CRC 1.1.13

No. 25162
No. 25175

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BIRDIE MAE DAVIS, ET AL., APPELLANTS, UNITED STATES OF AMERICA, APPELLANT

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL., APPELLEES

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

SECOND BRIEF OF THE UNITED STATES ON APPEAL

VERNOL R. JANSEN
United States Attorney

JOHN DOAR
Assistant Attorney General

FRANK DUNBAUGH,
OWEN M. FISS,
BRIAN K. LANDSBERG,
WALTER GORMAN,
FRANK W. HILL,
Attorneys,
Department of Justice,
Washington, D. C. 20530

TABLE OF CONTENTS

Page

TABLE OF CASES

Table of Cases--continued

STATEMENT OF THE CASE

I. Procedural History, 1963-66

On March 27, 1963, Negro students filed suit to desegregate the public schools in Mobile County. The complaint prayed that the appellees be enjoined from maintaining a dual school system based upon race or, in the alternative, that the appellees be directed to submit a complete plan for the reorganization of the Mobile County school system into a unitary, non-racial system. At the same time, a motion for a preliminary injunction was filed by plaintiffs.

By May 9, 1963, the trial court failed to grant or deny the preliminary injunction but rather granted time for the filing of briefs. Plaintiffs treated this as a denial of the motion and appealed, seeking either a reversal or relief in the nature of a writ of mandamus. This Court denied the petition and dismissed the appeal on May 24, 1963, holding that the trial court had not abused its discretion. Davis, et al., v. Board of School Commissioners of Mobile County, Alabama, 318 F.2d 63 (C.A. 5, 1963).

A month later, on June 24, 1963, the district court denied plaintiffs' motion for preliminary injunction and set the case for trial on November 14. This decision was appealed and on July 9, 1963, this Court granted an injunction pending appeal and directed that the district court enter a judgment and order requiring appellees to make an immediate start in the desegregation of their schools. 322 F.2d 356. This order further required the district court to direct the school board to submit a complete desegregation plan by August 1, 1963, the deadline was extended, on rehearing, to August 19, 1963. A stay of that mandate was denied by Justice Black on August 16, 1963. On August 12 appellees moved the district court to defer the desegregation of the rural schools in Mobile County until September, 1964, because of administrative problems, and upon stipulations by counsel for both parties, this deferral was ordered on August 12.

The first desegregation plan was submitted by appellees on August 19, 1963. Objections to the plan were filed on August 21 stating, inter alia, that the

plan did not conform to the mandate of this Court because it did not provide for transfers in all grades, but only for transfers in the twelfth grade. The plan was approved with minor changes by the district court on August 23.

On June 18, 1964, this Court decided the merits of the appeal taken from the order of the district court of June 24, 1963. 333 F.2d 53. This Court directed that the order be vacated and remanded the case, directing that the appellees be required to submit to the trial court a plan for desegregation which would meet the minimum constitutional standards outlined in a companion case, Armstrong v. Board of Education of the City of Birmingham, Alabama, 333 F.2d 47, (C.A. 5, 1964), and that the plan must provide for "the abolition of dual school zones, areas or districts . . ." Id., at p. 55.

Thereafter, on July 27, 1964 pursuant to an order of the district court, the appellees filed a desegregation plan with that court. The trial court approved this desegregation plan with minor modifications on July 31, 1964.

The plaintiffs on December 21, 1964, filed a motion for further relief requesting that the appellees be ordered to submit a desegregation plan which would meet current constitutional standards. On March 31, 1965, after a hearing, the trial court re-approved the appellees' plan with minor changes in the time of the transfer period, notice requirement, and expanded the number of grades where transfers would be available to include the 10th, 11th and 12th in all schools and the first in the city portion of the system.

The March 31, 1965 order was appealed by plaintiffs and on August 16, 1966, this Court reversed and remanded the case directing that the plan be modified to meet this Court's standards and that the plan be changed so that "all grades will be fully desegregated by the beginning of school in the fall of 1967" and that "there be an end to the present policy of hiring and assigning teachers according to race by the time the last of the schools are fully desegregated for the school year 1967-68." 364 F.2d 986, at p. 904. On August 19, 1966, upon remand and pursuant to an order of the district court, the Board of School Commissioners

amended its plan for the 1966-67 school year by providing for a four day transfer period from August 23-26 for certain students and requested that it be given 60 days to submit a full desegregation plan. On that same day the district court approved the amendments and granted the request for an additional 60 days. Plaintiffs moved the district court on August 26, 1966, to rescind that order and reopen and extend the transfer period through the first week of school. This motion was denied on August 30, 1966.

On October 19, 1966, a plan was submitted to the district court, which approved it. Under it students are to continue attending the same school as in the past unless they exercise certain transfer or option rights.

II. History of the 1967 Proceedings

Plaintiff, on April 18, 1967, moved the district court for further relief and specifically for the entry of the decree in United States v. Jefferson County Board of Education, 372 F.2d 836 (decision on rehearing

en banc, 380 F.2d 385 (C.A. 5, 1967). On July 18, plaintiffs amended this motion and asked the district court to reject the defendants' desegregation plan and "approve as an alternative plan one which will work to desegregate Mobile's schools." The United States intervened under section 902 of the Civil Rights Act of 1964 (42 U.S.C. 2000h-2) on June 14 and moved the district court to order the defendants to amend their plan to meet the present constitutional standards. Following discovery, a hearing on the merits was held from July 18, 1967 to July 28, 1967. Plaintiffs and plaintiff-intervenors submitted briefs on August 7, 1967. A response brief was filed by the Board of School Commissioners on August 15, and arguments were heard on August 18.

On August 24, the district court entered an order, designated by the court an "interim order," directing that those students whose places of residence have been changed from one elementary school zone to another as a result of changes in six named boundary lines during the 1966-67 school year, should immediately

be afforded an opportunity to transfer to the school serving the attendance area in which their residence now lies, or any other school afforded to them by the existing desegregation plan, i.e., the nearest formerly white or formerly Negro school outside their attendance area. The transfer period was to be held from August 28-31 and the notice to be published in the newspaper was attached to the order.

Notice of appeal was filed by plaintiffs on August 30 and by the United States on September 1. Both parties plaintiff also filed motions for injunctions pending appeal, plaintiffs on August 30 and the United States on September 1. These motions were denied by this Court on September 13, but the court ordered expedited consideration of the appeal and set October 16, 1967 as the date for argument.

On October 13, 1967 the district court entered another decree which declared that the defendant's desegregation plan "meets current constitutional standards and is therefore approved" -- subject to certain procedural changes being made in the transfer and option provisions, and with the addition of certain provisions relating to school construction and

reporting. This decree was accompanied by specific Findings of Fact and Conclusions of Law.

Due to the entry of the October 13 decree, the hearing of this matter was postponed until as soon after November 15 as possible. The United States filed a Notice of Appeal from the October 13 order on October 17, 1967.

SPECIFICATIONS OF ERRORS

I. The district court erred in holding that the Mobile County "Attendance Area - Option" plan of student assignment meets current constitutional standards.

II. The district court erred in failing to require that the Mobile County School System be reorganized into a system of unitary, mandatory geographic zones drawn to desegregate the system.

DISCUSSION

I. Student Assignments

A. Background

Prior to the 1963-64 school year, all student assignments in the Mobile County system were made on the basis of attendance zones designed to support a dual school system based on race. Davis v. Board of School Commissioners of Mobile County, 318 F. 2d 63,

64, (C.A. 5, 1963). Attendance zones were designed so all Negro children would be enrolled in one set of schools and all white children would be enrolled in a different set of schools.

Since that time, there has been no general, non-racial reassignment of students nor has the basic racial character of the method of student assignment been altered. The following provisions taken from the attendance plans which have been applied in Mobile County since that time and up until the present plan reflect the only changes made in the underlying racial assignments:

1. 1963-64 - Transfers were permitted for 12th grade students in the city of Mobile only, subject to the requirements of the Alabama Pupil Placement Act. Students new to the system could attend the school serving their area "or the nearest school formerly attended exclusively by their race."
2. 1964-65 - The above transfer provision, which was previously available only for 12th grade students in the city of Mobile, was extended to

include grades 10, 11 and 12 in all schools and 1st grade students in the city of Mobile were given the same rights as other newcomers to the system.

3. 1965-66 - The same transfer provision was extended to include students in grades 2 and 9 and the 1st grade students in the county part of the system were given the same rights as other newcomers in all schools (Record on Appeal filed August 24, 1965 hereinafter referred to as R., pp. 8, 11).

4. 1966-67 - The same transfer provision extended to include students in grades 3 and 8 in all schools (Modifications of Plan filed and approved on August 19, 1966). However, after this Court's decision on August 16,

1966, a special four day transfer period was held under the following terms:

a. Pupils entering grades 4, 5, 6, and 7 "who were enrolled in a particular school by virtue of having resided in racially overlapping school districts at the time said pupil originally entered the school system," could apply for a transfer to the school he would have been eligible to attend when he entered the system if he had been of the opposite race.

b. All pupils who entered the first grade in 1964 or 1965, and all those who both were new to the system and had entered grades 10, 11, or 12

in 1964 or grades 9, 10, 11, or 12 in 1965 could apply for transfer to nearest school serving the opposite race.

c. All pupils who were entering the school system for first time in 1966 without regard to their grade, were permitted to enroll at the school in the established attendance area or the nearest formerly Negro or formerly white school.

Thus, the racial method of student assignment in the Mobile system had remained basically intact. The use of dual attendance zones was not abandoned, but instead limited transfer provisions were superimposed on those zones and these limited transfer provisions were not sufficient to transform the method of student assignment into a unitary, non-racial one.

B. The Present Plan and its Operation

The basic provision of defendant's present "School Attendance Plan" is found in Section 4 which says

that all "[s]tudents in attendance at a particular school shall continue at that school from year to year unless:

a. A transfer is requested and granted;

b. He reached the next option level and exercises his option to attend an alternative school; or

c. His parents or guardians move their residence to a different attendance area and the option thereby granted is exercised."

This provision is imposed on an attendance system which was completely segregated before the 1963-64 school year; which was composed of attendance districts which generally conformed to the race of the school within the district (R., p. 65);[1/] and which had since 1963 only allowed students in a limited number of grades to exercise transfers pursuant to the Pupil Placement Act and permitted new students to attend the schools serving their attendance zone "or the nearest school attended exclusively by their race." The

---

1/ Also see Davis v. Board of School Commissioners of Mobile County, 364 F. 2d 896, 900 (C.A. 5, 1966).

following examination of these provisions particularizes their constitutional inadequacy and reveals why no significant desegregation has occurred in the Mobile School System.

1. Dual Zones

The district court found that although at one time there were "[d]ual attendance areas based upon race," they "have been abolished and a single attendance area system established" (Finding of Fact 7). We maintain, however, that this finding is totally without support in the record[2/] and is contradicted by the record. For example, the plan by its terms indicates, and Mr. McPherson's testimony (McPherson Dep. Vol. II, p. 95) states, that there is a white and Negro school serving each rural attendance area which in itself would establish that Mobile County does not have a single attendance area system. A bus route map and overlays showing portions of the rural transportation system (Pl. Int. Exs. 53-53I), establish that in some areas there is one Negro school serving a large geographic zone which overlaps several white attendance areas. The

---

2/ Where basic constitutional rights are at stake the appellate courts have a particular responsibility to scrutinize the findings of the trial courts. See, e.g., Edwards v. South Carolina, 372 U.S. 229, 235 (1963) where the Supreme Court said it was their "duty in a case such as this to make an independent examination of the whole record"; see also New York Times v. Sullivan, 376 U.S. 254, 285 (1964).

evidence (Pl. Int. Exs. 53, 53F, 53G and 53H) reflects that the St. Elmo Negro school serves the same attendance areas as three white schools: Alba, Mobile County High, and Theodore. The evidence further shows that although the Negro zone overlaps all three white zones, the white attendance areas never overlap each other. Indeed, Finding of Fact 8 says, inter alia, that "[A] majority of attendance areas have both races residing within them" yet only four of approximately 44,124 white students are presently enrolled at formerly Negro schools and only 692 of 31,995 Negro pupils currently attend formerly all-white schools (Pl. Ex. 16).

The district court also found that the "single geographic attendance areas as they presently exist are not racially devised but are arranged by giving due weight to proper factors, i.e., natural and man-made barriers; safety factors, such as railroads and thoroughfares; maximum use of facilities; transportation facilities and other like considerations" (Finding of Fact 8). However, Superintendent Burns testified at the 1963 hearing that the attendance areas generally conform to the race of the school within the district[3/] (Record on appeal filed

---

3/ See footnote at p. 56 , infra.

August 24, 1965, p. 65). As of November 1963 the zones were racially devised and there is no indication that this has changed. With respect to racial character of the geographic zones it should be noted that 1) there are still dual zones for each rural school;[4] 2) there are still split attendance areas in the city portion of the system involving the Whistler, Parks, Thomas, Beau Terra, John Will, Brookley, Woodcock, South Morningside and Craighead attendance areas; and 3) many schools are obviously located in a gerrymandered manner in that they are on the very edge of the boundary line (Pl. Ex. 2).[5] probably the most striking illustration of the continued racial nature of the school attendance lines is the Whistler attendance area. The Whistler area, which was formerly all white, is in two parts, separated by the Thomas school area which is served by an all-Negro school.

---

4 / This is discussed on p.25, infra.

5 / The Thomas, Warren, Howard, Palmer, Brazier and Barney Negro elementary schools are all located one block or less from a white attendance zone line. The Crichton, Bienville and Whistler elementary schools are located one block or less from a Negro attendance zone line. Mr. Barnett, the director of the Mobile City Planning Commission testified that schools should be located near the center of the area served.

As for the Court's conclusion that proper factors are considered in drawing the boundary lines, Mr. McPherson's testimony (McPherson dep., Vol. I, pp. 28-35, 48-56; Vol. II, pp. 8-25) shows that he cannot remember why he placed specific boundaries along particular lines except for one or two instances and it also shows that natural and man-made hazards were not used uniformly in setting up the boundaries.[6/] Mr. Shout, who succeeded Mr. McPherson as the head of pupil placement, testified that no studies were undertaken with reference to boundary changes involving Barney and Bienville, Thomas and Whistler or Ellicott zone lines (Shout dep. Vol. I, pp. 31-35). Nor did he receive any advice concerning these areas before the changes were made. The evidence simply does not lend any support to the district court's conclusions on this matter.

2. Transfers

The terms of the plan dictate that, except for students new to the system or new to a particular attendance area or those entering the first year of junior or senior high school, there is only one method by which a child may enroll at a school other than the one he already attends -- he must apply for a transfer and have his request granted.

In Davis IV, supra, this Court directed that the Mobile plan must be modified so that all grades

---

6/ e.g. The Gulf, Mobile & Ohio R.R. tracks were not used as a boundary but rather the line was made just to the south of the tracks.

"will be fully desegregated by the beginning of school in the fall of 1967 ..." (364 F. 2d 896,904). The defendants presently consider the plan to satisfy the 1966 instructions by virtue of the transfer provisions. However, this Court has repeatedly characterized transfer rights as permissible only to supplement a desegregation plan which does not reach all grades. Davis IV, supra; Singleton v. Jackson Municipal Separate School District, 355 F. 2d 865 (C.A. 5,1966). Furthermore, Davis and Singleton hold that Negro transfers to schools from which they were previously excluded for racial reasons must be granted as a matter of right. Defendants' plan continues to authorize transfers only for "good cause" and the applicant is required to state the reasons for his transfer request (Section 5).

Thus, the deficiency of the defendants' plan is apparent on its face.[7/] However, the actual operation of this plan underscores its consitutional inadequacy, and shows what this plan has meant to the defendants and the Negro community of Mobile.

7/ Some of the defects in the operation of the transfer program which inhibited the exercise of these rights in the choice of schools for April of this year have been eliminated by the district court's decree and therefore are not discussed here. These defects are discussed in the trial brief of the United States which was attached to our September 26 brief.

First, defendants have failed to grant transfers to students who resided in "former dual zones." Prior to the 1963-64 school year, every Negro student, no matter where he lived, was assigned to a Negro school and each white pupil, regardless of where his home was located, was assigned to a white school (testimony of McPherson, Shout and Clardy), and the district court found that "a majority of the attendance areas have both races residing within them" (Finding of Fact 8). Yet in both 1966 (Pl. Int. Ex. 93) and this year (Pl. Ex. 18, Shout dep., Pl. Ex. 17A, 17B) many Negroes were denied transfers to white schools. It also appears that defendants interpret the plan to mean that Negroes living in white school zones can transfer to the white school for that zone, but they do not understand that they are discriminating when they refuse to give Negroes living in an attendance zone serving a Negro school the right to attend a white school served by another attendance zone when white students living in the attendance zone serving the Negro school are given the right to transfer out. An analysis of the 1967 transfer applications (Pl. Ex. 18, Shout dep., Pl. Ex. 17A, 17B) reflects that, with 3 exceptions, the only Negroes who were allowed to transfer

to white schools either lived in a white attendance zone,[8] or had requested a specific course of instruction. This is what the Associate Superintendent, Mr. McPherson, had in mind when he said, "[w]e have not generally given transfers just for the sake of attending a desegregated school" (McPherson dep., Vol. III, pp. 40-41). A Negro elementary school principal, Mr. Willie O. Gaillard, testified that he wanted to get his children out of segregated Negro schools but he did not think that the board would consider that to be an appropriate reason to transfer.

A second problem in the operation of transfer provisions of this plan centers around the discriminatory handling of the requests for transfer. While, as mentioned above, only those Negroes who lived in white school zones or who requested a specific course of study were

---

8/ The name of the attendance area where the student lives is written on the top right hand corner of each application. See Pl. Ex. 18, Shout dep., Pl. Ex. 17. Also Mr. Shout testified that the officials checked addresses if they were not sure whether or not a Negro lived in a "dual" zone.

were permitted to transfer to white schools, scores of students were permitted to transfer into other schools serving their race[9/] (Pl. Ex. 18, Shout dep., Pl. Ex. 17A, 17B).

Notwithstanding this evidence showing that the transfer plan was operated in a discriminatory manner, the district court concluded that "[a]ll transfer requests are considered without regard to race and upon other proper factors such as" space, transportation considerations and the neighborhood school concept (Finding of Fact 12) and said there is "no evidence of any discrimination by virtue of race" (emphasis added) in the administration of the transfer ... provisions. The Court then found "as a matter of fact" that the "evidence supports equal application of the policies and provisions of the plan to both races" (Finding of Fact 13) and further

---

9/ Transfer applications for 99 white and 37 Negro students who desired to attend other schools serving their race were approved. Also, two Negroes were denied transfers to Murphy High School, although one of the goals set forth in the "Downtown Study" (Pl. Int. Ex. 64) is to fully utilize the facilities at Murphy (at p. 9).

stated that "[n]o transfers have been denied arbitrarily or unevenly as between the races" (Finding of Fact 14). These findings are without any support in the record and should be set aside by this court.[10/]

10/ There are other findings of the district court concerning transfers which are, in our opinion, without support in the record. The district court found that transfers are granted for a "number of reasons concerning primarily the convenience and well-being of students" (Finding of Fact 12). But, Mr. Shout, who is responsible for passing on the acceptability of transfer requests, testified that the convenience of the parents is not considered with respect to transfers. Also, one Negro child, after being administratively reassigned by the board, was twice denied a transfer based on convenience and at the time of the second application (1967) a sibling was in the school she wished to attend (Johnson testimony; Pl. Int. Ex. 39). The first transfer was denied because it was filed late. Mr. Shout wrote a memorandum concerning the first application saying "[t]he request ... is primarily for convenience and this office recommends that it be denied" (Pl. Int. Ex. 77J). And with respect to the 1967 request, he wrote, "it has not been our practice ... to grant transfers on the basis of convenience ... "[T]he parents created the problem of having children in both schools by the fact that they exercised an option to place the younger child in the Gorgas School" (Ibid., See also Pl. Int. Ex. 77H).

3. Grade Level Options

Earlier proceedings in this case established that assignments to secondary schools were based upon a racial feeder system. "In other words, no Negro elementary school prepared students for a junior high school that was not entirely Negro, and no white elementary school prepared students for a junior high school that was not almost entirely white." Davis IV, supra, at 900.

With only one apparent minor exception,[11/] since 1963, there has been no change in the racial character of the feeder system even though there have been at least six new elementary schools opened since 1963, thereby creating the need to establish new feeder patterns. The defendants had the three new white schools (Lee, Will and Davis) feed into white secondary schools (Satsuma, Shaw and Theodore, respectively) and the three new Negro elementary schools (Brazier, Hall and Robbins) feed into Negro junior highs (Trinity Gardens, Williamson and Blount, respectively).(Pl. Ex. 23). This consistent pattern

---

11/ Last year one class of Negro students at the Cottage Hill school fed into Azalea Road Junior High before the Cottage Hill School was closed.

can only be racially explained. There have also been a number of cases where white elementary schools which formerly fed into one white secondary school, now feed into another secondary school of the same race (Pl. Ex. 23. Also see Shout dep., Vol. III. pp. 15-21). The only elementary school which fed to a school of one race in 1964 and fed to a school of a different race in 1967 is the Gorgas Elementary School. But the changes were designed to perpetuate the dual system. The Gorgas School, which was a white elementary in 1964, at that time fed into Toulminville, which was then white (Pl. Int. Ex. 29, Gorgas). In 1965, when Toulminville became a Negro school, Gorgas started to feed into Phillips, which is a white junior high school and Booker T. Washington began feeding into Toulminville (Pl. Ex. 22, Central Annex). After 1966, when Gorgas became a Negro school, it began feeding into Booker T. Washington, a Negro junior high school (Pl. Ex. 23, Washington).

Superimposed on this feeder system are the option provisions of defendants' plan. Those students reaching the first year of junior or senior high school in the city have an absolute right to attend the racially determined feeder school serving

their attendance area and "the option of enrolling at the nearest formerly white school outside his attendance area or the nearest formerly Negro school outside his attendance area; within physical space limitations" (Section 2). In the rural portion of the system, the option grade student has the option of enrolling at either the formerly white or formerly Negro school serving his area, "within physical space limitations, provided that such optional school is within walking distance of his residence (under 2 miles) or that public school bus" or private transportation is available (Section 3).

When the time comes for exercising an option, each student in the option grade is given a form with the name of the feeder school on it (Shout Dep., p. 98) and his parent must then choose the school he desires to attend for the next three or four years. The form does not name any of the schools he may attend except the racially determined feeder school (Pl. Int. Ex. 41).

The option system does not disestablish the racially segregated feeder pattern and the method of exercising an option fails to meet the procedural requirements established under the Jefferson or Lee

decrees for methods of student assignments that employ choices by students. It is true the district court, in its Findings of Fact 13 relating to student options, said that "there is no evidence of any discrimination by virtue of race" in the administration of the option plan. But the constitutional defect in the option system appears on its face. The uncontradicted evidence shows that all forms, except for the one school previously noted, were sent out with the name of the racially determined feeder school already on the form and no other information was given to the students (Shout's testimony).

Furthermore, the secondary school orientation program has operated as an adjunct of the racial feeder system and as a means of reinforcing it with the inevitable effect of minimizing the significance of the option as a means of overcoming racial assignments. Pupils at the option grade levels received orientation from secondary school personnel in acquainting them with the courses and facilities available at the secondary schools. And this program was geared to the existing feeder system. No orientation at the option level is provided pupils by the various schools which may be chosen under the option provision of the plan. A Negro

secondary principal and a white secondary principal both testified that they were in contact with feeder schools serving the same respective races as their secondary schools for the purpose of keeping the students informed of activities at the secondary level. This included academic and extra-curricular orientation. However, neither principal had any contact with a school serving a race opposite to his school (Mills' testimony; Bell's testimony, July 27, 1967). Mr. Willie O. Gaillard, principal of the all-Negro Dixon Elementary School (Pl. Ex. 16), added that it is generally made known at Dixon what is taking place at his feeder school, but not at the predominantly white schools to which his students may option. Because of this orientation, the student has considerable familiarity with the traditional school of his race as he approaches the option period, but is totally ignorant of the experiences which might be available at any of the "option schools."

The discriminatory nature of the racial feeder system and the insignificance of the option provision as a means of correcting that discrimination are also revealed by the statistics. This was the first year that defendants operated under a plan with these option provisions (See previous plans on pp. 1-66, record filed with this Court on August 24, 1965), and the

Defendants' Exhibit 27 shows that, of the 5,888 Negroes who filled out forms in 1967, only 65 utilized the option to enroll at a white school (Pl. Ex. 18, Shout's Dep., Pl. Ex. 13). Plaintiff's Exhibit 23 established what everyone knows and could expect, that no white students used the option provision to attend Negro schools this year.[12/]

12/ The district court's error in understanding the racial significance of both the feeder system and the option feature could in part be attributable to other erroneous findings of fact concerning those matters. In 2(c), part of the difference between the option procedures in the city and rural parts of the system was ascribable to "the existence of a transportation system". However, the board's bus records and those filed with the State show that the transportation extends to the city as well (Pl. Int. Ex. 57, Part III; Pl. Ex. 7, McPherson Dep., Pl. Ex. 6). In 3(f) it was found that "special consideration" would be given to students whose option choice was refused because of overcrowding, although Mr. Shout testified he would apply the same procedures that would pertain to any child who was not accepted at a school he is eligible to attend - that he would have to decide it on a "merit" basis (Shout Dep., Vol. III, pp. 27-29). In 3(g) the court found that "the stated policy of the defendant" was to arrange its transportation routes to provide transportation for every rural student to "either of the two schools available under the option plan" and 3(g) said that no child had been denied the opportunity of attending a school under the plan, because of no bus transportation . Yet, Mr. Shout testified that transportation to a rural option school would depend upon whether a bus goes near the student's home and serves his grade level, (Shout Dep., Vol. I, p. 61; see also Pl. Int. Ex. 9(d)) and Pl. Int. Ex. 9(b), a memorandum from Mr. Shout concerning a request for school bus transportation, says that parents who send "their children to a school out-of-district . . . on an option basis were required to provide their own transportation for these children to the option school". And the provisions of the plan itself state that the rural school can be attended only if transportation is available. In 3(b), 3(c) and 3(d)

4. First Graders and New Students

We recognize that under the amended plan, the students who have the most opportunity to choose schools are first graders, students who are new to the system or who have moved from one attendance area to another. Section 2 of the plan gives these students in the city part of the system the absolute right to attend the school serving their attendance zone and provides the option of enrolling at the nearest formerly white or formerly Negro school outside his attendance area; "within physical space limitations". Section 3 describing the rights in the rural areas, says that these students "may . . . enroll at either the formerly white or formerly Negro school serving his area, within physical space limitations, provided that such optional school is within walking distance of his residence" or public school bus or private transportation is available. But there are

---

the district court said there was an "absolute right" to attend the option school but the plan clearly limits that right - in the city by the availibility of space and in the rural area by transportation (Sections 2 and 3, respectively.). In 17 the court found that option notice was given by newspaper ads, but Mr. McPherson testified that although a notice of pre-registration for first graders was published (Pl. Ex. 13), this was not done for grade level options.

limits on the choice of schools and these limits have a racial significance. For such a student in the city part of the system, he has no right to attend a school outside of his racially defined attendance zone. For such a student in the rural part of the system, the limit on his choice derives from the transportation. For years the rural schools have been run on the basis of dual attendance areas and a transportation system has been set up to service particular schools. The bus routes for these schools had, as an integral part of the dual school system, been designed to bring white students to the white schools and Negro students to the Negro schools. Mr. Montgomery, the assistant superintendent who has responsibility for the operation of the school buses (Shout Dep. Vol I, p. 10), testified that they do not go off the main roads (Montgomery Dep., p. 8) and indicated when asked how he knew to run a bus down a particular street, that the board had "been running them for so many years that it becomes more or less force of habit with us" (Montgomery Dep., pp. 9-10). He also testified that no plans have been made to discontinue any bus service (Montgomery Dep., pp. 17-18). Under the facts existing in the rural parts of the system, only the neighborhoods with white children would have school bus transportation available to the white school

and, thus, it is highly likely that large numbers of Negro children could not exercise options to formerly white schools because transportation would not be available. Only those living in areas with white students, or within two miles of the option school or who could furnish private transportation would be able to attend white schools. Furthermore, any instances where Negroes were denied entry into a white school because of the unavailability of transportation would not be referred to the central office, this matter would be handled by the local principal.[13/] Therefore, the central office would not have any records of these denials.

5. Alternative Methods of Student Assignment

There are ninety-three different school plants in the Mobile County Public School System (Finding of Fact 32). These plants have a combined normal capacity of 74,725 students (Pl. Int. Ex. 20) and the anticipated enrollment for this school year was approximately 76,196 (Pl. Ex. 23). In school systems of this size, where so

---

13/ Mr. Shout testified at his deposition that "the principal of the receiving school is responsible for verifying eligibility of the students who have elected to option to that school" (Shout Dep.,Vol. I, p. 127).

many students, faculty and staff personnel are involved and where enrollment exceeds the capacity of the facilities, it is difficult to house all of the students in the manner best suited to their educational needs. A variety of alternatives is available to find the best possible arrangement of pupils and facilities. In the past, defendants have examined the alternatives on numerous occasions and have, as we shall now show, with few exceptions always chosen an alternative which perpetuates the racially segregated dual system, even when they have had to sacrifice educational considerations to do so.[14/]

a. Administrative Reassignment

From time to time it is necessary to adjust the enrollments at various schools in the system to assume that each school will have a sufficient number of children to operate efficiently and to relieve overcrowding at other schools. The reassignment of students in this manner is done on a routine basis each year generally with a single memorandum from the Pupil Placement Division setting forth all the changes for the following year. (See Pl. Int. Exs. 83, 85, 94.)

14/ Section III of the trial brief of the United States which accompanied our brief of September 26 examines in more detail the methods of student assignment used to combat overcrowding and under population problems in defendant system.

Such reassignments affect an average of 17 complete grades annually, in addition to the reassigning of many geographically identifiable groups. The complete grade assignments alone average approximately 1399 each year.

The reassignment of students from Fonvielle to Palmer for the 1964-65 school year can be used as an example of the racial character which these transfers often have. For that year, the sixth grade at Fonvielle was reassigned and transported to the Palmer school in order to relieve overcrowding. Lying directly between the Fonvielle and Palmer Negro elementary schools is the Gorgas school,[15/] which housed white pupils.[16/] Furthermore, at this time, when the defendants were transporting children across the Gorgas attendance area, that school had eight empty classrooms. And the same memorandum of placement recommendations (Pl. Int. Ex. 94) which reassigned the Fonvielle students to Palmer also sent the entire fourth, fifth and sixth grades from the Lee school in Satsuma to Gorgas.

15/ See Pl. Ex. 1.

16/ Gorgas has since been converted to an all-Negro school. See McPherson testimony.

b. Changes in Attendance Lines

Although the reassignment of students to schools outside their normal attendance areas is an effective short-term remedy to overcrowding, it is an expensive and administratively burdensome device when contemplated for an extended period. A more efficient way to deal with the problem is to shift the attendance area boundary lines which define the zone served by the school.[17/]

To analyze the functions and understand the significance of changes in attendance lines, we must begin with the formal pupil placement recommendations which are submitted to the school board each year. These formal recommendations are important in that they advise the school board of the actual changes to be made in student assignments. Every student whose residence lies in a new attendance zone because the pupil placement recommendation is approved by the board, is administratively reassigned to the school serving the new area.

17/ For racial reasons, defendants have, on occasion, closed their eyes to the basic principals of attendance areas. In 1963, the Gorgas area was fairly large and the enrollment was high during the 1962-63 school year. However, in 1963-64 and 1964-65 the attendance steadily declined. In light of such facts, an appropriate course of action would be to expand the attendance area, but instead, the zone was severely reduced in size in 1965.

A list of all the adjustments of boundary lines which were reported in the pupil placement recommendations in Mobile County since January 1, 1963 (Pl. Int. Exs. 83, 85, 95) reveals that whenever one attendance line was increased and a contiguous one accordingly reduced, both schools were for students of the same race. Recommendations for adjustments were made only with respect to two white schools or as between two Negro schools. This consistent pattern, together with all else we know about the system, gives rise to only one inference and defendants have offered no explanation why adjustments prescribed in the formal recommendations have never been made between white and Negro schools.

Whatever adjustments might have been made in the attendance lines of racially dissimilar schools, they have not been contained in the found pupil placement recommendation to the board. This omission is significant. It means that these changes did not actually result in changes of student assignments - as would adjustments in attendance between racially similar schools. For example, the Thomas-Whistler area changes illustrate special handling of zone alterations where both Negro and white students are involved and

the residential patterns do not conform to the needs of a dual system. There, a seven or eight block area in the Negro Thomas zone was included in the white Whistler area and a thin strip of land along a railroad track in the Whistler area became part of the Thomas attendance zone.[18] No reassignment of students was made nor was any notice given to the people in either area to aprise them of the new lines. In fact nothing at all was done until after the trial of this case.[19]

c. Conversion of White Schools to Negro Schools

During the last few years, a definite enrollment trend in the public schools located in the downtown area can be ascertained. The white schools are experiencing a declining enrollment while the Negro schools are overcrowded. (See Pl. Int. Ex. 87.) In the downtown area, there are now situations where grossly under populated white schools are adjacent

---

18 / Compare Pl. Ex. 1 and 2.

19 / The district court merely ordered that those affected by the line change be given an "opportunity to transfer to the school serving the attendance area in which he now lives, or any other school afforded to them by the desegregation plan," (August 24, Order). The disposition of this matter was contrary to the manner in which the school officials in Mobile place their students and was inadequate relief under the facts of this case.

to terribly overcrowded Negro schools.[20] Absent racial considerations, the obvious solution to the problem, of course, would be to reassign a sufficient number of the students at the overcrowded schools to the under populated schools; this would aid the white school by increasing its operating efficiency, help the Negro school attain an enrollment more consistent with its capacity and insure, as constitutionally required, that between white and Negro schools the pupil-classroom ratios were substantially equal.[21]

However, defendants did not use this obvious, educationally sound method. Instead, they analyzed the problem solely in terms of perpetuating the dual system,[22] and what resulted was a "domino" system of abandoning and converting schools. The enrollment

---

20/ A list of the schools, the over or under population status, and the approximate distance between particular schools can be found on pp. 103 and 104 of the trial brief of the United States.

21/ Sections VI and IV of the Jefferson and Lee decrees, respectively, call for a substantially even distribution of pupil-classroom ratios in Negro and white schools.

22/ In a May 1, 1963 memorandum from Scarborough to Burns, it was pointed out that:

> The population in Prichard is fairly well stabilized by now it appears, so far as the total population is concerned. It appears to me that our difficulty lies not in too many or not enough schools, but in the matter in having the schools adjusted to the Negro or white population.

(Pl. Int. Ex. 87, Snug-Harbor-Turnerville.)

at the white schools was kept up, while continuing to assign the Negro students who resided in the area to the Negro schools. Then, when there was an insufficient number of white students to justify the school's continued operation, they reassigned the remaining white students to other white schools and immediately thereafter made it a Negro school. This was done on six different occasions. The last school conversion was effected at the Gorgas school and consumated shortly after this Court's decision in August 1966. A brief examination of the events surrounding this event may be helpful in understanding this aspect of the Mobile system. The enrollment at Gorgas declined steadily between the 1962-63 and 1965-66 school years. It had dropped from 836 to 274 elementary students during that time (Pl. Int. Ex. 87, Russell - "Downtown Study") and several efforts to bolster the enrollment by assigning students from other white schools had failed.[23/]

23/ For the 1964-65 school year the 4th, 5th and 6th grades at the Robert E. Lee school in Satsuma had been reassigned to Gorgas (Pl. Int. Ex. 83). In 1965-66 the Lee students returned to that school and grades 7-9 were added to Gorgas to make up for the loss but the total enrollment was still only 440 (Pl. Int. Ex. 87, Russell - "Downtown Study") and the school's capacity was 858 (Pl. Ex. 9, 1965 hearing).

A plan was then formulated for closing Gorgas, and for transferring those students to other white schools. On February 9, 1966, the head of the Pupil Placement Division made the following recommendations to Dr. Burns concerning "The Possible Closing of Gorgas School":[24]

1. The official closing of Gorgas school with the last day of operation being February 25, 1966.

2. The transfer of the elementary children to the records of Old Shell Road Elementary School.

3. The transfer of the junior high school pupils to the records of Sidney Phillips Junior High School.

4. That there would not be any actual physical move of these students but continue to keep them in this building for the remainder of this school term and to operate it as a part of Old Shell and Sidney Phillips.

5. There will be no recommendation concerning the future use of the Gorgas building at this time.[25]

---

[24] Pl. Int. Ex. 3. This memorandum, forwarded by Dr. Burns to the board members by letter dated February 11, 1965 (Pl. Int. Ex. 19) which was marked "CONFIDENTIAL," mentions that the recommendations had been endorsed by the board's attorney.

[25] It should be noted that in a February 22, 1965 memorandum from McPherson to Burns, the Associate Superintendent had suggested the possible use of the Gorgas school to relieve the overcrowding at nearby Negro schools (Pl. Int. Ex. 2).

Dr. Burns, on February 23, 1966, presented the recommendations of his assistant to the board, and also asked for corresponding personnel changes, all strictly preserving the dual nature of the system.

> That Mr. Wharton, principal of Gorgas, be made an assistant principal of Old Shell Road and Phillips as of February 28, 1966, thus making him responsible to Mr. Moore, the principal of Old Shell Road, for the operation of the elementary grades and to Mr. Dawson, principal of Phillips, for the operation of the junior high grades. . . that Mr. Wharton's salary remain the same. . . (Pl. Int. Ex. 41)

Once the white Gorgas school was "closed" and the white students reassigned to other white schools, then the dual nature of the system no longer prevented them from making reassignments and moving the attendance lines so as to bring Negroes into the school.[26/] They increased the size of the Gorgas attendance area to take in part of the Negro Stanton Road and Fonvielle areas, thereby relieving overcrowding at those two schools. With the

---

26/ During the time between the "closing" of Gorgas and its re-opening in the fall, the school officials referred to the building as the "New School" or, occasionally, the "school housed in the Old Gorgas building." See Pl. Ex. 3. However, the fact that Gorgas was called by other names did not impair the board's ability to place a racial designation on the school and in a memorandum from Zeanah to McPherson dated May 23, 1966, Mrs. Emma Reed, a Negro, was recommended for the principal's job at the "Old Gorgas building." (Pl. Int. Ex. 34) See also, Martin testimony, p. 22.

new attendance area now back to its 1963 size, an analysis of the projected enrollment prepared by Mr. Clardy showed that instead of a "declining" enrollment, the area contained 717 students.[27]

The abandonment-conversion in the Gorgas school was also felt by students at the Old Shell Road school. A number of children living in the Griggs school area had been attending the Old Shell Road school since the beginning of the 1963-64 school year.[28] When the Gorgas students were reassigned to Old Shell Road school, there was no longer room for the Griggs children at that school and they were reassigned to Griggs. These students were also given the right to transfer to another school or to transfer back to Old Shell Road.[29]

27/ Pl. Ex. 3. These recommendations were also approved at the May 11, 1966 meeting. Pl. Int. Ex. 7.

28/ Pl. Int. Ex. 94, memo from Scarborough to Burns dated April 2, 1963.

29/ Mr. Moore testified that those who requested to continue at Old Shell Road were granted a transfer back from Griggs. This is a sharp contrast to the handling of the transfer requests submitted by Negro parents when reassignments were made. See the discussion of Mrs. Johnson's attempts to obtain a transfer. p. 22 , supra.

This same racial character is present in the other abandonments-conversions, and yet the district court held to the contrary. The district court concluded with respect to the conversion of white schools to Negro schools that "[i]n each instance the change has been contemporaneous with a corresponding change in the racial composition of the general neighborhood and the attendance area surrounding the school" and that "none of these occurrences have resulted from nor been accompanied by bad faith upon the part of the defendant board, in light of all prevailing circumstances." These conclusions are without any support in the record. For the racial conversions of the schools to be attributable solely to the racial conversions of the neighborhoods, as the district court would have us believe, it would be necessary for each one of the attendance areas served by the six schools to change from 100% white to 100% Negro within the period of time within which the conversion took place - from one school year to the next. It would be unreasonable to assume that this did occur,

and everything in the record[30] and in our experience indicates to the contrary. And, of course, no racial conversion of a neighborhood could explain the faculty reassignments, all strictly along racial lines.

The district court found that none of the four school conversions from white to Negro which have occurred since the appellees have been under court order "have resulted from nor been accompanied by bad faith upon the part of the defendant board." There is absolutely no evidence in the record which support this finding, although a mass of evidence was introduced at the trial which would sustain a finding that appellees did act in bad faith. The manner in which the Gorgas matter was handled, for example, shows an artificial manipulation of records and which at best represents questionable conduct.[31]

30/ e.g. Pl. Int. Ex. 87 shows 149 and 186 parents in the Snug Harbor and Turnerville attendance areas expected to be living there for the 1963-64 school year. Toulminville was the feeder school for the Gorgas school (which was then white) up until its conversion. Mr. Moore, the principal at Old Shell Road, the school to which the Gorgas students were reassigned, testified that children living in the Gorgas area attended his school during the 1966-67 school year.

31/ For a detailed discussion of the school conversions, see pp. 39-56 of the Trial Brief of the United States.

C. The Relief Regarding Student Assignments

For the 1967-68 school year, we believe that appellees should be required to transfer students from designated overcrowded Negro schools in the city part of the system to under capacity white schools in that part of the system at the beginning of the second semester of the present school year.[32/] Such relief is neither novel nor impractical. In both Jefferson and Lee and a host of decrees entered since those cases were decided school boards have been ordered to take steps to equalize the pupil classroom ratios at Negro and white schools. These measures are especially appropriate in Mobile County since the

---

32/ The record shows that these Negro schools are overcrowded and are located near the white schools, which are under capacity. Both white and Negro schools in the non-city areas are overcrowded, so that similar relief would not be appropriate there.

defendants regularly transfer more than 1000 students each year to relieve overcrowding.[33/]

We also believe, as a first step toward the elimination of dual zones, that at the mid-year break, those Negro students living in white attendance areas and attending Negro schools outside of their attendance area should be transferred to the schools serving their residences. These dual attendance zones were condemned by Davis III, 333 F.2d 53, at p. 55.

The above relief looks toward the 1967-68 school year. We also believe that there is the need for relief to insure that a general method of student assignment is established to convert the Mobile School System into a unitary, non-racial system. We submit that the implementation of unitary geographic attendance zones would result in such a system.

33/ The fact that mid-year transfers can be made is demonstrated by Robinson v. Shelby County Board of Education, 12 R.R.L.R. 842 (W.D. Tenn., January 19, 1967). In that case the court, on a motion to show cause why the school officials should not be held in contempt, ordered that "Each Negro student presently enrolled in the Shelby County School System who is not now enrolled in and attending the school of his first choice for the 1966-67 school year, other than the Negro students already provided for in the preceding paragraph, shall be reassigned by the defendants to the school of his original choice for the second semester of the 1966-67 school year unless the parents of such student shall request in writing that he not be reassigned." at p. 842.

Historically, the students attending the Mobile County schools have been allocated pursuant to geographic attendance areas, although the zones are based upon race and have been for some time. Defendants have not abandoned this method of student assignment in the face of school desegregation. In addition, a system of geographic zones is probably the only practical method of student assignment in the Mobile System. This system with 50 elementary schools in the city part of the system alone has over 75,000 pupils. These facts when combined with the additional burden of having many overcrowded schools and others which have classroom space available,[34/] would lead to a chaotic situation if a freedom of choice plan were now adopted. The overcrowding problem would mean that choices would have to be granted on the basis of proximity and, therefore, the manner of assignment might well in the final stage, after considerable disruption, revert to geographic principles anyway. In view of this, we believe the most appropriate method of establishing a unitary school system in Mobile would be by redrawing the zones in a manner which would achieve desegregation.

34/ See footnote 36, infra.

In connection with the drawing of new attendance lines and the reorganization which will be necessary to effect school desegregation in defendant system, it is first necessary to ascertain just where the children live and what school facilities are available. A comprehensive survey of the Mobile County System should be required before the zones are redrawn. The need for comprehensive planning to meet the problems of desegregation has already been recognized by the courts.[35] See Dowell v. School Board of Oklahoma City, 244 F. Supp. 971 (W.D. Okla. 1965), modified and aff'd. 375 F. 2d 158 (C.A. 10, 1967), and Braxton v. Board of Public Instruction of Duval County, M.D. Fla., Civil Action No. 4598, order entered August 22, 1967. The district court in Dowell said, "Desegregation of public schools in a system as large as Oklahoma City requires a definite and positive plan providing definable and ascertainable goals to be achieved within a definite time according to a prepared procedure and with responsibilities clearly designated." at p. 976. No less is required for Mobile

---

35/ It should be noted that both the Alabama State Department of Education and the University of Alabama conduct such school surveys for local school systems.

than for Oklahoma City. The results of the survey would be reported to the district court by February 1, 1968, so that the court will have ample time to consider them and to insure full desegregation in 1968-69. The survey would show the location of all the students living in the system, by race, grade, and school and be accompanied by recommendations for the redrawing of attendance zone lines and the reorganizing of the feeder system to achieve desegregation. The recommendations would be accompanied by a forecast of the enrollment, by grade, race, and school, based on the proposed attendance lines. It is essential that the survey should also reflect a description of each school in the system and the property holdings of the system, and, thus, detailed information will be reported on buildings, sites, capacity, and similar items. The report will also show the uses planned for each school. The survey will be important in showing the district court just what can and should be accomplished at different stages of the desegregation process. In connection with the attendance lines, the survey should be conducted with the view that

each school shall be properly utilized in a manner consistent with the efficient operation of a unitary school system.

In conducting this survey, it should be noted that the defendants' obligation is to design attendance areas that would, to the extent consistent with the proper operation of the system as a whole, eliminate the effects of past racial decisions in assigning students, drawing attendance lines, and constructing school buildings. Morever, although we believe that a constitutional method of student assignment in Mobile should look toward the establishment of geographic zones, this does not mean that no modifications of the geographic zones could or should be made through the use of transfer provisions superimposed on the geographic zones. However, unlike the transfer provisions used by the defendants in the past, these new transfer provisions must contribute toward the achievement of a unitary, non-racial system and the disestablishment of the racially segregated patterns of student assignment attributable to defendants past discriminatory conduct.

Hence, those conducting the survey should be free to consider the appropriateness and necessity of using such transfer provisions as the majority to minority transfer provision formulated and approved in Dowell v. School Board of Oklahoma City, 244 F. Supp. 971 (W.D. Okla., 1965) Modified and aff'd, 375 F. 2d 158 (C.A. 10, 1967). Braxton v. Board of Public Instruction of Duval County, M.D. Fla., Civil Action No. 4598 (order entered January 24, 1967).

II. School Construction

Defendants have traditionally determined the need for and the location of school facilities on a basis designed to perpetuate the dual school system. For example, several Negro schools in the downtown area are overcrowded, while almost all white schools in the same area have vacant classrooms. At Emerson Elementary School, overcrowding exists to the extent that three additional classrooms are needed. At Craighead Elementary School, only 1.5 miles away, nine classrooms stand vacant.[36/] A report prepared by defendants during 1967 indicates the extent of this situation:[37/]

> There are at the present time in the formerly white schools 23 vacant elementary classrooms and space to accommodate additional students at Murphy High School and Mae Eanes Junior High School.

36/ See pp. 103-104 of the Trial Brief of the United States for a full list of these schools.

37/ This document is entitled: Report on Research of the Pupil Personnel Office for Use in Planning for the Full Utilization of School Facilities in the Downtown Area (Pl. Int. Ex. 64).

> . . . We are now accommodating nine classrooms of elementary students transported to Craighead and Old Shell Road from the South Brookley, and the Cypress Shores and Todd Acres areas. We are also providing for twelve classrooms of junior high school students in the elementary schools of the downtown area. If the transportation of students into this area and the housing of junior high school children in the elementary schools should be discontinued. . . , there should be an additional 21 vacant classrooms available on the basis of our present enrollment. This would mean a total of 44 elementary classrooms would become vacant and this number could increase if present trends in enrollment continue.

Concerning the Negro schools, the report continues:

> There are at the present time 10 vacant classrooms in the formerly Negro elementary schools of this area. There are now 39 portable classrooms being used to relieve crowded conditions at seven of the formerly Negro schools and in two or three places additional portables are needed. We are accommodating eight classrooms of students transported to Hall and Williamson from the South Brookley and Lloyd Station areas. In four schools (Southside, Emerson, Howard and Williamson), there is at the present time a need to replace part or all of the available facilities.

The obvious non-racial solution to the problem of overcrowded and underpopulated schools located in the same area is to assign students from the overcrowded schools to the ones that are underpopulated. Defendants have not done this. As was done by the defendants in Lee, et al. v. Macon County Board of Education, et al., 267 F. Supp. 458, 471 (M.D. Ala., 1967), they

> . . . have . . . sought to perpetuate the dual public school system by refusing to recommend consolidation where consolidation would have had the effect of desegregating . . . the survey teams consistently compromised the minimum student standards in order to maintain segregation of the students. Such a course of conduct is condemning evidence that the defendants have sought to perpetuate and, through this means, have effectively perpetuated the dual school system.

Rather than relieve the overcrowding at three of the Negro elementary schools located in the downtown area by assigning some of the students to the nearby white schools, defendants have made plans to construct a new Howard Elementary School in a Negro attendance area.

Defendants' selections of sites for the construction of new school facilities, such as the Howard project, are based upon racial considerations. Even the administrative aspects of the Mobile County construction program reflect this fact. For example, defendant school system has a standardized form for justifying the need for establishing a new school on a particular site (Pl. Int. Ex. 61). The form calls for the following information:

1. Name of the community where the site is needed.
2. Type of school center needed.
3. Boundaries of the proposed district.
4. Distances to other school centers of its own class.
5. Distances to school centers accommodating higher grades.
6. Present and anticipated enrollment of proposed center.
7. Schools where children in proposed district are now attending.

In every case where questions 4, 5 and 7 are answered, the schools listed are of the same race. If a new Negro school is contemplated,

all the schools listed are Negro and if a white school is planned, all the schools on the form are white.

The creation of the all-Negro Robbins School is illustrative of the other administrative methods employed by defendants in selecting a site for the construction of a new school. Mobile County school officials, in order to determine the racial composition of a contemplated new school, consult with agencies whose programs may affect the need for school facilities. On April 17, 1964, Superintendent Burns wrote to Mr. Neal Hanks, Executive Director of the Housing Authority of the City of Prichard. This letter reflects that school officials were well aware that the future enrollment at the Robbins School would be all-Negro:

> The School Board concurs in your calculations with respect to the number of children who will attend the new school. It is our understanding that the Housing Authority will construct 368 dwelling units (excluding 60 units of housing for the elderly). From our experience with the public housing in Mobile, I concur that these dwelling units in the project will consist of families with children under eighteen years of age. According to the 1960 Census of Population for Prichard,

> the ratio of "Non-white families with children under Eighteen to Non-white enrolled in grades 1-8" was 2,644 families to 4,829 children or 1.8 pupils per family. At the present time, 841 pupils enrolled in grades 1-6 reside in the newly formed Robbins District. It remains to be seen what the enrollment will be after the housing project is completed.
>
> These calculations are correct and you may rest assured that we will continue to coordinate and work closely with you and the Prichard Housing Authority.38/

After the April exchange of letters, the defendants had an accurate projection of non-white families who would be living in the urban renewal area in Prichard but as yet did not know about the white population. An inquiry to Mr. Hanks supplied the information necessary to make the school analysis concerning the Robbins area complete. On August 24, 1964, Hanks wrote to Mr. Montgomery explaining:

> In accordance with your request, I am submitting to you certain information pertaining to the Urban Renewal Project that we,

---

38/ A similar letter was written to Mr. Hanks concerning the Blount St. High School (Pl. Int. Ex. 87). This letter is dated April 17, 1962, but it refers to later events and dates. It probably should say 1964.

> here in the City of Prichard, are presently planning that I feel is pertinent to the new William D. Robbins Elementary School which the school board is presently planning to build. The Urban Renewal. . . Project consists of 116 acres of residential land. Living within this 116 acres are 291 families of which 137 are white and 154 are non-white families. Using the pupil ratio per family for children enrolled in grades 1 through 6, our records indicate a ratio of 1.84 children per family in this age bracket. The ratio of white families and children is not included as we believe that each and every white family located within this 116 acres will relocate outside of the area. Taking into consideration a pupil ratio of 1.84 children per family and the fact that 154 non-white families presently reside in the area, this means approximately 283 elementary school age children now reside within this 116 acres all of which is located inside the William D. Robbins Elementary School District (Pl. Int. Ex. 87).

Obviously, the defendants proceeded with the construction of the new facility in Prichard with every confidence that the enrollment would be, as it is, all-Negro.

With knowledge of the defendants' past utilization of racial factors in locating their schools, we believe that the proposed construction of new school

facilities at Howard, Emerson and Williamson, in heavily Negro residential areas, should be enjoined until a survey of defendants' facilities and needs can be made and a judicial appraisal of those factors can be made.

The federal courts have recognized that, under appropriate circumstances, school construction should be prohibited. In Kelly v. Altheimer, Arkansas Public School District No. 22, 378 F.2d 483 (C.A. 8, 1967), where Negro plaintiffs sought to enjoin an addition to the system's Negro school, the Court of Appeals said:

> We conclude that the construction of the new classrooms by the Board of Education had the effect of helping to perpetuate a segregated school system and should not have been permitted by the lower court, at p. 497.

And in Lee v. Macon County Board of Education, supra, the Court entered a model decree which enjoined school construction, consolidations and expansion which had been recommended in the course of racially conducted school surveys, unless subsequently approved by the State as non-racial. The need for such an injunction is demonstrated by the fact that once a school has been constructed on the basis of racial considerations, the

harm done to the desegregation process is irreparable and the constitutional rights of Negroes, already years postponed, are even more difficult to guarantee. Leave to proceed with particular construction projects could be obtained prior to the completion of the survey upon an evidentiary showing that the particular building project would not have the effect of perpetuating racial segregation.

With respect to injunctions against school construction, the trial court's order of October 13, 1967, directed the defendants to "make a comprehensive investigation as to the advisability and location" of any new school prior to beginning its construction and to submit a report of that investigation to the court for approval or disapproval. Excepted from this provision, however, are "any building project already in progress, including the Howard, Scarborough, Emerson and Williamson projects." (Paragraph 13, Order of October 13, 1967).

Although we agree with the lower court's approach to this matter, the record in this case clearly shows that the construction plans for the Emerson, Howard and

Williamson facilities are based upon unconstitutional racial considerations, as has been defendants' construction policy in general. Also, construction has not begun at any of these sites (See Luguire Dep., pp. 88, 98, and Barnett Testimony), and, therefore, there is no reason to exclude these projects from requiring Court approval prior to the commencing of actual construction.

Moreover, the Constitution requires that future plans for construction and consolidation of school facilities in a school system such as Mobile's must be undertaken with the objectives of eradicating past discrimination and of effecting desegregation.[39/] We believe that this Court's decree should reflect that requirement.

39/ These provisions are very similar to those ordered in Lee v. Macon, supra.

III. Transportation

As we have stated above at p. 30, the transportation system in Mobile County acts to preserve the segregation of students by race and operates within a dual attendance area based upon race. However, the Mobile County transportation system is more than merely an unconstitutional network of dual routes with overlapping schedules which were condemned in Lee v. Macon County Board of Education, supra. And it does more than restrict transfers in the rural areas, for here the school buses have traditionally been used to move children around when overcrowded conditions exist, allowing defendants to by-pass nearby schools with vacant classrooms in order to effect the reassignment of students to schools of the right race.[40/]

Also the evidence unequivocally shows that appellees continue to run racially separate sets of buses to their almost entirely racially separate sets of schools, (Pl. Int. Ex. 53-531). Moreover, the bus routes are overlapping and duplicative (Montgomery dep., pp. 15-17; Pl. Int. Ex. 6 to McPherson dep.; McPherson Testimony), and defendants have no plans to change them (Montgomery dep. pp. 17-18).

40/ This is discussed further on pp. 32-33, ~~infra~~ SUPRA.

Although no relief relating to appellees transportation system was granted by the district court, the evidence requires a finding of discrimination and relief directing the school officials to establish a unitary non-racial system of school buses.

IV. Faculty and Staff

Over one year ago the Court of Appeals held in this case that the defendants would have to end their policy of hiring and assigning teachers according to race, by the school year 1967-68, Davis IV, supra. The defendants have not complied with this requirement. According to Assistant Superintendent Martin,[41/] who is in charge of faculty procurement, nearly 100 new teachers have been recruited and hired for the 1967-68 school year, but none have been assigned to a school where their race is in the minority. The district court found that "in most instances [defendant board] continues to assign teachers with regard to race" (Finding of Fact 23).

The defendants took no steps toward faculty desegregation until a hearing was set by the district court in May. Even then, the only steps taken were to meet with a few selected teachers and offer them the opportunity to transfer to schools where their race would be in the minority. The defendants held two meetings, one for the teachers of each race and invited only about 20

41/ Except as otherwise noted this entire section of the brief is based on Mr. Martin's testimony.

teachers to each meeting. The invitations were limited to secondary school teachers. The white teachers who attended the meeting were informed that the assignment at a Negro school would only be for one year. They were also told that they should attend P.T.A. meetings and similar functions if they taught at a Negro school, but that they could probably get out of doing this, (Voight testimony).

The defendants have not established a system-wide program to encourage teachers to transfer. Neither have they sought the advice and assistance of the State Board of Education, although they were aware that the State Board had established a placement program to help local boards of education to find teachers willing to teach in desegregated situations.

Although some Negro teachers will be displaced by the consolidation of two Negro schools with adjoining white schools, Mr. Martin testified that he did not know what will happen to them. They apparently were not assigned to the white school to which their students were assigned. According to Mr. Martin only 12 Negroes are teaching in white schools and three white teachers are teaching in Negro schools during the 1967-68 school year

(affidavit filed October 3, 1967), although there are approximately 1,435 white teachers and 1,000 Negro teachers (Pl. Ex. 23) in the Mobile County system.

On October 12, 1967, the Court in Lee v. Macon (C.A. No. 604E, M.D. Ala.), reviewed the efforts made by five Alabama school systems[42/] to desegregate the faculties in their schools. The court found with respect to each system the evidence reflected that the school officials had failed to meet the legal requirements in this area. The evidence showed that each of the five systems had already made considerably more progress, on a comparative basis, than the defendants have in Mobile County. The Lee Court denied further relief requested by the United States at "this particular time" but went on to say that the denial did not mean that they "may not or should not renew their motion" if the school officials have not taken affirmative steps to desegregate their faculties prior to the start of the "next grading period."

In the instant case, the district court granted no relief in the area of faculty desegregation, but it did make several findings relating to the subject. It found

---

42/ Cherokee, Chilton, Dallas, Limestone and Washington Counties.

that "[t]he defendant board has formulated a specific initial plan for beginning faculty integration and has made an actual start upon that plan" (Finding of Fact 23). The evidence shows that the only plan formulated by the school officials was to ask approximately 6 white and 6 Negro junior and senior high school[43/] principals to recommend names of "teachers that they felt were proven teachers, teachers who were exceptionally competent and teachers they thought could make this transition."

These inquiries led the school officials to the two May meetings noted above. Martin testified that these were the first and last meetings with teachers concerning faculty desegregation (p. 13). Martin further testified:

> Q. What efforts have been made to prepare all the teachers in the system for the eventual at this time of your goal, your undertaking, that is faculty desegregation or integration?
>
> A. We haven't made any (at p. 81).

43/ Martin testified that the group was intentionally limited to junior and senior high schools because they "felt that the chance of integrating faculties would be better at this level" (p. 15).

> Q. In attempting to define your objective of the ultimate desegregation of the faculty, have you arrived at a time table, that is a time by which this would be achieved?
>
> A. We're trying to place those that we can ask to volunteer and make their teaching compatable with the vacancy. We are continually and consistently doing this. We are presently looking for further volunteers to make this transition. I don't know at what time all of this will be accomplished (at p. 82).

Such a plan falls hopelessly far below the standards articulated in Jefferson and Lee, supra, which require for this year some faculty desegregation in each school and substantial desegregation in as many schools as possible. There is absolutely no evidence even suggesting that the defendants could not meet these standards this year and the trial court's conclusion that "the policies adopted, the efforts made and stated intentions of the defendant board to [the end of faculty desegregation] are proper and sufficient in the prevailing circumstances."

In order that Mobile might have some meaningful faculty desegregation this school year, we propose that the decree require that for this school year, each teacher and other employee hired be assigned to a school of the opposite

race if a vacancy exists for which he is qualified.[44/] Since 80 or 90 new teachers are normally hired during each school year this provision should result in further faculty desegregation this year without creating administrative or educational problems. The defendants would also be directed to reassign teachers for the beginning of the second semester so that no school's faculty and staff will be composed exclusively of one race. This reassignment will include substantial desegregation in as many schools as possible.

In this case there is a great need for the basic provisions requiring non-racial hiring, assignment, and firing of faculty and staff except where necessary for the purpose of correcting the effects of past segregated assignments of faculty and staff under the dual school system. We believe we are at a stage where the defendants should be required to make assignments and reassignments to various schools so that by the start of the 1968-69 school year no faculty or staff will be

---

44/ This provision should remain in force until the appellees satisfy the Court that faculties are not identifiable as tailored for a heavy concentration of children of one race.

recognizable as being tailored for a heavy concentration of Negro or white students. Both Jefferson, supra, and Lee, supra described this as the real objective of faculty desegregation and until it is accomplished, defendants have not met their constitutional responsibilities. In accomplishing this objective the defendants should, where possible, distribute talents and abilities evenly among the various schools in the system. This reassignment is consistent with the requirement of the equalization of formerly white and formerly Negro schools.

The provisions in the decrees dealing with plans for encouraging teachers to transfer voluntarily to schools where their race is in the minority are an important part of achieving a smooth transition from a biracial to a unitary system. This will afford the defendants with a clearer understanding of what teachers could best be reassigned to particular schools. Also, because the Mobile school officials in their limited attempts to achieve faculty desegregation have thus far relied exclusively upon volunteers which has been sanctioned by the findings of the district court, the decree specifically requires that if necessary to meet the requirements of the order the board must make non-voluntary assignments and reassignments.

V. Under The Circumstances Of This Case This Court Should Fashion A Specific Desegregation Decree For Entry By The District Court

There can be no doubt that the appellees are operating their school system in an unconstitutional manner and will refuse to take the necessary corrective action unless judicially ordered to do so. Moreover, it is equally clear that the court below erred in ~~denying~~ failing to grant any meaningful relief for the 1967-68 school year and failing to require that the Mobile County schools be reorganized on a system of unitary, mandatory geographic zones drawn to desegregate the system. The order below must be vacated and the case remanded. The district court's interim order merely granted transfer rights to a limited number of students and a four-day period during which these rights could be exercised. The October 13 decree only ordered that changes be made in the transfer procedures, additional notice and time for those exercising options and required court approval of construction projects but ~~expected~~ excepted those plans which Plaintiffs and the United

States had challenged as being racially motivated. Thus, important questions presented by this appeal are, first, whether this Court--rather than the district court--should formulate the decree to be entered against appellees and second, if so, what the content of that decree should be. It is to these two questions that this discussion is addressed.

We believe that it is necessary and appropriate for this Court to formulate a specific decree to be entered by the court below for the following reasons: (a) delays in school desegregation are no longer tolerable; (b) the history of this litigation particularly indicates the need for very specific direction to the district court by the Court of Appeals; (c) the record reveals that appellees continue to operate their school system in an unconstitutional manner; and, (d) this court has in the past formulated detailed decrees to be entered by the district court when necessary, and similar action is required here.

In approaching this case, it must be recognized that we are at a point in time when all delays in school desegregation must be brought to an abrupt end. It is now more than 13 years since the Brown decision and it has been more than two years since

the Supreme Court said "Delays in desegregating school systems are no longer tolerable." Bradley v. School Board, 382 U.S. 103, 105 (1965). See also Davis v. Board of School Commissioners of Mobile County, 318 F.2d 63, 64; 322 F.2d 356, 358; 333 F.2d 53, 54-55; 364 F.2d 896; United States v. Jefferson County, supra.

Moreover, the peculiar history of this case--marred by foot dragging by the appellees and unwillingness by the district court to promptly and effectively implement the directives of this court--must also be recognized. This is the fifth appearance of this case in this Court. When the case was first presented to this Court nearly four and one-half years ago, Davis v. Board of School Commissioners of Mobile County, 318 F.2d 63, at 64 (C.A. 5, 1963), this Court noted that the district court was "left an area of discretion in the desegregation process," but added:

> ...this court must require prompt and reasonable starts [in the transition from segregated to desegregated schools], even displacing the district court discretion, where local control is not desired, or is abdicated by failure to promptly act.

More than three years later, 364 F.2d 896 at 898, the Court quoted the same language, and stated (Id. at 905):

> The degree to which the appellee accepts the legal principles announced by the courts as the guiding principles upon which it undertakes anew the task of operating a constitutionally valid school system, the simpler and more professionally acceptable to all will it be. As the Supreme Court and this court develop and announce additional legal principles affecting the "deliberate speed" principle, the Board should be guided accordingly.

Furthermore, in the 13 years since Brown and the four and one-half years since this litigation was commenced, defendants have taken no significant steps toward desegregating their schools. As we have documented in Section I of this discussion, students in the Mobile County schools were initially assigned to schools on a racial basis. The only change in the method of student assignment is to allow some students to transfer out. Even after the decision of last year in this case, defendants have adopted and the district court has not substantially changed a plan which will permit continued maintenance of a racially organized school system.

In addition to the discussion in Section I showing that very few of the elements of the pre-1963 racially dual system have been altered in the slightest, inter-school athletic events are scheduled so that white teams do not play Negro teams (McPherson

Dep., Vol. III, p. 66) and they hold a music program for just the Negro schools (Holloway testimony).

In a context such as this, where delays in ordering desegregation are no longer permissible, the appellees have refused to take any meaningful steps to desegregate, and the district court has not implemented previous instructions from this Court, it is appropriate and necessary for this Court to formulate a specific decree to be entered by the district court. Such action has ample precedent. This Court has previously found it necessary to formulate specific decrees in voting cases. See, e.g., United States v. Ward, 349 F.2d 795, 803 (C.A. 5, 1965). In school desegregation cases, this Court has formulated specific detailed injunctions to be entered by district courts pending appeal. Davis v. Board of School Commissioners, 322 F.2d 356 (C.A. 5, 1963); Gaines v. Dougherty County Board of Education, 334 F.2d 983 (C.A. 5, 1964); Stell v. Savannah-Chatham County Board of Education, 318 F.2d 425 (C.A. 5, 1963). Finally, in Jefferson County, this Court en banc set forth a specific decree to be entered in each of the consolidated school desegregation cases there on appeal, and to serve as a model for all such cases in this circuit. Similar action is now

essential in this case. We have therefore formulated a proposed decree fashioned around the peculiar circumstances of Mobile, and we urge this Court to direct the court below to enter that decree.

In its 1966 decision in this case, 364 F.2d 896, at p. 898, this Court pointed out that "it has been the duty of appellate courts to interpret and reinterpret" the meaning of "deliberate speed" and, thus, the constitutional duty of school systems to desegregate. Furthermore, this Court has recognized the fact that relief must change and become more exacting and the transition to a non-racial school system, accelerated. In Price v. Denison Independent School District, 348 F.2d 1010 (C.A. 5, 1965), at 1012 this Court quoted from Ross v. Dyer, 312 F.2d 191 (C.A. 5, 1963), at p. 194:

> . . . It is now clear that even though the 1960 order prescribes a plan in specific detail, this is not the end of the matter. The District Court of necessity retains continuing jurisdiction over the cause. This means it must make such adaptations from time to time as the existing developing situation reasonably requires to give final and effectual voice to the constitutional rights of Negro children. (Emphasis added.)

In order to assist the district court in fulfilling its obligations in making these adaptations, it is appropriate and necessary that the lower court be ordered to enter the attached decree.

CONCLUSION

For the reasons set forth in this brief we respectfully request this Court to remand this case to the district court for the entry of the proposed decree attached hereto.

Respectfully submitted,

VERNOL R. JANSEN
United States Attorney

JOHN DOAR
Assistant Attorney General

FRANK DUNBAUGH
OWEN FISS
BRIAN LANDSBERG
WALTER GORMAN
FRANK HILL
Attorneys
Department of Justice

Certificate of Service

I hereby certify that on November 5, 1967, I served a copy of the United States' Brief to which this is attached upon each party in this case, by sending by United States air mail a copy thereof, postage prepaid, to:

Vernol R. Jansen, Jr., Esquire
United States Attorney
United States Courthouse
Mobile, Alabama 36602

Charles H. Jones, Jr., Esquire
NAACP Legal Defense and
Education Fund, Inc.
10 Columbus Circle
New York, New York 10019

Michael Davidson, Esquire
NAACP Legal Defense and
Education Fund, Inc.
10 Columbus Circle
New York, New York 10019

Abram Philips, Jr., Esquire
510 Van Antwerp Building
Dauphin Street
Mobile, Alabama 36602

Vernon Z. Crawford, Esquire
578 Davis Avenue
Mobile, Alabama 36602

_____
Attorney
Department of Justice

APPENDIX

PROPOSED DECREE

It is ORDERED, ADJUDGED and DECREED that the defendants, their agents, officers, employees and successors and all those in active concert and participation with them be and they are permanently enjoined from discriminating on the basis of race or color in the operation of the Mobile school system. As set out more particularly in the body of the decree, they shall take affirmative action to disestablish all school segregation and to eliminate the effects of the dual school system:

I

STUDENT ASSIGNMENT

A. The defendants shall, to the extent feasible, make assignments of students and draw attendance area lines in such a way as to eliminate the effects of past racial decisions in assigning students, drawing attendance lines, and constructing school buildings.

B. In making administrative transfers where necessary to relieve conditions of overcrowding and for the purpose of changing school use, the defendants

shall, where possible, do so in a manner consistent with the objective of desegregating their schools. To that end, defendants shall, for the second semester of the 1967-68 school year assign a sufficient number of elementary students attending the Council, Emerson, Palmer, Howard, Grant, Gorgas, Stanton Road, Brazier, Thomas, Hillsdale, and Whitley schools, to the Arlington, Craighead, Ellicott, Glendale, Bienville, Old Shell Road, Crichton, Forest Hill, Whistler, Dickson, Chickasaw, Dodge, Eight Mile, Fonde, Mertz, Shepard, Westlawn, and Woodcock schools to relieve the overcrowded conditions at the first listed schools and to equalize the ratios of pupils per permanent teaching station at these schools; upon written request a student so transferred in 1967-68 may be allowed to remain at the school he is presently attending.

C. For the beginning of the second semester of the 1967-68 school year, the defendants shall assign to the school serving the elementary attendance areas in

which they live, all those Negro students presently living in attendance areas serving formerly white schools, except:

1. Students, upon their written request, may be allowed to remain at the schools they are presently attending; and
2. The number of students transferred will not exceed the emergency capacity of the receiving school, as already established by defendants.

D. The defendants shall not make administrative transfers of students which have the effect of perpetuating racial segregation, nor shall they fail to make administrative transfers because they would promote desegregation.

E. Transportation shall be provided to those students who are assigned to schools under paragraphs B and C above, in those cases where the new school is located more than two (2) miles from the student's residence.

F. After the attendance areas are redrawn to achieve the desegregation of the system as provided in section IV of this decree, all students will be required to attend the school serving their zone, absent some compelling non-racial reason.

II

CONSTRUCTION

To the extent consistent with the proper operation of the school system as a whole, the school board will, in locating and designing new schools, in expanding existing facilities, and in consolidating schools, do so with the object of eradicating past discrimination and of effecting desegregation. The school board will not fail to consolidate schools because desegregation would result.

Until such time as the Court approves a plan based on the survey conducted pursuant to paragraph IV herein, construction shall be suspended for all planned building projects at which actual construction has not been commenced, including the Williamson, Howard, (Northside) and Central Texas Street projects.

Leave to proceed with particular construction projects may be obtained prior to the completion of the survey upon a showing by the defendants to the Court, that particular building projects will not have the effect of perpetuating racial segregation.

III

FACULTY AND STAFF ASSIGNMENTS

A. Race or color will not be a factor in the hiring, assignment, promotion, demotion, or dismissal of teachers and other professional employees, except that race will be taken into account for the purpose of counteracting or correcting the effect of past segregated assignment of faculty and staff under the dual school system.

B. The faculty and staffs at each school will be reassigned and new vacancies filled so that by the start of the 1968-69 school year no faculty or staff will be recognizable as being tailored for a heavy concentration of Negro or white students.

C. Each new teacher, including those who begin work during the remainder of the 1967-68 school year, will be assigned to a school in which the faculty and staff is predominantly composed of members of the opposite race, if a vacancy exists for which such new teacher or employee is qualified. This provision shall remain in effect until the defendants demonstrate to this Court that no faculty or staff is recognizable as being tailored for a heavy concentration of Negro or white students.

D. Each vacancy filled by the reassignment of teachers, including those occurring during the remainder of the 1967-68 school year, will be filled by a qualified teacher of the opposite race except where such a teacher is not available.

E. The defendants shall, to the extent educationally feasible, reassign teachers and staff, for the beginning of the second semester of the 1967-68 school year, on a desegregated basis, so that no school has a faculty and staff which is composed exclusively of one race, and, take affirmative steps to accomplish desegregation of its school faculties and staffs, including substantial desegregation of faculties in as many schools as possible.

F. In reassigning the faculties, teachers should be assigned and reassigned in such a manner that the abilities, experience, specialties, and other qualifications of both white and Negro teachers in the system will be, insofar as administratively feasible, distributed evenly among the various schools in the system.

G. Teachers and other professional staff members may not be discriminatorily assigned, dismissed, demoted, or passed over for retention, promotion, or rehiring, on

the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system shall be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system shall be evaluated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the Clerk of the Court, serving copies upon opposing counsel, within five (5) days after such dismissal, demotion, etc., as proposed.

H. The Board will develop a plan to encourage voluntary transfers by teachers in order to achieve faculty desegregation. That plan shall include the following measures: (1) All teachers in the system should be advised in writing that they have a right to transfer to another school for the purposes of achieving

desegregation and they should also be advised of the procedures for exercising that right; (2) A questionnaire shall be sent to all teachers in the system inquiring as to whether they would be willing to transfer to another school for the purpose of desegregation; (3) Unless there is no vacancy in any school requested, those requests for transfer shall be honored; (4) In the course of the 1967-68 school year and each school year thereafter the defendants shall conduct training programs for the purpose of encouraging transfers of teachers, establishing exchange programs for various schools, and preparing faculty and staff to teach in desegregated situations; and (5) The defendants shall immediately begin reviewing all personnel files to ascertain where each teacher might best be assigned in order to meet the requirements of this decree.

In the event that an insufficient number of teachers and other staff members voluntarily agree to accept positions at schools where their race is in the minority to meet the requirements of this decree, additional teachers and staff members will be reassigned so that all the standards of the decree are fully satisfied.

IV

SURVEY

The defendants shall conduct a survey of their school system and report to the Court, by February 1, 1968, the results of such survey, and shall specifically report as follows:

A. The defendants shall prepare a map for each school showing the location, by race and grade, of each student in the school system during the 1967-68 school year.

B. Recommendations for redrawing attendance zone lines to achieve desegregation of the schools.

C. Recommendations for the reorganization of the "feeder" system consistent with the objective of achieving desegregation.

D. A description of each school in the school system to include:

1. The size of each site and whether it is suitable for permanent use, suitable for temporary use, or should be abandoned;

2. The number of buildings on each site and as to each, whether it is suitable for permanent use, suitable for temporary use or should be abandoned;

3. The standards and criteria used to determine whether buildings and sites are suitable for permanent use, suitable for temporary use, or should be abandoned;

4. The number of regular, special and portable classrooms at each school building and the number of square feet in each such classroom;

5. Recommendations for the future use (including grades to be accommodated) of each school building and site for the next ten years, including the need for additional classrooms and the information upon which such recommendations are based.

E. A property inventory to include:

1. A list of all sites currently owned;

2. A list of all sites which the defendants have present plans to acquire and the size and intended use of such sites;

3. The basis for selection of all sites listed under numbers 1 and 2.

F. The status of construction of each school building currently under construction and the status of planning for the use of sites currently owned.

G. A forecast of enrollment at each school for the next ten years and the information upon which such forecast shall be based.

V

ACTIVITIES AND PROGRAMS

No student shall be segregated or discriminated against on account of race or color in any service, facility, activity or program conducted or sponsored by the school system, including all inter-school activities.

VI

TRANSPORTATION

The defendants shall undertake a program to disestablish the dual system of transportation based on race and to establish a unitary non-racial transportation system available to all eligible students.

VII

REPORTS

A. Three weeks before the end of the first semester of the 1967-68 school year, defendants will file a report with the Court, and serve copies on opposing counsel, showing by race, grade and school transferred from and to, the number of students they expect to transfer under I B and I C above, and within a week after the start of the second semester they shall file and serve a comparable report showing the number who actually transferred.

B. Three (3) weeks before the end of this semester and within one week after the start of the second semester the defendants will submit reports to the Court, and serve copies on opposing counsel, showing respectively, the number of teachers, by race, grade (or where appropriate subject taught), and school, whom they, (1) expect to be reassigned under III E above and (2) the number actually reassigned.

C. On June 10, of each year beginning in 1968, defendants will submit a report to the Court, and serve copies on opposing counsel, showing the number of persons, by school, grade (where appropriate), and race they

anticipate will be employed for the fall semester. Within one week after the day classes begin for the fall semester in 1968 and each succeeding year defendants will submit a report to the Court, and serve a copy on opposing counsel, showing the number of teachers actually working at each school by grade (where appropriate) and race.

D. On the same dates set forth in VII C, above, reports will be submitted to the Court, and a copy served on opposing counsel, showing the number of students by school, grade, and race, expected and actually enrolled at the schools in Mobile County.

E. On February 1, 1968 and within one week after the opening of each school year, defendants shall submit a report to the Court and serve copies on opposing counsel, showing the number of faculty vacancies, by school, that have occurred or been filled by the defendants since the order of this Court or the latest report submitted pursuant to this sub-paragraph. This report shall state the race of the teacher employed to fill each such vacancy and indicate whether such teacher is newly employed or was transferred from within the system.

The tabulation of the number of transfers within the system shall indicate the schools from which and to which the transfers were made. The report shall also set forth the number of faculty members of each race assigned to each school for the current year.