IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL., Defendants	)	CIVIL ACTION NO. _____

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S APPLICATION FOR A
TEMPORARY RESTRAINING ORDER

STATEMENT OF FACTS

The following allegations supported by affidavits are set forth in the complaint and the affidavits and other documents affixed thereto:

The Columbus Air Force Base is located within Lowndes County, Mississippi. There are approximately 3,142 military men assigned to the base and about 299 civil service workers at the base.

In 1957 the Lowndes County Board of Education and the Board of Education of the Columbus Municipal School District agreed that the responsibility for providing public education to children living within Columbus Air Force Base would be assumed by the Columbus school district.

The Columbus school district has filed seven applications, pursuant to Title 20, section 631 et. seq. of the United States Code, for grants of federal funds to assist in the construction or improvements of school buildings to be used for the education of air base children. These applications were approved by the Commissioner of Education and since that date the federal government has paid or agreed to pay $939,875.87 in federal funds to the Columbus school district for this purpose. Columbus school district constructed or improved with the aid of the federal grants several schools within its jurisdiction, and in return the Columbus school district has from 1958 until the end of the 1962-63 school term educated air base children, including 1005 such children during the last school term.

In connection with each of its applications for school construction funds the Columbus Board gave a written "assurance", which is required by section 636(b)(1)(F) of Title 20, that:

> . . . the school facilities of such agency will be available to the children for whose education contributions are provided in this chapter on the same terms in accordance with the laws of the state in

> which the school district of such agency is situated, as they are available to other children in such school district . . . .

Notwithstanding the written assurance submitted as part of the Columbus Board's application for federal funds, the Board on August 22, 1963, adopted a resolution stating that when the schools of the Columbus district reopened for the regular fall term on Friday, August 30, 1963, the Board would no longer provide education for children residing outside the Columbus Municipal Separate School District, i.e., children living on Columbus Air Force Base.

As the affidavits affixed to the complaint allege, neither the United States Air Force nor any other agency of the federal government are able at this time to provide education for Columbus Air Base children. The federal government was not notified prior to August 23, 1963, that this action by the Columbus Board would be taken, or even that any such action was contemplated. There are no school facilities located on Columbus Air Force Base. It is, of course, physically impossible for the federal government to construct school facilities, or to modify existing facilities which might be adaptable for school purposes, in the near future. At best, several weeks would elaspe before even semi-adequate school facilities could be provided on the base, and a much longer time would be required before school facilities, teachers and other educational necessities could be organized on the base which would provide an education comparable to that normally provided by the Columbus school board.

If the defendants are allowed to exclude the air base children from their schools, it is quite obvious that for some time to come these children will not receive any formal education. This will be true even if the United States expends great energy and large sums of money as rapidly as possible to provide education for these children.

ARGUMENT

The plaintiff has applied to this Court for a temporary restraining order to compel the defendants to admit the Air Base children to the Columbus schools. As the prayer of the complaint reveals, the ultimate relief sought in this case is in two parts. First, the United States seeks to compel the defendants to provide public education for the children of servicemen and civilian employees of the United States who reside within Columbus Air Force Base. Second, the United States seeks an order requiring the defendants to eliminate their settled practice of assigning children of Columbus Air Force Base personnel, whether living on or off the base, to local schools on the basis of race or color.

The second part of the relief sought is also the subject matter of lawsuits in several other federal districts. See, e.g., United States v. Biloxi Municipal Separate School District, C.A. No. 2643 (S.D. Miss.); United States v. Gulfport Municipal Separate School District, C.A. No. 2678 (S.D. Miss); United States v. Madison County and City of Huntsville Board of Education, C.A. No. 63-23 (N.D. Ala); United States v. Bossier Parish School Board, C.A. No. 9282 (W.D. La.); United States v. Mobile Board of Education, C.A. No. 2964 (S.D. Ala.); and United States v. Prince George County School Board, C.A. No. 3536 (E.D. Va.). Each of these lawsuits, like this one, involves the question of whether local school boards which have obtained federal school construction grants may lawfully segregate federally-connected children within the local school system upon the basis of their race.

This question has received different answers in different courts. In the Eastern District of Virginia, after a trial, judgment was entered for the United States and the local board was permanently enjoined from segregating federally-connected children. In the Southern District of Mississippi, Judge Mize has dismissed the complaints in the Biloxi and Gulfport suits. Motions to dismiss have also been granted in the Western District of Louisiana and the Northern District of Alabama. No ruling has yet been made in the Southern District of Alabama. The defendants in the Virginia suit did not appeal the judgment for the United States. The United States has appealed each of the cases that have been dismissed in the district court.

The issue involved in each of the above pro-proceedings, which is also involved in the application of the plaintiff here for permanent injunctive relief, need not be reached in ruling upon the application of the United States for a temporary restraining order. The temporary restraining order we seek would not desegregate federally-connected children in schools of the Columbus Municipal Separate School District. It would merely serve the traditional function of preserving the status quo pending hearing on the motion for prelininary injunction. In short, the only question that need be reached on the application for a temporary restraining order is whether preliminary relief should be granted to compel the defendants to provide public education for Columbus Air Base children when school opens, and until such time thereafter as the legal issues are settled. This

education may be provided, under the terms of the temporary restraining order, on the same basis as it has been provided in the past.

Bearing in mind the narrow scope of the relief sought on the application for a temporary restraining order, we turn to the legal questions involved.

I. Defendants agreed in writing to educate Air Base children

A. Background -- the School Construction Act

The defendant Columbus School Board has filed seven applications with the United States Commissioner of Education for federal funds to be used for school construction purposes. The applications were filed pursuant to 20 U.S.C. 631 et. seq., the Federal School Construction Act of 1950.

The School Construction law was enacted in order to "provide assistance for the construction of urgently needed minimum school facilities in school districts which have had substantial increases in school membership as a result of new or increased federal activities," 20 U.S.C. 631. The "federal share" of any school construction project is computed according to the number and percentage of federal children who attend local schools. 20 U.S.C. 634-635. The Act sets forth the procedure to be followed in applying for federal funds for this purpose, and describes the information which must be included in the application papersand various "assurances" which must be given by the applicant. 20 U.S.C. 636.

Among other assurances which an applicant must give is an assurance that:

> . . . the school facilities of such agency will be available to the children for whose education contributions are provided in this chapter on the same terms, in accordance with the laws of the State in which the school district of such agency is situated, as they are available to other children in such school district. . . . 20 U.S.C. 636 (b)(1)(F). 1/

After the Commissioner of Education satisfies himself as to certain matters enumerated in section 636(b)(2), the statute provides that he "shall approve" the application and that he "shall pay" the approved amount in installments. Section 637(a).

Section 640 describes the conditions under which the Commissioner of Education is authorized to provide schools for federally-connected children. Section 641 authorizes the Commissioner, if he determines that certain requirements and assurances are not being complied with, to notify the applicant that it will not longer receive federal payments. Judicial review of any rejection of any application, or of any refusal to continue payments or make future payments, is provided for. Section 641(b).

B. The availability assurance requires the defendants to admit Air Base children to their schools

When the Columbus Board of Education applied for each federal grant under the School Construction Act it gave the assurance required by section 636 (b)(1)(F). To repeat, this assurance provides:

1/ The "school facilities" to which this assurance refers includes "classrooms and related facilities," and "initial equipment, machinery, and utilities necessary or appropriate for school purposes."

> . . . the school facilities of such agency will be available to the children for whose education contributions are provided in this chapter on the same terms, in accordance with the laws of the State in which the school district of such agency is situated, as they are available to other children in such school district. . . . 20 U.S.C. 636 (b)(1)(F).

The Columbus Board had, as the complaint makes clear, agreed with the Lowndes County Board to educate Air Base children; and the school construction funds were granted upon the representation to the Commissioner of Education by the Columbus Board that this was the purpose for which the Board sought federal construction funds.

Nothing in Mississippi law prohibits the defendants from educating the federal children. They have contracted to do so. Their refusal is a clear violation of their written assurance.

II. The assurance is a contractual obligation

The "availability" assurance is an obligation arising out of a contractual arrangement entered into between the United States and the Columbus School Board. See United States v. Prince George County School Board, No. 3536 (E.D. Va., June 24, 1963). Judge Mize appears to have agreed. See United States v. Gulfport Municipal Separate School District, C.A. No. 2678 (S.D. Miss. 1963). Pursuant to the statute the parties entered into an agreement by which the United States would provide school construction funds in exchange for certain "assurances" on the part of the Columbus Board. An "assurance" is a promise, Caband v. Federal Insurance Co., 37 F. 2d 23 (C.A. 2, 1930), and the entire arrangement, as prescribed by

the statute, has all the characteristics of an ordinary contractual transaction. When the United States makes a grant with the expectation of obtaining benefits in return therefore, and extracts promises in exchange, the grant is not a mere "gift", unaccompanied by any obligation on the part of the grantee, but is, on the contrary, a part of a binding contractual arrangement. In Burke v. Southern Pacific Ry. Co., 234 U.S. 669 (1914), the Court said, with reference to a federal grant of land to a railroad (234 U.S. at 679):

> We first notice a contention on the part of the mineral claimants to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly. The granting act not only does not support the contention but refutes it. The act did not follow the building of the road but preceded it. Instead of giving a gratutous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company * * *. The purpose was to bring about the construction of the road, with the resulting advantage to the government and the public, and to that end provision was made for cmmpensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal become obligatory on both. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the government * * * the grant should not be treated as a mere gift.

See also United States v. Northern Pacific Ry. Co., 256 U.S. 51 (1921); [2/] Helvering v. Northwest Steel Mills, 311 U.S. 45 (1940); Oregon & California Ry. Co. v. United States, 238 U.S. 393 (1915); United States v. Northern Pacific Railway, 311 U.S. 317 (1940); United States v. San Francisco, 23 F. Supp. 40, 45 (N.D. Calif. 1938), rev'd 106 F. 2d 569 (C.A. 9), rev'd, aff'g District Court, 310 U.S. 16 (1940).

These cases indicate that in general, when the government grants money upon certain conditions or obtains certain promises in exchange therefore, the grant is to be considered a contract, enforceable as such at the suit of either party. The grants made pursuant to the federal school construction act are no different. Here the United States agreed, by approving the applications, to make certain payments in exchange for certain promises; and it did make such payments. Indeed, even if the contracts were not now fully executed on the government's part, the statute makes it clear that once the statutory conditions are met the government is obliged to approve (or "accept") and to pay. The statute declares that, if the conditions specified are met, the Commissioner "shall approve" the application, 20 U.S.C. 636(b)(2), and he "shall pay" to the local school agency the

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2/ In the Northern Pacific case the Court said: * * * the Act and resolution [of Congress] embodies a proposal to the company to the effect that if it would undertake and perform that vast work, it would receive in return the lands comprehended in the grant. The company accepted the proposal and at enormous cost constructed the road and put the same in operation; and the road was accepted by the President. Thus the proposal was converted into a contract * * *."

funds agreed upon according to the statutory scheme. 20 U.S.C. 637(a), 637(b). Any doubt whether the Commissioner is bound to approve and to pay is dispelled by the provisions for a hearing and for judicial review of an adverse decision. 20 U.S.C. 636(c), 641(b).

In return for payment, the Board has agreed to do certain things specified in Section 636(b)(1), among them to make its school facilities available to federally-connected children. Indeed, this assurance is one of the main inducements for the government to grant the funds, as the assurance itself makes clear by referring to "the [federal] children for whose education contributions are provided in this chapter * * *.", 20 U.S.C. 636(b)(F). At this stage the government has paid and the contracts are therefore fully executed on its part. It follows that the defendants continue to be bound by the assurance required by Section 636(b)(1)(F).

III. The United States has standing to enforce the assurance

We have demonstrated that the assurance is a contractual obligation on the part of the Columbus School Board. The promisee of this contractual undertaking is the United States. And it has long been settled that, notwithstanding the absence of express statutory authority, the United States has standing to sue to enforce contracts to which it is a party. As early as 1818 in Dugan v. United States, 3 Wheat. 172, 177, the Supreme Court said that "in all cases of contract with the United States, [the United States] must have a right to enforce the

performance of such contract, or to recover damages for their violation, by actions in their own name, unless a different mode of suit be prescribed by law * * *. It would be strange to deny them [the United States] a right which is secured to every citizen of the United States." See also Jessup v. United States, 106 U.S. (16 Otto) 147, 152 (1882); United States v. Tingey, 5 Pet. 115, 127-128 (1831).

Similarly, in Cotton v. United States, 11 How. 229 (1850), the Supreme Court said:

> * * * the powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. * * * Although as a sovereign the United States may not be sued, yet as a corporation or body politic they may bring suits to enforce their contracts and protect their property.

See also Rex Trailer Co. v. United States, 350 U.S. 148, 151 (1956); Hart & Wechsler, The Federal Courts and The Federal System, 1114-1115 (1953); Corwin, ed., Annotated Constitution of the United States of America, 584 (1953); United States v. Prince George County School Board, supra.

The absence of express statutory authority to sue to enforce these contracts is, therefore, no obstacle to the maintenance of this suit, for the assurance is enforceable, like any other contract to which the Government is a party.

IV. A temporary restraining order is required to prevent irreparable injury

Schools in Columbus are scheduled to open on Friday, August 30. If Air Base children are not permitted to enroll on time they will fall behind in their education and may never be able to make it up. They may, indeed, miss an entire semester of schooling. And the United States will lose -- irretrievably -- the benefits it contracted for. Moreover, the morale of their parents -- servicemen and civilians stationed or employed at the Base -- will clearly be impaired, with a consequent interference with the efficiency of this important military installation of the plaintiff. No order of this Court issued after time has been lost can remedy this situation or restore the status quo ante.

The injury to the plaintiff is plainly irreparable. A temporary restraining order is therefore clearly justified and required.

For the foregoing reasons, it is respectfully submitted that the motion for a temporary restraining order should be granted.

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APPENDIX

SCHOOL CONSTRUCTION PROJECTS APPROVED UNDER PUBLIC LAW 815 FOR COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT, LOWNDES COUNTY, MISSISSIPPI, INCLUDING APPLICATION PERIODS, PROJECT NUMBERS, DATES OF PROJECT APPROVAL, FEDERAL AND LOCAL FUNDS EXPENDED AND TOTAL PROJECT COSTS FOR FISCAL 1951 THROUGH 1963

Application Period	Project Number	Date Project Approved	Federal Funds	Local Funds	Total Cost
(1)	(2)	(3)	(4)	(5)	(6)
1956-58	58-C-601A8	March 21, 1958	$279,218.97	$ --	$279,218.97
1958-60	60-C-601A10	June 15, 1959	52,577.07	--	52,577.07
1959-61	61-C-601A11	January 25, 1961	55,245.69	12,610.29	67,855.98
1959-61	61-C-601B11	January 25, 1961	55,283.39	14.40	55,297.79
1959-61	61-C-601C11	January 25, 1961	59,957.09	141.84	60,098.93
1959-61	61-C-601D11	January 25, 1961	51,013.72	57.60	51,071.32
1959-61	61-C-601E11	January 25, 1961	50,554.24	68.40	50,622.64
1960-62	62-C-601A12	May 19, 1961	260,902.70	--	260,902.70
1960-62	* 62-C-601B12	October 9, 1962	75,123.00	2,681.00	77,804.00
	Total		$939,875.87	$15,573.53	$955,449.40

* Under construction.