

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

SCHOOL DISTRICT 151 OF
COOK COUNTY, ILLINOIS,
et al.,

Defendants.

CIVIL ACTION NO. 68 C 755

PLAINTIFF'S BRIEF IN SUPPORT OF PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DECREE

THOMAS A. FORAN
United States Attorney

STEPHEN J. POLLAK
Assistant Attorney General

JACK E. SCHMETTERER
Assistant United States
Attorney

NATHAN LEWIN
J. HAROLD FLANNERY
ROBERT PRESSMAN
Attorneys
Department of Justice

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STATEMENT

This action is a school desegregation case brought by the Attorney General in the name of the United States, pursuant to Section 407(a) and (b) of the Civil Rights Act of 1964 (42 U.S.C. 2000c-6(a)(b)), to enforce the guarantees of the Fourteenth Amendment to the United States Constitution.

Jurisdiction of the subject matter of this action is conferred upon this Court by 42 U.S.C. 2000c-6 and 28 U.S.C. 1345, and the Court has personal jurisdiction over the defendants who reside in Cook County, Illinois, and who are charged under Illinois law with the responsibility of operating School District 151.

The original complaint was filed by the United States on April 25, 1968, and the Amended Complaint was filed on May 27, 1968. The defendants are School District 151 of Cook County, Illinois, its Superintendent, Charles B. Watts, and the members of its Board of Education, Louis Wiersma, Richard Graf, Wallace Davis, Donald McGee, James Hendrix, Hobart Krillic, and Gerald Bennett.^{1/}

^{1/} Between April 25 and May 27, 1968, Donald McGee and Hobart Krillic replaced Russell G. Gouwens and Lawrence Weier as members of the Board of Education; and pursuant to Rule 26(d) (1), F.R. Civ. P., they have been automatically substituted as defendants herein.

The Amended Complaint seeks preliminary and permanent injunctive relief against racial segregation of faculty and students in District 151 in violation of the Constitution and laws of the United States.

The defendants' Answer to the Amended Complaint, which was filed on June 3, 1968, admits certain of plaintiff's factual allegations, but denies that the racial composition of the faculties and student bodies at the District's schools is the result of discriminatory practices. As affirmative defenses the Answer avers that plaintiff is not authorized to sue to correct racial imbalance in public schools, that Title IV of the Civil Rights Act of 1964 does not authorize faculty desegregation suits, and that the defendants have not been afforded reasonable time to adjust the conditions complained of as required by Title IV.

Also on June 3, 1968, the defendants moved this Court to dismiss the action as to Superintendent Watts on the ground that not he, but the Board of Education, runs the school system.

On June 14, 1968, plaintiff moved this Court for a preliminary injunction on the basis of all materials on file in the action together with evidence to

be adduced at the hearing, and the matter was set down for hearing on June 19, 1968. Defendants' motion of June 17, 1968, for a stay of the hearing for at least sixty days was denied on June 18, and during the period from June 19, 1968 through July 1, 1968, trial was had on plaintiff's motion for a preliminary injunction.

SUMMARY OF EVIDENCE

A. Faculty Segregation

The evidence establishes that, during the period from the school year 1953-1954, when District 151 hired its first Negro teacher (Gov't Ex. S, p. 3, Tr. 313), to the present (Gov't Ex. S), faculty members have been systematically assigned to schools in which their race predominates.

Miss Gessell testified as to the method used to analyze and summarize Government's exhibits A-1 through A-18, C-1 through C-7, and J-1 in evidence, and the method used to identify the race of the teachers hired. (Tr. 668). This summary (Gov't Ex. R) shows that from the year 1953-1954 to the present there were 227 teaching vacancies filled at predominantly white schools by new teachers or teachers who had not taught in the system the previous year, and that of these 227, 220 were filled by hiring white teachers. All seven Negro teachers hired for predominantly white schools have been hired in the last two years. The summary also shows that of 89 vacancies in predominantly Negro schools filled within the same period of time, 77 were filled with Negro teachers. (Gov't Ex. R, p. 1).

The racial composition of the pupils at Coolidge-Kennedy School changed from 70 percent white in 1947 to 99 percent Negro by 1956 (Tr. 155, 296). With one exception, all teachers at Coolidge-Kennedy since 1959-60 were Negro until 1967-68, when one white teacher served both schools part-time. (Gov't Ex. S, Tr. 291-92). Former superintendent Kingsland testified on this matter giving at least four separate explanations: first, that teachers were assigned on a racial basis (Tr. 185, 246, and see Gov't Ex. at p.); second, that he did not discuss possibilities other than Coolidge with Negro teachers until "the policy" changed (Tr. 178-191); third, that the teachers preferred to teach at schools predominantly of their own race (Tr. 179-180, 183); and fourth, that the faculty vacancies and the teachers available coincided in time by happenstance, to produce an almost totally segregated racial pattern over a 15 year period. (Tr. 250-51).

Assistant Superintendent McGovern, whose duties include the employment of teachers (Tr. 284), transferred as principal from Coolidge to Madison in 1959 for racial reasons (Tr. 295). He testified that "the overwhelming

majority" of white teaching applicants would, on the basis of his interviews with them, not accept positions at Coolidge-Kennedy because he "would assume", of its racial makeup (Tr. 298-300). Until the Board indicated that Negro teachers should be found for the white schools for 1966-67 (Tr. 301-305), he doubted his authority to do so (Tr. 306) and would have been "reluctant" (Tr. 307) to do so. Further, he did not recall offering positions at Coolidge-Kennedy to any of the "25, 28" white teachers newly employed for 1967-68 (Tr. 308-309). Also, he doubted whether any Negro teachers newly employed for 1967-68 were asked about teaching in white schools (Tr. 311-312).

Mr. Bogolub, the former member and President of the Board of Education, testified (Tr. 518-523) that in the spring of 1965 the Board directed Superintendent Kingsland to secure one--and only one (Tr. 522)--Negro teacher for each white school "to alleviate the criticism" they had been receiving from residents of Phoenix.

Charles Kennedy, a former teacher, testified (Tr. 639) that despite an informal understanding when he was first employed that he would be able to transfer at the first opportunity to a position teaching seventh

or eighth grade social studies, and despite the fact that he indicated on the appropriate form at the end of the years 1963, 1964 , and 1965 that he would prefer to teach that subject in any school in the District, he was never permitted to transfer even though of his own knowledge he knew that white teachers were hired for such vacancies in predominantly white schools during those years.

Superintendent Watts testified that the only present plans for faculty desegregation are contingent on the willingness of teachers to accept voluntary transfers (Tr. 804), and that if Coolidge-Kennedy were desegregated a majority of the objections of white teachers would be removed (Tr. 805).

Mr. Wiersma, the current Board President, testified (Tr. 1092-1104) that the Board does not assign teachers on the basis of race, that, in effect, the Board ratifies the recommendation of those below it who are in charge of those matters, and that neither he nor any Board member regards himself as legally obliged to inquire into the racial concentrations of the faculties.

Finally, the testimony (Tr. 634, 694-695) and plaintiff's exhibit S disclose that the system's regular

substitute teachers are assigned more frequently to schools in which their race predominates than would be the case if the assignments were made on a random basis. During the first half of 1967-68, for instance, white teachers, who comprise 67 percent of the regular substitutes, filled 91 percent of the assignments at predominantly white schools. Three of every four assignments given to Negro teachers were at Coolidge-Kennedy.

The transfer of white teachers among schools has also been limited, with the exception of Mr. McGovern in 1956-57, to predominantly white schools. (Gov't Ex. R., pp. 3, 5, 7, 9, 11, 13, 15, 17, 17B, 19, 21, 23, 25, 27, 29.)

B. Student Segregation

The evidence establishes that no Negro children attend or have ever attended the Roosevelt, Madison, or Eisenhower schools during the regular school year (Tr. 154-158, 289). The few Negro children at Taft attend only special education classes to which they are assigned without regard to where they live, and none of them live in the Taft attendance zone (Tr. 289-290).

The Coolidge-Kennedy schools are attended almost exclusively (Tr. 290-291) by Negro children. Some white children, who are assigned without regard to where they live attend special education classes (Tr. 158, 291), but of 850 students "less than 10" white pupils are regular students (Tr. 962-963).

Our position is that the foregoing result is attributable to the actions of the defendants and their predecessors in establishing and maintaining attendance areas, bussing white students, locating and constructing schools, and passing on proposals for the educational organization or structure of the District.

Two witnesses, defendant Superintendent Watts and Mr. Bogolub, a former member and President of the Board, testified directly that (1) the Board's decisions in the foregoing categories were based upon racial factors (Tr. 749, 785-786, 798-800), and (2) that in 1964 three Board members expressed the view that Coolidge should be kept a Negro school (Tr. 571, 572-573).

1. Attendance Zones

Prior to 1964 and 1966, when attendance zone boundaries were set or formalized (Pl. ex.F-4 , pp.27-28; F-6, pp.27-28), some white students living outside of Phoenix (the area presently served by Coolidge-Kennedy) attended the Coolidge school. By 1956-57 all white children living outside of Phoenix were attending Roosevelt, although some of them lived closer to Coolidge -- as some do now (Tr.494-5,708, 720-7,1131-). Either the Roosevelt line was moved west to its present place, or the concept of attendance areas was not enforced when the Ravensloot, PeYoung, and Tromp white children were going to Coolidge (Tr. 494-495). The policy was enforced when several Negro families living in the Coolidge zone tried to transfer their children to Roosevelt in 1956 (Tr. 702-705).

With respect to some white children who presently live closer to Coolidge than the school they attend, and whose zone thus can not be explained in terms of a neighborhood school policy, some testimony (Tr. 1131-1132) suggested that they are bussed to Roosevelt because the street on which they would walk to Coolidge (157th, also known as 153rd) is unsafe. At least some of them (e.g., the Schippers), however, walk farther on the unsafe road to catch the bus than they would to Coolidge. /

The evidence further showed that some white children presently living in the Taft zone were bussed to Roosevelt before Taft was fully operative in 1966-67 (Tr. 1136). Coolidge was closer, and no safety or educational factors appear as a basis for not bussing to Coolidge (Tr. 964). Nor does any basis appear with respect to other white children who live closer to Coolidge but are bussed to Roosevelt.

/ If their families drive them to the bus, they could also drive them to Coolidge (Tr. 1132).

Some evidence (604 Ex 0-2, 0-3) indicates that the concept of neighborhood, upon which the attendance zones are said to be based, is related less to geography than to socio-economic groups.

A change in the present zone boundary between the Taft and Roosevelt schools is planned for 1968-69 (Tr. 961 -2). Its purpose is to relieve overcrowding at Eisenhower and it will not affect the racial composition of the pupils at any one school (Tr. 1125-26).

Evidence has also been received concerning the Board's 1968-69 pupil transfer policy (Tr. 965 - 8). It will permit children in upper-grade classes (more than 33 pupils) to transfer to classes having fewer than 27 pupils. Eight, or less than 1%, is the maximum number of Coolidge-Kennedy pupils who could presently transfer to white schools under this plan.

2. Bussing

District 151 has transported some of its children to schools for a number of years (Ex E-1 - E-9). Approximately 84 children were bussed in 1967-68 by the routes indicated in Appendix A. Some children who live less than 1-1/2 miles from their schools are bussed

for safety reasons. Others are bussed because of the distance they will have from their schools. The State of Illinois partially reimburses the district for the transportation of such children (Tr. 1204). Only white children are bussed, including 80 in 1967-68 and who lived closer to the Coolidge-Kennedy schools than the one they attended (Pl.Ex.E-9). With respect to white children who live within 1-1/2 miles of Coolidge-Kennedy, or closer to that school than to Roosevelt (where they are bussed), no evidence as to safety appears to explain why all buses go only to Roosevelt and none to Coolidge. It is undisputed that, during the early 1960's when there was unused classroom space at Coolidge, white children from the Harvey Highlands area southwest of Phoenix were bussed to Roosevelt.

3. Location and Construction of New Schools

It is undisputed that all decisions as to school construction in District 151 since the building of the Madison school in 1956 have preserved the racial isolation of all the schools. The evidence concerning the building of the Taft and Kennedy schools in 1965 is particularly significant.

As a result of the need in 1964 for additional classroom space in the western part of the district, the Board initially proposed to build a school north of the present Taft building (Tr. 373, 508). In addition to white children from the Harvey Highlands area who were then being bussed to Roosevelt, the school was designed to house the "over-flow" at Coolidge. That plan was abandoned by the Board after a bond issue proposal was defeated in the February, 1964 referendum (Tr. 373, 508). The prospect of a racially integrated school was the dominant issue in the referendum and the negative vote was so interpreted by the Board (Tr. 508, et seq., 515 - 517).

Also at that time, Board member Watkins, a Negro, proposed that a school be built northeast of Phoenix, and other Board members informally approved that proposal (Tr. 510-2, 380). That school, too, would have had a racially integrated student body (Tr. 382, 388-96):
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The approval was repudiated and the school was not built because of public opposition to an integrated school, which a majority of the Board chose to follow.
(Tr 515-517).

The plan which was ultimately adopted and implemented resulted in the building of the all-white Taft school and the addition of the all-Negro Kennedy School to Coolidge. (Tr. 517).

4. Educational Structure of the District

Superintendent Watts and a survey team of independent experts unanimously recommended for educational reasons, an upper-grade center for District 151 (Tr.

755). When such a recommendation was made to the Board in January of this year, its members agreed that the proposal was educationally sound. (Tr. 780).

The Board has considered four proposals concerning the organization of the structure of the district during the winter and spring of 1968: Plans, A, B, C and D (Tr. 759). Plan A would retain the status quo with capital outlays for construction to relieve crowding at Madison and Eisenhower (1114); Plan B would establish an upper-grade center at Roosevelt which would absorb all eighth-grade and some seventh-grade students (Tr. 759); Plan C would use the Coolidge school as an upper-grade center for all seventh and eighth-grade students in the district and the pupils presently in grades three through six in the Kennedy-

Coolidge Schools would be transported to the other schools in the district (Tr. 760); Plan D which was first adopted on February 5 and abandoned on February 19, 1968, involved only some shifting of students to relieve overcrowding at Eisenhower (Tr. 761).

From the standpoint of educational desirability and economic feasibility, Superintendent Watts has recommended the adoption and implementation of Plan C (Tr. 768). His analysis is that although that plan does not, as it now stands, produce an optimum program (Tr. 771), the best start toward an upper-grade center and a partial realization of its advantages can be best effected, within the district's present means, by Plan C (Tr. 770). The plan is not, according to the Superintendent, the best that can be devised, nor would not save the district any money, but it would provide a better education per child per dollar spent, and permit more ambitious plans to proceed while it is in effect (771, 972). Plan C can at this time be adopted for implementation in 1968-69 (Tr. 773). Although there is no educational emergency (Tr. 981), District 151 is today

providing its children with a poorer education that it can afford (773,981).

Several reasons for the failure to adopt an upper-grade center for 1968-69 have been advanced, including its cost, the possible loss of public support for a more ambitious program that has been proposed, and public opposition to the increased bussing that plans B or C would entail (878, 1111).

It is undisputed, however, that the issue of the racial composition of District 151's schools has permeated the consideration of this and related issues, That factor has overridden the consideration of policies which are educationally sound and desirable. (Tr. 749).

SUMMARY OF ARGUMENT

This action seeks preliminary injunctive relief against racial segregation in public education which violates the Constitution and laws of the United States.

First, the proof establishes that in assigning teachers to the six schools in the District during the past decade, defendants knowingly staffed the Coolidge and Kennedy schools, whose student enrollment has, since at least the early nineteen fifties, been predominantly Negro, with Negro teachers. This pattern of faculty assignments had the purpose and necessary effect of identifying the Coolidge and Kennedy schools as "Negro schools." In assigning teachers to the Roosevelt, Madison, Eisenhower, and Taft schools, where the students were all or predominantly white, defendants continued a traditional policy of maintaining the faculties of these schools as predominantly white. The purpose and necessary effect of this pattern of assignment was to identify these four schools as "white schools." It is the government's position that such a deliberate course of conduct designed to identify public schools by

race violates the Fourteenth Amendment rights of the students attending these schools and requires, under a consistent line of decisions of the Supreme Court and federal courts of appeals, speedy and effective corrective action.

Second, enrollment statistics indicate that two of the District's schools are today effectively all-Negro and the remainder are all-white. The evidence establishes that in a series of decisions from the 1940's to the present, the defendants accorded substantial weight to the policy of preserving separate schools in the District for Negro and white students. Decisions ostensibly made on educational grounds, the evidence establishes, were actually influenced by the defendants' desire to retain an all-Negro school or nearly all-Negro school within the borders of the Village of Phoenix and to preserve the remaining schools in the District as all-white schools. This policy -- which is plainly prohibited by the Fourteenth Amendment -- affected the clarification or establishment of attendance zone lines, the assignment of students and their transportation to schools, the location and construction

of new facilities, and the failure to implement educationally sound proposals for reorganizing the school system. The inevitable result of this series of decisions, in which racial factors played a substantial or controlling part -- and which can be understood only by reference to the defendants' overriding racial purpose -- was unconstitutionally to identify two of the District's schools in terms of pupil attendance as "Negro" schools and four as "white" schools. This violation, too, requires mandatory injunctive relief.

ARGUMENT

I

DEFENDANTS' POLICY OF ASSIGNING NEGRO TEACHERS TO PREDOMINANTLY NEGRO SCHOOLS AND WHITE TEACHERS TO PREDOMINANTLY WHITE SCHOOLS DEPRIVED STUDENTS IN DISTRICT 151 OF THE EQUAL PROTECTION OF THE LAWS.

A. Racial assignment of teachers violates the Fourteenth Amendment.

It is well established by court decisions that a school board may not so assign its teachers as to identify schools, by their faculties, as Negro or white. In Rogers v. Paul, 382 U.S. 198 (1965), the Supreme Court found that the racial assignment of faculty would deny to students the equality of educational opportunity guaranteed by the Fourteenth Amendment, as applied in Brown v. Board of Education, 347 U.S. 483 (1954), and subsequent decisions. See also Bradley v. School Board of Richmond, 382 U.S. 103 (1965).

The issue of faculty desegregation has, to be sure, heretofore arisen principally in cases involving districts operating schools which had been

previously racially segregated pursuant to local statutory law. The absence of a statutory basis for the racial segregation in this case does not, however, affect the constitutional rights of students in the district to receive a public education from a faculty assigned without regard to race.^{1/} The constitutional theory of Brown v. Board of Education, supra, and of Rogers v. Paul, supra is that the segregation of students and faculty into racially identifiable schools has an "inherently unequal" effect on school children. Students in Cook County, no less than their counterparts in Mississippi, Alabama, and Louisiana, are entitled to nonracial assignment of teachers. And where the school board has intentionally fashioned predominantly Negro and predominantly white faculties, the affected pupils have a legal and constitutional right to the disestablishment of these racially identifiable features in the public school system.

^{1/} Of course, de jure segregation exists when, as here, it is the product of participation by public officials regardless whether their conduct is supported by local law. See, e.g., Taylor v. Board of Education, 294 F. 2d 36 (2d Cir. 1961), cert.denied, 368 U.S. 940 (1961)

The evidence in this case establishes that the defendants, no less than school districts which have operated segregated school systems under unconstitutional local laws, knowingly assigned faculty members on a segregated basis. Applicable to this case, therefore, are the decisions of the Fourth, Fifth, Sixth, Eighth and Tenth Circuits which have directed school districts previously operating segregated school systems to take steps to desegregate their faculties. See Green v. School Board of New Kent County, Virginia, 382 F. 326, 338 (4 Cir. 1967), affirmed in part, No. 695 (U.S. May 27, 1968); United States v. Jefferson County Board of Education, 372 F. 2d 836, 895 (5 Cir. 1966), adopted en banc, 380 F. 2d 385 (1967), cert. denied, 389 U.S. 840 (1967); Monroe v. Board of Commissioners of City of Jackson, 380 F. 2d 955, 961 (6 Cir. 1967); Clark v. Board of Education of Little Rock School District, 369 F. 2d 661 (8 Cir. 1966); and Dowell v. School Board of Oklahoma City, 244 F. Supp. 971, 977-79 (W.D. Okla. 1965), aff'd, 375 F. 2d 158 (10 Cir. 1967), cert. denied, 387 U.S. 931 (1967).

B. Neither community pressure nor the preferences of individual teachers is a legal justification for the racial assignment of teachers.

The evidence indicates that there was, and continues to be, substantial community opposition in District 151 to the desegregation of its schools and faculties. That opposition is no defense to the assignment practice challenged here. Community opposition to nonracial hiring and assignment of teachers is no different from community opposition to the preservation of any right guaranteed to a minority by the Constitution or the Bill of Rights. The Constitution demands that those exercising governmental powers secure constitutionally protected rights irrespective of community sentiment. In considering the relief to be afforded in school desegregation cases, the Supreme Court observed in 1954 that "the vitality of these constitutional principals cannot be allowed to yield simply because of disagreement with them." Brown v. Board of Education, 349 U.S. 294, 300 (1954). This is true even if the anticipated or actual community response may involve tension, unrest and threats and incidents of violence. Cooper v. Aaron, 358 U.S. 1, 13 (1958).

If, as the courts have established, "community hostility or recalcitrance does not justify" any delay in desegregating a public school system which has previously been operated on a segregated basis under local law (Stell v. Savannah-Chatham County Board of Education, 333 F. 2d 55, 64 (5 Cir. 1964)), it follows, a fortiori, that such community feeling does not warrant institution of a policy of segregation. Yet the latter is what emerges from this record -- the defendants, concerned with adverse community reaction, chose to assign faculty in a manner designed to keep the schools in District 151 racially isolated.

Nor is it a defense that the individual teachers were reluctant to accept assignment or transfer to schools attended predominantly by pupils of the opposite race. School teachers are, like any other local government official, subject to the commands of the Fourteenth Amendment. The constitutional obligation applies to the State and all its agents, and it prohibits state officials - a school teacher as well as a governor - from discriminating on account of race. The suggestion that a school teacher has a constitutional or statutory "freedom

of choice" - that he may choose the race of his students - is plainly unsound. A teacher cannot, of course, be forced to teach against his will. But neither may he dictate all the conditions of his employment.

Moreover, it is the ultimate obligation of the school board to conduct a public school system free of racial discrimination. Hence the board may not, in the operation of that system, constitutionally defer to the private racial choices of its agents. If the board's only means of achieving a pattern of faculty assignment which removes the racial identifiability of its schools is by involuntary assignment of teachers, it is obliged to follow that course.

United States v. Board of Education of City of Bessemer, ___ F. 2d ___, No. 25810 (5th Cir. June 3, 1968) at 14; Monroe v. Board of Commissioners of City of Jackson, 380 F. 2d 955, 960 (6th Cir. 1967), ___ U.S. ___ (1968); Kelley v. Altheimer, 378 F. 2d 483, 498-99 (8th Cir. 1967); see Brewer v. School Board of City of Norfolk, No. 11782 (4th Cir. May 31, 1968). See also Part III(B) of this argument, infra.

Finally, there is plainly no merit in defendants' suggestion that Negro teachers are better suited to teach Negro students, and, presumably, that the same is true of white teachers in relation to white students. That proposition is bound up with the doctrine flatly and finally rejected in Brown v. Board of Education, 347 U.S. 483 (1954). To revive it as a basis for faculty assignment would be to return to the separatism which the Supreme Court unanimously determined in Brown to be "inherently unequal." See Stell v. Savannah-Chatham County Board of Education, 333 F. 2d 55 (5th Cir. 1964. The constitutional principle governing the administration of public schools today is one which recognizes no justification for separation of the races in student or faculty assignment or in any other aspect of the schools' operation.

II

STUDENTS IN DISTRICT 151 HAVE BEEN DENIED THE EQUAL PROTECTION OF THE LAWS BY A SERIES OF DECISIONS WHOSE PURPOSE AND EFFECT WAS TO SEGREGATE STUDENTS ACCORDING TO RACE.

The present enrollment figures of the six schools in District 151 demonstrate that for all practical purposes two schools are all-Negro and four schools are all-white. This result is not a fortuitous one, but was actively sought by the defendants who, through a series of decisions on matters which have come before the Board of Education between the late 1940's and the present, have taken steps to preserve and promote separation of the races in the District's public schools.

Ordinarily, courts do not look behind the official acts of legislatures and administrative bodies to determine the purpose of what they have done. / It is well established, however, that in the area of school segregation, purpose and effect of official acts are legitimate subjects of judicial

/ However, classifications that have a racial effect are constitutionally suspect and they are subject to intensive judicial scrutiny. McLaughlin v. Florida, 379 U.S. 184, 191-192 (1964).

inquiry. In Griffin v. School Board of Prince Edward County, 377 U.S. 218, 231 (1964) the Supreme Court struck down seemingly neutral action taken by a school board on the ground that the record in that case established that the action had been taken, "for one reason, and one reason only: to insure, through measures taken by the County and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school." The Court there noted that "grounds of race and opposition to desegregation do not qualify as constitutional."

The same conclusion is, we submit, mandated by the present record. The evidence proves that the plainly impermissible policy of preserving racially segregated education was paramount in a series of board decisions, and that these decisions contributed substantially to the development and preservation of schools which provide a racially separate education for school children in the District.

A. This is not a case of "adventitious segregation."

In Bell v. School City of Gary, 324 F. 2d 209 (7 Cir. 1963), cert. denied, 377 U.S. 924 (1964), the

Court of Appeals for the Seventh Circuit rejected a claim that the Gary school board was constitutionally obliged to end de facto segregation in its public schools. An essential element of the decision was the District Court's finding that, on the record then before it, the neighborhood school plan had been "honestly and conscientiously constructed with no intention . . . to segregate the races." See 213 F. Supp. 819 at 829. The Court of Appeals held that there was no affirmative duty "to change innocently arrived at attendance districts" which, together with population shifts, had resulted in predominantly Negro and predominantly white schools. 324 F. 2d at 213 (emphasis added). A similar holding on the subject of "adventitious segregation" was announced by the Court of Appeals for the Sixth Circuit in Deal v. Cincinnati Board of Education, 369 F. 2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967). In that case, as well, the Court limited its holding to a situation in which the boundaries are not drawn

for the purpose of maintaining racial segregation. /

The facts of the present case take it out of the rule of the above two decisions. The conduct of the defendants over the past twenty years resembles the "gerrymandering" of school districts which was found to violate the Constitution in Monroe v. Jackson Board of Commissioners, 380 F. 2d 955 (6 Cir. 1967), aff'd. U.S. (1968), and Taylor v. Board of Education of New Rochelle, 294 F. 2d 36 (2 Cir. 1961), cert. denied, 368 U.S. 940 (1961), more than the adventitious school segregation which marked the Gary and Cincinnati cases. See also Clemons v. Board of Education of Hillsborough, 228 F. 2d 853 (6 Cir. 1956).

The principle of the New Rochelle and Jackson cases, supra, is that when a school board takes deliberate action to maintain racial segregation in its system, it acts as unconstitutionally as if it had operated a dual system segregated by race under provisions of a local statute. As the district court said in the New Rochelle case, there is "no basis to

/ See also Webb v. Board of Education, 223 F. Supp. 466 (N.D. Ill. 1963), in which Judge Marovitz in this district held that "there must be some affirmative action of segregating, to violate the Fourteenth Amendment, even if it is only the passive refusal to redistrict unreasonable boundaries. Mere residential segregation is not enough." Compare Branche v. Board of Education, 204 F. Supp. 150 (E.D. N.Y. 1962).

draw a distinction, legal or moral, between segregation established by the formality of a dual system of education, as in Brown, and that created by gerrymandering of school district lines and transferring of white children The result is the same in each case; that conduct of responsible school officials has operated to deny the Negro children the opportunities for a full and meaningful educational experience guaranteed to them by the Fourteenth Amendment." 191 F. Supp. at 192. As this record discloses, a school board can as effectively preserve total separation of the races in its schools by a calculated series of decisions on student assignment, transportation, location and construction of new facilities, and reorganization of its school structure, as it can by gerrymandering attendance zones. This form of racial segregation is as unlawful as an unequivocal local statute requiring segregation by race in public education.

The same constitutional principles which forbid a school board to engage in segregation-prompted gerrymandering prohibit segregation-motivated decisions on the various other matters which come before

the board for decision. In locating and constructing new school buildings and facilities, a school board may not avoid educationally sound and financially feasible construction plans and institute instead a program of construction which will establish, maintain or perpetuate the racial separation of school children. Nor may a school board undertake a bussing program to achieve that end or formally establish attendance zones for the purpose of containing all the District's Negro students in one school and the whites in another.

Moreover, a constitutionally prohibited design to preserve racially segregated schools may be achieved by deliberate inaction as well as by affirmative acts. With school administration, as with reapportionment, impermissible ends may be accomplished by refusing to institute changes. Compare Reynolds v. Sims, 377 U.S. 533 (1964). Even if the record established nothing more than that the defendants had deliberately retained existing unreasonable attendance zones in order to require Negro school children to

attend separate schools from whites and had permitted plans which are educationally sound to wither because they would result in racially integrated schools, that inaction would be forbidden by the Constitution.

In brief, decisions with respect to school attendance zones, bussing, school construction sites, and the educational structure, especially where, as here, they are irrational -- which is evidence of their purpose -- are constitutionally impermissible where their purpose or deliberate effect is racial segregation. Nothing in the Gary or Cincinnati cases conflicts with this settled principle.

B. The defendants are responsible for the racially segregated student enrollment in District 151.

We contend that the defendants are responsible for the present pattern of student enrollment in District 151 -- that it is because of their deliberate decisions based on race that the District now has two all-Negro and four all-white schools. Our argument on this phase of the case is that (1) by drawing attendance zone lines where they have and by bussing white students who live nearer to the Coolidge School to Roosevelt and Taft, the defendants have

preserved Coolidge-Kennedy as an all-Negro school site; (2) the defendants' decision to abandon the plan proposed for the February 1964 referendum and to construct the Kennedy School adjacent to the Coolidge School perpetuated the segregated character of the District's schools; (3) the defendants' refusal in March of 1968, on racial grounds, to adopt an educationally sound proposal for the establishment of an upper-grade center (proposed by a five-man team of educators, as well as by the present Superintendent of Schools) has preserved the segregated student-assignment pattern; and, in any event, that (4) the results of the rules governing student assignment over the past decade which have produced almost total segregation raise a presumption of unconstitutionality which the defendants have failed to overcome.

- (1) Designing attendance zones and bussing to contain Negro students and to allow white students to avoid attendance at Negro schools.

The evidence establishes that although there were imprecise understandings on the subject of attendance zones prior to 1964, no records of the Board set

a fixed and definite boundary between the Coolidge and Roosevelt Schools. Some students living east of Phoenix had attended the Coolidge School. Those who were white transferred to Roosevelt after Negro enrollment at Coolidge became substantial. The applications of Negro children living in Phoenix to attend Roosevelt were denied.

The zone lines were drawn or formalized in 1964 and again in 1966, and the proof shows that those responsible for establishing these lines wished -- in the words used by the then President of the Board -- "keep the [Coolidge School] . . . Negro" (Tr. 571, 572-573). The boundary line chosen at that time was selected -- at least in part -- to insure that only Negro school children would attend the Coolidge School and that no residents of Phoenix would be eligible to attend any other school.

Bussing of white students to predominantly white schools from the Harvey Highlands and from the northwest section of the District was continued, even though a substantial number of these students resided closer to the Coolidge School than to the school to

which they were bussed. This bussing program -- which continued even while classrooms at Coolidge were unused (Tr. 641) -- is explicable only as a means of insuring that white and Negro students in the District attend separate schools.

The location of attendance zone lines and the details of the student bussing system are, of course, proper subjects for judicial inquiry. See Northcross v. Board of Education, 333 F. 2d 661 (6th Cir. 1964); United States v. Jefferson County Board of Education, 380 F. 2d 385 (5th Cir. 1967). When, as the evidence discloses here, zone lines are drawn and bussing is instituted to perpetuate segregation, it is appropriate for a court to declare such conduct impermissible and to take remedial action.

(2) Location and construction of new school buildings to preserve segregation.

School construction plans are an integral part of school desegregation. Wheeler v. Durham City Board of Education, 346 F. 2d 768 (4 Cir. 1965); United States v. Jefferson County Board of Education, 380 F. 2d 385, 394 (5 Cir. 1967) (en banc), cert. denied, 389 U.S. 840 (1967). A court may enjoin financing

and physical arrangement of schools designed to promote racial segregation. United States v. Board of Public Instr. of Polk County, No. 25786 (5th Cir. Apr. 18, 1968; Board of Duval County v. Braxton, 326 F. 2d 616, 620 (5 Cir. 1964). While it is within the discretion of the school board to base its construction plans, in good faith, on proper factors such as density of population, accessibility and convenience, economics, planned housing development, transportation, and safety despite resulting racial imbalance (Henry v. Godsell, 165 F. Supp. 87 (E.D. Mich. 1958)), it is impermissible to use new construction to perpetuate segregation (Wright v. County School Board of Greenville County, 252 Supp. 378, 384 (E.D. Va. 1966)).

In Kelley v. Altheimer, 378 F. 2d 483 (8 Cir. 1967), a small school district proposed construction of two new schools, one in a predominantly white and the other in a predominantly Negro neighborhood. There was evidence that no legitimate educational or financial basis existed for constructing two separate school complexes. Despite the fact that the district

had a voluntary transfer plan, the Court of Appeals barred the construction proposal upon a finding that it would have "the effect of helping to perpetuate a segregated school system and should not have been permitted by the lower court." 378 F. 2d at 494-97.

In the New Rochelle, New York school case, the Court of Appeals for the Second Circuit held that a school board's failure to adopt a building plan recommended in a report by a team of professional educators and its adoption of a different construction plan which, in light of a restrictive transfer policy, would inevitably result in a "perpetuation and a freezing in" of racial segregation in the schools, was evidence that the Board was discriminating in the operation of the school system. Taylor v. Board of Education, 294 F. 2d 36 (2 Cir. 1961), cert. denied, 368 U.S. 940 (1961)..

The record in the present case establishes that the defendants took impermissible steps with regard to school location and construction by selecting the sites for the Kennedy and Taft Schools for the purpose of establishing one as an all-Negro school and the other as an all-white school.

In a recent case involving facts nearly identical to those before this Court, the Fourth Circuit held that where a school board decides to build a new high school near the site of an existing identifiably Negro high school, the Court must look beyond the board's expertise in site selection and determine, on the basis of objective considerations, "whether the new school is located to perpetuate segregation." Brewer v. School Board of City of Norfolk, No. 11782 (4th Cir. May 31, 1968). Among these objective factors are "the new school's attendance area, whether it will be designed to accommodate only Negroes or whether it will include white pupils who live nearer to it than to the predominantly white high schools they now attend, whether the racial composition of the faculty will mark it as a Negro school, and what practical alternative sites and assignment plans, if any, are available." Slip opinion at 12.

The record in the present case with respect to all of these factors establishes that defendants selected sites for the Kennedy and Taft Schools for the

purpose of establishing one as an all-Negro school and the other as an all-white school. The former Superintendent testified that while no specific attendance zone was postulated for the new Kennedy School, its future enrollment was estimated by considering only the Phoenix area (Tr. 153 (Kingsland)). It is therefore clear that the school was not designed to include the white pupils who live closer to the Kennedy-Coolidge site than to the school they now attend. It is also clear that the racial composition of the projected faculties of the Taft and Kennedy Schools would further identify them as white and Negro schools. In addition, two alternative building plans which were geographically sound and would have resulted in some integration of white and Negro pupils were considered and rejected by the Board. The record shows that the Board's initial decision in 1964 not to build a single school in the Harvey Highlands area which would accommodate both white pupils presently attending Taft and the overflow of Negro pupils from Coolidge was based on its belief that the resulting racial integration would not be "accepted" by the community (See transcript references in Findings 19 and 20).

The Board's subsequent decision (contrary to Board member Watkins' understanding, Tr. 377-86) not to locate the Kennedy School northeast of Phoenix where it would be attended by pupils of both races also evidences the consciousness of race that ran throughout the Board's deliberations and decisions about the location and construction of new facilities.

- (3) Rejection of the most educationally sound reorganization because it would produce desegregation.

In February of 1967, a team of five educators who studied the District at the request of its Board recommended institution of an upper-grade center, and proposed use of an existing facility for that purpose. The evidence further establishes that in January and February, 1968, defendants considered proposals submitted by the school Superintendent of District 151 for the reorganization of the schools of that district. Although the immediate emergency was the overcrowding of the Eisenhower School, the plans were generally directed toward improving the quality of public education in the district. All members of the school board agreed that it was desirable, from an educational standpoint, to establish an upper-grade center in the district (Tr. 780-781), but the board rejected its Superintendent's plans to achieve that objective

by desegregating the Roosevelt or Coolidge Schools as upper-grade centers because such plans would result in Negro and white school children attending classes together (Tr. 536, 785, 798-800). The plan which was most sound educationally and favored by the Superintendent was "Plan C," which would have used Coolidge School for an upper-grade center and would have resulted in the distribution of Negro students between grades 3 and 8 among five schools in the district, so that they would represent between 12 and 31 percent of the student enrollment at each of the schools (Tr. 775). The board, reflecting community sentiment, rejected this proposal (Tr. 536).

The defendants' rejection of the reorganization proposals on racial grounds was similar to the impermissible action taken by the school board in the New Rochelle case, supra. The Court of Appeals for the Second Circuit determined in that case that the board acted unconstitutionally when it failed to adopt an educationally sound building plan which would have resulted in disestablishment of the Negro school.

The board's decision to perpetuate and "freeze in" the racially segregated attendance pattern was held to give rise to a constitutional claim on the part of Negro students.

The same is true of the defendants' decisions to reject "Plan C." The record establishes that the plan was rejected principally - if not solely -- because it would result in the racial integration of the district's schools. That decision was, like the parallel choice in the New Rochelle case, a determination to perpetuate racial segregation. That course is forbidden by the Fourteenth Amendment, and it is not open to the defendants.

- (4) Unrebutted presumption of unconstitutionality created by the results of defendants' student assignment system.

The Gary decision establishes in this Circuit that racial imbalance in a district's public schools is not sufficient, in and of itself, to sustain the conclusion that the school board is under a constitutional duty to take corrective action. On the other hand, it is entirely consistent with the Gary decision to say that when -- as is true here -- the enrollment

statistics are so extreme that they show substantially total segregation (except for the mentally handicapped), the burden shifts to the school board to explain how that result could innocently have been achieved by the application of nonracial and educationally legitimate criteria.

This rule was approved by the Court of Appeals for the Sixth Circuit, which has also adopted the Gary rule in its decision in Deal v. Cincinnati Board of Education, 369 F. 2d 55 (6 Cir. 1966), cert. denied, 389 U.S. 487 (1967). In Northcross v. Board of Education of Memphis, 333 F. 2d 661 (6 Cir. 1964), the court upheld shifting the burden in such a case to the Board "to demonstrate that the zone lines of each school were not drawn with a view to preserve the maximum amount of segregation." Similarly, in Evans v. Buchanan, 207 F. Supp. 820 (D. Del. 1962), a district court determined that extreme racial separation shown by student enrollment figures created a presumption of unconstitutionality which was not overcome by "inconclusive" evidence submitted to justify the boundaries.

Entirely apart from proof of affirmative conduct designed to preserve segregation, this record is sufficient -- on the sole basis of the enrollment statistics summarized above and defendants' inadequate explanation of them -- to warrant remedial action. The only defense offered to explain the extraordinary student assignment pattern in this case is that it would be expensive to reorganize the schools, that residential patterns in the district are totally segregated, and that the community would not "accept" integrated schools. The poor financial condition of the school district is obviously an inadequate defense to a charge that the Fourteenth Amendment is violated. Whatever limited funds the district has must be spent to provide equal education for all its school children, and the separate education now being provided is "inherently unequal." Nor is residential segregation an answer if it is attributable, as the community sentiment shown by this record implies, to private racial discrimination. See Brewer v. School Board of City of Norfolk, No. 11782 (4 Cir. May 31, 1968). We turn now to the question of community acceptance - particularly as reflected in referenda held within the district on various matters affecting student assignment.

C. The unwillingness of a majority of the community to accept desegregation does not affect defendants' constitutional duty.

The record establishes that, at a referendum held in February 1964, a majority of the voters in School District 151 defeated a construction proposal which would have established a racially integrated school (See Proposed Finding 20). The evidence also shows that there is substantial community opposition to the abolition of the segregated schools in School District 151 (See Proposed Findings 20 and 21). Defendants suggest that this hostility has made it difficult to obtain approval for the financing which is necessary for the construction of schools to be attended by Negroes and whites. Consequently, a new referendum proposing sites that preserved segregation was proposed and passed in December of 1964.

It is a constitutional truism, however, that "one's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." West Virginia State Board v. Barnette, 319 U.S. 624, 638. Less than five years ago, the Supreme Court

reaffirmed this principle in Lucas v. Colorado General Assembly, 377 U.S. 713, 736-737 (1964), wherein it observed that "a citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." At stake in this case are the rights of Negro school children, a minority class in School District 151. The Fourteenth Amendment was designed to protect this minority against invidious discrimination, and that protection cannot be disregarded simply because a majority of those in the district indicate by ballot that they wish it disregarded. This point was aptly summarized by a three-judge district court in a Louisiana school desegregation case, Hall v. St. Helena Parish School Board, 197 F. Supp. 649, 659 (E.D. La. 1961), aff'd, 368 U.S. 515 (1961): "No plebiscite can legalize an unjust discrimination."

We recognize, of course, that in this case the electorate under State law controls some of the purse-strings -- that approval at a referendum is required

/ That case involved a referendum decision by the electorate to close its schools when confronted by a desegregation order. The statute authorizing the referendum was voided on the basis of its constitutional purpose and effect.

to fund substantial school construction. That does not mean, however, that the defendants may sacrifice the Constitution if the electorate so expresses its will. The board's duty is to submit for referendum only constitutional proposals; it may not, out of deference to public opinion, add unconstitutional provisions or conditions to a construction proposal.

The same is true of the community sentiment shown by this record. The end sought to be achieved by the majority is an impermissible one, and it was the school board's duty to disregard it and to act as best it could within constitutional limits. It should not have permitted the referenda in 1964 to result -- as they did -- in construction which furthered and perpetuated racial segregation. Nor should it have permitted the unconstitutional objectives of the majority of the community to affect its

/ If, for example, a majority of the residents of the district expressed the view that Catholics or Jews should be refused permission to attend its public schools, the board could not include such a condition in a referendum proposal or implement it if it were adopted. The same would be true, if, for example, the electorate conditioned the construction of a new school on the use of other public funds for the construction of a church. The latter condition would violate the First Amendment (as applicable to the States through the Fourteenth Amendment) and should not be proposed or implemented.

other decisions -- to and including the rejection of "Plan C" of its Superintendent in February 1968, and its failure to implement the recommendation for an upper-grade center suggested by a five-man team of professional educators in 1967.

D. There is no merit to defendants' affirmative defenses.

Defendants' Answer sets out several affirmative defenses. First, they argue that the Court lacks jurisdiction because the action is an unauthorized suit to correct racial imbalance in the District's schools. The pleadings and the proof here establish that this case has virtually nothing in common with those involving so-called de facto segregation. The second affirmative defense is that the action is unauthorized as to faculty desegregation. This contention is contrary to the holdings of the United States Supreme Court and of the Courts of Appeals for the Fourth, Fifth, Sixth, Eighth, Tenth, and District of Columbia Circuits (See Part I, supra. There have been no cases upholding this view since the decision in Rogers v. Paul, 382 U.S. 198 (1965).

The third affirmative defense avers that, despite the requirement of 42 U.S.C. 2000c-6, the defendants have not had a reasonable amount of time to adjust the conditions complained of. That issue is foreclosed by the certificate of the Attorney General to the contrary. (See United States v. Junction City School District, 253 F. Supp. 676 (N.D. Ark. 1966.)

It is also contended that the relief sought is forbidden by Illinois law because it will require affirmative consideration of race. Precisely such relief is required by the Fourteenth Amendment where appropriate to correct the effects of past discrimination (See, e.g., Green v. County Board of New Kent County, — U.S. —, 36 L.W. 4476, decided May 27, 1968, slip opinion, p. 7, n. 4, and the Supremacy Clause would require that Illinois law yield if there were a conflict. In any event, Illinois law permits affirmative consideration of race even absent prior de jure discrimination. Tometz v. Board of Education of Waukegan, No. 40292 (September Term 1967)).

Lastly, it is asserted that the action should be dismissed as to Superintendent Watts because the Board and not he operates the school system. The Policy Manual of District 151, which was submitted by the parties in connection with the defendants' motion to dismiss Dr. Watts from the action and thus a part of the record, describes the Superintendent (Policy 8300) as "chief executive officer" of the system. Moreover, it is clear from the testimony that he is responsible for the day-to-day operations of District 151, and that often (although not always) his policy judgments are simply ratified by the Board. When Dr. Watts assumed office, he was charged by the Board with responsibility for administration, curriculum, finances, and public relations. In short, as in most - if not all - school desegregation cases of which plaintiff is aware the Superintendent is a necessary party.

III

THE RELIEF REQUIRED ON THIS RECORD IS A
PRELIMINARY INJUNCTION DIRECTING DEFENDANTS
TO DESEGREGATE FACULTIES AND TO DISESTABLISH
THE PRESENT SEGREGATION OF STUDENTS

White and Negro pupils who have been denied the rights secured by the Fourteenth Amendment are entitled to relief which not only ensures cessation of discriminatory practices in the future but also eradicates the harm done by the defendants' past unconstitutional conduct. This Court has "not only the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." United States v. Louisiana, 380 U.S. 145, 154 (1965). See United States v. Duke, 332 F.2d 759, 768 (5th Cir. 1964). Suitable relief is that which in light of the particular facts in each case rectifies past inequalities now, without delay. Alabama v. United States, 304 F.2d 583 (5th Cir. 1962), aff'd, 371 U.S. 37 (1962).

As noted, Federal courts should and do afford detained affirmative relief in school desegregation cases. See especially, United States v. Jefferson County Board of Education, supra. The proper approach,

we believe, is that articulated by the Supreme Court, in a different context, in Porter v. Warner Co., 328 U.S. 395, 397-398 (1946):

Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. . . . /T/he court may go beyond the matters immediately underlying and decide whatever other issues and give whatever other relief may be necessary under the circumstances

Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction.' (citations omitted)

And see Mitchell v. DeMario Jewelry, 361 U.S. 288, 291 (1960).

A. This Court should issue a preliminary injunction

The United States has instituted this action pursuant to Title IV of the Civil Rights Act of 1964, which reflects Congress' recognition that there is a vital national interest in the orderly desegregation of public schools. The Attorney General has certified, as required by law, that this action will materially further the orderly achievement of desegregation in public education. We need hardly point out to this Court the contemporary importance of this goal; there are few matters of more pressing national concern than the prompt realization of the civil rights of Negro citizens.

Prompt and effective relief to eradicate unlawful racial separation in public schools such as those in District 151 is obviously needed. Both white and Negro school children in such a district are irreparably harmed by the continuation of the policy of racial segregation, and the Constitution is violated each day that a school child is taught in an atmosphere of racial separatism. If injunctive relief is not afforded now, the children of School District 151 will continue, through 1968-1969, to be deprived of the

kind of education and school associations which the Constitution guarantees to them. And the United States will be the worse for the delay.

The need for prompt relief in these circumstances has been uniformly accepted by the Federal judiciary. The 16 cases listed in Appendix E are school suits brought by the United States in the States of Mississippi, Alabama, Louisiana and Georgia. In all of them relief was afforded by way of preliminary injunction within a month or two of the filing of the complaint. Such expedition is appropriate here.

B. Defendants must reassign teachers to avoid identifiability of schools by race.

The faculties of the six schools in District 151 are presently identifiable by race--the faculty statistics in evidence indicate that Coolidge and Kennedy are "Negro schools" and that Roosevelt, Madison, Eisenhower and Taft are "white schools". This result is, as we have shown in our Statement, the result of deliberate decisions by the defendants to assign Negro teachers to Coolidge and Kennedy and white teachers (with a strict quota limitation on Negroes (Tr. 518-523) to the other four schools. In these circumstances, the defendants

have a constitutional duty not merely to refrain from such conduct in the future but to take affirmative action to eradicate the effects of past assignments and to eliminate the racial identifiability of the schools.

It is, of course, true that to accomplish the latter objective, the defendants will have to take note of the race of Negro teachers in order to permit their reassignment to predominantly white schools, and that they will have to do the same with white teachers. This kind of race-consciousness--designed to remedy past discrimination--is not forbidden by the Constitution. Although it is a good general rule that State agencies which have not engaged in racial discrimination in the past should remain "color-blind," the same is not true of those which have, by unconstitutional action, created a situation which must be remedied by affirmative action.

Consciousness of race is appropriate and necessary in fashioning relief to prevent perpetuation of discrimination and to remedy its past effects. Springfield School Comm. v. Barksdale, 348 F.1d 261, 266 (1st Cir. 1965); Offerman v. Nitkowski, 378 F.2d 22 (2d Cir.

1967); Wanner v. Arlington County School Board, 357 F.2d 452, 454 (4th Cir. 1966); United States v. Jefferson County Board of Education, 372 F.2d 836, adopted en banc, 380 F.2d 385 (5th Cir. 1967) cert. denied, 389 U.S. 840 (1967); Dove v. Parham, 282 F.2d 158 (10th Cir. 1967). The Supreme Court of Illinois has recently gone further in upholding the state's Armstrong Act in Tometz v. Board of Education of Waukegan, No. 40292 (September Term, 1967). See also Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966) (jury commissioners must have a "conscious awareness of race in extinguishing racial discrimination in jury service). The State is "under a duty to take whatever corrective action is necessary to undo the harm it created and fostered The means to that end, such as disestablishing segregation among students, distributing the better teachers equitably, equalizing facilities, selecting appropriate locations for schools, and avoiding resegregation must necessarily be based on race." United States v. Jefferson County, supra, 372 F.2d at 868, 877. Efforts of school authorities to undo conditions of illegal racial segregation cannot be frustrated by reliance on

the theory that race is an impermissible consideration. "This is not the 'consideration of race' which the Constitution discountenances." Wanner v. Arlington County School Board, 357 F.2d at 454. Nor can a district meet its affirmative obligation to disestablish a discriminatory system by applying legitimate and otherwise educationally sound criteria if the effect of such criteria is to leave standing a pattern of previously created racial discrimination. However adequate these bases for decision may be where there has been no previous deprivation of constitutional rights, they are insufficient if they fail to eradicate a "created status of constitutional violation . . . no matter what educational justification they may provide." Dove v. Parham, 282 F.2d at 258-59.

In light of these principles, it is defendants' duty, with respect to faculty assignment, to reallocate teachers within the system so that none of the six faculties will "be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school." United States v. Jefferson County Board of Education, 380 F.2d 385, 394 (5th Cir. 1967) (en banc),

cert. denied, 389 U.S. 840 (1967). The objective should be to achieve Negro-white ratios on each faculty which would, by the law of averages, provide the kind of racial distribution which would have resulted if defendants had, in fact, been "color-blind" and had assigned Negro and white teachers to positions in the system entirely without regard to race. Each school would then have had a pro rata share of Negro and white teachers in the system, irrespective of the predominant race of its student body. That objective should be the goal set for the defendants in this case. See Dowell v. Oklahoma City Board of Education, 375 F.2d 158, 164 (10th Cir. 1967), cert. denied, 387 U.S. 931 (1967); Brewer v. Norfolk School Board, No. 11,782 (4th Cir., May 31, 1968; Coppedge v. Franklin County Board of Education, 273 F. Supp. 289, 300 (E.D.N.C. 1967).

The date for achieving this objective has been set in the Fifth Circuit as the beginning of the 1970-1971 school year (United States v. Bessemer Board of Education, No. 25,809 (5th Cir., June 3, 1968), and in the Tenth Circuit as 1970 (Dowell v. Oklahoma City Board of Education, 375 F.2d 158 (10th Cir. 1967), cert. denied, 387 U.S. 931 (1967)). We believe that the

reasons for delay in Cook County are less substantial than those in the Fifth Circuit, and that 1969-1970 would be the appropriate target date in this case.

The Fourth and Fifth Circuits have also held recently in the Norfolk and Bessemer cases, supra, that precise timetables must be set to fix intermediate objectives along the way. In the present case, we believe it to be a fair requirement to direct the defendants to accomplish approximately 50 percent of the total task by the beginning of the 1968-1969 school year. This would mean that sufficient Negro and white teachers would have to be reassigned to minority-race positions to result in 50 percent of the optimum minority representation in each school. Thus, with a total faculty and staff that is approximately 60 percent white and 40 percent Negro, each of the predominantly white schools should have a 40 percent Negro faculty in 1969-70 and at least 20 percent this fall; Coolidge-Kennedy's faculty should be about 60 percent white in 1969-70 and at least 30 percent this fall.

The defendants may not, however, rely entirely on voluntary transfers if they are unable in that manner to achieve this goal. United States v. Board of

Education of City of Bessemer, No. 25,810 (5th Cir. June 3, 1968) at 14; Monroe v. Board of Commissioners of City of Jackson, 380 F.2d 955, 960 (6th Cir. (1967), rev'd on other grounds, __ U.S. __ (1968); Kelley v. Altheimer, 378 F.2d 483, 498-99 (8th Cir. 1967); Coppedge v. Franklin County Board of Education, 273 F. Supp. 289, 300 (E.D.N.C. 1967); see Brewer v. School Board of City of Norfolk, No. 11, 782 (4th Cir. May 31, 1968).

In the Bessemer case, supra, the Fifth Circuit held that solicitation of voluntary transfers alone does not satisfy the constitutional obligation (Slip opinion, p. 13): "Jefferson stands for the proposition that there is an affirmative duty to do everything--the word is everything--within /the school board's/ power to meet the decree imposed complete desegregation of faculties." The court observed that while this demand may impose difficulties in terms of unavailability or unwillingness of teachers, the board must make its reassignments compulsory even though it might mean discharging an unwilling teacher. Neither teacher hiring statutes nor State law concerning tenure of teachers may be allowed to impede the Board in carrying out this obligation.

In Kelley, supra, the Eighth Circuit, dissatisfied with the voluntary approach, ordered complete faculty desegregation by the beginning of the 1969-70 school year. It directed that three steps be taken: first, that vacancies in predominantly Negro schools be filled with white teachers and vacancies in predominantly white schools with Negro teachers; second, that the cooperation of the faculty in volunteering for transfers be actively sought; and third, if the first two methods did not produce sufficient progress toward the 1969 goal, that teachers be reassigned.

In Monroe, supra, the District Court entered an order approving the board's voluntary teacher transfer plan. The Sixth Circuit reversed, reading Bradley and other Supreme Court decisions to forbid the "laissez faire handling of faculty" desegregation: " . . . leaving the decision of integration of the faculties to the voluntary choice of teachers, does not obey current judicial demands." 380 F.2d at 961.

In Coppedge, supra, the District Court entered an order requiring immediate compulsory reassignment of teachers and reasonable progress toward a goal of a

random ratio, notwithstanding the fact that many teacher contracts might have been signed for the forthcoming year. 273 F. Supp. at 300.

In Bowman v. County School Board of Charles City County, 382 F. 2d 326, 329, 335 (4th Cir. 1967) (en banc), reversed in part sub. nom. Green v. County School Board of New Kent County, No. 695, O. T. 1967 (May 27, 1968), the defendant school board submitted a plan which would permit teacher transfer within the system and would provide for hiring of new teachers in such a way as to "work toward integration." The Fourth Circuit remanded for a plan which would include a minimal objective timetable for faculty integration. At least two judges thought that this would require an order by the Court of Appeals for compulsory teacher reassignment. 382 F. 2d at 335-36 (Sobeloff and Winters, J. J. concurring specially). See also Brewer v. School Board of the City of Norfolk, No. 11,782 (4th Cir. May 31, 1968) at 5. Under these decisions, the court should direct the defendants to reassign teachers involuntarily if voluntary transfers do not achieve the required interim objectives. Of course,

the reassignment problems faced by districts which hire their teachers by school are not present here. District 151 hires for its system and its standard contract contains a reassignment clause (Gov't Ex.).

C. Defendants must disestablish their all-Negro schools

The defendants' unlawful course of conduct with respect to student assignment has resulted in the separation of Negro and white school children in District 151. There is available today no precise measure of the harm which has been done. There is no way of knowing how many white children would be attending the Kennedy or Coolidge schools if the attendance zone lines had remained where they were when the DeYoung, Ravensloot and Tromp children attended Coolidge, or if white children living nearer Coolidge than Roosevelt had not been bussed to the Roosevelt school. Nor is it possible to tell today how many Negro children would be attending a school located in the Highlands area if the referendum of February 1964 had passed, or if the school board had, even after rejection of that proposal, refused to abandon it in favor of the construction of separate Negro and white schools. And there is no certain measure of the number of white children who

would be attending a school located at the site proposed by Mr. Watkins and initially agreed upon (albeit informally) by the Board.

One thing is clear and certain, however. If any or all of the above steps had been taken -- if the Board had not violated its constitutional obligation by considering racial factors in reaching decisions on policy questions presented to it -- District 151 would not, today, have schools which are almost 100 percent Negro. And if the board had given lawful and racially impartial consideration to the plans proposed to it by Superintendent Watts in February, 1968, it might well be taking steps today to use the Coolidge School as an upper-grade center for the entire district and arranging for the transportation of Phoenix school children from grades 3 and up to the other schools in the district.

In these circumstances, the most appropriate means of undoing the harm caused by defendants' improper conduct is to require that they disestablish the all-Negro schools and transform them into institutions which are no longer predominantly Negro. That is the principal objective around which the relief to be granted on the subject of student segregation should be fashioned.

Such a directive would be in keeping with the most recent decisions on the subject by the Supreme Court and with the desegregation guidelines announced by the Department of Health, Education and Welfare. In Green v. County Board of New Kent County, No. 695, O.T. 1967, decided May 27, 1968 (36 Law Week 4476) the Supreme Court held unanimously that the constitutional obligation of a school board which has been operating segregated schools is "to formulate a new plan and . . . fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." The Court said that this burden requires a "plan that promises realistically to work, and promises realistically to work now." (Slip opinion, p. 8, emphasis in original.)

In determining the extent of the duty to segregate under the standards of Brown and other Supreme Court decisions, the Fifth Circuit, in promulgating a uniform decree for all school districts within that circuit, has held that "great weight" should be given the Guidelines on School Desegregation issued by the Department of Health, Education and Welfare. 33 Fed. Reg. 4955-59 (1968) (Daily ed.). Singleton v. Jackson

Municipal Separate School District, 348 F. 2d 729 (5 Cir. 1965). "The standards of court-supervised desegregation should not be lower than the standards of HEW supervised desegregation." United States v. Jefferson County Board of Education, 372 F. 2d 836, 848, adopted en banc, 380 F. 2d 385 (5th Cir. 1967), cert. denied, 389 U.S. 840 (1967). Courts in other circuits are in substantial accord. E.g., Kemp v. Beasley, 352 F. 2d 14, 18-19 (8th Cir. 1965) ("The Court agrees that these standards must be heavily relied upon"). ==/

Section 11 of the Guidelines provides that compliance requires affirmative action with respect to pupil assignment to insure that "there are no Negro or other minority schools and no white schools -- just schools." Section 12 suggests at least four types of plans which might be appropriate to accomplish this objective, including free choice transfers, rezoning of attendance boundaries, establishment of upper grade centers to serve the entire district, and the closing of minority schools and reassignment of pupils formerly attending those schools to other schools throughout the district. This section stipulates that the board

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—/ The fact that, on the basis of a cursory and incomplete examination, HEW officials may have advised members of the Board that they found no violation of the Fourteenth Amendment does not have the legal consequence of exonerating the defendants with respect to the allegations made here and the proof in this record. As the Court of Appeals for the Fourth Circuit, sitting en banc, recently said of a similar determination by HEW officials: "[A]pproval by the Department of Health, Education, and Welfare is not synonymous with complete compliance with the law." Cypress v. Newport News General and Nonsectarian Hospital Association, 375 F 2nd 648, 659 n. 21 (1967).

must adopt that plan which "will promote the most expeditious elimination" of the "conditions of racial separation."

The most effective and most expeditious means of eliminating segregated schools is obviously to implement an educationally sound proposal which would disestablish the all-Negro schools and distribute their students among the other schools in the district. The existence of an all-Negro school is a plain sign that segregated schools exist; in both the Green case and in its companion, Raney v. The Gould School District, No. 805, O. T. 1967 (May 27, 1968), the Supreme Court relied, in part, on the continued existence of all-Negro schools as proof that the desegregation plan utilized in those cases had not been effective. In the present case, disestablishment of one of the all-Negro schools is a necessary consequence of the educationally desirable "Plan C" which the board rejected -- for impermissible reasons -- in March of this year. This is a plan which the Superintendent -- a defendant in this case -- has proposed and which, in his view, is educationally sound (Tr.). Its principal goal

is the establishment of an upper-grade center, which the entire board has viewed as desirable (Tr. 780).

In these circumstances, we believe it most appropriate for this Court to direct the defendants to disestablish the Coolidge School as an all-Negro or predominantly Negro school for the coming school year. This may be accomplished by implementation of "Plan C" or by the use of any other plan which would have the same result and which would, viewed objectively, be no less sound educationally. Because of the time remaining before the commencement of the school year, we submit that it is appropriate to issue a more specific order than might issue if there were substantial time in which to conduct further hearings in this Court before the plan's implementation.

D. The prohibition against bussing in the Civil Rights Act of 1964 is inapplicable here.

There is no merit to the claims that the student reassignment provisions discussed above would violate Section 407(a)(2) of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6. That section provides, in pertinent part:

". . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

Implementation of "Plan C" or any similar proposal would, to be sure, require the transportation of students from Phoenix to other schools in the district. It would not, however, violate the above proviso because the purpose of the transportation would not be "to achieve . . . racial balance" but to remedy segregated attendance patterns for which the school board is responsible.

The language and legislative history of the "anti-bussing" proviso makes it abundantly clear that it was designed to limit the power of a court to deal with de facto segregation of the kind involved in Bell v. School District of Gary, supra. The proviso speaks in terms of an order "seeking to achieve racial balance" and of transportation designed "to achieve such racial balance." On its face, it does not apply to orders in cases where more is shown than mere racial imbalance

or to transportation which serves a purpose other than increasing the volume of Negro and white students attending the same schools. Where affirmative acts designed to promote and perpetuate segregation are proved, the purpose of the relief is to overcome the consequences of these acts -- not "to achieve racial balance" -- and transportation of students may be a necessary component of such an order.

The "anti-bussing" proviso must be read in the context of the limitation Congress was seeking to impose on the courts. That limitation was also inserted in the definitional provisions of Title IV. Section 401 defines "desegregation", for example, as not including "the assignment of students to public schools in order to overcome racial imbalance." It was the possibility that courts might direct the transportation of students where nothing more was shown than de facto segregation that impelled Congress to write into the law the limitation on the definition of "desegregation" and the proviso barring bussing as a remedy for such cases.

This conclusion emerges clearly from the legislative history. Congressman Cramer, who offered the "anti-bussing" amendment to the bill, stated (110 Cong. Rec. 2280):

The purpose is to prevent any semblance of congressional acceptance of approval of the concept of 'de facto' segregation or to include in the definition of 'desegregation' any balancing of school attendance by moving students across school district lines to level off percentages where one race outweighs another.

Senator Humphrey said (110 Cong. Rec. 12717):

This addition seeks simply to preclude an inference that the title confers new authority to deal with 'racial imbalance' in schools, and should serve to smooth fears that Title IV might be read to empower the Federal Government to order the bussing of children around a city in order to achieve a certain racial balance or mix in the schools.

In United States v. Jefferson County Board of Education, 372 F. 2d 836, 878-886, adopted en banc, 380 F. 2d 385 (5th Cir. 1967), cert. denied, 389 U.S. 840 (1967), the meaning of the "anti-bussing" proviso and its application to school systems segregated by local statute was thoroughly analyzed. The court concluded there, as we urge this court to do, that the proviso is limited to cases where nothing more is shown than racial imbalance

in the schools. It does not apply where, by the deliberate act of the school board, segregation is established and perpetuated.

The Supreme Court has recently expressed this view, at least by implication, in Green v. School Board of New Kent County _____ U.S. _____, 36 L. W. 4476 (1968). There the Court commended to the district court for its consideration a plan to convert the formerly Negro school to a center serving all students in grades 1 to 7, while the formerly white school would serve for grades 8 to 12 (slip opinion, note 6, paragraph 2, pp. 11-12). Such a plan would necessitate bussing students to both schools from all over the district.

Apart from legislative history, there is a sound constitutional reason for reading the proviso as so limited. For if it were interpreted as applying to situations in which segregation has been caused by the affirmative conduct of the school board, serious questions would be raised regarding its constitutionality. The decisions have made it crystal clear that school boards have a constitutional duty to do what is necessary to eradicate the effects of past impermissible

discrimination. E.g., Green v. County Board of New Kent County, supra. There is substantial doubt whether Congress could, by statute, restrict remedies which the Constitution commands. In order to secure the statute from constitutional doubt, it should be read as the Fifth Circuit has read it -- i.e., as limiting relief in a non-constitutional area, where all that is shown is a racial imbalance in the schools. /

/ In most cases involving desegregation of systems which provide transportation for their pupils, the transportation arrangements have been the subject of detailed judicial consideration and relief. See especially Lee v. Macon County Board of Education, 267 F. Supp. 458, 473, 481 (M.D. Ala., 1967), affirmed, 389 U.S. 215 (1967), and cases cited there.

- CONCLUSION

For the foregoing reasons, we submit that a preliminary injunction should issue requiring the defendants to desegregate their faculties on a systematic basis and to disestablish Coolidge-Kennedy as a Negro school by the adoption of plan C or any other educationally appropriate alternative which will have the effects of disestablishing the Coolidge School as a predominantly Negro school.

Respectfully submitted,

THOMAS A. FORAN
United States Attorney



STEPHEN J. POLLAK
Assistant Attorney General

JACK E. SCHMETTERER
Assistant U. S. Attorney

NATHAN LEWIN
J. HAROLD FLANNERY
ROBERT PRESSMAN
Attorneys
Department of Justice
Washington, D. C. 20530