IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

CITY OF BESSEMER BOARD OF EDUCATION, Plaintiff, v. ANTHONY J. CELEBREZZE, As Secretary of Health, Education and Welfare, FRANCIS KEPPEL, As Commissioner of Education, Defendants.	CIVIL ACTION NO. 65-180 MEMORANDUM BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This is a suit brought by the Bessemer Board of Education against the Secretary of Health, Education and Welfare to declare unconstitutional the provisions of Title VI of the Civil Rights Act of 1964 and the regulations and general statement of policies promulgated thereunder which relate to the discontinuance of Federal financial assistance to them.

In its original complaint the plaintiff averred that it had the right to receive Federal financial assistance "without complying with the unlawful and unconstitutional conditions and requirements imposed . . . by Title VI of the Civil Rights Act of 1964 or Defendants

regulations and instructions thereunder," (Par. 26). The defendants moved to dismiss the complaint on the grounds: (1) the plaintiff failed to exhaust its administrative remedies; (2) a case or controversy did not exist because Federal assistance had not been denied the plaintiff; and (3) the Civil Rights Act and its regulations are constitutional. The motion was denied. The defendant answered the complaint and subsequently filed a motion for summary judgment on the ground that there was no issue as to any material fact and that the issues raised in the pleadings had become moot. In support of this motion, the defendants submitted the affidavit of David S. Seeley, the Director of the Office of Equal Educational Opportunities, in which he stated:

> On August 6, 1965, the Board of Education of the City of Bessemer, Alabama, submitted to the Office of Education of the Department of Health, Education and Welfare orders of the United States District Court for the Northern District of Alabama in Brown v. City of Bessemer Board of Education, Civil Action No. 65-366, dated June 30, 1965 and July 30, 1965. . . . On August 9, 1965, the United States Commissioner of Education, United States Department of Health, Education and Welfare, accepted the Board's submission as constituting satisfactory compliance with the requirements of Title VI of the Civil Rights Act of 1964 and 45 CFR Section 80.4 (c) (1) and authorized the release of funds to the Bessemer Board of Education. 1/

In opposition to the defendants' motion the plaintiffs submitted the affidavit of James O. Knuckles, the Superintendent of the Schools of the City of Bessemer

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1/ The plaintiff's contention that this "voluntary cessation of alleged illegal activity does not deprive the tribunal of power to hear and determine the case" is without merit. The principle is applicable to actions which seek an injunction, as shown by the cases cited by plaintiff, and not actions for declaratory judgments.

in which he stated the Board had taken no other action under Title VI "other than to furnish to said David S. Seeley information concerning action taken by said Board under the said orders of the Court, and as set forth in the complaint filed herein and the amendments thereto." In fact, the Board on August 4, 1965, submitted to the Department of Health, Education and Welfare an assurance which states:

> (1) That it is subject to the final orders of the United States District Court for the Southern Division of the Northern District of Alabama in the case of Doris Elaine Brown, et al., and United States of America v. The Board of Education of the City of Bessemer, et al., Civil Action No. 65-366, for the desegregation of the Bessemer Public School System a copy of each of which orders are hereto attached, marked Exhibits A, B and C and made a part hereof;
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> (2) That no appeal from either of said orders has been taken;
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> (3) That the City of Bessemer Board of Education hereby gives and provides assurance that it will comply with such order including any future modification thereof.

This assurance is included in the attached certified copy of the file of the Department of Health, Education and Welfare, which document the defendant

respectfully requests be made a part of the record in this case.[2/]

When the plaintiff Board of Education brought this action, it had not taken any steps to desegregate its schools, but within a short time thereafter, parents of Negro children commenced a suit to desegregate the Bessemer schools. Pursuant to the court order resulting from that suit, Brown V. City of Bessemer Board of Education, supra, the plaintiff Board has begun to desegregate its school system.

The Civil Rights Act of 1964, Title VI, Sec. 601 provides that no one may be denied the benefits of any program receiving Federal financial assistance because of his race. Section 602 of the Title empowers and directs each Federal department and agency administering such programs to promulgate regulations which establish the procedures for the enforcement of this policy. Each such regulation is subject to Presidential approval before it becomes effective.

Pursuant to this statute, the defendant prepared regulations for the enforcement of Title VI which were approved by the President on December 3, 1964, 45 C.F.R.

2/ It is submitted that the defendant should be permitted to clarify the record, since the plaintiff's counter affidavit was not filed prior to the day of the hearing as required by Rule 56(c), Federal Rules of Civil Procedure.

Section 80.13. These regulations establish the procedures a school board must follow in order to obtain Federal financial assistance. The regulation, 45 CFR, Section 80.4(c), provides:

> The requirements of paragraph (a) or (b) of this section with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final court order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any future modification of such order, or (2) submits a plan for the desegregation of such school or school system which the Commissioner of Education determines is adequate to accomplish the purposes of the Act and this part, and provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the Commissioner may reserve the right to redetermine, after such period as may be specified by him, the adequacy of the plan to accomplish the purposes of the Act and this part.

This means there are two procedures a school board may follow in order to receive Federal financial assistance. It may either submit a final court order for the desegregation of its schools and give assurance of compliance or submit a voluntary plan for the desegregation of the school system which meets with the approval of the Commissioner.

The Bessemer Board of Education followed the procedures outlined in subsection (1) of the regulation. It "furnished to said David S. Seeley information concerning action taken by the said Board under the said orders of the Court" (James O. Knuckles affidavit) in Brown v. City of Bessemer Board of Education, supra. This action "constituted satisfactory compliance with the requirements of Title VI

. . . and of 45 C.F.R. Section 80.4(c)(1) and authorized the release of funds to the Bessemer Board of Education" (David S. Seeley's affidavit).

Since the plaintiff has complied with Title VI and its regulations, the defendant has no authority to withhold Federal financial assistance from the plaintiff as long as the plaintiff continues to fulfill its assurance by complying with the court order. In its briefs and oral argument, the plaintiff has maintained that the Commissioner of Education is given the authority under these regulations to withold Federal assistance if he determines the court order is inadequate.[3/] To support this contention, the plaintiff relies upon that portion of the regulation, recited above, which states that the Commissioner "may reserve the right to redetermine, after such period as may be specified by him, the adequacy of the plan . . .". It asserts that "plan" and "court order" are synonymous and when the regulations gave the defendants the right to review the adequacy of plans it impliedly granted the same right for review of court orders. This argument ignores the plain language of the regulations and the facts regarding the authorization of Federal financial assistance to the Bessemer Board.

The regulation has divided the methods of compliance into two categories, submission of a court order and submission of a plan. It has emphasized this separate consideration by listing the two methods in

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3/ At the hearing on November 22, 1965, the defendants' counsel, without fully researching the point, tentatively agreed with this mistaken assertion.

different subsections. To gain Federal assistance by the first method, the Board is required to submit a court order and an assurance that they will comply with the order. The second method requires the submission of a voluntary plan which is determined to be adequate by the Commissioner of Education and an assurance that the Board follow this plan. The redetermination clause is separated from the second method by a semi-colon and since it expressly refers to a "plan," not a court order, and since it uses the term "redetermination" it must refer only to voluntary plans submitted to the Commissioner, the adequacy of which he originally determined.[4/]

To effectuate the national policies reflected by Title VI, there must be some review of programs receiving Federal aid to determine that such programs are administered without distinctions based on race. Accordingly, Health, Education and Welfare reviews the policies and procedures used in the administration of programs financed through that Department. However, where such programs are challenged in court as being administered in a racially discriminatory manner it is the court that must decide what procedures the administrators of the program must follow to

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4/ The plaintiff attempts to justify his interpretation of this regulation by citing the interpretation of these regulations by the Commissioner of Education (PL. Ex. E). In "IV Methods of Compliance - Court Orders" the Commissioner defines the remaining of "Court Order" as used in the regulations. This is not, as the plaintiff contends, an initial determination of the adequacy of a court order, but is an explanation of "a final court order of a court of the United States for the desegregation of such schools or school system."

meet the requirements of the Federal constitution and Federal statutes. Obviously, any review of such determinations has to be within the framework of the judicial system. Thus, court orders in school desegregation cases can not be subject to administrative review by the Department of Health, Education and Welfare. The distinct functions of the executive and judicial branches in carrying out the national policies embodied in the Civil Rights Act of 1964 were recognized in Singleton v. Jackson Municipal Separate School Districts, 348 F.2d 729, 731 (5th Cir. 1965):

> 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 the three departments of government are united in a common objective.

The interpretation that court orders may not be administratively reviewed was applied in this very case. Atlthough the federal government, plaintiff-intervenor, in Brown v. City of Bessemer Board of Education, supra, took the position that the court ordered desegregation plan was inadequate in some respects, the federal funds were released upon receipt of an assurance that the Board would comply with the court order. The only possible review of the order was sought by noticing an appeal.

The remote possibility that Title VI or its regulations could cause any possible future injury to the plaintiffs has caused plaintiff's allegations, that the Civil Rights Act and its regulations are unconstitutional, to become moot. The Constitution empowers the Federal courts

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to exercise their judicial power only when there is a case or controversy between the parties, Art. III, Sec. II. Under this section the Federal courts lack jurisdiction to decide hypothetical questions. In Longshoremen's Union v. Boyd, 347 U.S. 222, 224 (1953) the court stated:

> . . . [This] is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable. Determination of the scope and constitutionality of legislation in advance of its immediate effect in the context of a concrete case involves too remote and abstract an injury for the proper exercise of the judicial function.

Thus, the Federal courts lacks jurisdiction to decide the constitutionality of possible future actions by a governmental agency. In Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1935) the plaintiffs, shareholders of the Alabama Power Co., sought to have declared unconstitutional the Tennessee Valley Authority's possible future sale of electricity to cities within the state. Some of the officials of the Tennessee Valley Authority had indicated these sales were contemplated but no actual sales had been made. The court held the issues raised were not ripe for judicial review and stated (p. 324):

> The procurement, policies and programs of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy, save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of persons complaining.

The defendants in Ashwander had stated their intention to sell electricity within the plaintiff's area

and had only to enter into the necessary contracts before their competition would threaten the plaintiff; yet the court held there was not a sufficient threat or injury to make the issue raised either a case or controversy within Art. III, Sec. II of the Constitution. The Department of Health, Education and Welfare has not even suggested it will issue regulations which might effect a school district which is subject to a court order for desegregation. If it did, the regulations would have to comply with the requirements of the Civil Rights Act[5/] before the plaintiff could be injured. Thus, the likelihood of any injury to this plaintiff is far more remote than it was in Ashwander, supra.[6/]

An additional guide to be used in determining whether a controversy is of sufficient immediacy for

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5/ The regulations must be of general applicability and "consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President" (Sec. 602).

6/ The same principle used in Ashwander was employed earlier in United States v. Alaska S. S., 253 U.S. 101 (1919) when the court refused to determine the constitutionality of possible future governmental regulations. The court stated, p. 115:

> However convenient it might be to have decided the question of the power of the Commission to require carriers to comply with an order prescribing bills of lading, this court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot effect the result as to the thing in issue as a result before it.

the exercise of judicial power was given in Public Service Commission v. Wycoff Co., 344 U.S. 237, 244 (1952):

> The disagreement must not be nebulous or contingent but must have taken on a fixed and final shape so that a court can see what legal issues it is deciding, what effect its decisions will have on the adversaries, and some useful purpose to be achieved in deciding them.

As shown above, the remote possibility of future termination of Federal assistance, which is the only possible injury to the plaintiff, is contingent upon future policies and practices of both parties as well as the President. This plaintiff would not be effected by the court's determination of the legal issues raised by the pleadings, and a decision for the Bessemer Board would not serve any useful purpose.

Weak Ending

CONCLUSION

The parties agree that no genuine issue of fact is raised in this motion for summary judgment[7/] and the issue of mootness is ripe for judicial determination.

7/ The Bessemer Board also maintains there is no genuine issue of fact on the merits and seeks a summary judgment for the plaintiff. If this motion were denied, the defendant believes a full hearing, which would include evidence showing mass violations of the 14th Amendment, would be necessary for this court to determine the merits of the issues raised by the pleadings. For this reason, the plaintiff request for a summary judgment in its favor should be denied.

Status of PP in respect to receipt of fed funds continued has been fixed by the Court in Brown ~~by conduct of defendants~~ + no action by the Court in this case will alter the status

For the above reasons, the defendants' motion for summary judgment should be granted.

Respectfully submitted this day of December, 1965.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Memorandum of Law in Support of Defendants' Motion to Dismiss has been sent by United States mail to the attorneys for plaintiff addressed as follows:

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