

4-25-66
No. 23173

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARGARET M. JOHNSON, ET AL.,

APPELLANTS,

UNITED STATES OF AMERICA,

APPELLANT-INTERVENOR,

v.

JACKSON PARISH SCHOOL BOARD, ET AL.,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES OF AMERICA, INTERVENOR

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BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

Procedural History and Status

This action was filed in the United States
District Court for the Western District of Louisiana

on June 2, 1965, by Negro citizens of Jackson Parish, Louisiana, who are fathers of children attending the public schools of the Parish, seeking to enjoin school officials of that Parish from operating a compulsory biracial school system. (R. 2-9)

The defendants (appellees here) filed their Answer asserting that the decision of the United States Supreme Court in the Brown case was erroneous, but also asserting that, in any event, they were fulfilling their obligations under the laws of the United States. They also asserted, by way of answer that although white and Negro students in their district were attending separate schools, they were not operating a "compulsory" segregated system. They further urged that because no Negro students had applied for transfer the plaintiffs had no cause of action. (R. 14-25)

A hearing was held on July 27, 1965, after which the District Court issued a permanent injunction in general terms and ordered the appellees to submit a plan

for the desegregation of Jackson Parish schools commencing with the 1965-66 school year and progressing with "all deliberate speed" until all grades were included. The speed and manner, according to the District Court's order, were to be "in accordance with the requirements set forth by the Fifth Circuit Court of Appeals." The appellees were allowed 30 days to submit one or more alternative plans, and the appellants were given 15 days for objections. The question of desegregation of teaching and administrative personnel was deferred "until the plan for desegregation of pupils, as finally approved, either has been accomplished or has made substantial progress." (R. 26-29)

On August 27, the appellees moved for and were granted a twenty day extension of time within which to file a plan. (R. 29-32)

The plan, which was filed on September 16, set up a procedure, to go into effect after Court approval of the plan (and apparently after 3 weeks newspaper notice) under which students in four grades could transfer to the school of their choice subject to certain limiting criteria. Provision was also

made to include additional grades for the 1966-67 school year and thereafter. All grades would be covered by September 1967. (R. 32-37)

The appellants filed objections to the plan (R. 40-46) and on October 5 the District Court entered an order setting forth a desegregation plan substantially the same as that proposed by the appellees. It considered adequate the initial pupil assignments for the 1965-66 school year and provided for transfers in four grades during the period January 3 to January 7, 1966. All grades were to be covered by the 1967-68 school year. (R. 47-53) ^{1/}

The plaintiffs appealed and on February 7, 1966, the United States moved in this Court to intervene, which motion was granted on March 10.

1 / The Jackson Parish School System consists of 8 white schools with 1,756 white students in grades 1 through 8 and 876 white students in grades 9 through 12, and 4 Negro schools with 1,190 Negro students in grades 1 through 8 and 490 Negro students in grades 9 through 12. There are 132 white teachers employed in the white schools, 76 Negro teachers employed in the Negro schools. (R. 19-20)

The desegregation plans in the court below

The order presently appealed from must be considered against the background of the plan originally submitted by the appellees and of the order entered by the court below substantially approving that plan.

1. Appellees' original plan. The plan submitted by the appellees to the court below on September 16, 1965, provided for newspaper notice advising "that applications for assignment for the first, second, eleventh, and twelfth grades of any school . . . may be made in person at the Jackson Parish School Board Office." (R. 33) The plan also provided that the principals would announce "the above procedures" to all the school children "so that all children who desire to make a transfer to the school of their choice may do so." (R. 33) The plan then went on to provide for application forms for "transfers or assignments" and the criteria by which such applications could be granted or denied. (R. 33-35) The plan was silent with respect to the assignments of students who did not apply or whose applications were denied. Presumably their assignments would remain as before, by race. New students were entitled to

assignment according to their choice to the former all-white school or former all-Negro school closest to their place of residence. (R. 35)

For the 1966-67 school year all initial assignments of pupils to the first, second, third, fourth, ninth, tenth, eleventh and twelfth grades were to be on the basis of choice, reserving to the pupil the right to transfer and reserving to the school board the right to place a pupil in a "comparable" school closer to his residence. (R. 35-36) All grades would be covered by September 1967. (R. 36)

The appellees' plan provided that applications for assignment were to be made in person at the school board office (R. 33), but did not specify when applications were to be filed.

The plan sets forth certain criteria for the granting or denying of applications for transfer or assignment. (R. 34-35) These criteria included, (1) Choice, (2) age, (3) availability of courses, and (4) availability of space. There were no priorities set among these various criteria.

The plan provided that dual school districts on racial lines would be abolished contemporaneously with the application of the plan to the grades reached. (R. 36)

2. Court ordered plan. The court below set out its approved desegregation plan in an order entered on October 5, 1965. (R. 47-53) This plan provided that "All initial pupil assignments made for the school year 1965-1966 will be considered adequate, subject to the following transfer provisions." (R. 47) The plan then provided that students in the first, second, eleventh and twelfth grades could, from January 3, 1966, to January 7, 1966, apply in person, accompanied by parents or guardians, for transfer and reassignment to another school of their choice. (R. 48) "Such transfer will be made in accordance with the procedures pertaining to transfers currently in general use by the Jackson Parish School Board." (R. 48) The plan set out certain criteria to be applied in granting or denying requests for transfer or assignment. They included, (1) Choice, (2) availability of space, (3) age, (4) availability of requested or desired course of study, and (5) availability of a "comparable" school closer to the pupil's residence. (R. 49-50). New students were entitled to assignment according to their choice to the former all-white school or former all-Negro school closest to their residence. (R. 50)

The transfers for the 1965-66 school year were to be effective at the mid term. (R. 50)

For the 1966-67 school year all initial assignments to the first, second, third, fourth, ninth, tenth, eleventh and twelfth grades were to be made on the basis of choice, reserving to pupils the right to apply for transfer and reserving to the school board the right to place a pupil in a "comparable" school closer to his residence. (R. 50-51) No provision is made for the procedures to be followed in making the "initial assignments" except for the statement that, "The method of initial assignment herein provided for will, of course, be subject to all reasonable procedural requirements that may be adopted and promulgated by the Jackson Parish School Board." (R. 52) The same assignment criteria would apply to all grades by the 1967-68 school year. (R. 51)

The court below ordered that dual school districts on racial lines be abolished contemporaneously with the application of the plan to each grade (R. 51), but no provision is made for accomplishing this.

As in the original plan proposed by the appellees, no provision was made for faculty and staff desegregation or for desegregation of services and programs sponsored by the school system.

SPECIFICATIONS OF ERRORS

The order of the district court of October 5, 1965 approving and ordering into effect the plan of desegregation for the Jackson Parish schools errs in that:

1. It fails to include specific provisions guaranteeing true freedom of choice in the administration of the plan.
2. It fails to require desegregation of faculty and staff.
3. It fails to prohibit racial discrimination against Negro students in formerly all-white schools in connection with services, facilities, activities and programs conducted by or affiliated with the school system.
4. It fails to provide for desegregation of the seventh and eighth grades, which are initial grades in secondary schools, for the 1966-67 school year.
5. It fails to provide that Negro students in grades not reached by the plan shall be allowed to transfer to formerly all-white schools upon request.

ARGUMENT

A. The court-ordered plan lacks sufficient specificity.

The order of the court below requires the appellees to effect a transition from a compulsory dual system of schools based upon race to a system in which the choice of the student or his parents shall determine the school of attendance. The need for specificity in the new system should be apparent. Students, parents, school staff and the community at large have long been conditioned to a system in which race is the determining factor. Each school has necessarily acquired the stigma of being either "white" or "Negro." To convert this system, in all of its aspects, to one in which race will no longer be a factor will at best be a difficult process if the new system is to rely for its operation upon the free volition of school patrons and upon administrators who have long been conditioned to the racial system.

This Court recognized these difficulties when in Stell v. Savannah-Chatham County Board of Education, 333 F. 2d 55, 65 (1964), it said:

The rule is now firmly established in this circuit, Gibson v. Board of Public Instruction of Dade County, Fla., 5 Cir., 1959, 272 F. 2d 763; Evers v. Jackson Municipal Separate School District, supra, that desegregation must be accomplished in the context of all inhibitions, legal or otherwise, serving to enforce segregation having been removed to the extent that Negro pupils are afforded a reasonable and conscious opportunity to apply for admission to any school for which they are otherwise eligible without regard to their race or color, and to have that choice fairly considered by the enrolling authorities. This is the first step. 2/

Thus, as stated by the Court of Appeals for the Fourth Circuit in Wheeler v. Durham City Board of Education, 346 F. 2d 768, 773 (C.A. 4, 1965):

2/ The following language of the District Court for the Western District of Virginia, in Kier v. County School Board of Augusta County, Va., 249 F. Supp. 239, 243, 246 (1966), is equally apt:

Unquestionably, to be constitutionally acceptable, a freedom of choice plan will impose upon the school boards additional duties not required under a geographic plan. The ground rules must be laid in a way which will not discourage desegregation, and students and their parents must be fully informed of their choices Where, as here, the school authorities have chosen to adopt a freedom of choice plan which imposes upon the individual student, or his parent, the duty of choosing in the first instance the school which he will attend (and where the burden of desegregating is imposed upon the individual Negro student or his parent), it is essential that the ground rules of the plan be drawn with meticulous fairness.

A freedom of choice system, to warrant approval, must operate to prevent discrimination and not merely to correct conditions which have been deliberately created by unlawfully discriminatory procedures. (Emphasis by the court.)

The generality of the language in the plans submitted by the appellees and ordered by the lower court in this case were clearly such as to permit misunderstanding of the specific nature of appellees' obligations. Such misunderstanding cannot only permit evasion, conscious or unconscious, but necessarily breeds further litigation to give specific content to the plan's general provisions.

The order entered by the district court on July 27, 1965, enjoined the appellees from "continuing to assign students to schools with regard to race or color" and from "continuing to operate a compulsory biracial school system in Jackson Parish, Louisiana." This order, properly read, would appear to require the appellees to fully meet their constitutional obligation to eliminate racial discrimination and the vestiges of past racial discrimination in the operation of their schools. In response to this order, however, the appellees submitted a plan which clearly misconceived the extent and nature of their obligations.

The misconception is best shown by the appellees' Answer in this case. After admitting (Paragraphs VI and VII; R. 19-20) that the schools in Jackson Parish are segregated by race, they claim (in Paragraph X; R. 20) that the schools in Jackson Parish are segregated by race, they claim (in Paragraph X; R. 20) that "they have fulfilled all of their obligations and duties under the laws of the United States." Their plan as submitted would have permitted the existing system of assigning pupils to continue indefinitely, subject only to a limited right on the part of students to seek transfer to schools from which they were initially excluded upon the basis of their race. The provision in Paragraph 5 of the plan that "dual school districts on racial lines shall be abolished" is little more than a deceptive verbal ritual.

The district court's Order on Plan for Desegregation of October 5, 1965, did little to disabuse the appellees of their misconceptions regarding the nature of their constitutional duty. It failed to set forth specific procedures that would make it clear that initial assignments were to be made without regard to race and that the burden would not be left upon Negro school patrons to obtain assignments to schools to which white patrons were automatically assigned.

A freedom of choice plan which is non-specific in detail, not only fails to meet legal requirements but will necessarily breed further litigation and encourage multiplicity of appeals. The lack of specificity in the order in this case left a multitude of questions for future litigation. We will now touch on some of these questions.

How shall notice be given students and parents of their rights under the plan in years following the 1965-66 school year? Shall it be by individual, mailed notice? Shall it be by publication in a newspaper? Shall it be by delivering a notice to the students in school? What should be the text of the notice? Should the entire plan be set forth? When should notice be given? Should it be given to all students and parents or only to Negroes? None of these questions is answered in the court's order. Any of them could be a matter of future dispute between the parties.

What type of form should be used when students or parents exercise their choice of schools? How and where should forms be made available to the students and parents? Should they be sent to the parents? What period of time should be allowed for the exercise of the choice? Should there be any time limit? Who must sign the choice form? May the chooser be required to state his reasons for the choice? None of these questions are answered in the order of the lower court, although these mechanics relating to the exercise of the choice must necessarily determine whether a "free" choice is being afforded.

Must a choice form be executed on behalf of every student enrolling in school? Must such a choice be exercised each year? If a yearly choice is not required may it nonetheless be exercised at the option of the student? If a choice is not required on behalf of every student, how will non-choosers be assigned? Will prior racial assignments be automatically continued absent the exercise of a contrary choice? No answer to these questions is found in the court's decree although the answers are vital to a determination of whether the dual racial system is being eliminated.

If limitations of school capacity preclude granting the choice of every student, which students will be given priority to attend the schools of their choice? Will white students who have previously attended particular schools by reason of their race be given preference over Negroes who have been excluded by reason of their race? If not, how will priority be determined? Will it be based upon date of application? Will it be based upon proximity of residence? Will it be based upon level of achievement, availability of transportation, enrollment of brothers or sisters in the same school, or on factors yet to be determined in the discretion of the School Board? These questions, which go to

the very heart of a free choice plan, were left by the district court to future litigation.

What of students whose choice of school must be rejected because of limitation of school capacity? Will they be given a second choice? What will be the basis for such choice? Will they be assigned to the closest school, or, perhaps, to the school having the most unused capacity? Or will they be assigned back to schools which they have previously attended by reason of their race? Again, these questions are unanswered by the district court.

What standards will guide the School Board in rejecting the choice of a student in order to assign him to a "comparable" school that is closer to his residence? What schools are "comparable?" Within the meaning of the order, is a traditionally all-Negro school "comparable" to a traditionally all-white school having substantially equal facilities? In implementing this rule, may the School Board reject the choice of any Negro student seeking enrollment in a traditionally white school that is farther from his residence than the closest Negro school? Again, no answer is to be found in the order of the district court.

Various of the other district courts in the Fifth Circuit have considered and resolved virtually all of the questions just raised. Although it may be that no single district court has considered and resolved all of these questions in the same case, a court clearly could do so with facility by drawing upon the already formulated standards and procedures set forth in the Commissioner's Guidelines. Indeed, in Singleton and Price, this Court has already suggested that the district courts do so. We submit that this was the course that the district court in this case should have followed.

- B. The plan fails to contain a provision designed to eliminate the racial segregation of faculty and staff

The Jackson Parish School System contains approximately 208 teachers all of whom are assigned on the basis of race to schools attended by students of the same race as themselves. (R. 20-21)

School districts that have operated dual racial school systems have the obligation under Brown v. Board of Education, 349 U. S. 294 (1955) to "effectuate a transition to a racially non-discriminatory school system."

Racial segregation of teachers as well as segregation of students has traditionally been one of the hall-marks of the dual school system. The transition to a non-discriminatory system cannot be effected until faculty, as well as students, have been desegregated.

Here, the district court, although enjoining the appellees from continuing to operate a bi-racial school system (R. 27), specifically deferred ruling on the question of faculty desegregation "until the plan for desegregation of pupils, as finally approved, either has been accomplished or has made substantial progress." (R. 28-29). This ruling was clearly erroneous.

The inclusion of a provision in the plan designed to eliminate race as a factor in the employment and allocation of faculty and staff at this late date is essential.

Singleton v. Jackson Municipal Separate School District, 355 F. 2d 865 (C.A. 5, 1966); Bradley v. School Board, Richmond, Virginia, 382 U.S. 103 (1965); Rogers v. Paul, 382 U.S. 198 (1965). As the Court wrote in Singleton v. Jackson Municipal Separate School District, supra at 870:

In view of the necessity that the Jackson School system be totally desegregated by September 1967, we regard it as essential that the plan provide an adequate start toward elimination of race as a basis for the employment and allocation of teachers, administrators, and other personnel.

A desegregation plan, if it is to comply with the rule announced in Singleton v. Jackson Municipal Separate School District, supra, must (1) require the Board to cease its practice of hiring and placing teachers on the basis of race and (2) define a program designed to correct the effects of past discriminatory hiring and assignment practices.^{3/} See the Revised Statement,

^{3/} As the Court said in United States v. Duke, 332 F. 2d 759, 768-69 (C.A. 5, 1964):

An appropriate remedy ... should undo the results of past discrimination as well as prevent future inequality of treatment. A court of equity is not powerless to eradicate the effects of former discrimination.

⁴/_{45 CFR 181.13.}

Where a school board is operating under a plan utilizing a freedom of choice (or transfer) method, the desegregation of faculty and staff is particularly important. As the district court said in Kier v. County School Board of Augusta County, Virginia, 249 F. Supp. 239, 246 (W.D. Va. 1966):

It is not enough to open the previously all-white schools to Negro students who desire to go there while all-Negro schools continue to be maintained as such. Inevitably, Negro children will be encouraged to remain in "their school," built for Negroes and maintained for Negroes with all Negro teachers and administrative personnel. [⁵/] See

⁴/ The Department of Health, Education and Welfare recently announced new school desegregation guidelines (31 Fed. Reg. 5623-5634, April 9, 1966). They are cited herein as Revised Statement and appear at the end of this brief.

⁵/ By maintaining a segregated or substantially segregated faculties and staffs, the Board has, in effect, labeled its schools "white" and "Negro." Brown v. County School Board of Frederick County, Virginia, 245 F. Supp. 546, 560 (W.D. Va. 1965); cf. Baldwin v. Morgan, 287 F.2d 750 (C.A.5, 1961).

Bradley v. School Bd., supra, 345
F.2d at 324 (dissenting opinion).
This encouragement may be subtle
but it is nonetheless discriminatory.
The duty rests with the School Board
to overcome the discrimination of the
past, and the long established image
of the "Negro school" can be overcome
under freedom of choice only by the
presence of an integrated faculty.

- C. The plan fails to guarantee to students who transfer that there will be no racial discrimination or segregation in services, activities, and programs, provided, sponsored, by or affiliated with the school system.

The plan is silent as to the elimination of racial discrimination in services, activities and programs sponsored by or affiliated with the schools to which Negro students may transfer. Valid plans must guarantee the absence of racial discrimination or segregation in connection with all programs related to the student's attendance. ^{6/} Cf. Singleton v. Jackson Municipal Separate School District, 355 F.2d 865, 870 (C.A. 5, 1966); Revised Statement, 45 CFR 181.14. This is particularly true under a freedom of choice (or transfer) system, for any such discrimination or segregation would inevitably inhibit free choice.

^{6/} Indeed, before Brown, where the state provided one school for both races, it was prohibited from discriminating on the basis of race in connection with the school services, facilities and programs. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

It is essential, therefore, that the plan specify the availability of all activities, services and programs on a nonracial basis and provide that any disqualifications or waiting period which might otherwise apply to newly enrolled students will not apply to students exercising their right to obtain a desegregated education. Revised Statement, 45 CFR 181.14 (b) (1). Similarly, if transportation services are furnished, the plan must make ample provisions to guarantee that service will be provided on a nonracial basis. Revised Statement, 45 CFR 181.14 (b) (2).

D. The plan fails to provide for undelayed desegregation of the initial grades in secondary schools

Under the plan, grades seven and eight will not be desegregated until the 1967-68 school year. These grades are initial grades of several secondary schools in Jackson Parish. ^{7/} Thus, a large percentage of the sixth and seventh grade students in the Parish necessarily begin a new school at the start of the next school year.

7/ According to the Louisiana School Directory - Session 1965-66, Bulletin No. 1047, State Department of Public Education, at pp. 84-85, the grade levels taught at the schools in Jackson Parish are as follows:

<u>White:</u>	Chatham	(1-12)
	Eros	(1-12)
	Hodge	(1-7)
	Jonesboro Elementary	(1-7)
	Jonesboro Hodge High	(8-12)
	Quitman	(1-12)
	Southside	(1-7)
	Weston	(1-12)
 <u>Negro:</u>	 Hawk	 (1-6)
	Jesper Hennison	(1-12)
	Jackson	(7-12)
	Union	(1-7)

Since July 1962, this Court has required that a desegregation plan must clearly provide, without delay, for the admission of new pupils entering the first grade, or coming into the County for the first time, on a nonracial basis. Augustus v. Board of Public Instruction of Escambia County, Florida, 306 F. 2d 862, 869 (1962); Singleton v. Jackson Municipal Separate School District, 355 F. 2d 865, 867 (1966). The rationale for this requirement is that although Brown, for reasons of administrative convenience, permitted school officials to temporarily leave students where they were, it did not allow such officials to add to the existing segregation by racially assigning students who are new to the system. This rationale applies equally to students who are necessarily beginning new schools but who have been in the system in the past. Racial assignment of any student entering a school for the first time "creates" segregation in relation to that school which did not exist before.

- E. The plan fails to contain a provision allowing Negro students in non-desegregated grades to transfer to schools from which they have been excluded because of race.

In Singleton v. Jackson Municipal Separate School District, 355 F.2d 865, 869 (C.A. 5, 1966), the Court wrote:

The school children in still-segregated grades in Negro schools are there by assignment based on their race. This assignment was unconstitutional. They have an absolute right, as individuals, to transfer to schools from which they were excluded because of their race.

It is true that this Singleton decision was rendered after the order of the district court in this case was issued. But, since the Singleton transfer rule is based on a constitutional principle, and is not merely an aspect of transitional relief, it should have been included in the plan. In any event, it is, of course, proper for this Court now to require its inclusion in the plan.

RELIEF

In Singleton v. Jackson Municipal Separate School District, 348 F. 2d 729 (C.A. 5, 1965), this Court said that "The time has come for foot dragging public school boards to move with celerity toward desegregation." The Court also said (348 F. 2d at 731):

We attach great weight to the standards established by the Office of Education. The judiciary has of course functions and duties distinct from those of the executive department, but in carrying out a national policy we have the same objective. There should be a close correlation, therefore, between the judiciary's standards in enforcing the national policy requiring desegregation of public schools and the executive department's standards in administering this policy. Absent legal questions, the United States Office of Education is better qualified than the courts and is the more appropriate federal body to weigh administrative difficulties inherent in school desegregation plans.

If in some district courts judicial guides for approval of a school desegregation plan are more acceptable to the community or substantially less burdensome than H.E.W. guides, school boards may turn to the federal courts as a means of circumventing the H.E.W. requirements for financial aid. Instead of a uniform policy relatively easy to administer, both the courts and the Office of Education would have to struggle with individual

school systems on an ad hoc basis. If judicial standards are lower, recalcitrant school boards in effect will receive a premium for recalcitrance; the more the intransigence, the bigger the bonus.

The Court emphasized that (348 F. 2d at 731).

"As to details of the plan, the Board should be guided by the standards and policies announced by the United States Office of Education in establishing standards for compliance with the requirements of Title VI of the Civil Rights Act of 1964."

In Price v. Denison Independent School District, 348 F. 2d 1010, 1013-14 (C.A. 5, 1965), this Court repeated its language in Singleton regarding the weight to be given the standards of the Office of Education and then went on to say:

More than that, we put these standards to work. To avoid the temptation to recalcitrant or reluctant school systems to seek judicial approval of a token plan as the basis for Federal aid under alternative (1) for court plans, the Court held the Jackson plan inadequate and directed that a plan modeled after the Commissioner of Education's requirements (note 11, supra) be submitted for the fall of 1965-66.

This signals what will be a frequent approach to these cases as they come to District Courts and thereafter this Court. These executive standards, perhaps long overdue, are welcome. To many, both on and off the bench, there was great anxiety in two major respects with the Brown approach. The first was that probably for the one and only time in American

constitutional history, a citizen -- was compelled to postpone the day of effective enjoyment of a constitutional right. In Ross v. Dyer, 5 Cir., 1963, 312 F. 2d 191, 194, we recognized that under "a stair-step plan Negroes not in the eligible classes continue to suffer discriminatory treatment." That there can be a moratorium on the enjoyment of such rights runs counter to our notions of ordered liberty. Second, this inescapably puts the Federal Judge in the middle of school administrative problems for which he was not equipped and tended to dilute local responsibility for the highly local governmental function of running a community's school under law and in keeping with the Constitution.

By the 1964 Act and the action of HEW, administration is largely where it ought to be--in the hands of the Executive and its agencies with the function of the Judiciary confined to those rare cases presenting justiciable, not operational questions.

The Court of Appeals for the Eighth Circuit in Kemp v. Beasley, 352 F. 2d 14 (C.A. 8, 1965), discussed this Court's ruling in Singleton insofar as it relates to reliance upon the H.E.W. guidelines. While agreeing "that these standards must be heavily relied upon to determine what desegregation plans effectively eliminate discrimination," the Court of Appeals for that circuit equally emphasized the responsibility of a federal court to exercise its own judgment in determining constitutional issues." The court states its conclusion as follows, (352 F. 2d at 19):

Therefore, to the end of promoting a degree of uniformity and discouraging reluctant school boards from reaping a benefit from their reluctance the courts should endeavor to model their standards after those promulgated by the executive. They are not bound, however, and when circumstances dictate, the courts may require something more, less or different from the H.E.W. guidelines.

Although the Court of Appeals for the Fourth Circuit has not had occasion to consider the effect of the H.E.W. standards, district courts in that circuit have relied on them. See Kier v. County School Board of Augusta County, 249 F. Supp. 239 (W.D. Va., 1966); Wright v. County School Board of Greenville County, Civil Action No. 4263 (E.D. Va., January 27, 1966); Miller v. Clarendon County School District No. 2, Civil Action No. 8752 (D. of S.C., April 21, 1966). In Miller, the most recent of these cases, the District Court for the District of South Carolina said, with reference to the H.E.W. standards:

Those standards have been adopted and approved generally in other forums in this circuit [citing Kier and Wright]. The orderly progress of desegregation is best served if school systems desegregating under court order are required to meet the minimum standards promulgated for systems that desegregate voluntarily. Without directing absolute adherence to the "Revised Standards" guidelines at this juncture, this court will welcome their inclusion in any new, amended, or substitute plan which may be adopted and submitted.

This case, as well as each of the other school desegregation cases now before this Court, illustrate the need for this Court to review present judicial enforcement methods to the end that the orderly transition to desegregation can be accomplished with a minimum of expenditure of judicial energy and with a maximum correlation between current desegregation standards and current desegregation practices. We suggest that this end can best be realized by the adoption of a specific decree to be entered in these cases by the district courts. This is neither a fundamental change in judicial approach nor a departure from established standards for desegregation. It would place in the courts, as it must under our constitutional system the primary responsibility for declaring the rights of the parties, and it would look to the Office of Education, rather than to the school boards, for administrative guidelines affecting desegregation so that (1) the court will not be "in the middle of school administrative problems," (2) uniformity in solving operational problems may be achieved, and (3) an efficient method of supervising school board performance can be realized.

This Court in cases involving voter discrimination has approved the same type of relief here being urged.

See United States v. Ward 349 F. 2d 795 (C.A. 5, 1965), and United States v. Palmer ____ F. 2d ____ C.A. 5, (No. 21646, decided February 8, 1966). In the Ward case the Court in adopting the former decision there proposed (349 F. 2d at 805) said:

[G]ood administration suggests that the proposed decree be indicated by an Appendix, not because of any apprehension that the conscientious District Judge would not faithfully impose every condition so obviously implied, but rather because of factors bearing upon administration itself.

It is not possible, or even desirable, of course to achieve absolute uniformity. But in this ever growing class of cases which have their genesis in unconstitutional lack of uniformity as between races, courts within this single circuit should achieve a relative uniformity without further delay.

Similarly in a recent decision involving jury discrimination this Court has emphasized "the desirability of achieving uniformity of the handling of the substantial number of cases arising in this Court dealing with the same questions of law." Scott v. Walker, ____ F. 2d ____ (C.A. 5, No. 20814 decided March 31, 1966).

The necessary function of the court in desegregation cases is to guarantee that methods adopted for desegregation do not fall below constitutional limits. It is not necessary to this function that the courts define every administrative detail necessarily involved

in day-to-day school administration. Under Title VI of the Civil Rights Act of 1964 the Executive Branch of the federal government must guarantee the fair use of federal funds by prescribing the ordinary administrative details inevitably involved in any workable desegregation plan. For the courts to look to the regulations and guidelines of the Office of Education does not involve the abdication of any judicial function, but instead is a rational method of enforcement of law under a uniform national policy.

Those regulations and guidelines are the product of the expertise of the Office of Education. They reflect the experience and knowledge of persons involved in the day-to-day administration of the schools. The courts do not have the staff, the facilities, or the time to undertake with the same precision the function of defining the workings of the desegregation mechanism.

With these considerations in mind we submit to the Court the proposed decree set forth in the appendix filed in connection with this brief and the

six other school desegregation cases before this Court to which the government is a party. The substantive requirements of the proposed decree derive from the Fourteenth Amendment and the decisions of the courts. The administrative details are largely drawn from the HEW Guidelines.^{8/}

^{8/} Recent court-approved plans which draw on the new guidelines are: Carr, United States v. Montgomery County Board of Education, Civil Action No. 2072-N (M.D. Ala., March 22, 1966); Lee, United States v. Macon County Board of Education, Civil Action No. 604-E (M.D. Ala., March 11, 1966) (entered by consent); Harris, United States v. Bullock County Board of Education, Civil Action No. 2073-N (M.D. Ala., March 11, 1966) (entered by consent); United States v. Lowndes County Board of Education, Civil Action No. 2328-N (M.D. Ala., February 11, 1966) (entered by consent); McGhee, United States v. Nashville Special School District No. 1, Civil Action No. 962 (W.D. Ark., March 3, 1966) (entered by consent); Beckett, United States v. School Board of the City of Norfolk, Virginia, Civil Action No. 2214 (W.D. Va., March 17, 1966) (entered by consent). And see Miller v. Clarendon County School District No. 2, D.C.S.C., Civil Action No. 8752 decided April 21, 1966.

We have urged that this Court direct the district courts in these seven cases to enter a specific decree along the line proposed herein. The records in these cases fully support such relief. With the use of this method of individual enforcement there will no longer be occasion for the periodic submission by school boards of "desegregation plans," the hearing of objections to the plans and the submission of amended plans. Instead, the school boards will clearly understand their obligations, and will report to the court on a periodic basis. It may be that supplementary enforcement proceedings will occasionally be necessary, but hearings should be less frequent and should produce more effective results in bringing current practices and current standards closer. There will also be a higher probability that desegregation will proceed more uniformly among school districts under court orders and between such school districts and those desegregating on a voluntary basis under the supervision of the Office of Education.

The courts would continue to have the final responsibility for fixing constitutional standards and for compliance with its decrees. The option is

still open to any school board to come into court to prove that extraordinary circumstances compel modification of one or another of the provisions of the decree. The private plaintiffs and the United States also retain their right, as they must, under our constitutional system and Title IV of the Civil Rights Act of 1964, to come into court when necessary to seek modification of or compliance with any provision in the decree.

Special mention should be made of the faculty provisions in the proposed decree and of the district court decisions that have decreed specific and detailed relief on this subject.

Principally within the past year, district courts have been grappling with the problem of framing practical and effective relief for the desegregation of faculty. Some courts in framing their decrees have focused upon the specific results to be reached by reassignment of teachers who had theretofore been assigned solely upon the basis of their race. Dowell v. School Board of Oklahoma City, 244 F. Supp. 971 (W.D. Okla. 1965), Kier v. County School Board of Augusta County, Virginia, 249 F. Supp. 239 (W.D. Va.

1966). The orders entered in these cases required that the defendant school boards assign any employed teachers and reassign already-employed faculty so that the proportion of each race assigned to teach in each school will be the same as the proportion of teachers of that race in total teaching staff in the system, or at least, of the particular school level in which they are employed. This type of relief is justified on the ground that if faculty members had in the past been assigned without regard to race such assignments would, as a matter of mathematical probability, have yielded this same result.

Other district courts in framing their decrees on faculty desegregation have not been specific as to the number of teachers of each race that should be assigned to each school in order to remove the effects of past discriminatory assignments. These courts have focused upon the mechanics to be followed in removing the effect of past discrimination rather than upon the result as such. Thus, in Beckett v. School Board of the City of Norfolk, Civil Action No. 2214 (E.D. Va., 1966); Gilliam v. School Board

of the City of Hopewell, Virginia, Civil Action No. 3554 (E.D. Va. 1966); and Bradley v. School Board of City of Richmond, Civil Action No. 3353 (E.D. Va. 1966), the courts approved consent decrees setting forth in detail the considerations that would control the school administrators in filling faculty vacancies and in transferring already-employed faculty members in order to facilitate faculty integration.^{9/}

^{9/} The faculty provisions in the Hopewell case, which were filed with the district court on April 8, 1966, read as follows:

The School Board of the City of Norfolk recognizes its responsibility to employ, assign, promote and discharge teachers and other professional personnel of the Norfolk City Public School System without regard to race or color. It further recognizes its obligation to take all reasonable steps to eliminate existing racial segregation of faculty that has resulted from the past operation of a dual school system based upon race or color:

In order to carry out these responsibilities, the School Board has adopted the following program:

1. Teachers and other professional personnel will be employed solely on the basis of qualifications and without regard to race or color.

(Cont. on following page.)

In yet other cases, the district court, while emphasizing the necessity of affirmative steps to undo the effects of past racial assignments of faculty and while requiring some tangible results,

9/ (Cont. from preceding page.)

2. In the recruitment and employment of teachers and other professional personnel, all applicants and other prospective employees will be informed that the City of Norfolk operates a racially integrated school system and that the teachers and other professional personnel in the System are subject to assignment in the best interest of the System and without regard to their race or color.

3. The Superintendent of Schools and his staff will take affirmative steps to solicit and encourage teachers presently employed in the System to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred. Such transfers will be made by the Superintendent and his staff in all cases in which the teachers are qualified and suitable, apart from race or color, for the positions to which they are to be transferred.

4. In filling faculty vacancies which occur prior to the opening of each school year, presently employed teachers of the race opposite the race that is in the majority in the faculty at the school

(Cont. on following page.)

has not been specific either regarding the mechanics or the specific results to be achieved. See Harris v. Bullock County Board of Education, Civil Action No. 2073-N (M.D. Ala. 1966); United States v. Lowndes Board of Education, Civil Action No. 2328-N (M.D. Ala. 1966); Carr v. Montgomery County Board of

9/ (Cont. from preceding page.)

where the vacancy exists at the time of the vacancy will be preferred in filling such vacancy. Any such vacancy will be filled by a teacher whose race is the same as the race of the majority on the faculty only if no qualified and suitable teacher of the opposite race is available for transfer from within the System.

5. Newly employed teachers will be assigned to schools without regard to their race or color, provided, that if there is more than one newly employed teacher who is qualified and suitable for a particular position and the race of one of these teachers is different from the race of the majority of the teachers on the faculty where the vacancy exists, such teacher will be assigned to the vacancy in preference to one whose race is the same.

Education, Civil Action No. 2072-N (M.D. Ala. 1966)^{10/}.

^{10/} In the Montgomery case the court's decree contained the following provisions on faculty desegregation:

Race or color will henceforth not be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff, with the exception that assignments shall be made in order to eliminate the effects of past discrimination. Teachers, principals, and staff members will be assigned to schools so that the faculty and staff is not composed of members of one race.

In the recruitment and employment of teachers and other professional personnel, all applicants or other prospective employees will be informed that Montgomery County operates a racially integrated school system and that members of its staff are subject to assignment in the best interest of the system and without regard to the race or color of the particular employee.

The Superintendent of Schools and his staff will take affirmative steps to solicit and encourage teachers presently employed to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred.

Teachers and other professional staff will not be dismissed, demoted, or passed over for retention, promotion, or re-hiring on the ground of race or color. In any instance, where one or more teachers or other professional staff members are to be displaced as a result of desegregation or school closings, they shall

(Cont. on following page.)

The proposed decree set forth in the appendix includes a faculty provision in general terms. It does not seem desirable for this Court to compel exact uniformity as to how faculty desegregation should be accomplished in every school district within the Fifth Circuit. The appellate court should not prescribe a detailed faculty provision from which a district court could not depart. District courts should be free to add specifics to meet the particular situation. By its decree, this Court will only be recognizing that there may be differences between large and small school districts and between urban and rural school districts.

At the same time, the decree does require that a reasonable beginning be made and that a reasonable program be achieved in the actual desegregation of the faculty. The decree makes it clear that the school officials are (1) restrained from

10/ (Cont. from preceding page.)

be transferred to any position in the system where there is a vacancy for which they are qualified.

practicing racial discrimination in the hiring and assignment of new faculty members, and (2) are required to take affirmative steps to correct existing results of past racial assignments.

This, we believe, is the minimum to be required in any school desegregation decree. The district courts, however, would be open to the plaintiff and to the United States to seek more specific relief if the facts warrant it.

CONCLUSION

Deference to local responsibility for the administration of school systems is a long established principle in the law of school desegregation -- one that continues to be valid today. However, we think it disserves the principle of local responsibility to place upon school boards the difficult and technical task of articulating judicial standards and formulating workable mechanics for free choice plans. The result is too often an inadequate plan which necessitates further abrasive involvement of the federal courts

in local school affairs. Instead, we urge the Court to make the legal obligations of local officials as clear as possible and to utilize the expertise of HEW in the formulation of free choice mechanics. Local responsibility can then be turned to the far more productive tasks of administration and performance.

Respectfully submitted,

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