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Differences between obligation under 441-B and under  
Lee v. Macon County Board of Education desegregation  
plan

A. Procedural Differences

Signing the 441-B brings a school system under an enforceable obligation to follow the Guidelines, under the theory of our complaint in United States v. Dale County Board of Education. Submission of a plan to the State Superintendent of Education, as provided in Lee, does not appear to result in any such obligation.

The channels of review differ. The channels under the 441-B go directly from the local superintendent to the federal government, while under Lee the State Superintendent is an intermediate agent between the local systems and the federal courts and executive. Lee is thus more consistent with state responsibility and with federalism.

These procedural differences are not necessarily points of conflict between the 441-B obligation and the Lee plan obligation, but conflict could arise. For example, in Dale County we could get in the position of asking the Middle District to order compliance with the Guidelines, even though they differ substantively from the Lee plan formulated by the same County. And, because of the different channels of review, desegregation progress by a school system might be deemed acceptable by the Court and unacceptable by the Commission; or vice versa. In such a situation it will be hard for the school system to know what to do -- presumably it will be best off to comply with neither the 441-B nor the Lee plan, so that it can get under the protection of a court ordered desegregation plan.

Finally, further differences may arise if either the Court or the Commissioner takes advantage of the opportunity left open in both the Guidelines and in Lee to change the plan for desegregation.

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### B. Substantive Differences

Comparison of the Guidelines and Lee plan reveals substantive differences, both in approach and in detail. But it would be misleading to discuss them without first pointing out their basic similarities -- both allow the school system to follow a free choice plan; both stress the elimination of choice-influencing factors; the mechanics of free choice in Lee follow the Guidelines in broad approach and in many specifics; both require faculty desegregation; both have a performance test for the adequacy of the plan; both aim at the elimination of the dual system. We should keep these similarities in mind as we examine the differences.

#### 1. Differences in Outlook

The Guidelines, in §181.2, state the goal of the desegregation plan as the elimination of "the continued maintenance of a dual structure of separate schools for students of different races." The Lee plan begins with the Board agreeing to:

take the following affirmative action to disestablish all state enforced or encouraged public school segregation and to eliminate the effects of past state enforced or encouraged racial discrimination in the operation of the school system.

Lee thus appears to aim for disestablishment of the racially dual system only insofar as it is or was state encouraged or enforced, while no such limitation appears in the Guidelines concept of a dual system.

The second apparent major difference in approach is that Lee contemplates the plan being a free choice plan, while the Guidelines favor the geographic plan. This difference is more apparent than real since the Lee court does not say a school system may not use geographic zoning and since all desegregation under the Guidelines in Alabama has basically been under free choice plans.

The third difference in approach is that the Lee opinion, while endorsing a performance test of the adequacy of the plan, did not mention any percentages of student desegregation which it would expect a school system to achieve. The Guidelines, of course, do contain

such percentages and the percentages have been construed by many people to constitute rigid requirements. If they are treated as rigid requirements it is likely that HEW and the Court would quickly diverge in ruling on the adequacy of performance.

2. Lee provisions missing from the Guidelines

To the extent that Lee requires more than HEW does, there will be no conflict. These are merely noted for the sake of completeness. The Guidelines have no provisions parallel to Lee's construction and consolidation provision or its requirements for remedial programs. In addition, Lee is much more specific about the requirement that programs and facilities be equalized.

3. Guideline provisions missing from the Lee plan

The following Guideline provisions are missing from the Lee plan:

- a. The option for a school system to give preference to choices of minority students (§181.49).
- b. Notification to all students of their assignments (§181.49).
- c. Notice by first class mail (§181.46).
- d. The requirement that there be official support for the desegregation plan (§181.17(a)).
- e. The provision relating to arrangements for attendance outside the school system of residence (§181.16).

Of these provisions, all but the last appear to be fairly insignificant. The last is significant, but although Lee has no such provision, I doubt that the Court would tolerate such arrangements if they resulted in discrimination.

4. Conflicts between Guidelines and Lee plan

There is a difficult conflict of dates for the 1967-68 school year choice period. Under the Guidelines (§181.44) the choice period is either completed or under way already. When we report to the Court on April 21, 1967 some systems following the Guidelines will have completed their choice period and the rest will be almost completed, since all choice periods must end by April 30. But the Lee plan



requires the 1967-68 choice period to commence on May 1 and end June 1, 1967 (I.C.). That plan also requires that students exercising choice have been notified that nondiscriminatory bus routes and criteria for eligibility for transportation will be adopted. Since the Guidelines contain no such provision, systems that have held or are holding a choice period will most likely not have complied with that requirement. Systems that are holding an April choice period knew of the requirement before the choice period began and presumably should have followed it. Systems that had January, February, or March choice periods could not have known about it, since Lee was decided March 22, 1967. This difference in choice period dates raises a number of questions:

a. Should HEW accept a May choice period for systems that have had no choice period. The answer is clearly yes.

b. Should HEW accept a May choice period for systems that have already had a choice period under the Guidelines? Should the Court require one? Does the answer depend on performance in the first choice period? Does it depend on whether notice was given about transportation routes and criteria? If so, is there a distinction between systems having an April choice period and systems holding an earlier period? If a second period is held, what does that do to choices by Negroes in the first period to attend white schools? If performance is what counts, what do we tell the Court on April 21 before we know the results of the choice periods? I would think we would want to let the earlier choice period be the only one, if it seems to have been fair.

Another serious possible conflict is found in the teacher desegregation provisions. The performance expected in Lee is "substantial desegregation of faculties in as many of the schools as possible for the 1967-68 school year." (II. A.). The Guidelines are more specific, requiring some desegregation in each school, or an equivalent amount of desegregation in the system (§181.13(d)) and I understand that HEW is taking the position that this means two teachers per school. Although Lee does not say it is desirable to have more than one minority teacher on a desegregated faculty, HEW seems to require more performance than Lee.

There is a major difference between the Lee (I. N.) and Guidelines (§181.51) transportation provisions. Lee requires transportation to the school of choice only if it is the nearest school to the pupil, while the Guidelines require transportation to the school of choice if it is the nearest formerly white or formerly Negro school. Under the Guidelines but not under Lee a Negro who chooses the closest formerly white school to his home is entitled to transportation even if there is a closer Negro school. Hopefully Lee's further requirements for nondiscriminatory routes and criteria for eligibility for transportation will minimize this conflict.

There are numerous minor differences in the mechanics of choice. Chief among these are the following. Under Lee (I. K.) choices may be changed until the end of the choice period; under the Guidelines (§181.48) they may not. Lee also allows change of choice where it is educationally called for (id.); there is no exactly parallel Guideline provision. Under Lee late choices may be subordinated (I. D.); under the Guidelines they must be (§181.45). Under Lee choices may, with permission from the State Superintendent, be denied "in extraordinary circumstances" (I.L.) even if there is no overcrowding; under the Guidelines overcrowding is the only permissible reason for denying a choice. (§181.49). There are other differences in language and content, but they are too minor to warrant consideration.

##### 5. Form 441

Although your question related only to 441-B, I should point out that one of the school systems listed in Part IV of the Court's order -- Cullman -- has an accepted form 441. That agreement places fewer affirmative obligations on the Board than either the 441-B on Lee.