

Landsberg

No. 23724

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RALPH STELL, ET AL., PLAINTIFF AND APPELLANT,
UNITED STATES OF AMERICA, PLAINTIFF-INTERVENOR
AND APPELLANT, AND THE BOARD OF PUBLIC EDUCATION
FOR THE CITY OF SAVANNAH AND THE COUNTY OF
CHATHAM, DEFENDANT AND APPELLANT

v.

LAWRENCE ROBERTS, ET AL., INTERVENORS AND APPELLEES

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

BRIEF FOR PLAINTIFF-INTERVENOR AND APPELLANT

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STATEMENT

The appeal in this school desegregation case is taken by the Negro plaintiffs, by the United States as plaintiff-intervenor, and by the defendant school board, all of whom seek review of the District Court's order of April 1, 1966.^{1/} In that order (Supp. R. 2)

^{1/} This case began in January, 1962. It has a lengthy and complex history in the District Court and in this Court. Much of the history is omitted from this statement for the sake of brevity and clarity, but is described in Appendix A to this Brief.

the court below ordered the appellant school board to follow the plan for operation of the school system proposed on behalf of white children who had intervened in the case.^{2/} The court rejected the plan proposed by the United States and the plan proposed by the school board.

The plan approved by the court below permits students at preregistration or final registration to choose a school within their residential attendance area as established by the Superintendent of Schools (2d Supp. R. 13-14, para. 3, 4). Transfer forms are to be made available at the Superintendent's office (Id. 14, para. 4). Criteria for assigning or transferring students are to be:

- (1) the choice of the pupil or his parents or guardian,
- (2) availability of space and facilities in and for the school chosen,
- (3) proximity of the school to the place of residence of the pupil, and
- (4) the age and mental qualifications of the pupil. (Id. 12-13, para. 1).

^{2/} The white intervenors' plan is found in 2d Supp. R. 12-18.

The plan additionally provides (Id. 17, para. 14):

In addition to the criteria herein-
before set forth, the Defendant Board shall
in making or granting assignments and/or
transfers take into consideration the
similarity of mental qualifications,
such as intelligence, achievement, progress
rate and other aptitudes, such to be deter-
mined upon the basis of Nationally standardized
tests. No student shall have the right to be
assigned or transferred to any school or class
the mean I.Q. of which exceeds the I.Q. of the
student, nor shall a student be assigned or
transferred to any school or class, the mean
I.Q. of which is less than that of the student,
without the consent of the parent or guardian.

The plan provides that students new to the school
system or moving from one district to another are to "be
assigned to their normal neighborhood school." (Id.
17, para. 14)

The plan does not provide for faculty desegrega-
tion. The court below found that the school board
discriminated against white teachers, and ordered an
end to that discrimination. (Supp. R. 6, 7, 26). The
court deferred all questions relating to the integration
of faculty until after the desegregation plan required
by its order is put into effect and the discrimination
in the employment and pay of teachers is terminated.
(Supp. R. 26).^{3/}

^{3/} The Court also held that the United States had
no standing to question actions or rulings in the case

(continued on following page)

After these appeals were taken the school board filed in the district court a motion to stay the judgment pending a decision by this Court on the merits. The district court refused a stay, and the board then filed in this Court a motion to stay the judgment. On June 7, 1966, this Court granted the stay.

3/ (continued from preceding page)

prior to the date it intervened (November 12, 1965). The Court held that depositions taken by attorneys of the United States, relating to the mechanics of the plan in effect in 1965, were inadmissible. (Supp. R. 9-11).

4 /
SPECIFICATION OF ERROR

The district court erred in approving the desegregation plan submitted by the white intervenors which departed significantly not only from standards established by this Court but from the mandate of this Court in a prior appeal of this case.

ARGUMENT

1. The method of assigning pupils adopted by the court below does not meet constitutional standards. Under the plan required by the district court Negro children who have been assigned to schools on the basis of race are to continue in those schools unless they request a transfer and their request is granted. In ruling on requests for transfer the school board is to consider the "mental qualifications of the pupil" (2d Supp. R. 13, par. 1), who cannot transfer to a school or class the mean I.Q. of which exceeds his own I.Q. (2d. Supp. R. 17, para. 14). White children already in the school need not meet such criteria -- in fact, by definition, many of them fall below the mean. This court has already noted, in a prior appeal in this case, the constitutional infirmity of such a scheme.

⁴ / While we believe it was error for the district court to hold that the United States had no standing to question any actions or rulings in the case prior to the date of its intervention under section 902 of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2, and that the depositions taken by the attorneys for the United States were inadmissible (see note supra), we do not specify these rulings as error on appeal because they pose no bar to the relief we think is appropriate in this case.

Stell v. Savannah-Chatham County Board of Education, 333 F. 2d 55, 61-62 and 65 (5th Cir. 1964), cert. denied 379 U.S. 933 (1964). See also United States v. Jefferson County Board of Education, (panel slip op. at 36), F. 2d (December 29, 1966) adopted per curiam on rehearing en banc, F. 2d (March 29, 1967), in which this Court said:

A number of district courts still mistakenly assume that transfers under Pupil Placement Laws -- superimposed on unconstitutional initial assignment -- satisfy the requirements of a desegregation plan.

Even apart from the imposition of intelligence criteria on students seeking transfer, the plan approved below falls far short of current standards because it fails to abolish initial racial assignments. As this Court said in United States v. Jefferson County Board of Education, (panel slip op. 104), supra:

At the minimum, a freedom of choice plan should provide that: (1) all students in desegregated grades shall have an opportunity to exercise a choice of schools. Bradley v. School Board of the City of Richmond, 4 Cir., 1965, 345 F. 2d 310, vacated and remanded, 1965, 382 U.S. 103; (2) where the number of applicants applying to a school exceeds available space, preferences will be determined by a uniform non-racial standard, Stell v. Savannah-Chatham County Board of Education, 5 Cir., 1964, 333 F. 2d 55, 65; and (3) when a student fails to exercise his choice, he will be assigned to a school under a uniform non-racial standard, Kemp v. Beasley, 8 Cir., 1965, 352 F. 2d 14, 22.

None of these requirements are met by the plan which the district court ordered the school board to follow.

2. The district court approved the white intervenors' plan on April 1, 1966. It was clear at that time that a plan which failed to contain a provision designed to make an "immediate start toward elimination of race as a basis for the employment and allocation of teachers, administrators, and other personnel", (Singleton v. Jackson Municipal Separate School District, 355 F. 2d 865, 870 (C.A. 5, 1966)), was defective. Yet the district court overruled the Government's and the plaintiffs' objection, (R. 141, 145), on this point, deferring all questions relating to the elimination of segregated faculty and staff until the board terminated what the court believed to be a practice of discrimination against white teachers.^{5/} Supp. R. 26; 255 F. Supp. at 99. Even assuming that the district court was correct in finding that white teachers were victims of racial discrimination at the hands of the board, its failure to require a provision on faculty and staff, consistent with this Court's holding in Singleton, was error.^{6/} It makes little sense to further delay the rights of Negro children to

^{5/} It should be noted that the board wished to desegregate its faculty beginning in the 1967-68 school year (R. 163-164).

^{6/} We do not discuss the correctness of the trial court's finding, because we believe that faculty desegregation would render the problem moot.

faculty desegregation on the ground that others--
in this instance white teachers--may also be entitled to
relief which can be afforded without reference to desegregation.

Most recently this Court referring to the obligation of school boards to eliminate segregated faculty and staff, said (United States v. Jefferson County Board of Education, (panel slip. op. at 106-109) supra at):

* * * [U]ntil school authorities recognize and carry out their affirmative duty to integrate faculties as well as facilities, there is not the slightest possibility of their ever establishing an operative non-discriminatory school system. [Footnote omitted.] The transfer of a few Negro children to a white school does not do away with the dual system. A Negro faculty makes a Negro school; the Negro school continues to offer inferior educational opportunities; and the school system continues its psychological harm to Negroes as a class by not putting them on an equal level with white children as a class. [Footnote omitted.] To prevent such harm or to undo the harm, or to prevent resegregation, the school authorities, even in the administration of an otherwise rational, nondiscriminatory policy, should take corrective action involving racial criteria.

* * *

We agree with the Eighth Circuit's statement: "The lack of a definite program will only result in further delay of long overdue action. We are not content at this late date to approve a desegregation plan that contains only a statement of general good intention. We deem a positive commitment to a reasonable program aimed at ending segregation of the teaching staff to be necessary

for the final approval of a constitutionally adequate desegregation plan." Clark v. Board of Education of the Little Rock School District, No. 18,368, December 15, 1966 (unreported).

After setting forth the position of the Eighth Circuit, this Court said:

It is essential that school officials (1) cease practicing racial discrimination in the hiring and assignment of new faculty members and (2) take affirmative programmatic steps to correct existing effects of past racial assignment.

3. The plan approved by the court is defective in other particulars as well. The notice provision requires publication of the plan in a newspaper of general circulation in the county only once a year. There is no requirement that it be published during pre-registration and registration when the opportunity to apply for transfer is available or that it appear in terms understandable to a layman. This kind of publication provision clearly falls short of what was required when the district court entered its order. See e.g., Singleton v. Jackson Municipal Separate School District, 355 F. 2d 865, 871 (C.A. 5, 1966), where the board used newspaper publication and radio and television facilities to inform pupils and their parents of their rights under the desegregation plan. In the prior appeal of this case the court said (333 F. 2d at 65):

The school boards must give timely notice of [the choice available to pupils], and in such a manner and terms as to bring home to Negro students notice of the rights that are to be accorded them.

There can be no question but that the notice provision falls far short of the standards set forth by this Court in the decree attached to its opinion in United States v. Jefferson County Board of Education, (en banc slip op. at 10-11) supra, which requires conspicuous publication in a newspaper of general circulation, use of radio and television media, as well as individual notice to the parents of students.

There is no provision requiring the board to conform its transportation policy to serve to the maximum extent feasible a system by which students choose the school they attend. See United States v. Jefferson County Board of Education, (en banc slip op. at 13). There is no provision prohibiting discrimination in services, facilities, activities and programs. (En banc slip op. at 16.) There is no provision dealing with new construction. Id. (en banc slip op. at 18). There is no provision for

reports to the court. Id. (en banc slip op. at 20-26). In short, the plan approved by the court below is inadequate in numerous respects when viewed in light of this Court's current standards.

4. In United States v. Jefferson County Board of Education, (en banc slip op. 8-24), supra, this Court attached to its opinion a decree to be entered in the cases before it. The Court stated, (panel slip op. 113):

Some schools have made no move to desegregate or have had plans rejected as unsatisfactory by district courts or the HEW. We expect the provisions of the decree to be applied in proceedings involving such schools. Other schools have earlier court-approved plans which fall short of the terms of the decree. On motion by proper parties to re-open these cases, we expect these plans to be modified to conform with our decree.

The need for such an approach was explained by the Court as follows (panel slip op. at 35-36):

The first school case to reach this Court after Brown v. Board of Education was Brown v. Rippey, 5 Cir. 1956, 237 F. 2d 796. Since then we have reviewed 41 other school cases, many more than once. [Footnote omitted.] The district courts in this circuit have considered 128 school cases in the same period. Reviewing these cases imposes a taxing, time-consuming burden on the courts not reflected in statistics. An analysis of the cases shows a wide lack of uniformity in areas where there is no good reason for variations in the schedule and manner of desegregation. [Footnote omitted.] In some cases there has been a substantial time-lag between this Court's opinions and their application by the district courts. [Footnote omitted.] In certain cases -- which we consider unnecessary to cite -- there has even been a manifest variance between this Court's decision and a later district court decision. A number of district courts still mistakenly assume that

transfers under Pupil Placement Laws -- superimposed on unconstitutional initial assignment -- satisfy the requirements of a desegregation plan. The lack of clear and uniform standards to govern school boards has tended to put a premium on delaying actions. In sum, the lack of uniform standards has retarded the development of local responsibility for the administration of schools without regard to race or color.

This case has been in the courts since January 1962. The plaintiffs' request for relief was not acted upon by the district court for more than 14 months. It was then denied by the district court (220 F. Supp. 667). Shortly thereafter this Court granted the relief sought by entering an injunction pending appeal. 318 F. 2d 425. Even though this Court outlined in considerable detail the standards for desegregation plans in the last appeal of this case (333 F. 2d 55), the district court approved a plan wholly inconsistent with those standards. Had this Court not stayed the district court's order of April 1, 1966 approving the white intervenor's desegregation plan, the Savannah-Chatham County school system would be required to desegregate under a plan inadequate in many particulars and discriminatory in its operation; a plan which the school board does not wish to employ.^{7/}

^{7/} The school board's plan comes much closer to conforming to the Jefferson County decree, but departs from it in some important particulars. It is reproduced beginning on page 12 of the appellant school board's brief in this case and beginning on page 159 of the Record. The plan does not contain the following major provisions of the Jefferson County decree: an equalization provision, a construction provision, a provision for a second choice when first

(Cont. on next page)

In United States v. Jefferson County Board of Education, supra, the Court reversed the judgments below and remanded each case for entry of the decree attached to its opinion. We believe that this would be an appropriate disposition of this appeal. It would avoid further delays and bring desegregation standards in the Savannah-Chatham County school system in harmony with the standards used in other school systems in the fifth circuit which are desegregating under court-approved plans.

7 / (Cont. from preceding page)

choice is denied, or a reporting provision. It contains provision for faculty desegregation, but does not provide for correcting the effect of past segregated assignments. The school board's plan allows criteria in addition to proximity to be used in ruling on a choice. These additional criteria are: (1) availability of space and facilities; (2) education and courses of the student; (3) the student's health; (4) hardship; (5) transportation; and (6) discipline.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should reverse the order of the district court and enter an order directing the district court to adopt the decree attached to this Court's opinion in United States v. Jefferson County Board of Education, supra.

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CERTIFICATE OF SERVICE

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APPENDIX A

History of Proceedings

In January, 1962, plaintiffs, Negro children attending Chatham County public schools brought suit under 28 U.S.C. 1343 and 42 U.S.C. 1983 in the District Court for the Southern District of Georgia. They prayed for an injunction restraining the defendant school board from operating a dual school system based on race and prayed in the alternative for an order requiring the defendant school board to submit a desegregation plan. On January 31, 1963, a group of white children attending the Chatham County public schools moved to intervene. On April 3, 1963, the district court granted their motion.

On May 13, 1963, the district court entered an order denying plaintiffs' request for relief, under the assumption that Brown v. Board of Education, 347 U.S. 483 (1964) permitted the defendant board to segregate school children on the basis of race upon a showing that white children's educational achievement and psychometric intelligence level is superior to that of Negro children. 220 F. Supp. 667. On May 15, 1963,

plaintiffs appealed to this Court. On May 24, 1963, this Court entered an injunction pending appeal which required the district court to order the board to desegregate one grade in September 1963 and a grade-a-year thereafter. 318 F. 2d 425.

On June 18, 1964, this Court decided the merits of that appeal outlining in considerable detail the standards for desegregation plans. 333 F. 2d 55. In the meantime, the board, in compliance with this Court's injunction pending appeal, submitted a desegregation plan which called for the desegregation of the twelfth grade in September, 1963 and a grade-a-year thereafter. On August 31, 1964, the board filed amendments to its desegregation plan seeking to comply with this Court's decision of June 18 (R. 15-17). Plaintiffs filed objections to the amended plan (R. 18-20) and the white intervenors moved to postpone a hearing on the matter until their petition for a writ of certiorari filed in the Supreme Court was denied or granted and the case decided. The district court granted the intervenors' motion postponing a hearing on plaintiffs' objections

(R. 20-22). On December 7, 1964, the Supreme Court denied the intervenors' petition for a writ of certiorari (379 U.S. 933) and on August 24, 1965, the district court entered its order on the board's amended desegregation plan (R. 119-130).[/] In that order, the district court observed (R. 121):

[T]he Court of Appeals necessarily left open for this Court to determine "the manner in which it (integration) is to be accomplished." If it may be accomplished by the "assignment of individual students to particular schools on the basis of intelligence, achievement or other aptitudes upon a uniformly administered program" without race being a factor in the making of assignments, such assignments may be made and, under the evidence in this case, should be made.

* * *

The Court takes judicial notice of the fact that in all well regulated school systems at all times school children in general and regardless of race are permitted to progress on a basis of intelligence, ability, achievement or other aptitudes. In no case called to the Court's attention has it been held that there is any constitutional requirement that children differing in ages and qualifications be educated together. In Brown it was held that only school children of "similar age" and the "same educational qualifications" are entitled to be classed together in schools under the equal protection clause of the 14th Amendment.

[/] This order is reported in 255 F. Supp. 83.

The district court went on to note evidence which it believed demonstrated that Negroes' educational achievement and ability level was below that of whites (R. 122-128). The court then said (R. 128):

In the plan filed by the defendant School Board now before the Court for consideration, there is no indication that integration is to be accomplished in any other manner than congregating children because of race or color. In fact, the plan takes no account of age and qualifications and the permissible criteria for classification, other than race or color, pointed out by the Fifth Circuit Court of Appeals.

The desegregation plan which the board submitted did not change existing racial assignments (R. 155). With its amendments (R. 15-17) it called for the desegregation of the 1st, 10th, and 11th grades for the 1964-65 school year (the 12th grade was desegregated in 1963-64); the 2nd and 9th for the 1965-66 school year; the 3rd and 8th for the 1966-67 school year; the 4th and 7th for the 1967-68 school year; and the 5th and 6th for the 1968-69 school year (R. 16). It permitted the parent of a child in a grade reached by the plan to apply for a transfer to any school within the child's residential attendance area as established by the Superintendent (R. 154-156). The plan vested in the Superintendent authority to act on the transfer application and established the following factors as guidance for the

Superintendent: "(1) choice of the pupil or his parents or guardians, (2) availability of space and facilities in and for the school chosen, and (3) proximity of the school to the place of residence of the pupil." (R. 154).

Referring to this plan, the district court ordered (R. 129):

It is Ordered that the plan filed by defendants be and the same is disapproved and disallowed and defendants are hereby ordered promptly to prepare and submit a plan of desegregation not inconsistent with but will accord with (1) the unquestioned and undisputed facts adduced at trial and subsequent hearing of this case; (2) the decision of the Fifth Circuit Court of Appeals; and (3) the decision of the Supreme Court in Brown, to the end that race or color will not be factors. The plan should assure that integration may be accomplished in such a manner as to provide the best possible education for all school children with the greatest benefits to all school children without regard to race or color, but with regard to similarity of ages and qualifications.

The court further ordered the defendant school board to (R. 130):

continue to collect and . . . give effect to test results so that race and color as such shall play no part in the assignment of school children or teachers and so that classifications according to age and mental qualifications may be made intelligently, fairly and justly.

The district court also made a ruling bearing on the board's employment practices as related to teachers. The court said (R. 129-130):

Intervenors stated that they would insist upon white teachers being no longer discriminated against in favor of negro teachers.

It having been made to appear at the trial of this case (Appendix, p. 16) that in Savannah "The mean yearly salary of negro teachers markedly exceeded that of the white teachers", and that "Negro principals assigned relatively lower competence ratings to the Negro teachers under their supervision than the white principals assigned to the white teachers under their supervision."

It is Further Ordered that the plan shall provide that discrimination in favor of Negro and against White teachers shall be terminated.

In response to the court's order, the board on September 1, 1965, filed a motion for a new trial and a motion to amend the court's judgment (R. 131-136). On November 3, 1965, another hearing was held. At this hearing the white intervenors submitted a desegregation plan in which the board concurred (R. 143). The board thereupon withdrew its prior motions. On November 9, 1965, the United States filed a motion to intervene pursuant to section 902 of the Civil Rights Act of 1964,

42 U.S.C. 2000h-2, (R. 139-140) which was granted on November 15, 1965. The United States, together with its motion to intervene, filed objections to the plan submitted on November 3, 1965 (R. 141-142). The plaintiffs also filed objections to that plan (R. 142-144) and, in addition, moved for further relief. The plan was then withdrawn and amended to meet some of the objections and on November 17, 1965, was resubmitted.

Another hearing was held on December 22, 1965. Prior to this hearing, the United States through its attorneys took the depositions of ten witnesses for the purpose of submitting proof relating to the mechanics of the plan then in effect (this was the plan disapproved by the district court in its August 23, 1965 order), its discriminatory administration and its ineffectiveness. At the December 22nd hearing the following stipulation was entered into by the parties (225 F. Supp. at 91):

"All parties agree that there shall be submitted to Honorable F. M. Scarlett, United States District Judge, the following questions for determination in the above stated case:

1. The admissibility, particularly with reference to Rule 26, of the depositions taken in Savannah, Georgia on December 22, 1965, upon notice by the Government and the Exhibits referred to therein and if such depositions are admitted then the questions as to relevancy and materiality thereof;

2. All Motions pending in the above stated case, including the motion filed by Plaintiff to Dismiss the Defendants Intervenor as parties, if such motion is still pending;

3. The approval of a plan for desegregation.

It is further agreed that briefs shall be filed and served upon opposing Counsel not later than January 20, 1966 and any reply briefs shall be filed and served not later than January 31, 1966."

After the hearing, the board resubmitted the plan that was disallowed by the district court in its order of August 23, 1965, stipulating that it was to apply only to 1966-67 school year. The board appended to this plan another plan which was to become effective for the 1967-68 school year. (See R. 159 ff. and appellant school board's brief, pp. 12 ff.) The United States also filed a proposed desegregation plan. In addition to these plans, there was before the court the plan proposed by the white intervenors submitted on November 3, 1965, withdrawn and amended and resubmitted on November 17, 1965.

On April 1, 1966, the district court entered its order approving the plan submitted by the white intervenors (Supp. R. 27). It also entered its findings of fact and conclusions of law. The court found that the board discriminated against white teachers in favor of Negro

teachers, referring to evidence which it believed indicated that white applicants for teaching positions in Savannah were required to have a minimum score of 500 on the National Teachers Examination before they could be employed, while Negro applicants were required to have a minimum score of only 400 (Supp. R. 6-7). The court also noted the difference between the mean yearly salary of white and Negro teachers which it had referred to in its ruling of August 23, 1965 (Supp. R. 7).

In its conclusions of law the court held (1) that the United States had no standing to question any actions or rulings in the case prior to November 12, 1965, the date it intervened, (2) that its order of August 23, 1965 was still binding and that "school children cannot be successfully integrated under conditions of massive integration without respect to age, mental qualifications, learning capacity, educability, and intelligence in general", (Supp. R. 8), and (3) that the depositions taken by attorneys for the United States were inadmissible (Supp. R. 9-11).

The court enjoined the board from maintaining in the operation of the Savannah-Chatham County School System any distinction based upon race or color but required the board to maintain and enforce distinctions based upon age, mental qualifications, intelligence, achievement and other

aptitudes upon a uniformly administered program. The court further ordered the board to "abolish every rule or policy under which colored applicants for school teacher positions or colored school teachers are accorded preference over white applicants or teachers as a result of race and color" and to "file with the court a detailed plan for the non-discriminatory hiring and payment of teachers without regard to race and color and in which intelligence, experience, competence and merit shall be controlling factors in the future employment and retention of teachers." (Supp. R. 26.) The court also ordered the board to "recite steps taken and to be taken to correct the injustices resulting from past discrimination." (Supp. R. 26.)

The court deferred all questions relating to the integration of faculty until after the desegregation plan as required by its order is put into effect and the discrimination in the employment and pay of teachers is terminated (Supp. R. 26). The court approved the desegregation plan submitted November 17, 1965 by the white intervenors and retained jurisdiction of the cause (Supp. R. 27).

The plaintiffs, the United States and the school board appealed from this order. The board then filed in the district court a motion to stay the judgment pending a decision by this court on the merits. The district court refusing to grant a stay, the board filed a motion to stay the judgment in this Court. On June 7, 1966, this Court granted the stay.

