated that a wine made from one kind of fruit shall be designated by the word "wine" qualified by the name of the fruit. The question frequently arose as to whether wine made from boysenberries should be labelled "blackberry wine" or "boysenberry wine." There was no provision in the formal legislative regulation covering this issue and accordingly the Deputy Commissioner ruled, stating that such wine should be labelled "boysenberry wine." That ruling was not approved by the Secretary. The District Court reviewed the ruling of the Deputy Commissioner on a plenary basis, concluded that the ruling was "correct" and denied the plaintiff-appellant injunctive relief. The Court of Appeals affirmed, saying (194 F.2d, at 331-332):

The first point presented by appellant is that the Deputy Commissioner's ruling of November 30, 1949, was an attempt to modify or amend a regulation and was invalid because it was not approved by the Secretary, as required by the statute, and no hearing was had prior to the promulgation of the ruling, as required by the statute and by Section 4 of the Administrative Procedure Act. The appellee officials say that the Deputy Commissioner's ruling was not an amendment or modification of a regulation but was merely an interpretative ruling. They say that interpretative rulings are within the authority of the Deputy Commissioner and are not within statutory requirements as to notice and hearing.

The distinctive characteristics of interpretative rulings, as contrasted with so-called regulations, have long been recognized. Administrative officials frequently announce their views as to the meaning of statutes or regulations. Generally speaking, it seems to be established that 'regulations', 'substantive rules' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulations means.

* * *

We think the ruling of the Deputy Commissioner here under consideration was clearly an interpretative ruling. On its face it purported to be merely the opinion of the Deputy Commissioner as to the meaning of the regulation. In the action in the District Court the parties and the court treated it as an expression of opinion. We think that treatment was correct.

Since the Deputy Commissioner's ruling was an interpretative one, it was not subject to the requirements of approval by the Secretary, of a hearing prior to promulgation, or of the rule-making procedure of the Administrative Procedure Act. Such exemptions have effect on the weight which the courts will accord to the administrative view and thus affect the limits of the judicial review.... (Footnotes giving statutory references omitted and emphasis added.)

See also Garellick Mfg. Co. v. Wellon, 313 F.2d 899 (D.C. Cir., 1963).

B. The Guidelines as a Public Statement
of the Enforcement Policies of the
Commissioner of Education.

The guidelines are not an exercise of the rule-making power conferred on the agency by Congress in section 602. They are a public statement of the policies that will generally guide the Commissioner of Education in discharging his responsibility under the Act and the regulation that was issued under §602 to determine the adequacy of desegregation plans submitted to him. They are rules for the management of his shop, and thus fall in the traditional category in administrative law of the so-called "interpretative regulations," which, as discussed in the preceding section of this brief, are not regulations or rules of law regulating the behavior of others.

We believe this Court need determine whether the guidelines are "valid" only in the limited sense of whether they are a permissible basis upon which the Commissioner can base his enforcement action. Thus, their validity depends, not upon whether they were issued in conformity with the procedural requirements set forth in section 602 for exercising the statutory rule-making power, but rather on their consistency with the substantive provisions of the statute and regulation. The essence of the defendants' position,

both in enacting Act No. 252 of the Alabama Legislature^{8/} and in their third party claim, is that the guidelines are invalid because they violate Title IV by requiring the correction of racial imbalance and because they seek to correct "employment practices" in violation of section 604 of Title VI. This should be the focus of this litigation, and we meet those contentions in our principal brief in this case.

Moreover, it should be recognized that this Court is being asked to determine the validity of the guidelines only on their face. This means that even if this Court in this proceeding determines that the guidelines are "valid" in that they are consistent with the substantive provision of the Act and the Regulation, it is still open to local school boards to assert, and for the courts to decide, in particular cases whether the enforcement policies of the Commissioner, as applied, are consistent with whatever

^{8/} The operative provisions of Act No. 252 are contained in section 1, and read in part:

"Any agreement or assurance of compliance with the guidelines heretofore made or given by a local county or city Board of Education is null and void and shall have no binding effect. No local county or city Board of Education shall have the authority to give any assurance of compliance with the guidelines or to enter into any other agreement with any agency of the government of the United States which would obligate such local city or county Board of Education to adopt any plan for desegregation which requires the assignment of students to public schools in order to overcome racial imbalance or which would authorize any agent of the United States to take any unlawful action with respect to any employment practice of such board or to take other action not required by law."

limitations may be in the statute respecting racial imbalance and employment practices. In addition, a court reviewing specific administrative action will be called in to decide questions not at all presented in this litigation, namely, whether these enforcement policies are arbitrary or unreasonable as applied and whether the Commissioner is mistaken in his judgment as to what is required in a particular situation to eliminate racial discrimination in the operation of the public school system. In fact, in such a proceeding to review a specific action of the Commissioner based on these guidelines or policies, the court has the power to undertake a plenary review of the Commissioner's policies and standards, and to determine whether, in its judgment, compliance with those standards and policies is required to eliminate racial discrimination. This broad scope of judicial review is appropriate and fair because the guidelines are not an exercise of the statutory rule-making power contained in section 602. To be sure, as the Supreme Court in Skidmore v. Swift & Co. recognized, a reviewing court may look to the guidelines "for guidance" as "a body of experiences and informed judgment," and "the weight of such a judgment in a particular case will depend upon . . . all those factors which give it power to persuade." 323 U.S., at 140.

The formal title and language of the guidelines indicate that they are a public statement of the enforcement policies of the Commissioner of Education, not regulations or rules of law. For example, the section that makes reference to percentages of Negro transferees, which section is perhaps the portion of the guidelines most in controversy in this litigation, makes it unmistakably clear that only the enforcement policies of the Commissioner, not regulations or rules of law, are being set forth. That section reads:

§181.54 Requirements for Effectiveness of
Free Choice Plans

= A free choice plan tends to place the burden of desegregation on Negro or other minority group students and their parents. Even when school authorities undertake good faith efforts to assure its fair operation, the very nature of a free choice plan and the effect of longstanding community attitudes often tend to preclude or inhibit the exercise of a truly free choice by or for minority group students.

For these reasons, the Commissioner will scrutinize with special care the operation of voluntary plans of desegregation in school systems which have adopted free choice plans.

In determining whether a free choice plan is operating fairly and effectively, so as to materially further the orderly achievement of desegregation, the Commissioner will take into account such factors as community support for the plan, the efforts of the school system to eliminate the identifiability of schools on the basis of race, color, or national origin by virtue of the composition of staff or other factors, and the progress actually made in eliminating past discrimination and segregation.

The single most substantial indication as to whether a free choice plan is actually working to eliminate the dual school structure is the extent to which Negro or other minority group students have in fact transferred from segregated schools. Thus, when substantial desegregation actually occurs under a free choice plan, there is strong evidence that the plan is operating effectively and fairly, and is currently acceptable as a means of meeting legal requirements. Conversely, where a free choice plan results in little or no actual desegregation, or where, having already produced some degree of desegregation, it does not result in substantial progress, there is reason to believe that the plan is not operating effectively and may not be an appropriate or acceptable method of meeting constitutional and statutory requirements.

As a general matter, for the 1966-67 school year the Commissioner will, in the absence of other evidence to the contrary, assume that a free choice plan is a viable and effective means of completing initial stages of desegregation in school systems in which a substantial percentage of the students have in fact been transferred from segregated schools. Where a small degree of desegregation has been achieved and, on the basis of the free choice registration held in the spring of 1966, it appears that there will not be a substantial increase in desegregation for the 1966-67 school year, the Commissioner will review the working of the plan and will normally require school officials to take additional actions as a prerequisite to continued use of a free choice plan, even as an interim device.

In districts with a sizable percentage of Negro or other minority group students, the Commissioner will, in general, be guided by the following criteria in scheduling free choice plans for review:

- (1) If a significant percentage of the students, such as 8 percent or 9 percent, transferred from segregated schools for the 1965-66 school year, total transfers on the order of at least twice that percentage would normally be expected.

(2) If a smaller percentage of the students, such as 4 percent or 5 percent, transferred from segregated schools for the 1965-66 school year, a substantial increase in transfers would normally be expected, such as would bring the total to at least triple the percentage for the 1965-66 school year.

(3) If a lower percentage of students transferred for the 1965-66 school year, then the rate of increase in total transfers for the 1966-67 school year would normally be expected to be proportionately greater than under (2) above.

(4) If no students transferred from segregated schools under a free choice plan for the 1965-66 school year, then a very substantial start would normally be expected, to enable such a school system to catch up as quickly as possible with systems which started earlier. If a school system in these circumstances is unable to make such a start for the 1966-67 school year under a free choice plan, it will normally be required to adopt a different type of plan.

Where there is substantial deviation from these expectations, and the Commissioner concludes, on the basis of the choices actually made and other available evidence, that the plan is not operating fairly, or is not effective to meet constitutional and statutory requirements, he will require the school system to take additional steps to further desegregation.

Such additional steps may include, for example, reopening of the choice period, additional meetings with parents and civic groups, further arrangements with State or local officials to limit opportunities for intimidation, and other further community preparation. Where schools are still identifiable on the basis of staff composition as intended for students of a particular race, color, or national origin, such steps must in any such case include substantial further changes in staffing patterns to eliminate such identifiability.

If the Commissioner concludes that such steps would be ineffective, or if they fail to remedy the defects in the operation of any free choice plan, he may require the school system to adopt a different type of desegregation plan.

Similarly, the way in which the guidelines evolved makes clear that they are merely a statement of the enforcement policies of the Commissioner, and that they were made public for the purpose of assisting the local school boards.

Title VI, as part of the Civil Rights Act of 1964, was enacted in July, 1964. The next several months were spent in establishing the appropriate enforcement machinery in the agencies and in drafting the regulation to be issued pursuant to the §602 rule-making power. On November 27, 1964, the Secretary of the Department of Health, Education and Welfare issued, with the approval of the President, a regulation establishing the basic legal framework for the enforcement of Title VI by his department. ^{9/} 45 C.F.R., part 80. Section 80.4(c)(2) required certain school districts to submit desegregation plans to the Commissioner of Education and it charged the Commissioner with the responsibility of determining whether the desegregation plans submitted were adequate to accomplish the purpose of Title VI and the regulation -- the elimination of racial segregation. The relevant portion of the regulation reads:

^{9/} Notice or hearing was not required for the promulgation of the regulation because section 4 of the Administrative Procedure Act exempts from the notice and hearing requirements of that section "any matter relating to . . . loans, grants, benefits or contracts, 5 U.S.C. 5003 (1964 ed.)

(c) Elementary and Secondary schools. The requirements of paragraph (a) of this section with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system . . . (2) submits a plan for the desegregation of such school or school system which the Commissioner of Education determines is adequate to accomplish the purposes of the Act and this Regulation and provides reasonable assurance that it will carry out such plan . . .

The regulation did not seek to spell out what such a plan must include, but instead relied upon the judgment of the Commissioner of Education. The regulation required the school boards to take the first affirmative steps in formulating desegregation plans and to submit them for approval to the Commissioner. However, section 80.12(b) of the regulation directs the Commissioner, as the responsible department official, to issue to interested persons "forms and detailed instructions and procedures" for effectuating the regulation.

In December, 1964, almost contemporaneously with the publication of this regulation in the Federal Register, instructions were sent to local school systems describing the requirements of the Act and of the regulation. Shortly thereafter, a memorandum entitled "Supplementary Information for School Districts Regarding Compliance with Title VI of the Civil Rights Act of 1964: Non-discrimination in Federally Assisted Programs" was sent to local school systems to clarify certain ambiguities in the earlier instructions. See e.g., Weaver Dep. U.S. Ex. 11. With respect to desegregation plans, the memorandum said:

E. Desegregation Plans

The responsibility for devising and implementing a reasonable and adequate plan of desegregation rests with the local school district, although all must comply with the Civil Rights Act.

The actions required to undertake the desegregation of a school system may differ from community to community. Nevertheless, under the provisions of the Civil Rights Act and the HEW Regulation, the Commissioner of Education must review any plan of desegregation submitted to determine its adequacy to accomplish the purposes of the Act and the Regulation.

No one set of guidelines or instructions can be devised which will fit all situations. Technical assistance on the formulation of a plan can be obtained on request from the Office of Education. Where local circumstances raise special problems, such problems should be set forth in the plan together with the particular solutions proposed to deal with them.

A need was soon recognized for the articulation of some of the standards that were to be used by the Commissioner of Education in judging the adequacy of desegregation plans. In response to this need a memorandum by F. W. Foster, Jr., Professor of Law at the University of Wisconsin and a consultant to the Office of Education, was published on March 20, 1965 in a magazine called the Saturday Review. (A copy of the article, of which we ask this court to take judicial notice, is attached.) The editorial preface to the article states:

The following memo is designed to provide specific guidelines to school authorities seeking to meet the terms of Title VI of the Civil Rights Act. . . . Mr. Foster's memo has no official status and does not bind the Office of Education in any fashion. Yet there is no doubt that it affects directly the thinking of the officials charged with the responsibility for the enforcement of Title VI as it applies to education.

One month later, on April 29, 1965, the Commissioner of Education in response to this same demand for an articulation of his enforcement policies issued and distributed to all school districts that had submitted an unacceptable plan, or that were in the process of preparing a plan, a document that has become to be known as the 1965 guidelines. It was formally entitled "General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools." At that time, the statement was not published in the Federal Register. However, with time a need was recognized to make the statement more available to the public, and in August 1965 it was published in the Federal Register. 30 Fed. Reg. 9981 (August 11, 1965); 30 Fed. Reg. 10163 (August 14, 1965). The nature and purpose of the statement were clearly set forth in the Federal Register:

Under §80.4(c) of the regulation issued by the Secretary and approved by the President (45 CFR 80.4(c), the Commissioner has authority and responsibility for determining whether a desegregation plan submitted by an elementary or

secondary school or school system desiring to receive Federal financial assistance is adequate to carry out the purposes of Title VI of the Civil Rights Act of 1964 . . . and the implementing regulation. . . . The following Part 180 describes the policies under which the Commissioner will make such determinations.

In order to conform his enforcement policies to his experience during the first year of operation of the Title VI program, the Commissioner in March, 1966, issued a revised set of guidelines, entitled "Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964." They were published in the Federal Register on April 9, 1966 (31 Fed. Reg. 5523), with an explanation essentially similar to that which appeared upon the publication of the 1965 guidelines in the Federal Register.

C. The Legislative History of the Requirement of Presidential Approval.

We do not believe that the legislative history concerning the requirement of presidential approval is particularly instructive. We do believe, however, that it is consistent with our position and the foregoing analysis. First, there is no indication that Congress intended to preclude the Secretary from issuing rules and regulations under §602 which require school desegregation plans to be submitted to the Commissioner of Education as a condition of the extension of financial assistance for education, and which charge the Commissioner with determining whether the plans are adequate to fulfill the purposes of the Act. Second, there is no indication that Congress intended to have the Commissioner, in exercising this function, to be without discretion to formulate enforcement policies and to be totally controlled by regulations issued by the Secretary and approved by the President. The following analysis of the legislative history supports these contentions.

(1) Genesis of the Requirement of Presidential Approval.

The requirement of presidential approval was not in the bill as introduced in the House by Congressman Celler on June 20, 1963,^{10/} nor in the version introduced on October 2, 1963 and reported out of Committee to the House for debate on November 20, 1963.^{11/} The latter

^{10/} "Title VI -- Nondiscrimination in Federally Assisted Assisted Programs

"Section 601. Notwithstanding any provision to the contrary in any law of the United States providing or authorizing direct or indirect financial assistance for or in connection with any program or activity by way of grant, contract, loan, insurance, guaranty, or otherwise, no such law shall be interpreted as requiring that such financial assistance shall be furnished in circumstances under which individuals participating in or benefiting from the program or activity are discriminated against on the ground of race, color, religion, or national origin or are denied participation or benefits therein on the ground of race, color, religion, or national origin. All contracts made in connection with any such program or activity shall contain such conditions as the President may prescribe for the purpose of assuring that there shall be no discrimination in employment by any contractor or subcontractor on the ground of race, color, religion, or national origin."

^{11/} The pertinent portion of the bill reads:
"Section 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, contract, or loan, shall take action to effectuate the provisions of Section 601 with respect to such program or activity. Such action may be taken by or pursuant to rule, regulation, or order of general applicability and shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."

version provided that administrative action to effectuate the nondiscrimination requirement of the Title "may be taken by or pursuant to rule, regulation or order of general applicability." In the course of debate on February 7, 1964, Congressman Lindsay offered an amendment to this version adding a requirement that the rule, regulation or order of general applicability be approved by the President.

The following is the entire discussion on the floor of the House that preceded the adoption of the amendment (110 Cong. Rec. 2499):

Mr. LINDSAY. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. Lindsay: On page 62, line 17, after the words "is taken" insert "no such rule, regulation or order shall become effective unless and until approved by the President".

The CHAIRMAN. The gentleman from New York [Mr. Lindsay] is recognized.

Mr. LINDSAY. Mr. Chairman, this amendment is designed to require that the President shall approve rules and regulations that are promulgated pursuant to Section 602 of Title VI.

I believe this amendment will be accepted by the chairman of the Committee on the Judiciary and the ranking minority member. The members of your committee feel that the rule-making power is so important in this area and can be so significant because of the latitude that this title by definition has to give to the executive in drafting rules and regulations that the Chief Executive should be required to put his stamp of approval on

such rules and regulations - after, of course, the normal procedures have been followed in promulgating such rules and regulations.

Mr. CELLER. Mr. Chairman, will the gentleman yield?

Mr. LINDSAY. I yield to the chairman of the committee.

Mr. CELLER. As chairman of the Judiciary Committee, I approve the amendment of the gentleman from New York.

Mr. LINDSAY. I thank the chairman.

Mr. McCULLOCH. Mr. Chairman, will the gentleman yield?

Mr. LINDSAY. I yield to the gentleman from Ohio.

Mr. McCULLOCH. The amendment is an acceptable amendment to us.

Mr. SMITH of Virginia. Mr. Chairman, I should like to have a brief explanation of what the amendment would do.

Mr. LINDSAY. I yield to the gentleman from Virginia.

Mr. SMITH of Virginia. I thought the gentleman had yielded the floor.

Mr. LINDSAY. I had not yet yielded the floor. If the gentleman would like the floor on his own time, I shall be glad to yield the floor.

Mr. SMITH of Virginia. No, I should merely like to have a more clear idea as to what the amendment would do.

Is it the gentleman's thought or intent that the President shall personally approve every regulation that is made under this regulatory power?

Mr. LINDSAY. No, it is not.

Mr. SMITH of Virginia. What would it do, then?

Mr. LINDSAY. Pursuant to Title VI, rules and regulations will have to be promulgated, as the gentleman will note on lines 14 and 15 on page 62 of the bill. The rules, regulations and orders there required, which will have to be promulgated according to standard procedures, with hearing and the rest, would have to be approved by the President of the United States.

Mr. SMITH of Virginia. Then he would have to approve every one of these regulations personally.

Mr. LINDSAY. No; I did not say that.

Mr. SMITH of Virginia. I thought the gentleman did.

Mr. LINDSAY. The rules and regulations will be promulgated, and will have to be promulgated as indicated on the lines 14 and 15 as I have mentioned, and are to be approved by the President of the United States if they are to be effective.

Mr. SMITH of Virginia. Did the gentleman not just say they had to be approved by the President?

Mr. LINDSAY. That is correct.

Mr. SMITH of Virginia. Then what does that mean? Would he have to approve them or would he not have to approve them?

Mr. LINDSAY. I refer the gentleman again to the language to which I referred, on lines 13 through 17 of page 62.

"Such action may be taken by or pursuant to rule, regulation, or order of general applicability and shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. "

It is those rules, regulations, or orders of general applicability the President would be required to approve. Very plainly stated.

Mr. SMITH of Virginia. Perhaps so. I still do not understand what the President would have to do, but I am happy to see any amendment agreed to by the gentleman from New York [Mr. Celler] and the gentleman from Ohio [Mr. McCulloch], so I am disposed to go along with it. I only wish I could get them to agree on my amendment to prohibit slavery.

Mr. POFF. Mr. Chairman, will the gentleman yield?

Mr. LINDSAY. I yield to the gentleman from Virginia.

Mr. POFF. Mr. Chairman, I am inclined to feel that the amendment is constructive in nature. I inquire, for the sake of the public: How will the President document his approval of the orders and regulations? Will his approval appear as an Executive order? Will it be published in the Federal Register?

Mr. LINDSAY. It will be published in the Federal Register.

Mr. POFF. I thank the gentleman.

Mr. JONES of Missouri. Mr. Chairman, I move to strike out the last word, for the purpose of clarifying the statement of the gentleman from New York.

I should like to have the attention of the gentleman from New York [Mr. Lindsay].

It seems, after you offered your amendment, you started wiggling around. I will read what the amendment says. I got a copy from the Clerk's desk. It says:

"No such rule, regulation or order shall become effective unless and until approved by the President."

Does it mean that the President has to approve every rule before it will become effective?

Mr. LINDSAY. That is correct; if it is applicable to this title and is of general applicability.

Mr. JONES of Missouri. The amendment says:

"No such rule * * * shall become effective unless and until approved by the President."

Mr. LINDSAY. That is correct.

Mr. JONES of Missouri. Is that not what the amendment says?

Mr. LINDSAY. That is correct.

Mr. JONES of Missouri. You ought to be able to answer the question "Yes" or "No."

Mr. LINDSAY. It must be a rule, regulation, or order of general applicability. If it is not a rule, regulation, or order of general applicability, I would assume that the President would not have to put his approval on it.

Mr. JONES of Missouri. The "such" refers back to that, but you were trying to wiggle out of it in the discussion of the amendment.

Mr. LINDSAY. Then, vote against the amendment if you do not like it.

Mr. JONES of Missouri. No. I am like Judge Smith. I want to do anything I can to improve this thing. Of course, I will vote against the bill.

Mr. LINDSAY. If the gentleman will yield further, I am sure he is trying to improve it, and we appreciate it.

Mr. JONES of Missouri. I am trying to make it "less worse."

I yield back the balance of my time.

The CHAIRMAN. The question is on the amendment offered by the gentleman from New York [Mr. Lindsay].

The amendment was agreed to.

No further changes in the presidential approval requirement were made in the course of the House debate, and on February 10, 1964, the bill passed the House. 110 Cong. Rec. 2805. The pertinent portion of what is now Section 602 read:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, shall take action to effectuate the provisions of section 601 with respect to such program or activity. Such action may be taken by or pursuant to rule, regulation, or order of general applicability and shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation or order shall become effective unless and until approved by the President.

When the House bill came up for debate in the Senate, Senator Dirksen, on May 26, 1964, introduced an amendment in the nature of a substitute. 110 Cong. Rec. 11926. His substitute changed the relevant portion of section 602 to read as follows (id., at 11930):

Sec. 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President.

As can be seen from the text, this substitute combined the first two sentences in the House version into one sentence. The meaning was changed in that the agencies were now directed to issue rules and regulations to effectuate the substantive provisions of the Act, the rules and regulations issued were to be the framework within which all the administrative action was to be taken and the phrase "consistent with the achievement of the objectives of the statute authorizing the financial assistance" now modified the rules and regulations rather than, as it had in the House version, the "action" to be taken to effectuate the substantive provisions of the Act. There was no change in the sentence regarding presidential approval.

This version of section 502 was passed by the Senate on June 19, 1964, and finally signed into law on July 2, 1964. Prior to its passage in the Senate, several amendments were introduced during the course of debate relating to the requirement of presidential approval. Senator Thurmond proposed an amendment that would have required that Congress, rather than the President, approve the rules and regulations issued by each agency. 110 Cong. Rec. 13937. Senator McClellan proposed an amendment which would have postponed the effective date of the Title until six months after submission to Congress by the President of a report identifying all programs covered by the Title and informing Congress of the rules

and regulations he had approved. 110 Cong. Rec. 9145. And Senator Ervin proposed to eliminate agency action as the primary enforcement technique and to substitute suits by the Attorney General based on sworn complaints. Under his proposal the agencies would have been authorized to withhold assistance only after a judicial determination in such a suit that there was a violation of 501 and no rule-making power was given to the agency. 110 Cong. Rec. 12548. All these amendments were defeated in the Senate.

(2) Purposes Underlying the Requirement of Presidential Approval.

The requirement of presidential approval was, we believe, primarily thought of as a safeguard against arbitrary administrative action, and we in no way ignore the importance of that safeguard.^{12/} Accordingly, all exercises of the rule-making power contained in §502 have satisfied that requirement, and the regulation so issued has established the basic administrative framework circumscribing the action of the Commissioner of Education. However, there is less of a need for such a

^{12/} This congressional purpose seems to require the President himself to personally exercise his responsibility and authority to approve regulations issued under section 502 and not to delegate this authority or responsibility to the Secretary of the Department of Health, Education and Welfare or to the Commissioner of Education, even though such delegation is explicitly allowed by the terms of 3 U.S.C. §301 (1964 ed.). This statutory power of the President to delegate his responsibility was not mentioned in the congressional debates on Title VI, but we assume that the overriding purpose of Congress in adopting the presidential approval requirement in section 502 would preclude such a delegation under 3 U.S.C. §301 (1964 ed.).

check against arbitrary action with respect to policy statements such as the guidelines. They do not have the same force or status as regulations issued pursuant to the §502 rule-making power, and the safeguard against arbitrary action by the administrative agency lies in a broad scope of judicial review. While it is true that action taken on the basis of the §502 regulations is also subject to judicial review, the scope of review of such action is more limited than review of administrative action predicated on the guidelines. In reviewing particular action predicated on the guidelines, the court would decide for itself whether, for example, a desegregation plan rejected by the Commissioner is "adequate" for the purposes of the Act, using the guidelines only as a body of informed judgment. The scope of review would be as great as it would be if the Commissioner had not issued guidelines, but had merely judged the adequacy of plans on a case-by-case, ad hoc basis. This judicial safeguard against arbitrary administrative action compensates, we believe, for lack of presidential approval of the guidelines.

We also believe that the requirement of presidential approval was to assure a measure of uniformity in the rules and regulations issued by the various agencies, and that this legislative purpose is not in any way frustrated by not issuing the guidelines as §502 regulations. At the outset of the debate in the Senate on the bill, a

letter from Attorney General Kennedy responding to certain questions from Senator Cooper was read into the record. See 110 Cong. Rec. 11941. The question was:

How is it intended that a consistent set of regulations prohibiting discrimination in Federal financial assistance programs shall be established throughout all departments and agencies? What procedure is provided by title VI to secure consistent regulations pursuant to, and the uniform application of, title VI in each and every Federal financial assistance program?

The Attorney General responded:

Section 502 provides that each agency's rules and regulations must be approved by the President. The validity of such rules and regulations will be subject to judicial consideration in any judicial review proceeding. Any cutoff of funds must be reported to the appropriate congressional committees.

See 110 Cong. Rec. 13099 (Senator Cooper's response). Similarly, when Senator Thurmond's amendment to substitute the requirement of congressional approval for that of presidential approval was defeated, Senator Miller read into the Record a letter from Deputy Attorney General Katzenbach, commenting on Senator Miller's suggestion that a phrase requiring uniformity in the rules and regulations be included in §502. That letter said (110 Cong. Rec. 13038):

This is in response to your request for comment on a suggestion that has been made for amending the provision in section

602 of H.R. 7152 which requires Presidential approval of the regulations to be issued by Federal agencies pursuant to that section. The suggestion is that language be added directing the President to make certain that the regulations issued by the agencies not be inconsistent with each other.

Complete uniformity in agency regulations is impossible because of the diversity in the programs and factual situations covered by title VI, and in the statutes under which those programs are administered. It is, of course, desirable that the regulations be drafted so that there will be no inconsistency in similar factual situations involving similar statutory provisions. Significant disparities in common procedures, or in the rules of agencies with similar programs, would be unjustified and, if they occurred, would undoubtedly lead to difficulties in the enforcement of title VI.

These considerations, as I understand it, were among the principal ones which motivated the House in writing and adopting the provisions for Presidential approval in section 602. It was intended that once White House scrutiny and approval of agency rules was required, inconsistencies of the kind referred to would be discovered and eliminated.

In view of the foregoing, I do not believe that the suggested amendment is necessary.

We believe that the congressional purpose to promote uniformity was satisfied in the promulgation of the regulation under §602, which was approved by the President. That regulation established an administrative framework in the Department of Health, Education and Welfare basically similar to those established in all the other federal agencies with responsibility

under Title VI. See e.g., 7 CFR, Part 15 (Department of Agriculture); 15 CFR, Part 8 (Department of Commerce); 32 CFR, Part 300 (Department of Defense); 43 CFR, Part 17 (Department of the Interior); 29 CFR, Part 31 (Department of Labor); and 22 CFR, Part 141 (Department of State). The President, who Congress looked to for obtaining uniformity among the federal agencies, approved a regulation for the Department of Health, Education and Welfare which uniquely gave the Commissioner of Education the power to determine the adequacy of desegregation plans for elementary and secondary schools, and which did not seek to circumscribe the Commissioner's judgment as to the specific content of these plans. Implicit in this administrative arrangement is a recognition that the desegregation of elementary and secondary schools may require time, flexibility, and professional expertise, and a judgment that entrusting the Commissioner with this responsibility and power would not be disruptive of ^{the} uniformity within the executive branch that Congress desired. This judgment has been proved correct by experience. If the existence and exercise of this power by the Commissioner to determine the adequacy of the desegregation plans is not disruptive of the uniformity Congress entrusted the President to obtain, certainly the guidelines, a statement of the enforcement policies of the Commissioner, would be no more disruptive of that uniformity.

In conclusion, there is one further matter that should be mentioned. During argument the Court, after noting that certain issues in this case were before the Court of Appeals for the Fifth Circuit in United States v. Jefferson County Board of Education, asked counsel for legal authorities on whether a three-judge district court is bound by the decisions of the Court of Appeals for the circuit in which it sits. We call the Court's attention to the opinion of the three-judge district court in Willis v. Pickrick Restaurant, 231 F. Supp. 395, 400 (N.D. Ga., 1964), in which the Court refers to the Court of Appeals "as a Court whose judgments are binding on this Court."

Respectfully submitted,

JOHN DOAR
Assistant Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 1967,
I served the Supplemental Brief to which this is
attached upon each party in this case by sending by
United States air mail a copy thereof, postage prepaid,
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Title VI: Southern Education Faces the Facts

Title VI of the 1964 Civil Rights Act provides that racial discrimination must be ended in all programs that receive federal financial assistance. Responsibility for administering this provision for most of the federal educational programs lies with the Office of Education of the Department of Health, Education, and Welfare. Requests for federal support for these programs for the 1965-66 school year are now being prepared in thousands of communities in both the North and the South. And in the process, the full import of the Civil Rights Act is becoming clear.

The South today is a society in agonizing transition. Ancient traditions and attitudes are slowly changing before the onslaught of contemporary events. For a decade or more since the 1954 and 1955 Supreme Court decisions outlawing segregation in the schools, the South has been moving with more deliberation than speed in bringing Negro and white together in the classroom. Slowly, but inexorably, however, efforts to avoid change have been swept away by the courts. The inevitability of full compliance with the Supreme Court's decision has become progressively clearer as one alternative after another has been attempted and has failed. Now Title VI opens another major act in the drama of school segregation. As one Florida news headline stated it, the issue for the seventeen Southern states that receive more than \$350 million annually for elementary and secondary school programs is: "INTEGRATE—OR LOSE FEDERAL \$\$."

The issue appears clear—and, to the uninitiated, simple. Yet enforcement of Title VI is a complex matter. Its purpose is to build, not to destroy, to liberate, not to erect barriers. But harsh and unsympathetic enforcement of the letter of the law could be destructive. It could deny federal support to those children most desperately in need of it—and in the process exacerbate sectional feelings far beyond anything we have seen to date. Yet the law must be enforced.

Aware of the complex responsibility assigned to it, the Office of Education has moved with its own version of "all deliberate speed." To date it has been more notable for its caution than for its accomplishment in providing specific direction to school authorities faced with the necessities of radical change under Title VI.

There are, to be sure, good reasons for caution. An official statement of well-defined standards for desegregation would almost certainly be interpreted as an acceptable minimum, and few if any school districts would feel obliged to move beyond them. Nor is it reasonable to expect equal action from communities in Mississippi or Alabama and those in Kentucky or Tennessee. Yet it is difficult to justify unequal enforcement of the law. Meanwhile, Southern school authorities are not receiving the guidance they need in charting their course in unfamiliar waters.

The following memo is designed to provide specific guidelines to school authorities seeking to meet the terms of Title VI of the Civil Rights Act. It was prepared by G. W. Foster, Jr., professor of law at the University of Wisconsin and consultant to the Office of Education, who has long been deeply concerned with the problems of education. Mr. Foster's memo has no official status and does not bind the Office of Education in any fashion. Yet there is no doubt that it reflects directly the thinking of the officials charged with the responsibility for enforcement of Title VI as it applies to education.

SR hopes that Southern school authorities will find these guidelines helpful in making the fateful decisions that confront them. And Northern readers will find, in the calm words and careful analysis of the memo, a clear view of the issues as they have evolved to date.

THE ISSUE posed for Southern schools by Title VI of the 1964 Civil Rights Act is not *whether* they will desegregate. It is *whether* they will desegregate with—or without—continuing federal financial assistance. Even if federal aids are discontinued, segregated school districts still face the prospect of private litigation brought on behalf of Negro pupils in the community. And the Civil Rights Act increased the inevitability of desegregation by authorizing the Attorney General to bring suit in the name of the United States.

This memorandum is designed to furnish some guidelines to school authorities seeking compliance with Title VI. It stresses the points with which a desegregation plan must deal, illustrates ways in which particular procedures must be described, and suggests something of the range of choice open to a school district. What it cannot do is guarantee approval by the Commissioner of Education.

According to regulations promulgated by the Department of Health, Education and Welfare to implement the nondiscrimination policy of Title VI, school districts which seek to qualify for future federal aids must select among three courses of action:

1. **"Form 441" Assurance of Compliance.** This is an unqualified assurance that no discrimination whatever is practiced within the district. The 441 Assurance is largely

inapplicable to districts in the seventeen states which in 1954 maintained legally separated Negro and white schools since in only a very few southern school districts have the last vestiges of the dual school system been eradicated. The Office of Education is returning for further information all 441 Assurances it receives from districts not fully desegregated and presumably a plan of desegregation rather than a 441 Assurance will be required in order to comply with requirements of Title VI.

2. **Plan for the Desegregation of the School System.** The regulations implementing Title VI will allow future approvals of federal aids for a district which submits to the Commissioner of Education a suitable plan for removing whatever discrimination remains in the school system. For the great bulk of the biracial school districts of the South the only effective way to continue receiving federal aids lies in submitting a plan of desegregation.

3. **Court Order for Desegregation of the School System.** The regulations also authorize continuation of aids to districts which are operating under a final order of a court of the United States for the desegregation of the school system. It is crucial to note that the order must be one directing desegregation of the school system; an order merely directing admission of a few named individuals, for example, without otherwise providing for desegregation of the system,

Title VI Southern Education Faces the Facts

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE DEPUTY ATTORNEY GENERAL

WASHINGTON, D. C.

- 2 -

The VI of the 1964 Civil Rights Act provides that racial discrimination must be ended in all programs that receive federal financial assistance. Responsibility for administering this provision for most of the federal educational programs lies with the Office of Education of the Department of Health, Education, and Welfare. Requests for federal support for their programs for the 1965-66 school year are now being prepared in thousands of communities in both the North and the South. And in the process the full impact of the Civil Rights Act is becoming clear.

The South today is a society in agonizing transition. Ancient traditions and attitudes are slowly changing before the onslaught of contemporary events. For a decade or more since the 1954 and 1955 Supreme Court decisions outlawing segregation in the schools the South has been working with more determination than speed in changing Negro

The Bureau of the Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely

Dear Senator Eastland:

This is in response to your request for information regarding the progress of the Department of Justice in carrying out its obligations under Title VI of the Civil Rights Act of 1964.

Deputy Attorney General

The Department of Justice is committed to the goal of ending racial discrimination in all programs that receive federal financial assistance. This commitment is reflected in the Department's policies and actions regarding Title VI of the Civil Rights Act of 1964.

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The Department of Justice is committed to the goal of ending racial discrimination in all programs that receive federal financial assistance. This commitment is reflected in the Department's policies and actions regarding Title VI of the Civil Rights Act of 1964.

The issue of racial discrimination in education is a complex one. It involves the rights of individuals to equal treatment under the law, the role of government in providing education, and the history of racial segregation in the United States. The Civil Rights Act of 1964, particularly Title VI, is a key piece of legislation in this area. It prohibits discrimination on the basis of race in any program or activity that receives federal financial assistance. This includes public schools, colleges, and universities. The Department of Justice, through the Office of Education, is responsible for enforcing this law. This report provides an overview of the Department's efforts to carry out its obligations under Title VI. It discusses the challenges faced in the South, where segregation has been deeply ingrained in the educational system. It also outlines the steps being taken to address these challenges, including the use of federal funds to support desegregation efforts. The report concludes by emphasizing the importance of continued vigilance and action to ensure that all students have access to a quality education, regardless of their race.

will not suffice. Despite more than a decade of litigation only a small fraction of the South's biracial districts were acting under court-ordered desegregation plans when the regulations implementing Title VI were promulgated.

The major issues facing desegregating school districts are highlighted below, together with some guidelines to the procedures that may be followed.

In general, it seems clear that no tersely stated or vaguely defined plan will be approved. What must be done in any plan is to spell out enough detail so that there can be general understanding of the situation and problems in the district, of the policies and procedures designed to deal with the problems, and of the district's intentions to carry out the plan in good faith.

On all these points the burden of persuasion is on local school authorities. Each school district's plan must sell itself.

I. Summary Statement of Present Racial Situation in District Schools

All plans for desegregation or final court orders submitted to the U.S. Office of Education for compliance with the Civil Rights Act of 1964 should be accompanied by a summary statement describing the racial picture in the district schools at the time the plan is submitted. As an alternative, the questionnaire on page 78 may be used, with the district adding to the questionnaire whatever further information it believes appropriate.

The reason for this demand is that rational appraisal of any desegregation plan is impossible without a general picture of the circumstances in the district when the plan is submitted. The questionnaire covers the minimum information needed to tell the story. But if the district intends to make use of geographic attendance zones or if busing is to be employed, maps and statistics which show the general racial characteristics of the proposed arrangement are essential.

Lest there be undue concern that too great a burden is imposed by having to supply this much information, it should be understood that precise, up-to-the-minute statistics are not required. The information needed is the kind that knowledgeable school authorities are aware of in general terms. It is enough that what is supplied is what fair-minded school officials believe to be true and what reasonable men would think necessary to know in order to judge a desegregation plan rationally.

II. Types of Desegregation Plans: General Characteristics

Most school desegregation plans evolved since 1954 are based either on geographic attendance zoning or freedom of choice. Some plans combine features of geography and choice and occasionally it has been suggested that pupils should be assigned to schools according to achievement or ability test scores. While in many districts pupils are separated according to achievement, ability or vocational interests for some purposes, no widespread use has been made of these characteristics as the basis of plans for desegregation, though presumably they would suffice if operated in good faith without discrimination based on race.

Because geographic zoning and freedom of choice provide the usual bases for desegregation plans this memorandum concentrates on the features of these two types.

A. Assignment by Geographic Zoning

Throughout the country geographic zoning is the common means for assignment of pupils to schools. In the dual systems of the South prior to 1954, separate (and often overlapping) geographic zones were widely used to assign Negro pupils to Negro schools and white pupils to white schools.

Since desegregation involves doing away with these separate Negro and white schools, the use of geographic zoning to accomplish this result requires the establishment of a unitary rather than dual system of attendance zones. Or put in the form of an example, all elementary schools of the district, whether formerly Negro or white, would have to be zoned on a single map without any overlapping of attendance zones.

Plans approved by courts in earlier years introduced unitary zoning on a grade-a-year or other staircase basis. The questionable status of grade-a-year plans at present should give pause to any serious thought about using them, and any district must weigh carefully the factors discussed in Section VI of this memorandum as to any discriminatory practices preserved after fall 1965.

For many administrative purposes the relative simplicity of geographic zoning gives it evident advantages over assignment based on freedom of choice. It provides a relatively accurate way of forecasting future enrollments and is a direct method for shifting pupil populations to adjust for overcrowding.

Across the South the courts have uniformly held that assignment by attendance zones satisfies constitutional requirements for doing away with dual systems of schools, provided it is not used with the motive of producing racially invidious results. The fact that school authorities have the burden of explaining away circumstantial evidence of discrimination means that care should be taken to zone schools in ways which minimize instances in which suspicions of racial discrimination are likely to be aroused. And this is not an easy task.

The following examples illustrate situations likely to cause trouble: Oddly formed zones raise doubts, particularly where they coincide with racial boundaries between neighborhoods; indeed any zone lines coinciding with racial boundaries call for some explanation. Trouble comes also from creating optional attendance zones in racially mixed neighborhoods; certainly some special explanation is needed for any rule which permits out-of-zone attendance for residents of some but not all school zones.

Plans using geographic zoning should initially assign all pupils to the school in their zone of residence. Whatever transfer policies are available for attending outside the zone of residence should be open to Negroes and whites alike on the same terms and by the same means. The provision, sustained for a time in the courts, for permitting transfers to children who would be in a racial minority within their attendance zone school or classroom, has been struck down as a device to preserve segregation and will not do.

B. Assignment Based on Freedom of Choice

Desegregation plans based on freedom of choice are perhaps no more than transitional devices that ultimately will give way to unitary zoning. In theory, freedom of choice is unobjectionable. The practical difficulty is that the choice open may not in fact be free and school authorities who are considering freedom of choice plans have a special responsibility to assure themselves before adopting them that they can be carried out in good faith. Particularly is this true

(Continued on page 76)

Title VI—Nondiscrimination in Federally Assisted Programs

Section 601 of the Civil Rights Act of 1964 provides that: "No person in the United States shall, on the ground 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."

Southern Schools

Continued from page 61

where ingrained community custom is likely to result in economic reprisals or threats to parents and children.

Recently, Federal courts have directed some districts to install unitary geographic zoning where it was shown that freedom-of-choice plans adopted earlier failed to affect the dual school pattern. But at present, plans based on freedom of choice appear sufficient to meet the requirements of Title VI, provided pupils are afforded a choice which is free and unfettered by past or present practices.

Thus a choice of schools is not free where a pupil is initially assigned to a school on the basis of race and then is provided only a limited right to transfer to another school. For this reason Pupil Assignment Laws, by themselves, do not constitute acceptable plans of desegregation.

Again, a choice is not free where administrative practices within the school system make the exercise of choice a burden by requiring parents either to go through the ordeal of complex forms or discomfiting interviews. It would also be an improper burden to require a pupil to register at a place reserved for his race even though he was subsequently permitted to enroll at a school of his choice;

the answer here is that the pupil should be permitted to apply directly to the school he desires to attend.

Somewhat different problems are presented in handling transfers and re-assignments of children already enrolled in school. One reasonable way to handle the matter is to have the necessary forms and instructions distributed by the classroom teachers in the schools the pupils presently attend—provided that neither the teachers nor other school authorities attempt to influence or pressure anyone in the exercise of choices to be made.

School districts which attempt to combine freedom of choice with geographic zoning face special problems. Where freedom of choice furnishes the theoretical basis for assignment, every pupil in the district should be provided with a right to choose either a formerly white or formerly Negro school. If overcrowding results from the choices made, racial considerations cannot be employed to reject those who initially select the school threatened with overcrowding; geographic proximity to the school should then be employed in determining which choices to reject. Where such choices are thus rejected, further opportunity should be provided each parent and child to make another choice which can be carried out effectively. In other words, if freedom of choice is to be adopted, geographic zoning cannot be employed to prevent an effective choice of either a formerly white or formerly Negro school.

In light of the ease and convenience of administering geographic attendance zoning it may be realistic for many districts to employ a combination which gradually adds unitary zoning to a desegregation plan which initially relied principally on freedom of choice. For example, unitary geographic zoning could be employed for initial assignment and re-assignment commencing with the lower elementary grades, while a policy of freedom of choice is applied to the remaining grades of the system. Over a fairly short period of time the unitary system of zoning would be moved upward through the other grades, supplanting freedom of choice.

In short, freedom of choice plans are probably no more than a transitional device. Districts, in view of this, should give serious thought either to going directly to unitary systems of zoning or to introducing unitary zoning at lower grade levels from the beginning, expecting to move the unitary zoning upward to replace the freedom of choice policy first installed at higher grade levels.

III. Detailed Statement of Administrative Practices; Public Notice

Rational appraisal of a desegregation plan (or a court order for desegregation) is likewise impossible unless the

plan itself sets forth enough detail to dispel doubts about the manner in which nondiscriminatory policies will be administered.

The written instructions to school districts furnished by the Department of Health, Education and Welfare make two points clear. First, there can be no discrimination practiced in desegregated grades as to questions of initial assignment, reassignment or transfer. Second, sufficient advance notice must be given so that parents can understand how the assignment and transfer rules work and can take advantage of them effectively.

It is a common reaction among school officials and other local authorities facing their first school desegregation that disaster will follow if public announcement is made of rules and procedures for making initial assignments and transfers. The answer to this is that the courts have consistently required clear and ample notice to be given—and the consequences have not been disastrous for communities that have made plain their intention to brook no disorder and to see to it that the rules are given firm and faithful implementation.

A frequent shortcoming of the desegregation plans initially forwarded to the Office of Education has been the failure to set out in any detail either the administrative specifics or the content, timing and manner of providing notice of assignment and transfer rights. Below, for illustrative purposes, are model forms of notice which set out the administrative details for handling four problems common to every system of schools. The models in question were designed for desegregation plans based on freedom of choice and would have to be adapted to fit the particular policy variations within any particular district. Too, the models would have to be altered to be made applicable to desegregation plans grounded on unitary geographic zoning.

The point to be stressed here is that every desegregation plan must deal specifically with providing notice of administrative details respecting initial assignment, reassignment and lateral transfer. Plans which fail to spell out the procedures and forms of notice for these four situations simply cannot be judged and thus no favorable action can be taken on them.

The following examples illustrate one way in which matters of notice, initial assignment, reassignment and transfer may be handled:

A. PRE-REGISTRATION OF PUPILS PLANNING TO ENROLL IN LOWEST ELEMENTARY GRADES.

(1) Beginning 1965 (a date at least four weeks before pre-registration is to commence) and once a week for three successive weeks the announcement below shall be conspicuously pub-

Federal Educational Expenditures

During fiscal year 1964, the federal government spent \$351,410,000 for aid to elementary and secondary school programs in the seventeen Southern states. State-by-State expenditures are listed below. If the President's education program, now before Congress, is passed in substantially its present form, these amounts would be approximately doubled.

State	Amount (in thousands)
Alabama	\$29,463
Arkansas	10,202
Delaware	2,671
Florida	27,187
Georgia	27,872
Kentucky	17,514
Louisiana	16,021
Maryland	24,668
Mississippi	12,548
Missouri	17,263
North Carolina	27,914
Oklahoma	17,098
South Carolina	15,802
Tennessee	19,290
Texas	44,241
Virginia	36,147
West Virginia	5,509

lished in two newspapers having general circulation in the district:

PRE-REGISTRATION OF KINDERGARTEN/FIRST GRADE PUPILS FOR FALL 1965

Pre-registration of pupils planning to enroll in kindergarten/first grade (as appropriate for schools in the district) for the fall 1965 semester will take place for a period of . . . days, from . . . 1965 through . . . 1965. Under policies adopted by the Board of Education, parents or guardians may register pupils during this period at the school of their choice. At the time of pre-registration a choice may be expressed for either the nearest formerly Negro school or the nearest formerly white school. In the event of over-crowding, preference will be given without regard to race to those choosing the school who reside closest to it. Those whose choices are rejected because of over-crowding will be notified and permitted to make an effective choice of a formerly Negro or formerly white school.

The choice is granted to the parent or guardian and the child. Teachers, principals and other school personnel are not permitted to advise, recommend or otherwise influence the decision. Nor will school personnel either favor or penalize children because of the choice made.

Children not pre-registered in spring may be registered at the school of their choice on . . . , immediately prior to the opening of schools for the fall 1965 semester, but first preference in choice of schools will be given to those who pre-register in the spring period.

(2) Annually after 1965, similar practices will be followed with respect to registering and enrolling pupils for the first time in the lowest elementary grades.

B. ALL OTHER PUPILS NEWLY ENROLLING IN DISTRICT SCHOOLS.

The Office of the Superintendent will furnish at such times as are appropriate to the parents or guardians of all other pupils newly enrolling in the schools of the district the forms and instructions necessary to complete registration and enrollment at the school of their choice. These instructions for registration and enrollment of new pupils shall be in writing and shall set forth in detail the Board of Education policies and procedures for registering and enrolling in the school of their choice (see form of published notice under Part A above).

C. PUPILS GRADUATING FROM ELEMENTARY AND JUNIOR HIGH SCHOOLS.

The initial assignment of pupils graduating either from elementary or junior high schools and planning to enroll for the first time in a school at the next higher level will be handled in the following manner:

All such pupils will be furnished by their classroom teachers on a date fixed

by the Superintendent prior to their graduation the appropriate instructions and forms on which their parents or guardians may exercise their choice of the school next to be attended by the pupils. A reasonable time will be provided for returning the form after it has been distributed and the written instructions accompanying the form shall set forth in detail the Board of Education policies permitting a free choice of the school next to be attended (see form of published notice under Part A above). Where no choice is exercised by the parents or guardians within the time fixed, the pupil will be assigned without regard to race to the next higher school, and the instructions furnished parents and guardians shall so state.

D. LATERAL TRANSFERS BY PUPILS ELIGIBLE TO CONTINUE IN A SCHOOL WHERE CURRENTLY ENROLLED.

Prior to the end of classes for each school year pupils eligible to continue in the same school will be assigned for the forthcoming year. At a date fixed by the Superintendent and appropriately in advance of the time that reassignment for the forthcoming year is made, all pupils will be furnished by their classroom teachers with appropriate forms and instructions for use by their parents in exercising their right to apply for a transfer of their child to a school of their choice for the forthcoming year. Such instructions will set forth in detail the Board of Education policies respecting transfers without regard to race for the forthcoming year (see form of published notice under Part A above) and will state that each child will be reassigned to the school currently attended in the event the right of lateral transfer is not exercised within the time fixed in the instructions. The instructions may also provide for lateral transfer at other times of the year under special circumstances as may be fixed by the Superintendent under the Board's direction.

IV. Buses and Bus Routes

Districts which provide busing must make special provision in their plans to make clear that discriminatory practices are removed. In dual school systems it has been customary in many instances for separate buses to travel the same roads, one to pick up Negroes for the Negro school and the other to take whites to a different school. Again, separate bus routes for Negro and white schools have operated in some instances to place individual children of either or both races under the burden of going to a distant pick-up point for their own race when a pick-up point for the opposite race was much more convenient.

Such policies and practices, supported with public funds, result in manifest racial discrimination and if continued

can seriously impair the right freely to choose a school without regard to race. Desegregation plans must accordingly spell out in detail the present racial character of busing practices, indicate the steps which will be taken to create unitary systems of busing available to all pupils without regard to race, and describe the manner in which parents or guardians and pupils will be given notice of the right to ride buses without regard to race.

V. Teacher and Staff Desegregation

Desegregation of teachers and professional staffs is ultimately in the picture. It was characteristic of the legally separated schools that Negro teachers were assigned to Negro schools, white teachers to white schools. In general the courts have permitted desegregation of pupils to take precedence over desegregation of teachers and staff personnel in the schools. More recently, however, courts have been ordering districts to undertake teacher integration as part of the total job of desegregating.

As the court cases deal with the problem, pupils have been permitted to challenge faculty segregation on several grounds. First, pupils cannot be discriminated against on the basis of their race and hence pupils have a right to insist that a teacher not be assigned them on the basis that the teacher's race corresponds to their own. Second, it has been objected that the existence of all Negro and all white faculties restrains freedom of choice, given traditional community patterns. Finally, it is objected that segregated faculties and teaching staffs are evident vestiges of the dual schools and that a district cannot be said to have a unitary character until patterns of teaching and staff segregation are broken up.

The problem is one which every district must face and start working on. Every desegregation plan should reveal awareness of the problem and provide assurance that steps will be taken to remove racial discrimination in assignment of teaching personnel.

VI. Rate of Desegregation: How Many Grades to Desegregate?

It is difficult to advise with certainty concerning the rate at which desegregation must be completed. For one thing, the courts have ordered a speeding up in districts which first began at slow year-to-year paces. At the same time, courts have allowed some districts to break the ice by starting with a shorter step toward full desegregation the first year than will be required of them thereafter.

Whatever the date of completion, any plan of desegregation must sketch

Compliance Information: Nondiscrimination in Federally Assisted Programs---

This outline is furnished as an aid in reporting information generally helpful in appraising the sufficiency of plans for desegregation of school districts which seek compliance with the nondiscriminatory policy of Title VI of the Civil Rights Act of 1964. Precise, up-to-the-minute statistics are not required. The information sought is the kind that knowledgeable school authorities are aware of in general terms and approximations will suffice where exact detail is not easily available.

I. Racial Characteristics of School Population

- A. By race, what are the approximate school-age populations residing within the geographic boundaries of the school district (including residents who attend public schools outside the district or private school within or without the district)? White _____; Negro _____; Other _____.
- B. How many Negroes presently attend predominantly white schools? _____
- C. How many whites presently attend predominantly Negro schools? _____
- D. By grade level, approximately how many Negro pupils presently attend classes with whites in the public schools of the district (strike out grades not actually taught in district schools)? Kindergarten _____; 1st grade _____; 2nd _____; 3rd _____; 4th _____; 5th _____; 6th _____; 7th _____; 8th _____; 9th _____; 10th _____; 11th _____; 12th _____.
- E. How many pupils attend public schools outside the district on a tuition-paid basis? White _____; Negro _____; Other _____.
- F. How many pupils residing in the district presently attend private schools on a tuition-grant basis? White _____; Negro _____; other _____.
- G. Where separate treatment is accorded any other non-white groups besides Negroes, please indicate the general situation on a separately attached sheet.

II. Racial Characteristics of District Schools

- A. What is the number of elementary schools (grades _____ through _____) in which the pupils enrolled are: all white _____; all Negro _____; integrated _____; other (describe on a separate sheet)?
- B. What is the number of junior high schools (grades _____ through _____) in which the pupils enrolled are: all white _____; all Negro _____; integrated _____; other (describe on a separate sheet)?
- C. What is the number of high schools (grades _____ through _____) in which the pupils enrolled are: all white _____; all Negro _____; integrated _____; other (describe on a separately attached sheet)?
- D. Briefly describe on a separately attached sheet the general racial characteristics of the pupil populations in any special schools operated by the district which are not accounted for in the categories set out above.

III. Racial Characteristics of Teaching and Administrative Staffs

- A. By race, what is the approximate number of teachers in the district who are: white _____; Negro _____; other _____?
- B. By race, what is the approximate number of non-teaching staff members who are: white _____; Negro _____; other _____?
- C. How many elementary schools have teaching staffs which are: all white _____; all Negro _____; integrated _____; other (describe separately)?
- D. How many junior high schools have teaching staffs which are: all white _____; all Negro _____; integrated _____; other (describe separately)?
- E. How many high schools have teaching staffs which are: all white _____; all Negro _____; integrated _____; other (describe separately)?

IV. Maps

Maps, which need not be of professional quality, can be separately furnished where useful or perhaps necessary to demonstrate such things as school location, bus routes. Supply these separately where this is thought desirable to demonstrate particular characteristics of a desegregation plan.

V. School Bus Routes and Practices

Where school buses are supplied for some or all pupils, describe in a general way on a separate sheet the effect which the routes and stops made by the buses have on the racial characteristics of the district's schools.

Date _____ Name of District _____

out the steps needed to finish the job. For the purpose of securing funds for the coming year, however, the steps to be taken in the fall of 1965 are, perhaps, the most critical single part of the overall plan. The HEW regulations make it clear that any plan accepted may be reviewed in later years.

Some general guidelines may be helpful, however:

Neither Title VI nor the regulations adopt court rulings as the standard to be followed by the Commissioner of Education. But under the regulations the Commissioner must accept court ordered plans of desegregation and it would appear unlikely that he will accept less than required by judicial standards in passing on voluntary plans.

The U.S. Courts of Appeal have played a major role in rationalizing the differences among lower court reactions to desegregation plans. In the absence of a more precise indication for the Office of Education, the rulings of the Courts of Appeal probably furnish the best approximate guides at hand. But in looking to court decisions several things must be borne constantly in mind. First, what the courts ordered for fall 1964 is not likely to be the same they will order for fall 1965; there has been a marked judicial trend toward accepting less delay as the years pass. Second, since the Commissioner of Education is free to reach an independent judgment, he is certainly not bound to follow lower court rulings which call for the most minimal amounts of desegregation.

Last year, for the opening of schools in 1964, the Court of Appeals for the Fifth Circuit laid down a general formula for newly desegregating districts which suggested (a) that desegregation had to take place both from the bottom up and the top down simultaneously and (b) that a total of four desegregated grades for fall 1964 was expected. In the Fourth Circuit on the other hand some Federal courts have insisted upon applying a freedom of choice program throughout every grade level in the first year of desegregation.

It can be said with certainty that no plan will be approved which works exclusively from the top down. It will be essential for approval that there be in all instances desegregation which begins without restriction in the lowest grade levels of the school system. To avoid misunderstanding, any district which has a desegregation program which works from the first grade up must either apply the policy to pre-school clinics and kindergartens or state that classes at these levels are not held.

Each district must carry the burden of justifying any delay beyond fall 1965 in completing its desegregation plan. This is true of districts which have already experienced some desegregation.

It is also true for districts which have yet to take the first step.

Clearly, the surest course is to make the desegregation program available generally to all grades for fall 1965. If less than this is done, desegregation should be installed both from the bottom of the system upward and from the top down. The real question for any district is the extent to which it wishes to risk disapproval of its plan.

VII. Consultants and Technical Assistance

Other provisions of the Civil Rights Act of 1964 make available funds to assist school districts in designing and carrying out plans of desegregation. The U.S. Office of Education currently retains a group of legal consultants who can be called on by school districts who request such assistance. State Departments of Education, in complying with Title VI, agree to provide advice and assistance to local school authorities in working out desegregation problems and the State Departments may arrange ways for providing further guidance through the use of consultants and others. Questions concerning such help should be addressed to the State Departments of Education or to the U.S. Office of Education.

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