File

NO. 24468
NO. 24561

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 24468

JOHN W. GARDNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
APPELLANT-RESPONDENT

v.

THE STATE OF ALABAMA, FOR AND IN BEHALF OF AND AS TRUSTEE FOR THE DEPARTMENT OF PENSIONS AND SECURITY OF THE STATE OF ALABAMA, ET AL,
APPELLEE-PETITIONER

NO. 24561

PETITION OF THE STATE OF ALABAMA TO REVIEW THE DECISION, DIRECTIVE OR ORDER OF HONORABLE JOHN W. GARDNER, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES, DATED JANUARY 12, 1967

BRIEF FOR THE STATE OF ALABAMA, FOR AND IN BEHALF OF AND AS TRUSTEE FOR THE DEPARTMENT OF PENSIONS AND SECURITY OF THE STATE OF ALABAMA, APPELLEE-PETITIONER

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INDEX

TABLE OF CASES AND STATUTES

Cases

Statutes

Regulations

STATEMENT OF THE CASE

After the State of Alabama, acting in behalf of the Department of Pensions and Security of Alabama, obtained the preliminary injunction shown by the record and described in the brief filed in behalf of Secretary Gardner and after the taking of the appeal by the Secretary from the decree of the United States District Court granting the injunction, the State on February 20, 1967, filed in this Court a petition to review the action of the Secretary of January 12, 1967. This petition by its terms is based, in short, upon the proposition that if the District Court had jurisdiction of an attack against the cutting off of funds by the Federal Department in connection with only a part of Alabama's five welfare programs, or in connection with none, and if the sole remedy is to review the action of the Secretary under Section 1316, Title 42, U.S.C.A., in regard to any of these programs, then a review by this Court on the petition to the extent applicable is prayed and sought. In such case, the petition, having been filed within sixty days of the Secretary's action, is timely.

Alabama's five welfare programs are outlined in the District Court's decree granting the injunction (page 83 of the printed record) and are as follows:

	Social Security Act	U.S.C.A.
Title I	(Old Age Assistance and Medical Assistance to the Aged)	Title 42, § 301-306
Title IV	(Aid to Dependent Children - Alabama Program)	Title 42, § 601-606
Title V	Part 3 (Child Welfare Service)	Title 42, § 721-728
Title X	(Aid to the Blind)	Title 42, § 1201-1206
Title XIV	(Aid to the Total and Permanently Disabled)	Title 42, § 1351-1355

As the Government concedes, there is no provision for a judicial review of the cutting off of federal funds in connection with the program under Title V, Part 3, of the Social Security Act, Title 42, Sections 721-728, Child Welfare Service, under Section 1316, Title 42. Thus, we contend, this Court has no jurisdiction to entertain a petition to review the action of the Secretary as it relates to such a program, that a review under that program is within the exclusive jurisdiction of the District Court

under the Administrative Procedure Act, 5 U.S.C. 705 (formerly Section 1009), a catch-all statute insuring a review in a Federal Court of competent jurisdiction where no other method of review is provided by statute or where the review provided by a statute is inadequate (necessarily meaning in such case a District Court). We contend also that the District Court has jurisdiction of the action filed therein as to all the programs. These contentions will be developed in the argument.

On motion of the State, this Court has entered an order consolidating the case made by the appeal from the preliminary injunction order, No. 24468, with the case made by the State's petition, No. 24561, and therefore the whole case is before this Court, entitling the parties to a decision on the merits, under one procedure or the other, or both, in order that the issue may be fully settled. With this the Government agrees, as we interpret the brief of the Appellant-Respondent.

It would be well to point out to the Court that Alabama's welfare plan or plans on record with the Department of Health, Education and Welfare were not introduced

at the injunction hearing. Neither the original nor any copy thereof has been filed at this writing as a part of the record on appeal. They should be before this Court because official or judicial notice was taken thereof by the hearing examiner at the administrative hearing on October 21, 1965. (See page 38, Volume I, Appendix to Secretary Gardner's Brief, page 17 of the transcript before the hearing examiner.[1] See also page 107 of the printed record, particularly the statement of Mr. D. Robert Owen, Attorney, Department of Justice.[2]) The plans are

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[1] "MR. YOURMAN:" * * (Attorney, Office of the General Counsel, Department of Health, Education and Welfare) * * "Mr. Hearing Examiner, we would like to take official notice of the plans for the public assistance program and for the child welfare services which the State has filed and which are on file within the Department of Health, Education and Welfare and which are open there for public inspection. This is made under Section 81.84 of the regulations." * * *

"MR. BARNES:" * * (Alabama Department's Attorney) * * "No objection, your Honor. I think it is understood, while it has not been brought in formally into evidence and they are available and will be treated as if they were in evidence."

[2] "MR. OWEN: I wouldn't disagree with Mr. Barnes. They could be noticed either in argument or briefs or whatever was required. We could set out those portions that we wanted to show the Court."

part of the administrative record.

Had the petition case not been consolidated with the injunction appeal case, or had the consideration of the appeal not been expedited, Secretary Gardner would undoubtedly have filed a certified list of the entire administrative record, including the plans, with the Clerk of this Court, as required by Section 2112, Title 28, U.S.C., in response to the petition (Fifth Circuit Rules 38-39).

The attorneys for both sides in this case agreed to cooperate with each other as far as possible in the expedition of a hearing on these two cases and, recognizing that it would be a less difficult task for the Alabama State Department to produce the papers and instruments representing the plans, it was suggested to us by Owen Fiss, Esq., Department of Justice, that the State might incorporate any parts of the plan in an appendix to the State's brief. However, upon reflection on our part, we (meaning the State) concluded that, since the Rules of this Court require the transmission of the entire record to this Court, and apparently do not provide for substitution of an appendix for the original record, and because

of the bulk of the plans, the originals should be filed with the Court. The plans will be so offered as a part of the original record and we ask leave that they be accepted as such.

It has proved to be difficult, as the State Department informs us, to reconstruct the plans to show as nearly as possible the essential documents on file with the Federal Department at the time of the hearing in October of 1965, as well as amendments since that time. Much time has been consumed in such reconstruction, and this has occasioned delay in the submission of this brief in behalf of the State. We ask that the Court show us indulgence in that regard. While the plans may not have been essential to a decision merely on the question whether a preliminary injunction should have been granted, with the whole case now before this Court under the consolidation of the petition with the appeal, the plans as a part of the administrative record should be available for the Court's consideration.

Other parts of the administrative record which have not been included in the original record before the

Court, or any reproduction thereof, are the State's motion for postponement of the effective date of the action taken by the Secretary on January 12, 1967, cutting off federal financial assistance, transmitted to the Secretary by mail on January 16, 1967, and the Secretary's action denying the motion, all of which occurred before the setting of the case for hearing in the United States District Court, Northern District of Alabama, on application for a preliminary injunction. This motion, as its content shows, was filed in accordance with Section 705, Title 5, U.S.C., the Administrative Procedure Act, authorizing any department, officer, or agency to stay such action pending judicial determination. We ask leave to file the motion and order, which are a part of the official record in Washington, as a part of the record in this case, and we have reproduced the motion in an appendix to this brief (we do not at present have a copy of the denial). This appendix also contains a reproduction of the petition filed in behalf of the State, No. 24561.

It is important that the plans be a part of the record because, while the transcript of the administrative

hearing in Washington, and the evidence taken therein, set forth in Volume I of the Brief of Appellant-Respondent, briefly describe the five programs, the plans describe them in detail. For example, in that part of the volume which is characterized as the Manual for Administration of Public Assistance, Part 1, there is set forth on page IV-13 and on IV-14 a provision for regular payments directly to the welfare recipient by mail under four of the five programs, viz., Old Age Assistance (described under Alabama law and regulation as Old Age Pension), Aid to Dependent Children (ADC), Aid to the Blind (AB), and Aid to Permanently and Totally Disabled (APTD).

Such factors and details are significant. For example, under the first of the above mentioned programs, the Old Age Assistance, persons 65 years of age and over who otherwise qualify with respect to residential and need requirements (from the standpoint that they do not have the income or sources sufficient for their support--the amount determined to be paid to each person is gauged by such standards as are set forth in the plan) receive these payments directly without regard to the physical condition of

such person. If there is no discrimination as between white and Negro recipients in determining eligibility, it would seem logical that under no condition should the federal funds which make up a substantial portion of these "pensions" be cut off. Yet all through the record of the administrative hearing, questioning by the Assistant General Counsel of HEW, there stands out an indication that if the employees of the State Department are not desegregated, in the sense that a sufficient number of Negro employees interview white recipients to determine eligibility and need, or vice versa, this constitutes discrimination under the Civil Rights Act, the regulation and HEW's interpretation thereunder (the same situation exists as far as aid to dependent children is concerned).

Direct payments of this nature made for aid to the blind, and to the totally and permanently disabled, can be made only upon the determination of a physician, who certifies the condition of the recipient. As to these, it is claimed by the officials of HEW, those who interpret and administer the Civil Rights Act, that if the physician does not have a desegregated waiting room or all desegregated

facilities, in making the examination (and only one may be required), there would be such discrimination if the Alabama Department made any payment to the physician as would violate the Civil Rights Act, the regulation, and the assurance required to be signed by the State Department. This is an example of the payments to third parties in order to provide medical assistance to the aged, the blind, the disabled, and needy children, which the HEW regulation and the assurance form required to be signed proscribe.

These programs, according to the State plans, also provide benefits, involving third party payments, which may be outlined briefly as follows:

(1) Title I, Social Security Act (Old Age Assistance and Medical Assistance to the Aged), Title 42, §301-306, U.S.C.A Under this each eligible person over 65 years of age, in addition to direct payment or pension, may receive medical assistance by way of hospitalization, for a limited period (thirty days at the time of the administrative hearing in October, 1965), and post hospital limited medical assistance for such limited period, upon certification by a physician of the beneficiary's choice. The

State paid (and now pays) the doctor for the examination ($5), and also paid a limited amount for the hospitalization (this was before medicare), and now the State pays only $40 for those entitled to receive medicare (the deductible amount under medicare), a substantial portion of all such payments being made up with federal funds. Also upon certification of a physician that nursing home care was needed, the patient would be placed in a licensed nursing home if requested, the nursing home being paid by the State (including federal money). If the family preferred to take care of the recipient, a payment would be made to the recipient for that purpose.[3] All hospitals and nursing

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[3]Pertaining to the nursing home situation (the great majority of the licensed nursing homes will accept only white patients, with only one accepting both races [Administrative Hearing Transcript pages 94-95, 75; pages 115-116, 96 of Appendix to Appellant-Respondent's Brief]) and the family situation, Commissioner Ruben King, Head of the State Department, testified in part:

"A No, I don't know how many were for colored. But I want to say I know what your inference is, because of only 13 colored nursing homes, as I stated to you. Now as I stated before, I know of no Negro who has ever applied for nursing home care that has not been able to get into a nursing home. And I think it is a credit to the Negro race that they want to keep their old people at home, because we feel like in many

homes are licensed by the Health Department and not the Alabama Department of Pensions and Security. Payment for nursing home care is another example of payment to a third party facility, which the Federal Department claims cannot be used, however necessary, unless that facility is completely desegregated.

(cont'd)

cases, even in regards to whites, that these old people would do better if they were in their own homes and were receiving nursing care in their own homes instead of being in a nursing home.

Q You say it would be equally better for whites also?

A Yes, sir, I think it would be better in many cases. I think that the nursing home care is growing at an alarming rate, not only in Alabama, but throughout this Nation, and I think the Welfare agencies in this Nation ought to concentrate on more people staying in their homes and receiving nursing care in their homes. I think that the people would probably live longer and I think it would be better for this country, certainly cheaper."

* * *

"Q Mr. King, during your whole tenure, in your experience as the head of the State department, has there ever been an instance to your knowledge where a person of the Negro race who is eligible to go into the nursing home and who we will say who expressed a desire to go, his family did, was there ever a failure to put them in there because there was no nursing facility?

A No, sir. We have adequate bed facilities for Negroes in the State. I would like to point out again that all of these are privately owned institutions. They are not run by the State, and if the need was there for the Negro it would be met by private enterprise just like it had been in all other instances."

(2) Title IV, Social Security Act (Aid to Dependent Children - Alabama Program), Title 42, §601-606, U.S.C.A. This involves only direct payments.

(3) Title X, Social Security Act (Aid to the Blind), Title 42, §1201-1206, U.S.C.A. In addition to direct payments, nursing home care, or family care in the alternative, as above described, can be provided.

(4) Title XIV, Social Security Act (Aid to the Total and Permanently Disabled), Title 42, §1351-1355, U.S.C.A. Nursing home care may be provided in addition to direct payments, with like certification and handling as above described.

With reference to the Child Welfare Service program, Title V, Part 3, Social Security Act, Title 42, U.S.C.A., §721-728, this involves services to needy children essentially performed only by third parties. One of these is placing the child in a child care institution, for the most part church homes for children, maintained by various churches. It also involves third party services such as day care for children whose parent or parents are unable for any reason to take care of them

during the day. These day care service functions are performed by private businesses, some of which accept only white children. As to the day care service, money is paid to the day care business (made up in substantial part by federal money), but as to the child caring institutions such as the church homes, no money is paid to the institution by the State, and no federal funds used, for the care and housing of the child. The only federal money expended would be to pay salaries of case workers assisting in finding the child, determining the child's needs, and placing the child in the institution. Mr. King, State Commissioner, testified relative thereto.[4] (Pages 80-82 of the Hearing Examiner's Transcript; pages 101-103 of the Appendix to Appellant-Respondent's Brief.)

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[4] "A Well, they know, the Federal officials know as well as I do. And in the conference I have discussed with them the thing that bothers us and that is particularly in the field of child care and institutions where no Federal money or State money is going to pay the money for the care of our children and yet they tell us the mere fact that they pay half the salary of case workers, of some social worker in the home, that these homes must integrate. They start off on the premise that a child is better off in an integrated--

Q You are talking about the Federal officials?

(cont'd)

A The Federal officials, particularly those in the child welfare, start off on the premise that children do better in an integrated society and I disagree with them.

Q Let's take the institutions themselves. Now what are we talking about?

A We are talking about your Methodist homes, your Baptist homes. We are talking about your Presbyterian homes, your church homes. These people are not charging us under the State plan one penny for taking care of our children and yet we have told the Federal officials time and time again what is going to happen to these children if we have to integrate these facilities. Our job--and I want to say this, Mr. Barnes--my job as Welfare Commissioner is to see that the needy people in the State of Alabama get help. And I want to know, and I would like to bring it out in this hearing today, I want to know whether or not the Federal Government is more interested in integration or seeing that needy people get help.

I live down there with these people and I see the poor and hungry and the children that come in every day, in many cases who are half beaten to death and have burns, and my interest is in that child and to see that that child gets help. That is the reason I went to Montgomery. I am interested in those children.

Q When you say child, you mean both white and Negro?

A That's right.

Q Do you have any, or do you have any Negro church homes?

A We have some that are serving families, yes, sir, Negro children.

Q Do you also--

A We have some who serve in both. We have some that serve only white and some that serve only Negro, and I believe we have some that serve both.

Q Both?

A Yes, sir.

Q You are talking about in the State of Alabama?

A In the State of Alabama."

The Child Welfare Service program is the one pertaining to which no provision is made under Section 1316, Title 42, for review by a United States Court of Appeals, and the services performed involve purely payments to the third party (as in payment to day care businesses), or only payment of the salaries to employees of the Department (in case of placing children in church homes which charge the State Department nothing by way of state or federal money).

On the hearing for preliminary injunction, several affidavits were introduced in behalf of the plaintiff, the State, all of which are not shown in the reproduced record, but all of which are part of the original record in this Court. One affidavit, or a portion of one, demonstrates that irreparable injury would result from the cutting off of Federal funds on page 101 of the printed record. There it appears that Federal funds actually expended at the end of the fiscal year prior to the hearing, amounted to approximately $95,000,000, whereas State funds amounting to approximately $31,000,000 during the same period were expended. The budget for the fiscal year to

end September 30, 1967, was approximately $103,000,000 of Federal funds and approximately $35,000,000 of State funds.

Appearing in the exhibits and record, although possibly not in the printed or reproduced portion, is the fact that approximately 200,000 persons in Alabama receive benefits under Alabama's welfare programs.

QUESTIONS PRESENTED

Questions presented involve the validity of the regulations of the Department of Health, Education and Welfare together with, and also separately from, the validity of the requirement of the assurance required to be given by the State Department (page 158, 158a, Vol. I, Appendix to Appellant-Respondent's Brief), Form CB-FS 5022 containing, particularly with reference to Section 4 of such form (as well as the regulation) a guaranty that the third parties whose services are utilized and are necessary to be utilized, such as physicians, nursing homes, day care centers, church homes, will be completely desegregated.

Related to such questions is the question whether the regulation and/or the assurance are consistent with the

objectives of the Act or Acts under which Federal funds are allocable for the benefit of thousands of poor, needy and indigent persons, both white and Negro.

Another question presented is whether the Secretary had the authority to cut off the funds at all and whether the Department of Health, Education and Welfare should have passed regulations which would have afforded the Department or the Government "other legal means" (words used in the Civil Rights Act of 1964) for preventing discrimination, before putting into effect any cut-off procedure (to be used only as a last resort).

There are, of course, the jurisdictional points involving the question as to which court has a right of review of all of the programs involved.

The matters out of which these questions arose have been pointed out and the point will be discussed.

SPECIFICATIONS OF ERROR

The Secretary of Health, Education and Welfare erred in taking the action, and rendering the decision, of January 12, 1967, directing the cutting off and

discontinuance of Federal financial assistance from the Department of Pensions and Security of the State of Alabama, for the following reasons, separately and severally:

(1) Said action of the Secretary transcends the authority given him, or the Department of Health, Education and Welfare, under the Civil Rights Act of 1964.

(2) Said action transcends the regulations of the Department of Health, Education and Welfare.

(3) The regulations of the Department of Health, Education and Welfare in the respect involved in said action were not consistent with the objectives of the act or acts providing financial assistance.

(4) Requiring the cutting off of said financial assistance was not consistent with the objectives of the act or acts providing for such financial assistance.

(5) Requiring the assurance or guaranty that third parties would desegregate all of their facilities was not consistent with the objectives of the act or acts providing financial assistance.

(6) Cutting off of Federal funds for direct payments to beneficiaries was not warranted.

ARGUMENT

We think it in order to discuss first the question of the validity of that portion of the Federal Regulation, 45 C.F.R. 80.3, which is contained under (b), and which is set out in part on page 49 of the printed record and the validity of that portion of the form which is set out on page 50 of the printed record, with particular reference to the requirement of an assurance that the State agency will take such steps as necessary to assure that any other agency, institution or organization participating in the program through contractual or other arrangements, will comply with the act and regulation. The validity vel non of the requirement of such an assurance relates principally to that portion of Section 602, Title 6, of the Civil Rights Act contained in the first sentence thereof as follows:

> Sec. 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of

> Sec. 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

The pertinent portion of the form, DB-FS-5022 is as follows (Page 158 B, Appendix to the Secretary's Brief):

> 4. Other Agencies, Institutions, Organizations and Contractors
> The State agency will take such steps as necessary to assure that any other agency, institution or organization participating in the program, through contractual or other arrangements, will comply with the Act and Regulation. [Emphasis ours]

This involves the third party payment question, one of the primary issues by the parties in this case.

In pinpointing the objections for the State agency to sign a form including this section (the section we construe--and it would be hazardous for us to construe it otherwise--as containing in effect a guaranty that private physicians and/or private nursing homes and/or private institutions assuming the care of children [such as church homes] will completely integrate themselves), we introduced evidence through the State Department's sole witness, Mr. Ruben King, the Commissioner, at the administrative

hearing, that private physicians have rendered and are rendering treatment to Negroes as well as white people, giving them all the same treatment, and even providing places for them to sit, but that many private practitioners (who receive only $5.00 per person) have refused to desegregate their waiting rooms and that in some counties, to say the least, where there was only one doctor (a white doctor), this would deprive the needy poor people of examination if as a condition to such treatment there must be a desegregated waiting room so that the poor sick people might be able to socialize while they are waiting for service.

Pertinent portions of the evidence given by Mr. King on the physician aspect of the case are set out both in the printed record and the Appendix to the Secretary's Brief (Printed record, pp. 51-53, Hearing Transcript pp. 76-80, Appendix to Appellant-Respondent's Brief, Vol. I, pp. 76-80).

Pertinent excerpts from the evidence pertaining to the placing of children in church homes in the Child Welfare Services program have been set out in footnote in

the Statement of the Case. The situation pertaining to other third party services (commonly referred to as vendor services) has been described, such as the use of nursing homes and day care centers.

Concerning institutional care, the Government's chief witness at the administrative hearing stated the position of the Government in the interpretation of the regulation and the assurance form required as follows (Miss Margaret A. Emery, Vol. I, Appendix to the Secretary's Brief, pp. 68-69):

> "Q Then, in such a case, has the Department interpreted it this way and so instructed the states that the institution must agree or desegregate even though it does not receive any federal funds whatsoever?
>
> A Whether or not the institution is receiving federal funds directly or indirectly is not the determining factors as to whether the state agency must require compliance under Title VI of the Act.
>
> For example, if the children that are being placed by the state welfare department had been placed by the court in the custody of the state welfare department, then the state welfare department is responsible for providing to those children services whereby there will be no discrimination in their treatment. And if the state, under those circumstances,

would not be able to use an institution which was completely segregated, it would be responsible for assuring compliance in all situations of the children who --

Q You mean even though the state in its plan did not pay out any federal money to the institution?

A That is correct. As I said, as an illustration I am using the children who are in the legal custody of the state welfare department."

The Federal Department's position pertaining to the meaning of the regulation and the assurance form on the physician aspect is illustrated by the testimony of Miss Emery as follows (Appendix, Vol. I, pp. 64 and 78):

"Q May I ask if any of the discussions with which you are familiar, whether you heard it discussed or stated to the representatives of state departments, in any way, that for example under the assurance that we have given to take such steps as necessary to make the institution or agencies or persons applying, it has been stated that for example the doctor must have a desegregated waiting room.

A Have I heard that stated; is that your question?

Q Yes, ma'am.

A Yes.

Q All right.

A This is also stated in writing, but wherever the state plan provides for use of private physicians, the private physician -- and this is true in many states -- the private physician must give the state agency assurance that there will be no discrimination in the treatment and the services provided to recipients of public assistance funds.

Q That has been interpreted even to segregated waiting rooms?

A Those are included as being within the purview of the Act."

* * *

"A . . . But my understanding is that many states would prefer to let the individual recipient choose the physician or the arrangement for the medical care that he wished to use, but when he does that the physician is under the purview of Title VI and the Department regulations, if that arrangement is included in the state plans for public assistance."

Pertaining to the refusal to sign the form previously referred to and shown by the record, contained in the "Handbook", the State Department's position is shown on page 92 (Secretary's Appendix) in the testimony of Commissioner King on the administrative hearing:

"A We stated -- I stated to several Federal officials that we were willing to sign a compliance, that we would comply with the Civil Rights Act, that the State of

Alabama, and I as Commissioner, would have a right to interpret, that as Commissioner I had as much right to interpret whether or not the rules and regulations were within the intent and scope of the law as some official here in Washington.

Q You made a statement of what you stated, what you were willing to sign. Are you still willing to sign?

A We are still willing to sign a statement that we are willing to comply with the law.

Q You are talking about the Civil Rights Act of 1965?

A Yes, sir."

There has never been a statement by the Government that such an assurance would be sufficient and the difference between what the Government absolutely required and what the State agency was willing to do involves a principal issue.

The Government in its brief appears to take the position that the form does not contain a rigid assurance, and gives the impression that all that it intends to do is to require the State to do the best that it can. We submit that while there is no time limit set, the assurance that the State agency will take such steps as is "necessary"

to assure compliance by third parties is at least a commitment that all segregation of every service, as interpreted by the Federal Department, on the part of third parties will end within a reasonable time. That this is true is clearly demonstrated by the testimony of Miss Emery on the hearing in Washington where she says, having referred previously to the "Handbook" and the regulation (pp. 43 and 44, Appendix to Secretary's Brief):

> "A This is correct. The state plan material is required to set forth the situation in the state, and the state plan and time limit, the purpose of that and the other regulation was to provide assurance that within a reasonable time the state would not only take steps it would accomplish compliance with the Civil Rights Act, but there is no specific deadline set forth in the regulations nor in the handbooks of the two bureaus." [Emphasis ours]

It appears to us that the Government should not insist upon such a guaranty (which might well be construed as a contractual one and upon which action might later be brought) that all private practitioners upon whom the State agency must rely, must agree to administer integrated services of all classes (in the case of physicians to integrate them in waiting rooms), as long as equal services

are administered from an equal source (as the evidence shows in the case). Then, in the future, if it should be charged or determined that services are not available for Negroes as well as whites, a case might be made for the cutting off of funds in that particular activity, program or part thereof. Until that time arrives, there should be no determination of non-compliance, with the necessary eventual cutting off of funds, merely because HEW insists upon a particular form (the writer has on occasion characterized this insistence as the law of the Medes and the Persians which altereth not).

Undoubtedly the question will occur: What difference does it make whether the State agency signs a form which includes the guaranty? Let us illustrate the difference: If the State agency signs a form giving assurance that it eventually will bring physicians upon which it is forced to depend, into subjection, and it fails to do so (no matter at what time), then it has violated the assurance, no matter how hard it may have tried. No one at this point can say but what the violation of the assurance is contractual and, if this is true, the Government might

elect to recover from the State agency all of the federal money pre-advanced to the State agency for the treatment of old people, between the time of the signing of the assurance and the time when it may be finally determined that the State agency is unable to bring the doctors into "compliance".

Such would be a far more drastic step than the mere cutting off of future funds. The State agency wants a situation to exist where it is required only to do its best and, in the event of future failure in good faith, it could be subjected at most only to the future cutting off of funds and not the imposition of sanctions for money already received and expended. This appears to us to be a valid and substantial difference, and it matters not what other states or other agencies may have signed. Our State agency has a right to insist upon its rights and upon equitable treatment.

We, therefore, contend that requiring such an assurance transcends the Civil Rights Act itself.

While §601 of Title VI provides generally that no person shall on the ground of race, color or national

origin be excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity receiving Federal financial assistance, §602 prescribes a limitation upon that general directive or at least a clarification as to what might be considered discrimination under particular circumstances.

While §602 confers upon such Federal Department or agency empowered to extend for Federal financial assistance under any act the authority to execute the provisions of §601 by issuing rules, regulations and orders of general applicability, it is further prescribed that such regulations, etc., "shall be consistent with the achievement of the objectives of the statute authorizing financial assistance in connection with which the action is taken". [Emphasis ours]

There is a further limitation, in speaking of the termination or refusal of funds, that "such termination or refusal shall be limited to the particular political entity or part thereof, or other recipient" against whom a finding has been made and also "shall be limited in its effect to the particular program or part thereof, in which

such non-compliance has been so found."

We urge, for example, that requiring a doctor to have a desegregated waiting room, as long as he otherwise treats all patients alike, is not consistent with the achievements of the objectives of the Social Security Act under which the Welfare programs are administered, and shall quote from the Congressional Record an analogous situation in order to demonstrate our contention.

First, however, let us make sure that we are correct in this example (desegregation of waiting rooms) as being embraced within the scope of the guaranty required of the State agency under §4 of the form. That this construction has been placed upon the assurance required or upon its regulation is shown in the testimony of the witness for the Government (HEW), Miss Margaret A. Emery, heretofore referred to.

We think it elementary to state that the construction placed by the administrative department or agency upon the regulations which it has promulgated and which it seeks to administer, will be given great weight in the interpretation of such regulations.

There is another question involved and that is that although the Civil Rights Act provides that the withholding of financial assistance or the cutting off thereof shall be limited to the particular program or activity or part thereof (see the Act itself) in which the discrimination is practiced,[5] the assurance required by HEW may well be and probably will be construed as applying to all of the programs of a particular state agency or at least a complete program (as distinguished from a part thereof),

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[5]Concerning that part of §602 which provides that the termination or refusal of assistance shall be limited in its effect to the particular program or part thereof in which such non-compliance has been found, Senator Javits said [p. 62 BNA, "Civil Rights Act of 1964"]:

"Let me give the Senator an example, because we discussed the question in great detail. We discussed in great detail the situation in which a contractor on Government work -- that is, work in which the United States puts up some of the money. Assume he is a road contractor and was discriminating in his business against hiring Negroes, but he was not discriminating on that particular job.

I state for the RECORD that because he was discriminating generally, but was not discriminating on that job, we could not cut off his funds because the statute which permitted the Federal Government to put up its share of the money did not apply to the contractor's general business operations. It applied only to the construction of the road." [Emphasis ours]

This is a secondary contention on our part but nevertheless is what we conceive to be a substantial one. Relative to that question, we point to the testimony of Miss Emery on re-direct examination (pp. 72, 73, Appendix to Appellant-Respondent's Brief):

> "Q Similarly, if a state submitted a statement of compliance which is adequate for purposes of meeting the requirements with respect to, let's say, the child welfare services under Title V, Part 3, of the Social Security Act, the fact that it didn't submit such a statement with respect to its public assistance programs would be immaterial as far as receiving child welfare services grants?
>
> MR. BARNES: We think that is an interpretation. We object to it. They are talking about the assurance would have to be given.
>
> HEARING EXAMINER IRWIN: If that is the objection, I will overrule it.
>
> MR. YOURMAN: Would you answer the question?
>
> (The reporter read the question.)
>
> THE WITNESS: This is correct in some situations. For example, in certain states the child welfare program is administered by a separate agency and there is a separate statement. The usual pattern is where the programs are administered by the same agencies

you have one Civil Rights branch which is applicable to both child welfare and public assistance." [Emphasis ours]

This is all that we will say concerning this secondary contention (important as the question is) and we return to the discussion of respondents' primary positions.

As stated, §602 of the Civil Rights Act, the provision of Title VI which empowers the defendants to issue rules and regulations, provides expressly that any such rules, regulations or orders issued "shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." [Emphasis ours] It was for the specific purpose of prohibiting the issuance of regulations which would apply to authorize the withholding of financial assistance under, for example, programs for furnishing lunches for school children that the above quoted provision was included in this act. This is shown very clearly by the following statement of Senator Pastore (the floor leader in the Senate for Title VI)at p. 13936 of the Congressional Record of June 19, 1964:

"Let me advise Senators that the failure of a district court to desegregate the schools will not jeopardize the school lunch program; it absolutely will not. Even if a community does not desegregate, that will not jeopardize the school lunch program--unless in that particular school the white children are fed, but the black children are not fed; and I refer Senators to page 33 of the bill, which states very, very clearly: 'which shall be consistent'--in other words, the orders and rules -- 'shall be consistent with the achievement of the objectives of the statute authorizing financial assistance.'

"We have a school lunch program, and its purpose is to feed, not to desegregate the schools; therefore, that would not be consistent. But if a school district did not desegregate, it could no longer get federal grants, let us say, to build a dormitory -- not unless it integrated; and a hospital could not receive 50 percent of the money with which to build a future addition unless it allowed all American citizens who are taxpayers and who produce the tax funds that would be used to build the addition, to have access to the hospital.

"So we must remember that the shutting-off of a grant must be consistent with the objectives to be achieved. A school lunch program is for the purpose of feeding the school children. If the white children are fed, but the black children are not fed, that is a violation of this law." [Emphasis ours]

This statement demonstrates what Congress meant by the term "discrimination" -- that in the use of that term in §601 of the Act, it was intended only that all children should be entitled to the benefits of the school lunch program, not to cause the "desegregation" of the

schools in which funds received under such programs are used. It is evident that the use of the word "discrimination" in Title VI was used selectively.

If, as the floor leader for Title VI said (Senator Pastore), the act when applied to feeding children in school contemplated merely that all the children be fed, Negro and white, and in essence that the word "discrimination" as used in the act did not require that the children be integrated while being fed, then we do not see how the act can be construed as requiring that there be a mingling together in waiting rooms, or in nursing homes, or in institutions assuming the care of children. The purpose of these programs is to treat the sick, and to care for the poor, and so long as the treatment and care are provided for all, then there is no discrimination under such program within the meaning of the Civil Rights Act. Thus, the assurance required, the guaranty, in effect, that there must be absolutely desegregated waiting rooms or nursing homes or institutions for child care, goes beyond the scope of the Civil Rights Act.

We next quote from Senator Saltonstall of Massachusetts:

> "Furthermore, it is important to note that section 602 states that any rules or regulations established to effectuate the provisions of this title 'shall be consistent with achievement of the objectives of the statute authorizing the financial assistance.' Thus, where Federal funds are used to feed needy children through a program which is operated on a segregated basis, this section does not intend that the children be deprived of the food because the administrators of the program are violating the law. However, we cannot justify the expenditure of Federal funds collected from all citizens on programs which are being administered in a way which clearly deprives some of them of the equal protection of the laws."
> [Underscoring supplied]
> (110 Con. Rec.--Senate, Number 11, page 12263)

Senator Saltonstall was, as we understand it, the Chairman of the Bi-Racial Senate Conference whipping the final version of the substitute into effect, as finally passed, and made the above statement shortly before the passage. This statement, we submit, is entitled to great weight.

We also quote from Senator Ribicoff:

> "The remedies provided by section 602 are withholding of assistance and any other means

authorized by law. In general, the consistent-with-the-objectives requirement would make withholding of funds a last resort, to be used only when other means authorized by law were unavailable or ineffective.

"To make that clear: The withholding of funds would be the last step to be taken only after the administrator or the agency had used every other possible means to persuade or to influence the person or the agency offending to stop the discrimination.

"Seventh. Looking first to the 'other means authorized by law,' the agency could, for example, ask the Attorney General to initiate a lawsuit under Title IV, if the recipient were a school district or public college; or the agency could use any of the remedies available to it by virtue of its own 'rule, regulation, or order of general applicability.' For example, the most effective way for an agency to proceed would often be to adopt a rule that made the nondiscrimination requirement part of a contractual obligation on the part of the recipient. Then violation of such a requirement would normally give the agency the right to bring a lawsuit to enforce its own contract; or, in the absence of a technical contract, the agency would have authority to sue to enforce compliance with its own regulations. All of these remedies have the obvious advantage of seeking to end the discrimination, rather than to end the assistance." [Underscoring supplied]
(110 Con. Rec. 6846-6847, daily ed., April 7, 1964)

These examples, statements from responsible leaders of the Senate, illustrate that the cutoff of funds

in cases of this kind, where innocent people will suffer by reason thereof, is a last resort; and Senator Ribicoff indicates that the Federal agency could and should adopt a regulation affording a remedy against discrimination and forcing a State agency, if accepting funds, to desist from any discrimination complained of, prior to the cutting off of funds. The Civil Rights Act applies to every form of financial assistance by way of grant, loan or contract. For example, if a contractor with the Government practiced discrimination, the Federal agency involved might terminate the contract and cut off the funds, without being compelled to use other means. However, it is not consistent with the objectives of the Social Security Act that aid be withheld from those who do not have anything to do with compliance, such as the white and Negro beneficiaries. Thus, the beneficiaries should not be victimized and excluded from the aid which the law intended they should have.

Thus, for example, a regulation or action which authorizes or directs the cutting off of all funds merely because the State agency refuses to sign a guaranty that

a private physician who declines to desegregate his waiting room will not be chosen for an initial service in certifying a beneficiary as eligible for aid, is not consistent with the intent of the Social Security Act.

JURISDICTION OF THE DISTRICT COURT

In support of District Court's jurisdiction, the appellees are invoking the provisions of the second sentence of Section 603 of the Civil Rights Act of 1964, which provides: "in the case of agency, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to Section 602, any person aggrieved (including any state or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with Section 10 of the Administrative Procedure Act ...". We acknowledge that by an amendment to the Social Security Act in 1965, review in the Court of Appeals was provided for determinations of discontinuation of financial assistance under certain programs. This amendment, codified as 42 U.S.C., Section 1316, provides for such review in the Court of Appeals for determinations under Sections 304, 604, 1204, 1354, 1384 and 1396c of 42 U.S.C. However, no provision was made for review by the Court of Appeals

of determinations with respect to funds provided under Subchapter V of the Social Security Act, 42 U.S.C. Sections 704-731, providing for grants to states for maternal and child welfare. The state agency administers programs under part 3 of Subchapter V of the Social Security Act and a determination was made by the Secretary of HEW to terminate payment of funds under this subchapter as well as others.

Since no review in the Court of Appeals is provided for determinations and terminations of payments to states under Subchapter V of the Act, the only court in which plaintiffs can secure review with respect to the termination of child welfare funds is in the district court. This is because, of course, the Courts of Appeal have no general original jurisdiction as do the district courts and the only jurisdiction which they have to review agency action is that which is "specifically conferred by legislation relating specifically to the determinations of such agency." AF of L v. N.L.R.B., 308 U.S. 401,404; City of Dallas v. Rentzel, 172 F.2d 122 (5th Cir. 1949).

There is no doubt, therefore, that the District Court has jurisdiction by virtue of Section 603 of the Civil Rights Act of 1964 and the Administrative Procedure Act with respect to the administration of programs under Subchapter V of the Social Security Act relating to child welfare.

It is the position of the State that the Administrative Procedure Act, 5 U.S.C. Section 1009, which is thus made applicable by the provisions of Section 603 of the Civil Rights Act, provides under the circumstances existing here for jurisdiction in the District Court of the entire suit of the plaintiffs. Subsection (b) of Section 1009 provides in pertinent part that the form of proceeding for judicial review of agency action is by "any special statutory review proceeding ... in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action ... in any court of competent jurisdiction." In order for a legal remedy provided by statute to be "adequate" within the recognized meaning of that term, such remedy must be able

to afford relief for the entire case presented by the plaintiffs. As stated in analogous context in Hillsborough TP v. Cromwell, 326 U.S. 620,629 (1946):

> "A remedy at law cannot be considered adequate so as to prevent equitable relief, unless it covers the entire case made by the bill in equity."

Since the Court of Appeals has and could require no original jurisdiction under the child welfare program portion of the appellees' case, and since the only court in which a stay of the agency action in regard to such program and any determination of the invalidity of the agency action in that respect is the District Court under the Administrative Procedure Act, the statutory review provided for in the Court of Appeals is plainly inadequate since it does not cover the entire case made by the plaintiffs' complaint. Therefore, and also following the action of the Supreme Court in Hillsborough v. Cromwell, supra, the District Court has the authority and power under the Administrative Procedure Act to exercise its concurrent jurisdiction by assuming jurisdiction over the entire case (including

those programs for which review is provided in the Court of Appeals) in order to afford to the plaintiffs adequate and complete relief. For, as noted in Elmo Division of Drive-X Co. v. Dixon, 348 F.2d 342,343 (D.C. Cir. 1965), "statutory provisions concerning review of agency action by the Courts of Appeals do not in and of themselves ... preclude district court jurisdiction" when only the district court can provide an effective and adequate remedy.

This is also true with respect to the claim of the individual plaintiffs representing the class of Alabama recipients of funds, added by the second amendment to the complaint (Printed record, page 70).

The Government argues that the fact that the administration of the Child Welfare Service program is so intertwined with the other programs, especially the aid for Dependent Children should operate to confer jurisdiction upon this Court of a direct review of the action in respect to that program as well. Patently, this cannot confer jurisdiction where none is granted by statute. The fact that they are intertwined augments the

position that the review in the Court of Appeals is inadequate, that a review in one Court of the entire action is the only adequate review, and this alone should serve to relegate jurisdiction to the District Court. However, as stated, the whole case is before this Court in all events.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief and Appendix to the Brief have been served by official United States mail in accordance with the rules of this Court to the attorneys for appellant-respondent as follows:

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