

423 F.2d 203
United States Court of Appeals, Fifth Circuit.

Evelyn R. ELLIS, a minor, et al.,
Plaintiffs-Appellants,
v.
The BOARD OF PUBLIC INSTRUCTION OF
ORANGE COUNTY, FLORIDA,
Defendant-Appellee.

No. 29124.
|
Feb. 17, 1970.

Synopsis

School desegregation case. The United States District Court for the Middle District of Florida, at Orlando, Young, J., entered judgment, appeal was taken and motion was filed for injunctive relief pending appeal. The Court of Appeals, Bell, Circuit Judge, took the case for final decision on the merits and held that, if county wished to maintain neighborhood assignment system for its public schools, it must do so without variances and each student in system must be assigned to attend school nearest his or her home, limited only by capacity of school, and then to the next nearest school, and students must be transferred to accomplish that end.

Affirmed in part, reversed in part and case remanded with directions.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

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James W. Markel, Winter Park, Fla., Joel H. Sharp, Charles R. Fawsett, Orlando, Fla., for defendant-appellee.

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

Opinion

BELL, Circuit Judge:

The issue presented in this case is whether the Orange County Florida public school system is now unitary. The answer depends on a review of the posture of the system in light of two controlling decisions of the Supreme Court.¹ In *Green v. County School Board of New Kent County*, 1968, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716, the mechanics of what must be done to bring about a unitary system were outlined. They were stated in terms of eliminating the racial identification of the schools in a dual system in six particulars: composition of student bodies, faculty, staff, transportation, extracurricular activities, and facilities. 391 U.S. at 435, 88 S.Ct. It was such dual systems, organized and operated by the states acting through local school boards and school officials, which were held unconstitutional in *Brown v. Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (Brown I), and which were ordered abolished in *Brown v. Board of Education*, 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (Brown II).

In *Green* the court spoke in terms of the whole system—of converting to a unitary, nonracial school system from a dual system. Then, in *Alexander v. Holmes County Board of Education*, 1969, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19, the court pointed to the end to be achieved. The result, if a constitutionally acceptable system may be said to exist, must be that the school system no longer operates as a dual system based on race or color but as a ‘unitary school * * * (system) within which no person is to be effectively excluded from any school because of race or color.’ 396 U.S. at p. 20, 90 S.Ct. at p. 30, 24 L.Ed.2d at p. 21.

Tested in this frame of reference, we conclude that the Orange County school system falls short of being a unitary system only in one respect: A part of the student desegregation plan. It follows that the motion for injunction pending appeal will be denied so as to afford the district court, along with the school board, an opportunity to complete the conversion from a dual to a unitary system. We take the case for final decision *205 on the merits.² The judgment of the district court will be affirmed in part, reversed in part, and the case remanded to the district court with direction.

I.

THE ORANGE COUNTY SCHOOL SYSTEM

This system covers the whole of Orange County including the urban areas of Orlanda, Winter Park, Winter Garden and Apopka, as well as rural areas embraced in a county having a land area of 910 square miles, or almost the size

of Rhode Island (1,049 square miles). The system is comprised of 26 secondary schools, 66 elementary schools, 3 vocational schools and 3 special education schools, or a total of 98 separate schools. There are 68,012 white and 14,856 Negro students in the system, or a total of 82,868 students as of the present time (February 2, 1970). The racial ratio of students is approximately 82 per cent white-18 per cent Negro. There are a total of 3,563 teachers in the system, 2,913 white and 650 Negro, or much the same racial ratio as students.

On February 1, teachers were transferred so as to establish a substantial racial ratio in each school.³ As an example, Jones High School which has a student population of 1,136 Negro students and 121 white students, now has a faculty composed of 66 white teachers and 14 Negro teachers, 82.5 per cent white and 17.5 per cent Negro. The greatest percentage departure in the system (Orange Center Elementary School) from the system-wide faculty ratio would involve the change of three faculty positions to be exact. Attached as Appendix I is the present faculty population by school and race.

In our recent decision in *Singleton v. Jackson Municipal Separate School District*, 5 Cir., 1969, 419 F.2d 1211 (consolidated cases en banc) (Nos. 26285 et al., dated December 1, 1969), in order to mandate compliance with the *Green* and *Alexander v. Holmes County* decisions, we required, not later than February 1, 1970, that the faculty and staff be desegregated on the following basis:

‘Effective not later than February 1, 1970, the principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for Negro students or white students. For the remainder of the 1969-70 school year the district shall assign the staff described above so that the ratio of Negro to white teachers in each school, and the ratio of other staff in each, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system.’

The Orange County system has complied with this directive as to faculty and staff. It has also agreed to comply in full with the *Singleton* provision as to continuing non-discriminatory practices in maintaining and replacing faculty and staff.

We also required that transportation systems, in those school districts having transportation systems, be designed to insure the transportation of all eligible pupils on a non-segregated and otherwise non-discriminatory basis. Orange County has been in compliance with this directive *206 since 1964. In addition, a bi-racial committee will review the transportation system from

time to time to insure non-discriminatory operation.⁴

It also appears that all extracurricular activities, including sports, are being operated on a non-segregated basis and this is likewise true as to facilities.

The requirement of *Singleton* that all school construction, school consolidation and site selection (including the location of any temporary classroom) in the system be done in a manner which will prevent the recurrence of the dual school structure by taking into consideration residential housing patterns has also been adopted by Orange County. The bi-racial committee will consider and review matters falling into this category. Fn. 4, *supra*.

These facts demonstrate full compliance with five of the six criteria of *Green*: Faculty, staff, transportation, extracurricular activities and facilities, leaving only the question of student body composition.

In order to facilitate the integration of student bodies, we required a majority to minority transfer policy in *Singleton* as follows:

‘The school district shall permit a student attending a school in which his race is in the majority to choose to attend another school, where space is available, and where his race is in the minority.’

This policy is designed to facilitate the integration of all-white and all-Negro student body schools. The Orange County system has exceeded this directive. A majority to minority transfer rule has been promulgated wherein any transferee is to be furnished free transportation, and all parents have been notified of this provision. Moreover, the transferee is given absolute priority for space and thus the transfer is not dependent on space being available. Again, under the plan of desegregation, the bi-racial committee will review the operation of this rule from time to time in the interest of fairness and effectiveness. Fn. 4, *supra*.

This leaves for discussion the question whether the Orange County plan of student desegregation is deficient to the extent that it prevents the systems from being unitary. It is urged that all student assignment is on a neighborhood school basis, subject, of course, to the majority to minority transfer rule. The defendant school officials wish to maintain such a basis of assignment.

It was not clear from the opinion and findings of the district court that the defendants were in fact maintaining a neighborhood school system as we would define such a system. A neighborhood school system cannot be a system where variances are allowed to permit children a choice of not attending the nearest school to his or her residence and thereby avoiding assignment to a formerly

Negro or formerly white school as the case may be.

The sum of the present assignment system is that ten elementary schools and one junior high school remain with all-Negro student bodies. There is no high school with an all-Negro student body. It appears that 7,518 Negro students attend these eleven schools (ten elementary and one junior high) with the result that 51 per cent of the total of 14,856 Negro students are assigned to schools having all-Negro student bodies.⁵

***207** In order to have full facts available, as to neighborhood assignment and the results obtained on a school to school basis, we required the district court, by order dated January 30, 1970, to file supplemental findings of fact within five days addressed to the specifics. They were promptly filed after a further hearing in the district court on short notice. These supplemental findings demonstrate that variances are now allowed from the neighborhood school assignment system with the result that some white students are attending schools located greater distances from their home than nearby schools where the student body is all Negro. As will be seen, this cannot be permitted in a school system operated on a neighborhood basis.

If not permitted in Orange County, eight of the eleven schools having all-Negro student bodies will have integrated student bodies. The percentage of Negro students attending schools having integrated student bodies will increase from 49 to 84 per cent. Moreover, the increase will be even greater if students avail themselves of the majority to minority transfer rule.

II.

THE NEIGHBORHOOD SCHOOL SYSTEM

In the typical southern dual school system in operation prior to Brown I and II, the student was assigned to attend the school nearest his or her home. This so-called neighborhood assignment system was designed to eliminate transportation costs and to permit the student to remain as near home as possible. Under the dual system as ruled unconstitutional, a Negro student would be assigned to the nearest Negro school to his or her home and a white student would be assigned to the nearest white school. Negro students might pass a white school or schools en route to a Negro school. White students might pass a Negro school or schools en route to the white school. Under a neighborhood assignment basis in a unitary system, the student must attend the nearest school whether it be a formerly white school or a formerly Negro school. Orange County is generally using this approach but it is now apparent, under the current plan, that it is not being correctly observed.

As stated, based on the supplemental findings of fact, it appears that a true neighborhood assignment system, assigning students to the school nearest the student's home up to the capacity of the given school, will result in the desegregation of eight of the remaining eleven all-Negro student body schools in the Orange County system, leaving three elementary schools. In four of these eight schools, the number of whites assigned would be somewhat greater if an equi-distance rule between schools was used as a basis for assignment rather than the capacity of the school.⁶ This would necessitate, however, increasing the size of the four schools in question.

Stated differently, under equidistance assignment, zone lines would be located equi-distant between two schools and all students within the zone would attend a given school without regard to the capacity of the school. On the other hand, under the nearest school to student assignment basis, the assignment would be limited by the capacity of the school, and those unable to be accommodated would go to the next nearest school to the home. We hold that the assignment system must take into consideration the existing capacity of the schools. Whether to expand present facilities is a question for the school authorities.

We also hold that the neighborhood system, based on school capacity, must be observed without exception. This will prevent any variance based on traffic conditions, such as are disclosed in the supplemental findings of fact with respect to 53 students who should go to Callahan school, or by zone line locations as is the case with five children who ***208** should be assigned to the Webster Avenue school. Variances by arbitrary zone lines, or for reasons of traffic, while reasonable on their face, may destroy the integrity and the stability of the entire assignment plan. If Orange County wishes to maintain a neighborhood assignment system, then it must do so without variances. Each student in the system must be assigned to attend the school nearest his or her home, limited only by the capacity of the school, and then to the next nearest school.

There are a number of all-white student body schools in the Orange County system. This is due to the preponderant white student population (82 per cent), and to residential patterns. The three all-Negro student body schools which will remain, if the neighborhood assignment system is properly invoked, are also the result of residential patterns. The majority to minority transfer provision under the leadership of the bi-racial committee is a tool to alleviate these conditions now. Site location, also under the guidance of the bi-racial committee, will

guarantee elimination in the future. In addition, open housing, Title VIII, Civil Rights Act of 1968, 42 U.S.C.A. § 3601 et seq., *Jones v. Alfred H. Mayer Co.*, 1968, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189, will serve to prevent neighborhood entrapment.

A view of the student body status of the eleven schools which now have all-Negro student bodies, once this order has been effectuated, can be had from Appendix II, attached. The present status of all of the schools in the system is reflected in Appendix III. The figures shown have not been adjusted to reflect what we are now requiring.

III.

DEFICIENCIES TO BE REMEDIED

We conclude that five of the six elements which go to make up a unitary system have been accomplished in the Orange County system: faculty, staff, transportation, extracurricular activities, and facilities. We conclude also that the sixth element, student desegregation, will be

accomplished once the district court requires and ascertains as a fact that the neighborhood student assignment system, based on the definition herein contained, is invoked and the transfers made necessary thereby have been made.⁷

Once done, and when the district court, by the standards herein stated, has made its own conclusion as to the system being unitary, the district court must retain jurisdiction for a reasonable time to insure that the system is operated in a constitutional manner. As the Supreme Court said in *Green*, ‘* * * whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that the state-imposed segregation has been completely removed.’ 391 U.S. at 439, 88 S.Ct. at 1695.

Affirmed in part; reversed in part; remanded with direction.

APPENDIX I

Orange County Public Schools

INSTRUCTIONAL POSITIONS AS OF 1-27-70

Secondary Schools**White****Black****Total**

Apopka Memorial

54

9

63

Apopka Junior

30

9

39

Boone

74

12

86

Carver Junior

41

8

49

Cherokee Junior

43

6

49

Colonial

92

14

106

Conway Junior

50

8

58

Edgewater

74

12

86

Evans

76

12

88

Glenridge Junior

47

7

54

Howard Junior

47

7

54

Jackson Junior

56

8

64

Jones	66	14	80
Lakeview	44	7	51
Lee Junior	43	7	50
Lockhart Junior	32	5	37
Maitland Junior	36	5	41
Meadowbrook Junior	44	5	49
Memorial Junior	48	7	55
Mid-Florida Tech	58	9	67
Oak Ridge	87	13	100
Ocoee	43	6	49
Robinswood Junior	46	7	53
Union Park Junior	45	7	52
Vocational	27	4	31
Walker	58	6	64
Winter Park Junior	31	5	36

Winter Park Senior	105	16	121
Wymore	21	7	28
TOTALS:	1518	242	1760

Elementary Schools	White	Black	Total
Aloma	25	8	33
Audubon Park	22	7	29
Azalea Park	14	7	21
Blankner	21	6	28
Bonneville	14	4	18
Brookshire	22	7	29

Callahan	15	5	20
Catalina	21	6	27
Cheney	21	6	27
Chickasaw	25	8	33
Columbia	12	4	16
Conway	23	6	29
Cypress Park	9	3	12
Delaney	12	4	16
Dillard Street	12	4	16
Dommerich	26	8	34
Dover Shores	25	8	33
Dream Lake	28	9	37
Durrance	24	7	31
Eccleston	27	8	35

Engelwood	25	3	28
Fern Creek	24	7	31
Forrest Park	19	3	22
Gateway	25	3	28
Grand Avenue	14	7	21
Hiawasse	23	7	29
Hillcrest	12	3	15
Holden Street	25	7	32
Hungerford	15	5	20
Ivey Lane	23	7	30
Kaley	17	6	23
Killarney	24	7	31
Lake Como	22	6	28
Lake Silver	23	7	30

Lake Sybelia	15	4	19
Lake Weston	20	6	26
Lakemont	25	7	32
Lancaster	28	9	37
Lockhart	17	5	22
Lovell	27	8	35
McCoy	22	7	29
Magnolia	10	4	14
Maxey	16	5	21
Ocoee	13	4	17
Orange Center	26	2	28
Orlo Vista	21	6	27
Pershing	24	7	31
Pine Castle	22	6	28
Pine Hills	24	7	31

Pineloch	24	7	31
Princeton	15	4	19
Ray	22	6	28
Richmond Heights	23	7	30
Ridgewood Park	19	6	25
Riverside	15	4	19
Rock Lake	24	7	31
Rolling Hills	23	7	30
Sadler	21	7	28
Shenandoah	18	5	23
Spring Lake	22	6	28
Tangelo Park	21	7	28
Tildenville	15	4	19
Union Park	25	7	32

Washington Shores	26	8	34
Webster Avenue	14	4	18
Wheatley	23	7	30
Windermere	16	5	21
Winter Garden	12	4	16
Zellwood	18	6	24

TOTALS	1395	408	1803
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TOTAL COUNTY:

Elementary	1395	408	1803
Secondary	1518	242	1760

TOTALS

2913

650

3563

APPENDIX II

School Population, By Race and Proximity Area

School	Grades	Present			Proximity Area		
		White	Black	Total	White	Black	Total
Carver Jr.	7-9	1	1143	1144	47	1100	1147
Callahan Elem.	K-6	1	389	390	101	404	452
Eccleston Elem.	1-6	0	904	904	0	889	889
Holden St. Elem.	K-6	1	717	718	0	725	725
Hungerford Elem.	K-6	0	448	448	141	353	494
Maxey Elem.	K-6	1	468	469	38	461	499
Org. Cen. Elem.	1-6	0	716	716	50	655	705

Rich. Hts. Elem.	K-6	0	703	703 22	692	714
Wash. Shs. Elem.	K-6	0	797	797 0	783	783
Web. Ave. Elem.	1-6	3	410	413 76**	352	423
Wheatley Elem.	K-6	0	824	824 29	811	840

APPENDIX III

School Population, By Race, As Of February 2, 1970

SECONDARY

School	Grades	White	Black	Total
Apopka Memorial High	9-12	903	366	1269
Apopka Junior High	7- 8	664	355	1019

Boone High	10-12	1869	102	1971
Carver Junior High	7- 9	1	1143	1144
Cherokee Junior High	7- 9	741	244	985
Colonial High	10-12	2355	6	2361
Conway Junior High	7- 9	1417	9	1426
Edgewater High	10-12	1720	209	1929
Evans High	10-12	1908	17	1925
Glenridge Junior High	7- 9	1325	3	1328
Howard Junior High	7- 9	813	364	1177
Jackson Junior High	7- 9	1597	3	1600
Jones High	10-12	121	1136	1257
Lakeview High	7-12	847	229	1076
Lee Junior High	7- 9	932	240	1172
Lockhart Junior High	7- 9	656	127	783
Maitland Junior High	7- 9	895	69	964
Meadowbrook Junior High	7- 9	1150	0	1150
Memorial Junior High	7- 9	1003	266	1269
Oak Ridge High	10-12	1986	149	2135
Ocoee High	7-12	855	265	1120

Robinswood Junior High	7- 9	1213	11	1224
Union Park Junior High	7- 9	1179	0	1179
Walker Junior High	7- 9	1591	33	1624
Winter Park High	10-12	2462	113	2575
Winter Park Junior High	7- 9	652	184	836
Total		30855	5643	36498

ELEMENTARY

School	Grades	White	Black	Total
Aloma	1-6	896	2	871
Audubon Park	K-6	802	0	802
Azalea Park	K-6	854	2	856
Blankner	1-6	689	2	691
Bonneville	K-6	450	0	450
Brookshire	1-6	722	1	723

Callahan	K-6	1	389	390
Catalina	K-6	667	21	688
Cheney	K-6	718	0	718
Chickasaw	K-6	857	0	857
Columbia	1-6	432	0	432
Conway	K-6	760	0	760
Cypress Park	1-6	207	50	257
Delaney	K-6	277	71	348
Dillard Street	4-6	272	79	351
Dommerich	K-6	898	16	914
Dover Shores	1-6	821	0	821
Dream Lake	K-6	862	84	946
Durrance	1-6	742	28	770
Eccleston	1-6	0	904	904
Englewood	K-6	736	2	738
Fern Creek	K-6	817	3	820
Grand Avenue	1-6	188	233	421
Hiawassee	1-6	798	0	798
Hillcrest	1-6	328	1	329

Holden Street	K-6	1	717	718
Hungerford	1-6	0	448	448
Ivey Lane	1-6	173	499	672
Kaley	K-6	479	1	480
Killarney	1-6	808	4	812
Lake Como	1-6	751	0	751
Lake Silver	1-6	787	1	788
Lake Sybelia	1-6	474	32	506
Lake Weston	K-6	715	24	739
Lakemont	1-6	708	103	811
Lancaster	1-6	1005	2	1007
Lockhart	K-6	530	0	530
Lovell	K-6	898	6	904
McCoy	1-6	769	0	769
Maxey	1-6	1	468	469
Ocoee	1-6	365	1	366
Orange Center	K-6	0	716	716
Orlo Vista	1-6	746	0	746
Pershing	K-6	817	2	819

Pine Castle	K-6	751	1	752
Pine Hills	1-6	809	1	810
Pineloch	1-6	738	0	738
Princeton	K-6	480	9	489
Ray	1-6	722	8	730
Richmond Heights	1-6	0	703	703
Ridgewood Park	1-6	638	3	641
Riverside	1-6	547	5	552
Rock Lake	1-6	234	236	470
Rolling Hills	K-6	600	1	601
Sadler	1-6	776	0	776
Shenandoah	1-6	490	14	504
Spring Lake	1-6	695	1	696
Tangelo Park	K-6	532	199	731
Tildenville	K-6	279	164	443
Union Park	1-6	878	4	882
Washington Shores	K-6	0	797	797
Webster Avenue	1-6	3	410	413
Wheatley	K-6	0	824	824

Windermere	1-6	538	8	546
Winter Garden	1-3	336	80	416
Zellwood	1-6	354	248	602
Total		35194	8628	43822

VOCATIONAL

Mid-Florida Tech		1076	47	1123
Vocational		390	208	598
Wymore Tech		63	233	296
Total		1529	488	2017

SPECIAL EDUCATION

Forrest Park		117	15	132
Gateway		172	19	191
Magnolia Special Education				
Center		145	63	208
Total		434	97	531

	White	Black	Total
Secondary	30855	5643	36498
Elementary	35194	8628	43822
Vocational	1529	488	2017
Special Education	434	97	531
Total	68,012	14,856	82,868

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All Citations

Footnotes

- ¹ Lower court decisions, if any, which may be inconsistent with these Supreme Court decisions on the requirements for converting from dual to unitary systems obviously must yield to the principles there enunciated.
- ² Under the stringent requirements of *Alexander v. Holmes County Board of Education*, supra, which this court has carried out in *United States v. Hinds County School Board*, 5 Cir., 1969, 423 F.2d 1264 (Nos. 28030, 28042, Nov. 7, 1969), this court has judicially determined that the ordinary procedures for appellate review in school segregation cases have to be suitably adapted to assure that each system, whose case is before us, 'begin immediately to operate as unitary school systems.' Upon consideration of the record, the court has proceeded to dispose of this case as an extraordinary matter. Rule 2, FRAP.
- ³ The transfers are complete with the exception of 25 teachers whose transfer orders are being reviewed on the basis of hardship.
- ⁴ The bi-racial committee is constituted by the district court from names submitted by the parties to this suit. The membership of thirty will be divided equally between whites and Negroes. The chairmanship is to alternate annually between a white chairman and a Negro chairman. The committee is to review the operation of the transportation system and the majority to minority transfer rule, and also is charged with responsibility in the area of selecting school sites. The committee is authorized to hold hearings and make recommendations to the school board in connection with any of these activities.

⁵ Five of the eleven schools have three or less white students in attendance but we, as did the district court, considered these as schools with all-Negro student bodies.

⁶ There would be 44 additional white students in Orange Center, 143 additional in Webster, 9 in Wheatley, and 90 in Carver.

⁷ Under the facts of this case, it happens that the school board's choice of a neighborhood assignment system is adequate to convert the Orange County school system from a dual to a unitary system. This decision does not preclude the employment of differing assignment methods in other school districts to bring about unitary systems. There are many variables in the student assignment approach necessary to bring about unitary school systems. The answer in each case turns, in the final analysis, as here, on all of the facts including those which are peculiar to the particular system.

* Includes 53 now in other schools by reason of variance based on traffic conditions.

** Includes 5 now in another school because of location of zone line.