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Nos. 77-1464 and 77-1467

In the Supreme Court of the United States

OCTOBER TERM, 1977

GERALDINE HUCH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

SOUTH PARK INDEPENDENT SCHOOL DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that the court of appeals erred in remanding this case to the district court for further findings of fact on the question whether a 1970 court-ordered desegregation plan has produced a "unitary" school district that satisfies the standards set forth in *Swann* v. *Board of Education*, 402 U.S. 1.

1. In August 1970, in litigation instituted by the United States, the district court ordered into effect "a school integration plan designed to establish a unitary school

system in South Park Independent School District" (Pet. App. C-1).[1]

In July 1976, the United States returned to the district court and moved for supplementary relief. The government asked the court to adopt a new desegregation plan in light of statistics that indicated the goal of a unitary school system had not been achieved. Four schools that had been designated for black students under the dual system remained all black under the 1970 plan; seven schools that were all white under the dual system remained virtually all white. During the 1975-1976 school year, 75.1 percent of all black students in the district attended schools that were 92 percent or more black; 77.5 percent of all white students attended schools that were 86 percent or more white (Pet. App. A-6).[2]

The district court, without a full evidentiary hearing, found that the 1970 plan had desegregated petitioner school district, "thereby dissolving all vestiges of a dual school system" and producing a unitary system (Pet. App. B-6). The court also found that the school district had not violated the 1970 court order and had not taken any action that "had, as a natural and foreseeable consequence, a segregative effect on student integration" (*ibid.*). The court found in addition that the United States had not provided petitioner school district with notice of the details of the alleged denial of equal educational opportunity and equal protection of the laws and thus had deprived the district of a reasonable opportunity to develop a voluntary remedial plan, in conjunction with

[1]Until the late 1950's, petitioner school district had operated a dual system pursuant to a Texas law that required black and white students and faculty to be assigned to separate schools (Pet. App. A-6 n. 2).

"Pet. App." refers to the appendices to the petition in No. 77-1467.

[2]In 1975-1976, the school district had approximately 12,000 students, approximately 40 percent of whom were black.

the local community (*ibid.*). Accordingly, the court held that, under 20 U.S.C. (Supp. V) 1758, it was precluded from granting the supplementary relief sought by the government.

The court of appeals reversed (Pet. App. A-1 to A-14; 566 F. 2d 1221). The court held that *Swann* v. *Board of Education, supra,* provides the standard of review by which the effectiveness of the 1970 desegregation plan must be judged and that, under *Swann,* desegregation plans that entail the continued existence of one-race or predominantly one-race schools must be carefully scrutinized (Pet. App. A-9 to A-11). The court ruled that the district court erred in failing to examine the results of the 1970 plan in detail and in declaring the school district unitary solely on the basis of a finding that the district had complied with the 1970 court order. The court further held that in the absence of a valid judicial declaration of a school district's unitary status, the notice requirement of 20 U.S.C. (Supp. V) 1758 does not control, and that, even if Section 1758 were applicable, the government's letter to the school district, dated three months before the government's motion for supplementary relief, provided sufficient prior explanation of the ways in which the district's existing system does not comply with federal law. The court remanded for supplemental findings to determine whether the district's assignment of students to schools is genuinely nondiscriminatory (Pet. App. A-11).

2. The non-final ruling of the court of appeals does not merit review by this Court. The decision of which petitioners now complain did not finally dispose of the motion filed by the United States; it merely remanded the case for further factual and legal determinations by the district court. In the absence of extraordinary circumstances, this Court has declined to review non-final orders issued by the courts of appeals (see, *e.g., Brotherhood of Locomotive Firemen & Enginemen* v.

Bangor & Aroostook Railroad Co., 389 U.S. 327), and this salutary practice should be followed here.

3. In any event, the court of appeals' determination is correct. Petitioners err in arguing that the implementation of the 1970 plan immediately established a unitary system. No court has reviewed the actual results of that plan, and such review is necessary before any school district is declared unitary. *Green* v. *County School Board*, 391 U.S. 430, 439.

This Court held in *Swann* that "in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition" (402 U.S. at 26). The continued existence of all-black schools previously designated as black schools under a dual system requires close judicial scrutiny, and places the burden on district officials to establish that the racial composition of these schools is not a product of past or present discrimination by school authorities (*ibid.*). The court of appeals' ruling is consistent with other post-*Swann* decisions by that court in similar cases; this Court has repeatedly deemed further review unnecessary in such situations. See, *e.g.*, *Ellis* v. *Board of Public Instruction of Orange County, Florida*, 465 F. 2d 878, certiorari denied, 410 U.S. 966; *Hereford* v. *Huntsville Board of Education*, 504 F. 2d 857, certiorari denied *sub nom. Huntsville Board of Education* v. *United States*, 421 U.S. 913; *United States* v. *Texas Education Agency*, 512 F. 2d 896, certiorari denied *sub nom. Richardson Independent School District* v. *United States*, 423 U.S. 837; *United States* v. *Columbus Municipal Separate School District*, 558 F. 2d 228, certiorari denied, No. 77-626, January 9, 1978; *Lee* v. *Demopolis City School System*, 557 F. 2d 1053, certiorari denied, No. 77-649, January 9, 1978.

The determination that 20 U.S.C. (Supp. V) 1758 does not bar the district court from ordering further relief in response to the United States' motion is also correct. The court of appeals' summary of the letter the United States sent to the school board three months before filing its motion shows that the United States provided the requisite notice of the "details of the violation" and allowed "the local educational agency * * * a reasonable opportunity to develop a voluntary remedial plan" (Pet. App. A-7 n. 3, A-12). As the court of appeals noted, the motion for relief was not filed until after the school district responded to the United States' letter (Pet. App. A-12). That response stated that the school district would not consider further desegregation for at least one full school year.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1978.