IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

BRENDA K. MONROE, et al,

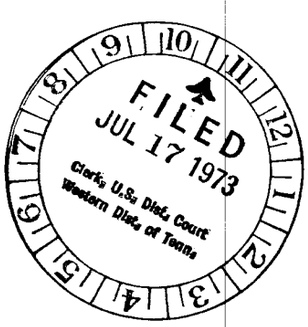
Plaintiffs,

vs.

BOARD OF COMMISSIONERS OF THE CITY OF JACKSON, TENNESSEE, et al,

Defendants.

NO. 1327



MEMORANDUM OPINION

This case has been remanded to this Court for consideration of implementation of desegregation of the City of Jackson public schools in light of principles enunciated in Swann v. Mecklenburg Board of Education, 402 U.S. 1 (1970), Robinson v. Shelby County, 442 F.2d 255 (6th Cir., 1971) and Davis v. School District of Pontiac, 443 F.2d 573 (6th Cir., 1971).[1] Hearings have been had in which the Justice Department participated, having been previously made an "amicus curiae" party in this proceeding. After an opportunity was presented to the parties in a hearing in late August of 1972, the Justice Department submitted recommendations to the Court.[2] The defendant Jackson School Board then presented a plan for further desegregation of its elementary school system followed by a request of plaintiffs to propose a plan suggested by Dr. Michael J. Stolee who has been connected with a Title IV Center at the University of Miami.

1/ 453 F.2d 259 (6th Cir., 1972).

2/ See proposed findings and memorandum filed March 15, 1973.

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As stated by Judge Miller in his concurring opinion in Robinson, 442 F.2d 255 at p. 258, ". . . there has been a great divergence of views among lower courts as to the meaning of 'unitary' and 'dual' school systems . . . as to the extent bussing may be required or employed to effectuate further integration and as to whether any mathematical distribution is required among various schools". This divergence of views has continued after the Swann decision as to these same questions which now involve the Jackson, Tennessee school system, and the distinctions in decisions have to considerable degree been based upon differing circumstances. In a later Robinson decision, 467 F.2d 1187 (6th Cir. 1972) filed 9-21-72, Judge McCree, dissenting, noted that Swann and Davis v. School Board of Mobile, 402 U.S. 33 (1970) "have received extensive and differing interpretations in other districts and circuits and in scholarly and other commentary."

It was observed by Judge Peck in Monroe, 453 F.2d 259 at p. 262 that "although Jackson once maintained a dual school system as of October, 1971, all of its schools are integrated to some degree; that there is now one high school comprised of 843 white and 643 black students; that there are now three junior high schools integrated in ratios running from 60-40 to 50-50; that four of the nine elementary schools are integrated in ratios similar to those just cited for the junior high schools; but that in the five remaining elementary schools three are over 90% black and two are over 90% white. Integration in these five schools is minimal because the location in the city is such that no conceivable zoning change would produce any substantially greater integration."

It is noted that in the history of this case an original desegregation plan was submitted by the defendant Board some

ten years ago.[3] Since that time after many court skirmishes, there has been a steady progress towards a unitary system in Jackson. The predominantly black Merry Senior High School and the predominantly white Jackson Central High School were consolidated for form the Jackson Central-Merry High School for the 1970-71 school year pursuant to the district court order of August 23, 1970. Upon the consolidation of the two high schools, the white principal of the former Jackson Central High School became the administrative head of the Jackson Central-Merry High School. The black principal of the former Merry High School became the associate principal of the school. Both have co-responsibilities in all administrative affairs.

Merry Junior High School was closed in the consolidation of the high schools and the following figures reflect the extent of desegregation in Jackson's Junior High Schools:

	Tigrett Jr.		Jackson Jr.		Parkway Jr.[4]	
Year	Black	White	Black	White	Black	White
1968-69	16	797	162	386	627	0
1969-70	61	906	327	351	496	8
1970-71	45	892	315	300	556	36
1971-72	200	373	300	274	340	513
1972-73	314	443	267	245	306	476

There are 31% black teachers out of the total staff assigned to the consolidated high school, 30% black teachers in the three junior highs (each, school, incidentally having almost exactly 30%-70% ratio) and there are 32% black teachers among the 208 elementary school teachers for the 1972-1973 school year. No

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3/ 211 F.Supp. 968 (W. D. Tenn., 1963).

4/ During 1968-69, 1969-70, and 1970-71, the figures shown reflect attendance at Merry, now closed. Parkway Junior High School was constructed for the 1971-72 year over objections of plaintiffs.

elementary school had less than 26% black faculty nor more than 39% black faculty for that year, the over-all ratio being between 30 and 31%. Black students comprised approximately 46% of Jackson's students this past school year, whereas it was approximately 40% ten years ago.[5/] Approximately one-third of Jackson's total population of about 40,000 in 1970 was black.[6/] There has been prepared and utilized a pupil locator map in connection with Jackson's school districts covering the City's approximate 26 square mile area. Except for the elementary schools which are the subject of controversy in this decision, it can realistically be said that the City of Jackson has virtually achieved a unitary school system that stands the test of comparison with any system of which we are aware which has been the subject of a reported decision in this circuit. This has been accomplished despite past traditions of de facto and de jure segregation and, despite the Board's opposition to much of the change that has been wrought. This is not to imply, however, that there are not continuing problems with which the Court is concerned in this opinion.

To the extent that plaintiffs have questioned the student assignment plan for any junior high school or the operations of the consolidated high school, including its administrative set-up of principal and associate principal, we decline to afford the relief demanded (or suggested for consideration by the Justice Department), and we refuse to disturb what appears to meet current judicial standards with respect to elimination of a dual school structure as to high school and junior high school desegregation.

5/ 211 F. Supp. 968.

6/ As this Court noted in Seals v. Madison County Quarterly Court, #2106 (1972).

The defendant Jackson School Board has never operated a bus system nor afforded students attending its schools transportation.[7] The City of Jackson has a public transit or transportation department, but it has not been indicated to what extent it is utilized or can be utilized for students attending public school. Despite a continuing fear of "white flight" from the public schools by reason of school desegregation, Jackson has pursued, as required in 1970 and since that time, "greater, not less, student and faculty desegregation . . . to alleviate the problem . . . of disparity in the achievement levels of students from different socio-economic backgrounds".[8] Jackson, then, unlike Charlotte in Swann and Shelby County, Tennessee, in Robinson, has no long history of bussing students. It cannot be said that Jackson has caused black students to be transported past "white" or "major white" schools in the past to "black" or "majority black" schools as in Detroit. See Bradley v. Milliken, #72-1809[9] (6th Cir., 6-12-73). Likewise, bussing had been previously utilized in Mobile County, Alabama, and outlying areas of metropolitan Mobile prior to the Supreme Court decision in Davis v. Mobile County School Comm., 402 U.S. 33 (1971), a companion case to Swann, where bussing was ordered by the Court.

We turn then to the elementary school situation in Jackson and consideration of the suggested plans for bringing about more desegregation in these schools.

7/ There has, however, been special budgetary provision for taxi or other transportation for retarded and handicapped children.

8/ 427 F.2d (6th Cir., 1970).

9/ The same situation occurred in Chicago suburbs as in Detroit. See U.S. v. Cook County School District, 404 F.2d 1125 (7th Cir., 1968).

The Alexander Elementary School was constructed in 1951, the Highland Park Elementary School in 1960, the Parkview Elementary School in 1951, and the West Jackson Elementary School in 1940. While the construction date of the original Whitehall Elementary is unknown, the school was reconstructed in 1966. Prior to the 1963-64 school year, each of the above schools was maintained solely for white students.

Only Whitehall Elementary School of these five formerly "white schools" came into being in course of reconstruction during the past 12 years. Whitehall is now a majority black but highly integrated school. It was not built to preserve a segregated school system because even in 1966, and thereafter, it has continued to be one of the most integrated schools in the Jackson School System and located in a somewhat racially mixed neighborhood.

The Lincoln Elementary School was constructed in 1954, the South Jackson Elementary School in 1936 and the Washington-Douglas Elementary School in 1952. Prior to the 1963-64 school year, each of the above schools was maintained solely for black students.

The Andrew Jackson Elementary School was opened in the northwest section of the district for the 1969-70 school year pursuant to the district court order of September 13, 1968. The attendance zones for the other elementary schools were not affected by its opening. Slight modifications in the elementary school attendance zones were made for the 1971-72 school year in accordance with the district court order of March 17, 1971. The attendance zones for the 1971-72 and 1972-73 school years in elementary schools are essentially the same as those established for the 1963-64 school year. Only the Andrew Jackson Elementary School can be said to have

been recently constructed by defendant Board with possible racial considerations in view, since it has been predominantly white from its inception. (We note also that Highland Park, constructed in 1960, has also been predominantly white since its beginning). The following statistics reflect data as to racial enrollment at Jackson Elementary Schools, (listed in order of completion of construction or reconstruction):

School	Attendance Per Year:														Total
	1968-1969			1969-1970			1970-1971			1971-1972			1972-1973		
	Black	White	Total	Black	White	Total	Black	White	Total	Black	White	Total	Black	White	
South Jackson	435	0	435	350	4	354	349	8	357	281	8	289	266	0	1666
West Jackson	101	289	390	118	293	411	195	291	486	195	243	438	157	216	1373
Alexander	183	571	754	155	415	570	141	408	549	204	384	588	200	355	1455
Parkview	171	457	628	252	431	683	235	382	617	274	349	623	274	328	1602
Washington-Douglas	393	0	393	392	3	395	365	0	365	273	17	290	246	4	1250
Lincoln	559	0	559	504	0	504	569	0	569	542	6	548	584	7	1591
Highland Park	3	752	755	2	549	551	13	502	515	10	508	518	12	473	1485
Whitehall	85	327	412	77	264	341	116	264	380	217	210	427	244	179	1423
Andrew Jackson				0	486	486	15	495	510	15	445	460	24	459	1483

The attendance zones for the 1971-72 and 1972-73 school years in elementary schools are essentially the same as those established for the 1963-64 school year. The school district constructed four classroom additions at the Whitehall Elementary School for the 1972-73 school year pursuant to the District Court Order of April 7, 1972.

A majority of all of Jackson's black elementary students attend predominantly black Lincoln, Washington-Douglass, and South Jackson Elementary Schools, although Alexander, Parkview and Whitehall have been effectually desegregated. In the Title VII report and recommendation by the Education Opportunities Planning Center at the University of Tennessee submitted to this Court in a previous consideration of this case, there were attached enrollment reports and comments thereon by the superintendent, Fred Standley, dated September, 1970. These comments deserve attention in considering the plans submitted in connection with this Court's responsibility with regard to the Jackson elementary schools for the 1973-74 (and subsequent) years. South Jackson was described as "an old building in need of replacement. We are presently utilizing an area in the auditorium for the one kindergarten class and we have one portable class room . . . the capacity should be reduced to 275 to 300. We keep the classes small with the aid of PL 80-10 funds which is needed badly in this our worst slum area".[10/]

West Jackson was described as "at capacity. If an additional kindergarten is added a further reduction would be needed of approximately 30 pupils". (The then enrollment was 438). Alexander was described as needing "an EMR or other special education

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10/ The then enrollment, including kindergarten, was 357 which was the "estimated pupil capacity with present program of instruction".

class" and hope expressed "to continue expanding our kindergarten program . . . with these expansions the enrollment as now served should not exceed the present number of 550".[11/]

Parkview was noted as having 22 teacher stations and a desired maximum capacity of 620 including a desired kindergarten and special education facility. Washington-Douglass was indicated to have a "good teacher-pupil ratio which is desirable in this school".[12/] Lincoln was denoted as "at capacity now" (634) with two kindergarten classes and two more hoped for . . . "the present figures should be reduced somewhat perhaps to 515 to 600". Moreover, Lincoln then had a librarian, a remedial reading as well as a special education instructor.

Highland Park had no kindergarten but one classroom area was used for art. It did have a special education instructor and a librarian, enrolled a total of 515 with estimated student capacity of 525. Its student-teacher ratio was higher than any other except West Jackson. Whitehall was noted as needing a reading and special education room, and a kindergarten. "The building can accommodate no more than 350 students - 35 per classroom." (Additional classrooms have since been added at Whitehall). Andrew Jackson, the newest school, had blacks in every grade but they comprised only 3% of the school's enrollment, and it had no kindergarten or special education instructor and only a part-time remedial reading teacher. Estimated capacity was put at 600.

In April of 1973, the defendants in response to the

11/ With 3 added kindergartens, Standley estimated capacity at 620.

12/ 365 pupils, including kindergarten, and 16 teachers, plus a librarian, remedial reading teacher and a special education instructor.

memorandum proposals of the Department of Justice, requested closure of South Jackson Elementary School and a realignment of elementary district lines to accommodate the closing. Plaintiffs have vigorously opposed this closing and presented their own plan to utilize this school in bussing white students there for a greater degree of integration. On June 7, 1971, defendant's counsel advised the Court and plaintiffs' counsel in connection with a report on discontinuing Merry Junior High and consolidation of the high schools, that "enrollment in the South Jackson Elementary School is dropping dramatically due to the fact that it is located in the center of an urban renewal project. For the same reason the enrollment at Parkview Elementary School is increasing. The City desires to add a kindergarten program at the Parkview School and wishes to move a portable classroom from South Jackson School to Parkview Elementary School".

In connection with the plan for proposed closing of South Jackson Elementary School, the following factors have been taken into account. This school is the oldest, substantially unimproved by new structures and facilities, of all the Jackson City Schools,[13/] having been completed in 1936. It is located at the south edge of the "downtown" commercial area of Jackson and it has declined in number of students in attendance from 534 to 278 from 1963 to August 31, 1972. Projected enrollment at South Jackson for 1971-72 was 310, actual enrollment was 289; projected enrollment for 1972-73

13/ It was for a number of years utilized as the only black high school, and some of the buildings at Jackson Central-Merry High are as old or older. Substantial improvements, however, have been built at the consolidated high school which is approximately 42% black in its enrollment. It is claimed that very substantial additional capital outlay is needed at the consolidated high school.

was 278 and actual dropped to 243 by year end; enrollment over-all in Jackson's elementary schools is projected for 1973-74 at approximately 4% less than this past year. In this regard, since 1965 the total enrollment in elementary schools has dropped nearly 10%, due primarily to a decreasing birth rate and the growing incidence of private schools in the City. It seems reasonable to anticipate enrollment at South Jackson to be no more than 225 students in 1973-74, and that it will be at least 97% black, absent any change in district lines or adoption of a plan which would affect its past status. Since 1966, no other elementary school has operated in Jackson with less than 329 students, except Washington-Douglass which had only 250 students in 1972-73, and which has, like South Jackson, dropped from a high of 450 in 1966-67 when it was an all black school.

South Jackson School, as has been noted, is located in the midst of an urban renewal area in Jackson. The Jackson Housing Authority, an agency, and Tennessee Public Welfare Corporation, have been formed to operate and maintain this urban renewal area designated the "South Jackson Urban Renewal Area," generally described as bounded on the north by Chester Street, on the east, south, and west by the GMO, L & N and I.C. Railroads, respectively. This area was used in the early 1960's as high density residential and commercial and contained many sub-standard dwellings. About ten years ago, Jackson City planners initiated a proposal for development or redevelopment of this area through urban renewal which contemplated new streets with municipal and governmental facilities that would encroach upon the South Jackson School and its surrounding schoolyard. New apartment multi-family and commercial structures were also contemplated. In 1966, these plans were changed virtually

to eliminate residential after consultation with the Federal Housing and Home Finance Agency (H.U.D.) bringing about and necessitating a referendum on November 1, 1966. This referendum posed the question, "shall the City of Jackson renovate substandard areas within the City (including specifically the South Jackson area heretofore described) under the provisions of the Federal Urban Renewal Program?" At that time the Director of Planning testified that it was not contemplated that South Jackson School would be continued if and when the program were ultimately brought into being. The vote was 62% in favor of the urban renewal program, and in the wards involved, (South Jackson) the vote was 68% favorable. This project was subsequently reduced in its scope and residential redevelopment within the affected South Jackson area and was virtually eliminated in favor of governmental, municipal and commercial facilities. In 1969, at South Jackson School there was a noticed public hearing to consider a four year program for acquisition of properties within the urban renewal special area project. Plans were then discussed for a Civic Center with a large new auditorium with all day parking nearby and service streets to the auditorium to be constructed. This civic center has now come partially into being in that the auditorium has been completed nearby South Jackson School and other government buildings and improvements have been commenced in the area. It should also be pointed out that additional low-rent housing units and housing for the elderly were also discussed at the 1969 meeting at South Jackson School in connection with relocation, but these have not yet come into fruition.

It was called to the Court's attention during hearings in May, 1973, that on March 30, 1973, the City of Jackson had entered

into a contract with Jackson Housing Authority calling for sale of the 5.86 acre South Jackson School site for $219,600.00. Pending a final determination of the issues before it in connection with the entire elementary school situation, the Court temporarily enjoined the carrying out of such transfer, particularly in the absence of prior notification and in light of plaintiffs' application for relief under the immediate circumstances. It was subsequently learned that the contract contained a provision calling for continued retention of this property by the City and defendants "until the United States District Court acts upon the application to close the South Jackson Elementary School which is located upon a portion of said property," and another provision calling for reconveyance in the event of disapproval. Planned and contracted for street improvements have been delayed pending decision on the status of South Jackson Elementary School.

This school would be closed under defendant's plan and after redrawing elementary school attendance lines, there would be a desegregation of Washington-Douglass from 98% black to a projected 48% black; Highland Park would change from 2% black to 24% black and all other elementary schools would range from 27% black to 70% black except Lincoln which would remain 99% black and Andrew Jackson, which would remain only 4% black. South Jackson is old, costly to maintain, and the continuing urban renewal work indicates fewer and fewer students within a "neighborhood" proximity to the school. To maintain a minimal necessary staff, cafeteria, and other facilities for as few as 200 to 225 students in the Jackson system is administratively unsound and not feasible. The closing is part of a long range plan to eliminate this oldest operating school which

is not directly related to racial motivation but rather the intent, largely unfulfilled, to upgrade slum housing occupied for the most part by blacks. It is not desirable from an educational viewpoint, nor from any other demonstrated to the Court, to assign large numbers of black or white students from newer and better physical structures to this school. The school is geographically located so as to make it not feasible to move other students into this nearby 40 year old facility by any changing of attendance boundary lines; this could only be accomplished by the expensive process of bussing or transporting white students from considerable distances into environment largely devoid of homes or residences - an area in transition into commercial type development.

Plaintiffs maintain, on the other hand, that South Jackson School is not antiquated nor ready for retirement. They concede the classrooms are small but feel that auditorium and cafeteria facilities there are relatively desirable as compared to some other elementary schools in Jackson which lack these facilities. They would operate this school with 127 whites to be bused from the Highland Park School, grades 4 to 6, in a grouping situation, out of a total proposed attendance of 277. This assumes that the whites would voluntarily comply with bussing arrangement and attend this school, an assumption not borne out by past experience, and that black attendance would not continue to drop in the present South Jackson zone because of urban renewal. It was pointed out that 163 residence units have been acquired by Jackson Housing Authority in the course of the ongoing urban renewal program surrounding this school and additional residences remain ready to be demolished. It seems unlikely that even if plaintiffs' plan were approved, as many

as 225 students would actually be in attendance at this school, which is in the least desirable area of the City, with the oldest school structure being utilized, as such expense that could scarcely be justified for the relatively small number of students to be so accommodated.[15/] A safety factor of construction dangers going on in the immediate vicinity and virtually surrounding this school, and possible transportation hazards might also be taken into account in consideration of requiring South Jackson School to be operated under such future circumstances as proposed by plaintiffs.

In January, 1969, during previous hearings in this case before Judge Robert M. McRae, Superintendant Standley testified (in part) that South Jackson Elementary School was the oldest school in the system and that it was "in an area that is scheduled to be in an urban renewal zone and perhaps will be phased out pretty soon . . . right now if it were phased out they (youngsters now attending) would probably be absorbed in existing schools". Defendant's plan then with respect to closing or phasing out this school is not therefore a sudden inspiration to perpetuate segregation, as inferred by plaintiffs, although defendant should have kept this Court apprised of its continuing intentions and desires in this regard prior to May, 1973. Because (1) it is a comparatively inferior facility due to its age and state of repair, (2) it is located in the midst of a designated and rapidly changing urban renewal commercial area with little nearby present residential potential, (3) the steady decline in attendance of elementary school children there makes it impractical and unduly burdensome for its continued operation, and (4) there is no prospect of racial mixture

15/ Expense including cost of transportation, high maintenance, few students and faculty at high proportionate administrative costs.

in the school through changes in neighborhood residential patterns, the Court approves the requested closure of South Jackson Elementary School, but only under the circumstances and conditions hereinafter specified.[16] We find the closing not to be associated with unconstitutional racial overtones. See Robinson v. Shelby County, supra. The defendant has carried its burden in this particular. Haney v. Sevier County Board of Education, 429 F.2d 364 (8th Cir. 1970).

There has been no showing in the record of any racial identity or discriminatory assignment of faculty in Jackson elementary schools since 1971, or in any other Jackson public school for that matter. Nor has there been demonstrated a pattern or design as to quality of school equipment or program so as to identify a "white" or a "black" school in Jackson, although it is true that the newest school, Andrew Jackson, is more than 95% white and was built in a rapidly growing area near the expressway and a major by-pass highway in the northwest section of the City. The defendant's explanation that "this location was where the people were" is plausible in view of the fact that it was done, in effect, with the knowledge and approval of this Court after initial desegregation steps had been instituted and subsequent to the filing of this suit.[17] There has been no history in Jackson since desegregation activities of the discharge

16/ With eight remaining elementary schools, the average attendance in each would be less than but approximately 500 students per school. There remains ample capacity for approximately 4300 elementary students which is at least 11% more than the contemplated attendance for the forthcoming year.

17/ We are mindful of the language in Swann, supra, that "school authorities must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered . . . over the long run, the consequences of the choice will be far reaching."

of a disproportionately large number of black teachers. Indeed, the Court of Appeals in its remand order, 453 F.2d 262, commented that "to the credit of all concerned, . . . it is observed that at long last Jackson has made some very substantial progress toward the desegregation of its school system". At least some of these "salutary evidences of accomplishment" were the result of recognition by defendant that it must integrate and its own initiated steps or means to accomplish that end (even if "under duress").

We must now consider whether the Board's or other proposals might bring about "even greater accomplishment" to end of effecting a unitary system. "The measure of any desegregation plan is its effectiveness." Davis v. Mobile, supra, p. 37. The Board's plan would leave two of the eight elementary schools racially identifiable by very large majorities of white in one school and black students in the other.[18] Plaintiffs' proposal would bring about, at least theoretically, nearly a racial balance in all elementary schools, utilizing also through means of substantial transportation, continued use of South Jackson. Under this plan, however, two of the schools would continue to operate at material undercapacity, and would involve transporting a large proportion of students attending these two schools from other areas. We have heretofore expressed grave reservations and doubt about the practical effect of such a proposal in the face of reality with regard to the location and condition of one of these schools. The same situation probably would

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18/ Andrew Jackson and Lincoln respectively. Parenthetically, it is strange that these schools should bear the names of a Tennessee President and a border state President, one identified with a slave society, the other with the emancipation of slaves.

19/ South Jackson and Washington-Douglass.

occur at Washington-Douglass under plaintiffs' (Dr. Stolee's) plan. It is likely, as reflected in the history of such proposals, that attendance would drop with respect to proposed transferee students, especially in majority to minority situations. There would be limitations on opportunities and disciplines involved in after school and extra-curricular activities, and parental participation in school and parent-teacher associations may be adversely affected. Of course, there is also involved the expense and possible hazards of bussing in a city which has never before utilized or provided transportation of its public school students, costs not demonstrated to be directly related to academic achievement or higher scholastic accomplishment. Extensive, multi-school bussing also involves other serious financial and administrative difficulties, the solutions to which have not been presented in the several hearings herein. 20/

"It should be clear that the existence of some small number of one-race or virtually one-race schools within a district is not in and of itself the mark of a system that still practices segregation by law." Swann, supra, 402 U.S. 26.

Swann, supra, does not appear to require, "as a matter of substantive constitutional right any particular degree of racial balance of mixing". 402 U.S. 124 (emphasis ours). Nor does it specify in Chief Justice Burger's words that "the constitutional command to desegregate" requires "every school . . . to reflect the racial composition of the school system as a whole". No "fixed racial balance" was required in Winston Salem-Forsyth Board of Education v. Scott, 404 U.S. 1221, 1228 (1971). See also the concurring opinion of Judge Cecil in Davis v. Pontiac School District,

20/ These factors to the extent they involve "white flight" or represent "opposition to court ordered desegregation" are not controlling but they are matters entitled to consideration as to feasibility and practicality of a plan.

supra, (443 F.2d 577). Since a unitary school system is now perhaps something more than or different from "one within which no person is to be effectively excluded from any school because of race or color," Northcross v. Memphis Board of Education, 397 U.S. 232, 236 (1970),[21] the burden is now cast upon a court or school authorities to "make every effort to achieve the greatest possible degree of actual desegregation" and to overcome the presumption of discrimination as to "schools that are substantially disproportionate in their racial composition". Swann, supra, 402 U.S. 1, 26.

"It is initially the responsibility of the Board of Education to propose a feasible means of disestablishing existing segregation and eliminating its effects within the school system. Ordinarily, the court will not substitute its discretion for that of a board of education but will adopt a plan proposed by the board if it fulfills the board's duty to eliminate the effects of past illegal conduct." Robinson v. Shelby County Board of Education, supra, 442 F.2d at 258, cited, Davis v. Pontiac School District, supra, 443 F.2d at 577. The defendant School Board here has received or is to receive more than $200,000 from the sale of the South Jackson Elementary School property. These funds should be used at least in some degree to benefit the students formerly attending that school now planned to be closed. This Court may and should examine carefully every possible remedy "which would not involve increased student transportation" and should, indeed, "minimize student transportation requirements" in a desegregation plan, if this is possible in connection with good faith efforts to desegregate. Cisneros v. Corpus Christi Independent School District,

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21/ See dissent in Mapp v. Chattanooga Board of Education, (6th Cir. 4-30-73, #72-1443 and 1444).

467 F.2d 142 (5th Cir. 1972) (en banc). See also Goss v. Knoxville Board of Education, 444 F.2d 632 (6th Cir. 1971), and 340 F.Supp. 711 (E.D. Tenn., 1972) on remand. It remains, of course, "one tool of school desegregation". Swann, supra, 402 U.S. 30. Plaintiffs' plan was presented through Professor Michael J. Stolee, a native of and educated in Minnesota, who has associated with the Desegregation Consulting Center in Miami, and has been described as "a professional school desegregation witness". Goss v. Knoxville Board, 340 F.Supp. 711, 721 (footnote 7). As he has testified in other cases, Dr. Stolee was a proponent of bussing in Jackson, contending that it offers few hazards and minimizing its detriments. Dr. Stolee's contentions were based upon his conclusion that any school with less than 30% minority students was per se "racially identifiable" in Jackson since this represents a variation of 15% or more from the norm. His plan would indeed bring about a fixed racial balance in every Jackson Elementary School.

We conclude that neither the defendant Board's plan nor the plaintiffs' proposal are satisfactory solutions likely to bring about greater accomplishments as to further desegregation of elementary schools in Jackson. The latter is not, in our judgment, feasible or pedagogically sound, particularly in view of the impending closing of South Jackson Elementary School. Defendants' plan does not sufficiently meet the requirement of fulfilling its affirmative duty to eliminate discriminatory effects of the past. Green v. New Kent County School Board, 391 U.S. 430, 438 (1968). The estimates of cost of necessary transportation equipment, drivers, maintenance, availability of equipment and fuel under any plan offered or suggested which would require transportation have been

uncertain and indefinite at best. Proceeds of the South Jackson Elementary School sale to the Jackson Housing Authority, however, afford the defendant a means of defraying the costs attendant to the Court's plan herein set forth. Because it does not appear reasonable to assign all the former South Jackson Elementary School children to adjacent or adjoining schools because of the distance involved,[22/] and because the result would not bring about sufficient improvement and advancements towards a truly unitary system, we have prescribed a plan involving a minimum of transportation and some elementary school zone or district changes which this Court believes will meet constitutional requirements with the least disruptive effects. This plan has been fashioned in recognition of the fact, among others alluded to, that the defendants in making the progress heretofore noted have not totally defaulted in their duty to submit an acceptable plan, and because it has never before operated a bus system as was the case in Swann, supra, and to some degree in Davis, supra (both in Mobile and in Pontiac), and because substantial progress has already heretofore been made.

P L A N

1. Provided the defendant School Board advises the Court within 40 days after the entry of this Order that arrangements have been made to comply substantially with the Court's Plan as herein set out, the sale of South Jackson Elementary School property is

22/ West Jackson, Alexander, Whitehall, Parkview and Washington-Douglass all are contiguous to former (1972-1973) South Jackson district lines but West Jackson, Parkview and Washington-Douglass are closest to most South Jackson Elementary School students.

approved and at the end of said 40 day period the temporary injunction heretofore ordered will expire in order that the transfer and contracts in relation thereto may be carried out. If, however, satisfactory approved arrangements have not been completed and submitted within the time specified by defendants, said temporary injunction shall remain in effect in order that the said school may continue to be utilized as long as reasonably needed to accommodate the elementary school children in the neighborhood and vicinity of that school (and perhaps others who may be assigned to South Jackson Elementary School in such event).

2. Beginning in the school year, 1973-74, 90 students, as nearly as practicable, 15 per grade (one through six) who have previously attended South Jackson School, reside in that district, or would plan to attend or be expected to attend the first grade at this school under the existing district lines, will be afforded free bus transportation from the Civic Center site (or such other nearby convenient point of departure as may be approved[23/]) to Highland Park Elementary School and will be returned daily to this point of departure.

3. Beginning the school year 1973-1974, ninety students from South Jackson Elementary School, on the same basis as prescribed in paragraph #2 with respect to Highland Park (that is 15 per grade as nearly as practicable), will be afforded bus transportation to and from Andrew Jackson Elementary School.

4. Beginning the school year 1973-1974, the balance

23/ A convenient point of departure and return would be a facility near South Jackson Elementary School with adequate cover for the elementary students in inclement weather and a safe place to load and unload.

of the students who would be expected otherwise to attend South Jackson Elementary School and who reside in this district (anticipated to be approximately 40 to 50 in number) preferably those living nearest Washington-Douglass Elementary School will be afforded transportation to that school from the same point of departure and returned thereto.

Those students assigned to Washington-Douglass who reside within 1 3/4 miles of that school and prefer to arrange their own means of transportation to Washington-Douglass will not be required to accept the assigned transportation.

5. Defendants will arrange for a traffic patrol to protect the safety of the children at the loading and unloading time at this point of departure and return. They will likewise arrange for a permanent, convenient and safe place for the students to load and unload at Highland Park, Andrew Jackson and Washington-Douglass before and after school hours.

6. Beginning the school year 1973-1974, defendants will adjust the district boundary between Highland Park and West Jackson schools so that approximately 60 white students will be assigned to West Jackson Elementary School previously within the Highland Park district.

7. Beginning the school year 1973-1974, defendants will adjust the district boundary lines between Parkview and Washington-Douglass so that approximately 90 white students will be assigned to Washington-Douglass Elementary School previously within the Parkview district.

8. Beginning the school year 1973-1974, defendants will adjust the boundary lines between Alexander and Lincoln, and/or

Whitehall, so that approximately 50 black students from Lincoln or Whitehall will be assigned to Alexander previously within the Lincoln and/or Whitehall districts.

9. Beginning the school year 1973-1974, defendants will adjust the boundaries between Andrew Jackson and Highland Park so as to transfer to Highland Park approximately 30 students previously within the Andrew Jackson district.

10. All teachers previously assigned to South Jackson Elementary School who desire to remain in the Jackson school system will be reassigned to comparable teaching or administrative positions for the school year 1973-1974 without regard to race, but maintaining as nearly as practicable present racial ratios in each elementary school faculty.

11. The principal of South Jackson Elementary School will be reassigned to a comparable position either as a principal or in a like administrative position.[24/]

12. Defendants will present to the Court by July 1, 1974, guidelines and job descriptions with respect to objective selection, promotion and appointment of teachers, principals and

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24/ The Court suggests that defendants arrange as promptly as feasible and if possible, an outside advisory committee of perhaps six persons familiar with the Jackson school system, trained educationally and with an academic background, who might study the present principal and administrative requirements within the system and propose objective guidelines for selection of qualified persons to fill these positions without regard to race within the system beginning in 1975. The Court suggests that at least two of these persons be blacks, and that the Presidents of Lane, Lambuth, Union, and Jackson Community Junior College (or their designates from these colleges and universities) might serve as a nucleus of such an advisory committee. The Court would welcome a copy of a report and recommendation of such a committee.

administrative personnel within the entire Jackson school system so as to insure adequate and appropriate black representation at all levels.[25/]

13. According to the estimates for 1973-1974 attendance and taking into account the adjustments hereinabove prescribed, the following is the approximate anticipated attendance for the elementary schools for 1973-1974:

	White	Black	Total	%	(1972-1973 figures for comparison in parenthesis)
West Jackson	250 (216)	160 (157)	410 (373)	61% (58%)	
Alexander	350 (355)	240 (200)	590 (555)	60% (64%)	
Parkview	240 (328)	270 (274)	510 (602)	47% (54%)	
Washington-Douglass	75 (4)	285 (246)	360 (250)	21% (2%)	
Lincoln	10 (7)	560 (584)	570 (591)	2% (1%)	
Highland Park	435 (473)	100 (12)	535 (485)	81.5% (98%)	
Whitehall	165 (179)	215 (244)	380 (423)	43% (42%)	
Andrew Jackson	425 (459)	110 (24)	535 (583)	79% (95%)	
TOTAL	1960 (2027)	1940 (2007)	3900 (4034)	50% (50%)	

Note - Above estimations take into account an anticipated drop in over-all attendance in accordance with the defendant's predictions, and assumes that one-half of the transfers to Alexander will come from Lincoln and one-half from Whitehall; all other district changes are assumed to be effective.

25/ Heads of schools should be chosen on the basis of objective, non-racial criteria. Singleton v. Jackson Mun. School District, 419 F.2d 1211 (5th Cir., 1969).

14. Majority to minority transfers will continue to be permitted except at Parkview. Transfers to Parkview will be deferred pending determination of actual attendance and racial composition thereof. Defendants will use additional reasonable efforts to enforce boundary attendance as herein set forth. District boundaries for junior high schools will not be affected by this Plan.

S U M M A R Y

15. Defendants will present its report to the Court in furtherance of this Plan as soon as practicable and in no event later than 40 days from the date of this Memorandum Opinion.

16. There will be no demolition or destruction of South Jackson Elementary School pending the outcome of any appeal from this Court's order permitting and approving its closing.

17. The defendants will study the need and feasibility of construction of a new elementary school in the southwest area of Jackson to serve the general South Jackson and West Jackson elementary school sections as a priority before the construction of new schools or substantial elementary facilities in the system in the future.

18. The defendants will include in the report as supplementary to this Plan proposals for kindergarten or special class requirements and facilities for children presently residing within the South Jackson Elementary School district. The South Jackson Elementary School will remain available for such use, absent a satisfactory plan providing for kindergarten and necessary class availability.

The Court has provided for a minimum of transportation

in light of all the factors and circumstances presented in support of the plans and proposals submitted and in view of the prior history of this cause. This plan has been set out since every student in the Jackson public school system will have almost a fully integrated experience[26/] and all will have a fully integrated faculty experience during their entire period of attendance.

After the next school year the defendants may have devised a further means for further desegregation of the only remaining school out if its twelve in operation which under this present plan will retain substantial racial identity. The Court will welcome any further plan or suggestion after the defendant has had some experience under this Order, especially in connection with Lincoln Elementary, or any other further improvement in the event this plan does not operate as it is projected.

We are mindful that the effects of a plan to accomplish more desegregation should not fall disproportionately upon blacks. U.S. v. Indianapolis School Board, 474 F.2d 81 (7th Cir., 1973), Kelley v. Nashville Met. School Board, 463 F.2d 732 (6th Cir., 1972). The burden of desegregation is connection with the closing of schools must be considered with regard to avoidance of that burden upon the minority racial group sought to be benefited. Clark v. Little Rock Board of Education, 449 F.2d 493 (8th Cir., 1971), Thompson v. Newport News School Board, 465 F.2d 83 (4th Cir., 1972). Approximately 180 whites have been ordered reassigned to new elementary schools and approximately 290 blacks, most of whom due primarily to

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26/ It is anticipated that less than 15% will be in any school for a period with less than 18% minority students (Lincoln); virtually all have a right to transfer from a majority to minority situation; and only 6% will be transported because their neighborhood school has been or will be closed (South Jackson). The above figures relate to elementary school students only - All junior high and senior high students enjoy a fully integrated experience.

the closing of the oldest school in the system, one in an urban renewal area no longer suited to any substantial number of residential users as heretofore discussed.

F E E S

Plaintiffs' counsel have requested an award of fees against defendants. Prior to 1972, granting of such fees has been made in the exercise of equitable discretion where the defendant school board's conduct has been unreasonable, defiant and/or obstinate. Brewer v. Norfolk, 456 F.2d 943 (4th Cir., 1972). Fees have been awarded in this case previously against defendants where it failed to initiate required affirmative action. The circumstances here would not indicate allowance of fees where "substantial progress" and "salutary evidences of accomplishment" have been noted. We must, however, consider allowance of fees under provisions of Section 718 of the Emergency School Aid Act effective June 30, 1972.[27] At the time this case was remanded, January, 1972, there was no final order outstanding to which an award could be attached.[28] Were these proceedings "necessary to bring about compliance?" It has not been seen fit to adopt plaintiffs' plan because it is not practical, and defendant's plan has also been rejected as insufficient in light of its present affirmative duty.

27/ "Upon the entry of a final order of a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color or national origin in violation of Title VI of the Civil Rights Act of 1964, or the Fourteenth Amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, reasonable attorney's fees as part of the cost."

28/ Bradley v. Richmond School Board, 472 F.2d 318 (4th Cir., 1972). See Johnson v. Combs, 471 F.2d 84 (5th Cir., 1972).

We are doubtful that the Act does, in fact, prescribe imposition of an award in the present posture of this case or that plaintiffs' actions, on remand, have brought about compliance. We, nevertheless, in the exercise of equitable discretion, will award a fee of $1500.00 to plaintiffs' counsel partially, at least, to offset such expense under all the circumstances, particularly in light of the school closing investigation herein studied.

The implementation of the plan herein specified is hereby ordered and the temporary injunction previously entered will be continued with respect to South Jackson Elementary School pending compliance with conditions enumerated. Payment of fees to plaintiffs' counsel is also ordered within 60 days from entry of this Memorandum Opinion and Order.

This 17 day of July, 1973.

Harry W. Wellford

UNITED STATES DISTRICT COURT JUDGE