

Order dated November 7, 1969

On October 29, 1969, the United States Supreme Court announced its decision in the Mississippi school case, *Alexander v. Holmes County*, Case No. 632. That decision, the most significant in this field since *Brown v. Board of Education*, peremptorily reversed an order of the Fifth Circuit Court of Appeals which, upon request of the United States Attorney General, had postponed until 1970 the effective desegregation of thirty Mississippi school districts, and had extended from August 11 to December 1, 1969, their deadline for filing desegregation plans. The Supreme Court held that the Court of Appeals

“* * * should have denied all motions for additional time because continued operation of segregated schools under a standard of allowing all deliberate speed for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court, the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. *Griffin v. School Board*, 377 U. S. 218, 234 (1964); *Green v. School Board of New Kent County*, 391 U. S. 430, 439, 442 (1968).” (Emphasis added.)

The Supreme Court further directed the Fifth Circuit Court of Appeals to make such orders as might be necessary for the *immediate* start in each district of the operation of a “totally unitary school system for all eligible pupils without regard to race or color.”

It is this court’s opinion that the word “dual” in the Supreme Court opinion is another word for “segregated,” and that “unitary” is another word for “desegregated” or “integrated.” It is also this court’s opinion that although,

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as defendants say, this is not Mississippi, nevertheless the Supreme Court's prohibition against extension of time as laid down in *Alexander v. Holmes County* is binding upon this court and this school board, and bars the exercise of the court's usual discretion in such matters, and that to allow the request of the defendants for extension of time to comply with this court's previous judgments would be contrary to the Supreme Court's decision and should not be done.

Therefore, and based also upon the considerations set out in the memorandum opinion to be filed contemporaneously herewith, the motion of the defendants for extension of time for compliance with the court's August 15, 1969 order is denied. Ruling on all other pending motions is deferred.

This the 7th day of November, 1969.

/s/ JAMES B. McMILLAN
James B. McMillan
United States District Judge

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PRELIMINARY STATEMENT

On Wednesday, October 29, 1969, the United States Supreme Court announced its decision in the Mississippi school case (*Alexander v. Holmes County*, Case No. 632). That decision peremptorily reversed an order of the Fifth Circuit Court of Appeals which, upon request of the United States Attorney General, had postponed until 1970 the effective desegregation of thirty Mississippi school districts, and had extended from August 11 to December 1, 1969, their deadline for filing desegregation plans. The Supreme Court held that the Court of Appeals

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The Supreme Court further directed the Fifth Circuit Court of Appeals to make such orders as might be necessary for the *immediate* start in each district of the operation of a “totally unitary school system for all eligible pupils without regard to race or color.”

The Mississippi school districts in the *Holmes County* case had degrees of desegregation ranging from nearly zero to about 16% of the Negro pupils. They like Mecklenburg hoped that their “freedom of choice” plans would satisfy the Constitution.

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The request for time extension, and all later proceedings in this cause, must be considered in light of the Supreme Court's reaffirmation of the law which this court has been following, and in light of the urgency now required by the *Holmes County* decision.

THE RESULTS OF THE 1969 PLAN

For pupil desegregation, the July 29, 1969 plan proposed to close seven black inner-city schools (most or all of which had previously been ear-marked for eventual "phase-out") and to transfer their 3,000 students in specified numbers to named suburban schools. All the transferee schools except West Charlotte were white. In addition, 1,245 black students, in specified numbers, were to be transferred from eight black or largely black schools to other designated suburban white schools.

The plan was accepted and approved because of its apparent promise to extend the opportunities of a desegregated education to over 4,000 new black students.

The plan has not been carried out as advertised: (a) Only 73 of the 1,245 scheduled for transfer from overcrowded black schools have been so transferred; those 73 were transferred not to the schools designated, but to other schools not mentioned in the plan. (b) It is now revealed that the closed schools, which were billed in July to produce 3,000 black students for transfer, actually had only 2,627 students in them when the schools closed in June! (c) The Board allowed full freedom of choice for students from the closed schools, and those students in large numbers elected to go to Harding High School, and to Williams Junior High, Northwest Junior High and other black schools, instead of to the assigned white schools. As a result, Harding High School was transformed immediately

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from 17% black to 47% black. This produced community consternation but no racial disorder among the students. The result may be deplorable, but the fact that the students at Harding High School have adjusted peaceably to the situation (like others before them at Cornelius, Davidson, Olympic, Randolph Road, Hawthorne and Elizabeth, and like the people of Anson and other North Carolina counties) shows that Mecklenburgers can live with desegregated schools. (d) The transfers proposed simply appear never to have been made to most of the suburban schools named in the plan. (e) *The plan therefore transferred to white schools only 1,315 instead of the promised 4,245 black pupils!* From closed schools, the elementary transferees numbered 463 instead of the advertised 1,235; junior high transferees were 273 instead of 630; and senior high transferees were 506 instead of 1,135; and from overcrowded schools 73 instead of 1,245. If Harding (47% black, 630 Negro students), Olympic (42% black, 376 Negro students), and Wilmore (49% black, 228 Negro students) should be allowed to continue their rapid shift from white to black, the net result of the 1969 pupil plan would be nearly zero.

Faculty desegregation has significantly and commendably improved since the April 27 order. Nevertheless, only six "black" schools and one "black" kindergarten have predominantly white faculties; and 98 out of the 106 schools and kindergartens in the system are today readily and obviously identifiable by the race of the heavy majority of their faculties.

The "performance gap" is wide.

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THE SITUATION TODAY

The following table illustrates the racial distribution of the present school population:

SCHOOLS READILY IDENTIFIABLE AS WHITE

% WHITE	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS		
		WHITE	BLACK	TOTALS
100%	9	6,605	2	6,607
98-99%	9	4,801	49	4,850
95-97%	12	10,836	505	11,341
90-94%	17	14,070	1,243	15,313
86-89%	10	8,700	1,169	9,869
	<hr/> 57	<hr/> 45,012	<hr/> 2,968	<hr/> 47,980

SCHOOLS READILY IDENTIFIABLE AS BLACK

% BLACK	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS		
		WHITE	BLACK	TOTALS
100%	11	2	9,216	9,218
98-99%	5	41	3,432	3,473
90-97%	3	121	1,297	1,418
56-89%	6	989	2,252	3,241
	<hr/> 25	<hr/> 1,153	<hr/> 16,197	<hr/> 17,350

SCHOOLS NOT READILY IDENTIFIABLE BY RACE

% BLACK	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS		
		WHITE	BLACK	TOTALS
32-49%	10	4,320	2,868	7,188
17-20%	8	5,363	1,230	6,593
22-29%	6	3,980	1,451	5,431
	<hr/> 24	<hr/> 13,663	<hr/> 5,549	<hr/> 19,212
TOTALS:	106	59,828	24,714	84,542

Some of the data from the table, re-stated, is as follows:

Number of schools	106
Number of white pupils	59,828
Number of black pupils	24,714

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Total pupils	84,542
Per cent of white pupils	71%
Per cent of black pupils ..	29%
Number of "white" schools	57
Number of white pupils in those schools	45,012
Number of "black" schools	25
Number of black pupils in those schools	16,197
Number of schools not readily identifiable by race	24
Number of pupils in those schools	19,212
Number of schools 98-100% black	16
Negro pupils in those schools	12,648
Number of schools 98-100% white	18
White pupils in those schools	11,406

Of the 24,714 Negroes in the schools, something above 8,500 are attending "white" or schools not readily identifiable by race. More than 16,000, however, are obviously still in all-black or predominantly black schools. The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision. The black school problem has not been solved.

The schools are still in major part segregated or "dual" rather than desegregated or "unitary."

The black schools are for the most part in black residential areas. However, that does not make their segregation constitutionally benign. In previous opinions the facts respecting their locations, their controlled size and their population have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from

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public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or "*de facto*," and the resulting schools are not "unitary" or desegregated.

FREEDOM OF CHOICE

Freedom of choice has tended to perpetuate segregation by allowing children to get out of schools where their race would be in a minority. The essential failure of the Board's 1969 pupil plan was in good measure due to freedom of choice.

As the court recalls the evidence, it shows that *no white students have ever chosen to attend any of the "black" schools.*

Freedom of choice does not make a segregated school system lawful. As the Supreme Court said in *Green v. New Kent County*, 391 U.S. 430 (1968):

"* * * If there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable."

Redrawing attendance lines is not likely to accomplish anything stable toward obeying the constitutional mandate

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as long as freedom of choice or freedom of transfer is retained. The operation of these schools for the foreseeable future should not include freedom of choice or transfer except to the extent that it reduces segregation, although of course the Board under its statutory power of assignment can assign any pupil to any school for any lawful reason.

THE "NATIONAL STANDINGS"

The defendants filed some statistics concerning the one hundred largest school systems in the country, and say that Charlotte-Mecklenburg desegregation compares favorably with that in most of those systems. That may well be so. The court is not trying cases involving the other ninety-nine school boards, and has not studied any evidence about them and does not know their factual nor legal problems. The court in its first order of April 23, 1969 has noted the substantial desegregation achieved in certain areas in the Charlotte-Mecklenburg system, and is still aware of it. The fact that other communities might be more backward in observing the Constitution than Mecklenburg would hardly seem to support denial of constitutional rights to Mecklenburg citizens. The court doubts that a double standard exists. The Attorney General of the United States has filed suit for desegregation in Connecticut as well as in the whole State of Georgia. One of the most stringent desegregation orders on record was entered recently against a school board in the City of Chicago. Constitutional rights will not be denied here simply because they may be denied or delayed elsewhere. There is no "Dow-Jones average" for such rights. With all due deference to the complexities of this school system, which have already been fully noted

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in previous opinions, the Board and the community must still observe the Constitution. The fact that the school system ranks high in some artificial "national standings" or that one-third of the Negro students do attend desegregated schools or predominantly white schools is no answer to the constitutional problems presented by sixteen thousand black Mecklenburgers still going to all-black or largely black schools in this predominantly white community.

THE PROSPECTS FOR THE FUTURE

The second part of the Board's report is answers to the court's questions designed to determine whether the Board has made the hard decisions necessary to desegregate the schools.

The answers show that those decisions have not been made.

The computer expert has been given restrictions which, taken at face value, indicate that his work will not lead to desegregation of all the schools. One such restriction has the apparent effect of limiting attendance to those who live a maximum of roughly a mile and a half from the school. (This is the requirement that all grids or areas must be "contiguous to the home grid or to grids which are contiguous to the home grid.") Another is the limitation that no school attended by whites should have less than a 60% white student population. (Unless this were coupled with a further requirement that no school attended by blacks shall have more than a 40% black student population, this appears to put the black schools "off limits" for his study.) The original verified motion of the School Board contained two other limitations. Those were that "a 'desirable' racial balance should be obtained" and that "reasonable limitation on distance of travel for a child has been imposed." The

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record is silent on what these limitations mean and whether they are still in effect.

The Board has not accepted pairing and grouping and clustering of schools as legitimate techniques, but has simply indicated that it will "consider" those techniques where they offer "*reasonable prospects of producing stable desegregation * * *.*" (Emphasis added.)

The report states unconditionally that:

"The information supplied by the systems analysis approach will not produce desegregation of all schools by September, 1970. Dramatic results are expected. It is hoped that the number of all white and all black schools will be substantially reduced. The number of such schools cannot be determined at this time." (Emphasis added.)

The report also says that:

" * * The Board of Education does not feel that it will be possible to produce pupil desegregation in each school by September, 1970. It is expected that faculties will fairly represent a cross section of the total faculty so that most and possibly all schools will not have a racially identifiable faculty. Furthermore, the restructuring of attendance lines coupled with faculty desegregation may satisfy constitutional requirements."* (Emphasis added.)

The School Board is sharply divided in the expressed views of its members. From the testimony of its members, and from the latest report, it cannot be concluded that a majority of its members have accepted the court's orders as representing the law which applies to the local schools.

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By the responses to the October 10 questions, the Board has indicated that its members do not accept the duty to desegregate the schools at any ascertainable time; and they have clearly indicated that they *intend not to do it* effective in the fall of 1970. They have also demonstrated a yawning gap between predictions and performance.

Withholding or delaying the constitutional rights of children to equal educational opportunity on such vague terms as these is not the province of the School Board nor of this court.

Furthermore, since the Supreme Court has now prohibited lower courts from granting extensions of time, it may well be that the gradual time table laid down by this court's April 23, 1969 order contemplating substantial progress in 1969 and complete desegregation by September 1970) was and is too lenient.

If the plan tendered by the School Board on November 17, 1969 is thorough and informative, and sufficiently shows an unconditional purpose on the part of the Board to complete its job effective by September, 1970, the Board may perhaps be allowed to adhere to the existing time table. Certainly a Mecklenburg plan ought if possible to be prepared by the Mecklenburg School Board and its large and experienced staff, rather than by outside experts. Decision on that and other pending questions must await further developments, including the Board's November 17, 1969 report.

CONCLUSIONS

The school system is still discriminatorily segregated by race and maintained that way by state action. In many ways it is not in compliance with the Constitution. The Board has not shown a valid basis for an extension of time

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to comply with the court's judgment; it has shown no intention to comply by any particular time with the constitutional mandate to desegregate the schools; and it has suggested its intention *not* to comply by September, 1970. In spite of those facts the court would like as a matter of discretion to grant some of the time extension requested, but is of the considered opinion that in *Alexander v. Holmes County* the Supreme Court has prohibited the exercise of such discretion. The findings of fact in this opinion will be considered, along with facts found in previous orders, opinions and memoranda, as the basis for such future judgments and orders as may be appropriate, including such judgments and orders as may be appropriate upon receipt of the Board's November 17, 1969 plan. All statements of fact in this memorandum opinion, whether or not labeled as such, shall be deemed findings of fact, as necessary to support such judgments and orders.

This the 7th day of November, 1969.

/s/ JAMES B. McMILLAN
James B. McMillan
United States District Judge