IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Nos. 71-1767
71-1768

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

AARON LEE SMITH, et al.,

Plaintiff-Intervenor-Appellants,

v.

BOARD OF EDUCATION, INDEPENDENT SCHOOL DISTRICT NO. 1, TULSA COUNTY, OKLAHOMA, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Oklahoma

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BRIEF OF THE UNITED STATES ON REMAND

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STATEMENT

A. Procedural History

The procedural history of this case through November 2, 1971 appears at pages 1-5 in the brief of the United States

served on February 14, 1972. Subsequent events relevant to this proceeding are set forth below.[1/]

By its opinion of May 5, 1972 this court affirmed the decision of the district court which the United States and plaintiff-intervenor-appellants had appealed. Plaintiff-intervenor-appellants then petitioned the Supreme Court for a writ of certiorari. The petition requested review of the holding that segregation at five elementary schools was de facto and need not be remedied and of the holding that the secondary school desegregation plan was not racially discriminatory. Although the United States did not independently seek review of this court's decision, we filed a memorandum in September 1972. That memorandum suggested that no substantial legal issue was raised as to the secondary school plan, but as to the elementary schools we said that the petition:

1/ In addition, there was a subsequent appeal to this court by the school board, seeking to reverse the denial of a motion to stay desegregation of the four elementary schools which had been found to be de jure segregated. Nos. 72-1555 and 72-1789, decided April 10, 1973; 476 F.2d 621.

> necessarily raises the issue of what standards of evidentiary analysis should be applied in determining whether a school is de facto or de jure segregated. To this extent the question may be controlled by this Court's decision in Keyes v. School District No. 1, No. 71-507, in which oral argument has been set for October 12, 1972. As to this question, therefore, the Court may wish to defer action on the petition pending its decision in Keyes.

The Supreme Court followed this suggested course of action and did not rule on the petition until June 25, 1973, four days after the decision in Keyes. The order of the Court provides in relevant part:

> The petition for a writ of certiorari is granted, the judgment is vacated and case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of Keyes v. School District No. 1, _____ U.S. ____ (1973).

By order of September 21, 1973, this court ordered that briefs be filed "addressing the issues raised upon remand." The order set forth a briefing schedule, and the United States, as the original plaintiff and as an appellant in this Court, is filing this brief in accordance with the schedule established for Petitioners.

B. Facts

The facts are thoroughly discussed at pages 8-19 of our February 14, 1972 brief. However, certain facts which were not highlighted in that brief appear to assume more

importance now, in light of Keyes. In Keyes the Supreme Court attached significance to the fact that the school authorities had followed a "deliberate segregation policy at schools attended, in 1969, by 37.69% of Denver's total Negro population" (slip op. at 9), and that "teachers and staff had for years been assigned on a minority teacher-to-minority school basis throughout the school system" (id. at 10). When this case was tried approximately 85% of the black students in the district were assigned to segregated black schools; about 60% of the black students in the district attended the schools which have been held de jure segregated. See App. Ex. 14-35. The record reflects that as three of the five elementary schools involved in this appeal became black the school system changed their faculties from majority white to majority black.[2/]

The Keyes decision states (slip op. 11-12):

> Similarly, the practice of building a school--such as the Barrett Elementary School in this case--to a certain size and in a certain location, "with conscious knowledge that it would be a segregated school," 303 F. Supp., at 285, has a substantial reciprocal effect on the racial composition of other nearby schools.

2/ See discussion in our February 14, 1972 brief of Burroughs (p. 12), Emerson (p. 15), and Frost (p. 17). Hawthorne and Whitman have always had majority white faculties.

> So also, the use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools.

413 U.S. at 202

Our brief of February 14, 1972 presents, at pages 8-19 largely undisputed facts which appear in the record, showing the use of these discriminatory techniques at the five schools in question.

Finally, the Supreme Court held in Keyes that the facts relating to segregation in schools in one part of the school system created a prima facie case of segregation in another part of the system, even if the two areas are "separate, identifiable and unrelated units." (Slip op., p. 14). In Tulsa the record shows that the area in which the five schools here at issue are located is not separate, identifiable or unrelated to the area in which the schools held to be de jure segregated are located.

ARGUMENT

1. In our prior brief we urged that the district court erred in failing to apply the presumption, in systems with a history of de jure segregation, "against schools that are substantially disproportionate in their racial composition." (Gov't. brief of August 14, 1972, quoting Swann v. Board of Education, 402 U.S. 1, 26). After reviewing the detailed evidence showing the five schools in question were de jure segregated we urged this court to reverse "the judgment of the district court insofar as it finds that five elementary schools are de facto segregated...." We think the decisions in Keyes requires such a reversal, for the following reasons.

First, Keyes reaffirms the holding of Swann, supra that segregated schools in a system with a history of segregation are presumptively part of the dual system. Slip op., pp. 10-11. This presumption applies to formerly white schools which have become all black, as well as to traditionally black schools.[3/] This court held that the presumption had been overcome by proof that Tulsa followed a neighborhood school system and that there had been racial change in the neighborhoods in which the five schools were

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3/ See the discussion at p.28 of United States brief of February 14, 1972.

located. 459 F.2d 720 at 723-24. However, Keyes holds "that the mere assertion of [a neighborhood school] policy is not dispositive where, as in this case, the school authorities have been found to have practiced de jure segregation in a meaningful portion of the school system by techniques that indicate that the 'neighborhood school' concept has not been maintained free of manipulation." Slip op. at 22. This court has previously held: "As conceived, and as historically administered, the Tulsa neighborhood school policy has constituted a system of state-imposed and state-preserved segregation, a continuing legacy of subtle yet effective discrimination." United States v. Board of Education, 429 F.2d 1253, 1259 (10th Cir., 1970). Under the holding in Keyes the defendants have failed to show that their use of the neighborhood school policy was not done in a discriminatory fashion. Indeed, the evidence reviewed in our prior brief suggests discriminatory manipulation of the neighborhood school policy as to each of these five schools.

Second, Keyes holds that the type of proof presented by the plaintiffs there, of locating schools where they would be segregated, discrimination in student transfer policies and assignment of staff establishes a case of de jure segregation. This is precisely the kind of proof

presented by the United States as to the five schools here, and there is no district court finding -- indeed there is no evidence -- negating that proof.

Third, Keyes says that if Denver "is a dual school system, respondent School Board has the affirmative duty to desegregate the entire system 'root and branch.'" Slip op. at 23. If this Court does not find that the segregation at the five schools in question is de jure, it will have to confront the question of what the above-quoted phrase means, since there is no doubt that Tulsa was a dual school system.

2. Keyes does not directly address the question raised here concerning the closing of Carver Junior High and the operation of the senior high school plan, although the presumptions discussed above may arguably apply here. The senior high school plan has now been implemented and we understand that Carver Junior High has been reopened. Under these circumstances the question whether desegregation is being accomplished in a discriminatory fashion might best be resolved by the district court.

CONCLUSION

For the reasons stated above the decision of the district court holding that the five elementary schools are not de jure segregated should be reversed and the case

remanded for the development and implementation of an elementary school desegregation plan. If intervenors are still pressing their appeal as to the secondary school plan, the case should be remanded to the district court for consideration of the adequacy, under Keyes, of the plan as actually implemented, and intervenors should be allowed to participate in any district court proceedings on this issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this the 23rd day of October, 1973, I served two copies of the attached Brief of the United States on Remand upon counsel for the parties in this case as listed below by United States mail, postage prepaid:

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