No. 23274

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, APPELLANT

v.

CADDO PARISH SCHOOL BOARD,
ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES

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STATEMENT OF THE CASE

Procedural history and status. This action was filed in the United States District Court for the Western District of Louisiana on May 4, 1965, by six Negro children residing with their parents in Caddo Parish, Louisiana.[1] The complaint sought an injunction against the

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1/ Record on appeal, p. 1. This record will hereafter be referred to as "R."

Caddo Parish school officials from discriminating against the plaintiffs and other members of their class in Caddo Parish in the operation of the public schools under their jurisdiction (R. 1-10).

On June 14, 1965, following a hearing on the factual allegations of the complaint and of defendants' answer (R. 63-132), the district court entered a decree permanently enjoining the defendants from continuing to operate a compulsory bi-racial school system in Caddo Parish.[2/] The court ordered the defendants to submit a plan within 30 days to accomplish this object "with all deliberate speed," beginning with the 1965-66 school year. The court specifically deferred ruling on the question of desegregation of teaching and administrative personnel. (R. 133-136.)

On July 7, 1965, the defendants submitted their plan for desegregating the Caddo Parish schools (R. 138-150). On July 19, 1965, the United States filed its motion for leave to intervene as a party plaintiff pursuant to section

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2/ The Caddo Parish school system contains approximately 55,000 students of whom approximately 24,000 are Negroes (R. 170, 189). These students attend 72 schools which are organized according to race and geographical attendance areas (R. 170-171, 74-75, 69, 76, 78, 79, 84, 201, 251-253). Forty schools serve grades 1 through 6; nine serve grades 1 through 8; three, grades 1 through 12; one, grades 9 through 12; five, grades 7 through 12; nine, grades 7 through 9; and five grades 10 through 12 (R. 59).

902 of the Civil Rights Act of 1964 (42 U.S.C. 2000h-2) (R. 151). Accompanying this motion were the Attorney General's certification pursuant to this statute and objections by the United States to the proposed plan of desegregation (R. 152-155). The plaintiffs' objections to the School Board's plan were filed on July 21, 1965 (R. 158-160).

On August 3, 1965, the district court denied the motion of the United States to intervene, ruling that it "comes entirely too late." (R. 166.) On the same day, the court heard evidence on the plan and the objections thereto (R. 161-290) and then entered an order approving the plan, with modifications (R. 291-298). This order was amended by the court on August 20, 1965 (R. 302-304) after a motion to vacate and reconsider was filed by the plaintiffs on August 17, 1965 (R. 299).

On October 4, 1965, the United States appealed from the order denying it leave to intervene (R. 305).

The desegregation plans in the court below. The order presently appealed from must be considered against the background of the plan originally submitted by the appellees and of the original order entered by the court below approving that plan.

1. Appellees' original plan. The plan submitted by the appellees to the court below on July 7, 1965, begins with a request to delay the start of desegregation in the area outside the City of Shreveport until the opening of the school year in 1967-68 (R. 138-139). The plan goes on to provide that all students may go to the school they attended last year or the one closest to their residence that is attended predominantly by members of their race. "Desegregation"would be accomplished for the 1965-66 school year by means of permitting students in the first and twelfth grades in the Shreveport schools to apply for transfer or assignment "to the school nearest their residence" (R. 141). Their applications would be judged on the basis of several limiting criteria, including age of the pupils, available space, scholastic aptitude, academic preparations, "ability," and "compatibility" of the applicant (R. 146-148). Applications could be made in person at the Superintendent's office (R. 142). Provision was made for notice of the plan's operation by mail to affected students at the end of each school year (R. 144). The plan would apply to all grades throughout the system by the fall of 1970 (R. 141).

2. Court ordered plan of August 3, 1965. After the hearing on the objections to the School Board plan, the court below entered its order of August 3, 1965, setting forth its approved desegregation plan (R. 291-298). This plan, the first adopted by the court, provided that "[a]11 initial pupil assignments made for the school year 1965-66 will be considered adequate" subject, however, to a right of students in the 1st and 12th grades in schools throughout the system to apply for assignment and transfer to a school of their choice. (R. 291-292.) Notice of this right would be published in a local newspaper (R. 292). Applications for transfer were to be made available, upon request, by the School Board (R. 292). The court's order provided that the School Board in ruling upon applications for transfer, could apply several criteria including age of the pupils and availability of space (R. 293). In addition, the plan stated that "[i]n the event a transfer or assignment is requested to a particular school, but it develops that there is available space in another school, in all respects comparable to the one to which transfer or assignment is requested, closer to the applicant's residence, the School Board may, if it deems it advisable, make the transfer or

assignment to the comparable school closest to the pupil's residence, rather than to the school to which the transfer or assignment was requested" (R. 294). The court added a requirement that new students entering the school system for the first time, regardless of grade, would be offered a choice of attending the formerly all-white or formerly all-Negro school closest to their residence (R. 295).

The plan further stated that "[c]ommencing with the school year 1966-67 all initial assignments of pupils to the first, second, eleventh and twelfth grades ... shall be made purely and simply on the basis of individual choice ... reserving to the School Board ... the right to place a pupil in a comparable school closer to the pupil's residence than is the school of his choice." (R. 296.) No provision is made for the procedure to be followed in making the "initial assignments" except for the statement that (R.297) "[t]he method of initial assignment herein provided for will, of course, be subject to all reasonable procedural requirements that may be adopted and promulgated by the ... Board."

As in the original plan proposed by the appellees, no provision was made for faculty and staff desegregation, or for desegregation of services and programs sponsored by the school system.

The dual school districts on racial lines would be abolished with respect to each grade as it was reached by the plan (R. 296). All grades would be reached by the fall of 1968 (R. 296).

3. Amended court plan of August 20, 1965. Upon plaintiffs' motion to vacate and reconsider, and following this Court's remand in the Bossier case with instructions to reconsider in the light of Singleton and Price (R. 301), the district court amended its plan so as to increase the number of grades to be affected in each of the coming school years (R. 303-304). As amended by the district court, the plan reached the first, second, eleventh and twelfth grades beginning with the fall of 1965 and four additional grades in each of the two succeeding school years so that all grades would be affected by the beginning of the 1967-68 school year. The district court, in amending its order to comply with this Court's directive, still made no specific provision for the procedure to be followed in the making of the "initial assignment" described in the order; made no provision for non-discriminatory use of the services, facilities, activities and programs sponsored by the school, and failed to require any steps for the elimination of racial segregation of faculty and staff.

SPECIFICATION OF ERRORS

The order of the district court of August 20, 1965 approving and ordering into effect the amended plan of desegregation for the Caddo Parish schools errs in that:

1. It fails to include specific provisions guaranteeing true freedom of choice in the administration of the plan.

2. It fails to require desegregation of faculty and staff.

3. It fails to prohibit racial discrimination against Negro students in formerly all-white schools in connection with services, facilities, activities and programs conducted by or affiliated with the school system.

4. The order fails to provide for desegregation of the seventh grade, which is an initial grade in secondary schools, for the 1966-67 school year.

5. The order fails to provide that Negro students in grades not reached by the plan shall be allowed to transfer to formerly all-white schools upon request.

ARGUMENT

I

A. The court-ordered plan lacks sufficient specificity.

The order of the court below requires the appellees to effect a transition from a compulsory dual system of schools based upon race to a system in which the choice of the student or his parents shall determine the school of attendance. The need for specificity in the new system should be apparent. Students, parents, school staff and the community at large have long been conditioned to a system in which race is the determining factor. Each school has necessarily acquired the stigma of being either "white" or "Negro." To convert this system, in all of its aspects, to one in which race will no longer be a factor will at best be a difficult process if the new system is to rely for its operation upon the free volition of school patrons and upon administrators who have long been conditioned to the racial system.

This Court recognized these difficulties when in Stell v. Savannah-Chatham County Board of Education, 333 F. 2d 55, 65 (1964), it said:

> The rule is now firmly established in this circuit, Gibson v. Board of Public Instruction of Dade County, Fla., 5 Cir., 1959, 272 F. 2d 763; Evers v. Jackson Municipal Separate School District, supra, that desegregation must be accomplished in the context of all inhibitions, legal or otherwise, serving to enforce segregation having been removed to the extent that Negro pupils are afforded a reasonable and conscious opportunity to apply for admission to any school for which they are otherwise eligible without regard to their race or color, and to have that choice fairly considered by the enrolling authorities. This is the first step. 3/

3/ The following language of the District Court for the Western District of Virginia, in Kier v. County School Board of Augusta County, Va., 249 F. Supp. 239, 243, 246 (1966), is equally apt:

> Unquestionably, to be constitutionally acceptable, a freedom of choice plan will impose upon the school boards additional duties not required under a geographic plan. The ground rules must be laid in a way which will not discourage desegregation, and students and their parents must be fully informed of their choices. . . . Where, as here, the school authorities have chosen to adopt a freedom of choice plan

Thus, as stated by the Court of Appeals for the Fourth Circuit in Wheeler v. Durham City Board of Education, 346 F. 2d 768, 773 (C.A. 4, 1965):

> A freedom of choice system to warrant approval, must operate to prevent discrimination and not merely to correct conditions which have been deliberately created by unlawfully discriminatory procedures. (Emphasis by the court.)

The generality of the language in the plans submitted by the appellees and ordered by the lower court in this case were clearly such as to permit misunderstanding of the specific nature of appellees' obligations. Such misunderstanding cannot only permit evasion, conscious or unconscious, but necessarily breeds further litigation to give specific content to the plan's general provisions.

3/ (Cont'd.)

> which imposes upon the individual student, or his parent, the duty of choosing in the first instance the school which he will attend (and where the burden of desegregating is imposed upon the individual Negro student or his parent), it is essential that the ground rules of the plan be drawn with meticulous fairness.

The order entered by the district court on June 14, 1965, enjoined the appellees from "continuing to assign students to schools with regard to race or color" and from "continuing to operate a compulsory bi-racial school system in Caddo Parish, Louisiana." This order, properly read, would appear to require the appellees to fully meet their constitutional obligation to eliminate racial discrimination and the vestiges of past racial discrimination in the operation of their schools. In response to this order, however, the appellees submitted a plan which clearly misconceived the extent and nature of their obligations. Their plan as submitted would have permitted the existing system of assigning pupils to continue indefinitely, subject only to a limited right on the part of students to seek transfer to schools from which they were initially excluded upon the basis of their race.

The district court's Order on Plan for Desegregation of August 3, 1965 did little to disabuse

the appellees of their misconceptions regarding the nature of their constitutional duty. Although the court removed some of the criteria set forth in the proposed plan and purported to base assignments for the school years 1966-67 and 1967-68 on "freedom of choice" it failed to set forth specific procedures that would make it clear that initial assignments were to be made without regard to race and that the burden would not be left upon Negro school patrons to obtain assignments to schools to which white patrons were automatically assigned. The uncertainty of the plan was compounded by the district court in introducing a new element - the right of the School Board to deny a choice of school upon the ground that there is a "comparable" school closer to the student's residence (R. 296).

Plaintiffs' motion to vacate and reconsider followed and relied on this Court's remand in United States v. Bossier Parish School Board, No. 22863, in which the same district court was instructed to reconsider in the light of Singleton and Price. This directive, as we read it, should have caused the district court to enter an amended order with sufficient specificity to

cure the defects in the order appealed from. Singleton and Price, in effect, direct lower courts to draw upon the expertise of the Office of Education, as set forth in the Commissioner's Guidelines for school desegregation, in framing decrees. The Guidelines do in fact set forth requirements for desegregation plans under "free choice" systems with as much specificity as could be desired in a court order.

Despite this Court's directive the lower court made no changes in its order other than to extend the coverage of the plan to an increased number of school grades. The fatal lack of specificity remained. Its result in practice soon became apparent. Only one (1) of the approximately 24,450 Negroes in the system, a system containing the third largest City in the State, was enrolled by the appellees in formerly all-white schools for the 1965-66 school year. See affidavit of St. John Barrett appended to the Motion To Consolidate And Expedite Appeals filed in this case on April 4, 1966. This can hardly be regarded as an adequate first step in desegregating a school system at this late date.

A freedom of choice plan which is non-specific in detail, not only fails to meet legal requirements,

but will necessarily breed further litigation and encourage multiplicity of appeals. The lack of specificity in the order in this case left a multitude of questions for future litigation. We will now touch on some of these questions.

How shall notice be given students and parents of their rights under the plan? Shall it be by individual mailed notice? Shall it be by publication in a newspaper? Shall it be by delivering a notice to the students in school? What should be the text of the notice? Should the entire plan be set forth? When should notice be given? Should it be given to all students and

parents or only to Negroes? None of these questions is answered in the court's order. Any of them could be a matter of future dispute between the parties.

What type of form should be used when students or parents exercise their choice of schools? How and where should forms be made available to the students and parents? Should they be sent to the parents? Who must sign the choice form? May the chooser be required to state his reasons for the choice? None of these questions are answered in the order of the lower court, although these mechanics relating to the exercise of the choice must necessarily determine whether a "free" choice is being accorded.

Must a choice form be executed on behalf of every student enrolling in school? Must such a choice be exercised each year? If a yearly choice is not required may it nonetheless be exercised at

the option of the student? If a choice is not required on behalf of every student, how will non-choosers be assigned? Will prior racial assignments be automatically continued absent the exercise of a contrary choice? No answer to these questions is found in the court's decree although the answers are vital to a determination of whether the dual racial system is being eliminated?

If limitations of school capacity preclude granting the choice of every student, which students will be given priority to attend the schools of their choice? Will white students who have previously attended particular schools by reason of their race be given preference over Negroes who have been excluded by reason of their race? If not, how will priority be determined? Will it be based upon date of application? Will it be based upon proximity of residence? Will it be based upon level of achievement, availability of transportation, enrollment of brothers or sisters in the same school, or on

factors yet to be determined in the discretion of the School Board? These questions, which go to the very heart of a free choice plan, were left by the district court to future litigation.

What of students whose choice of school must be rejected because of limitation of school capacity? Will they be given a second choice? What will be the basis for such choice? Will they be assigned to the closest school, or, perhaps, to the school having the most unused capacity? Or will they be assigned back to schools which they have previously attended by reason of their race? Again, these questions are unanswered by the district court.

What standards will guide the School Board in rejecting the choice of a student in order to assign him to a "comparable" school that is closer to his residence? What schools are "comparable?" Within the meaning of the order, is a traditionally all-Negro school "comparable" to a traditionally all-white school having substantially equal facilities? In

implementing this rule, may the School Board reject the choice of any Negro student seeking enrollment in a traditionally white school that is farther from his residence than the closest Negro school? Again, no answer is to be found in the order of the district court.

Various of the other district courts in the Fifth Circuit have considered and resolved virtually all of the questions just raised. Although it may be that no single district court has considered and resolved all of these questions in the same case, a court clearly could do so with facility by drawing upon the already formulated standards and procedures set forth in the Commissioner's Guidelines. Indeed, in Singleton and Price, this Court has already suggested that the district courts do so. We submit that this was the course that the district court in this case should have followed.

B. The plan fails to contain a provision designed to eliminate the racial segregation of faculty and staff.

The Caddo Parish school system contains 3,700 teachers and other staff personnel, all of whom are assigned, on the basis of race, to schools attended by students of the same race as themselves (R. 170, 74-75). Discrimination is employed in the hiring of teachers. 4/ In addition to staff working in the schools themselves, the Parish maintains a staff of fourteen or fifteen supervisors with offices located at the "instructional center." Several of these are Negroes. Negro supervisors are assigned to supervise Negro schools only. (R. 106.)

School districts that have operated dual racial school systems have the obligation under Brown v. Board of Education, 349 U.S. 294 (1955), to "effectuate a transition to a racially non-discriminatory school system." Racial segregation of teachers as well as segregation of students has traditionally been one of the hallmarks of the dual school system. The transition to a non-discriminatory system cannot be effected

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4/ Thus, Superintendent Perry testified that (R. 100) "[o]f course, we have more white teachers because we have a much bigger number of white children."

until faculty, as well as students, have been desegregated.

Here, the district court, although enjoining the appellees from continuing to operate a bi-racial school system, specifically deferred ruling on the question of faculty desegregation "until the plan for desegregation of pupils, as finally approved, either has been accomplished or has made substantial progress." This ruling was clearly erroneous.

The inclusion of a provision in the plan designed to eliminate race as a factor in the employment and allocation of faculty and staff at this late date is essential. Singleton v. Jackson Municipal Separate School District, 355 F. 2d 865 (C.A. 5, 1966); Bradley v. School Board, Richmond, Virginia, 382 U.S. 103 (1965); Rogers v. Paul, 382 U.S. 198 (1965). As the Court wrote in Singleton v. Jackson Municipal Separate School District, supra, at 870:

> In view of the necessity that the Jackson School system be totally desegregated by September 1967, we regard it as essential that the plan provide an adequate start toward elimination of race as a basis for the employment and allocation of teachers, administrators, and other personnel.

A desegregation plan, if it is to comply with the rule announced in Singleton v. Jackson Municipal Separate School District, supra, must (1) require the Board to cease its practice of hiring and placing teachers on the basis of race, and (2) define a program designed to correct the effects of past discriminatory hiring and assignment practices. 5/ See the Revised Statement, 45 CFR 181.13. 6/

Where a school board is operating under a plan utilizing a freedom of choice (or transfer) method, the desegregation of faculty and staff is particularly important. As the district court said in Kier v. County School Board of Augusta County, Virginia,

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5/ As the Court said in United States v. Duke, 332 F. 2d 759, 768-69 (C.A. 5, 1964):

> An appropriate remedy . . . should undo the results of past discrimination as well as prevent future inequality of treatment. A court of equity is not powerless to eradicate the effects of former discrimination.

6/ The Department of Health, Education, and Welfare recently announced new school desegregation guidelines (31 F.R. 5623-5634, April 9, 1966). They are cited herein as Revised Statement and appear at the end of this brief.

249 F. Supp. 239, 246 (W.D. Va. 1966):

> It is not enough to open the previously all-white schools to Negro students who desire to go there while all-Negro schools continue to be maintained as such. Inevitably, Negro children will be encouraged to remain in "their school," built for Negroes and maintained for Negroes with all Negro teachers and administrative personnel. [7/] See Bradley v. School Bd., supra, 345 F. 2d at 324 (dissenting opinion). This encouragement may be subtle but it is nonetheless discriminatory. The duty rests with the School Board to overcome the discrimination of the past, and the long established image of the "Negro school" can be overcome under freedom of choice only by the presence of an integrated faculty.

7/ By maintaining segregated or substantially segregated faculties and staffs, the Board has, in effect, labeled its schools "white" and "Negro." Brown v. County School Board of Frederick County, Virginia, 245 F. Supp. 546, 560 (W.D. Va. 1965); cf. Baldwin v. Morgan, 287 F. 2d 750 (C.A. 5, 1961).

C. The plan fails to guarantee to students who transfer that there will be no racial discrimination or segregation in services, activities, and programs, provided, sponsored, by or affiliated with the school system.

The plan is silent as to the elimination of racial discrimination in services, activities and programs sponsored by or affiliated with the schools to which Negro students may transfer. Valid plans must guarantee the absence of racial discrimination or segregation in connection with all programs related to the student's attendance. 8/ Cf. Singleton v. Jackson Municipal Separate School District, 355 F.2d 865, 870 (C.A. 5, 1966); Revised Statement, 45 CFR 181.14. This is particularly true under a freedom of choice (or transfer) system, for any such discrimination or segregation would inevitably inhibit free choice.

8/ Indeed, before Brown, where the state provided one school for both races, it was prohibited from discriminating on the basis of race in connection with the school services, facilities and programs. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

It is essential, therefore, that the plan specify the availability of all activities, services and programs on a nonracial basis and provide that any disqualifications or waiting period which might otherwise apply to newly enrolled students will not apply to students exercising their right to obtain a desegregated education. Revised Statement, 45 CFR 181.14 (b) (1). Similarly, if transportation services are furnished, the plan must make ample provisions to guarantee that service will be provided on a nonracial basis. Revised Statement, 45 CFR 181.14 (b) (2).

D. The plan fails to provide for undelayed desegregation of grade seven.

Under the plan, grade seven will not be desegregated until the 1967-68 school year. This grade is the initial grade of fourteen junior and senior high schools for students graduating from forty elementary schools (R. 59). Thus, a large percentage of the sixth grade students in the Parish necessarily begin a new school at the start of the seventh grade.

Since July 1962, this Court has required that a desegregation plan must clearly provide, without delay, for the admission of new pupils entering the first grade, or coming into the County for the first time, on a nonracial basis. Augustus v. Board of Public Instruction of Escambia County, Florida, 306 F. 2d 862, 869 (1962); Singleton v. Jackson Municipal Separate School District, 355 F. 2d 865, 867 (1966). The rationale for this requirement is that although Brown, for reasons of administrative convenience, permitted school officials to temporarily leave students where they were, it did not allow such

officials to add to the existing segregation by racially assigning students who are new to the system. This rationale applies equally to students who are necessarily beginning new schools but who have been in the system in the past. Racial assignment of any student entering a school for the first time "creates" segregation in relation to that school which did not exist before.

E. The plan fails to contain a provision allowing Negro students in non-desegregated grades to transfer to schools from which they have been excluded because of race.

In Singleton v. Jackson Municipal Separate School District, 355 F.2d 865, 869 (C.A. 5, 1966), the Court wrote:

> The school children in still-segregated grades in Negro schools are there by assignment based on their race. This assignment was unconstitutional. They have an absolute right, as individuals, to transfer to schools from which they were excluded because of their race.

It is true that this Singleton decision was rendered after the order of the district court in this case was issued. But, since the Singleton transfer rule is based on a constitutional principle, and is not merely an aspect of transitional relief, it should have been included in the plan. In any event, it is, of course, proper for this Court now to require its inclusion in the plan.

II

The District Court Improperly Denied the United States Leave to Intervene.

A. After the Board submitted its desegregation plan but before the plaintiffs filed objections to the plan and before the hearing on the objections was held, the United States moved to intervene pursuant to section 902 of the Civil Rights Act of 1964 (42 U.S.C. 2000 h-2). The motion was denied by the district court on the grounds that it was made too late (R. 151-166).

Section 902 of the Civil Rights Act of 1964 (42 U.S.C. 2000 h-2) provides:

> Whenever an action has been commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution on account of race, color, religion, or national origin, the Attorney General for or in the name of the United States may intervene in such action upon timely application if the Attorney General certifies that the case is of general public importance. In

> such action the United States shall be entitled to the same relief as if it had instituted the action.

Timeliness is not measured simply by the lapse of time between institution of the suit and the application for intervention. 9/ Indeed, it is error under some circumstances to deny intervention after final judgment in the district court. Wolpe v. Poretsky, 144 F.2d 505, 508 (C.A.D.C., 1944); Pellegrino v. Nesbit, 203 F.2d 463, 465 (C.A. 9, 1953); Cuthill v. Ortman-Miller Machine Co., 216 F.2d 336 (C.A. 7, 1954); United States Casualty Co. v. Taylor, 64 F.2d 521, 527 (C.A. 4), 1933). Such factors as, whether the issues have been fully drawn (Kozak v. Wells, 278 F.2d 104, 109 (C.A. 8, 1960), whether the applicant's delay in attempting to intervene was justified (Clark v. Sandusky, 205 F.2d 915, 918-919

9/ Plaintiffs' complaint was filed May 4, 1965. Defendants answered on May 24, 1965 and on July 19, 1965, the United States moved to intervene.

(C.A. 7, 1953), whether the applicant diligently filed for leave to intervene following notice of facts creating the desire to intervene (Pyle-National Co. v. Amos, 172 F.2d 425, 428 (C.A. 7, 1949), and whether there is a necessity to protect the right of appeal so as to assure adequate representation of all claims and interests involved (Wolpe v. Poretsky, supra; Pellegrino v. Nesbit, supra; Cuthill v. Ortman-Miller Machine Co., supra; United States Casualty Co. v. Taylor, supra) are relevant in measuring the applicant's timeliness.

The United States applied for intervention twelve days after the Board's proposed desegregation plan was submitted. To hold that intervention at this juncture was untimely would require the United States to intervene before a plan for desegregation could be studied in light of constitutional standards. It is doubtful that Congress intended such a result by conditioning intervention by the United States on filing a timely application.

Moreover, intervention, after the proposed plan has been submitted for the purpose of objecting to the

plan would not prejudice any of the parties to the suit. This is the time objections are to be filed by the original parties. Nor would delay result from intervention at this point. Indeed, the United States filed its objections to the Board's plan with its motion to intervene two days before the original plaintiffs filed their objections. The attempt to intervene, thus, came at a convenient and reasonable point in the suit.

B. In opposing the motion to intervene, the defendants argued that intervention was sought for the purpose of impeaching a decree already made, namely the district court's decree of June 14, 1965 (R. 163). Even were this contention accurate, it would not be a valid basis for denying intervention in this case. Ex Parte Jordan, 94 U.S. 248 (1876); 4 Moore's Federal Practice 121 (2d ed. 1963). 10/ But this contention is

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10/ Under such circumstances the intervenor might properly be precluded from impeaching this decree, a consideration distinct from determining the timeliness of intervention. Moore's Federal Practice explains:

simply untrue. The district court's decree of June 14, 1965 required the submission of a desegregation plan which would comply with the constitutional standards established by this Court. The motion filed by the United States to intervene was based on the theory that the Board's proposed plan did not comply with the court's decree in that it failed to meet these standards. 11/

(Cont'd.)

> It should be pointed out that the rule as to prior decrees is not a rule which regulates the right of the petitioner to intervene, but nevertheless where the right to intervene is discretionary, one factor in denying intervention will be the administrative inconvenience that intervention might cause, or the fact that intervention for the sole purpose of attacking a prior decree would be useless. Where the right to intervene is absolute, however, it is particularly important that the problems be kept separate. Thus, in Ex Parte Jordan, where bondholders desired to intervene and to object to certain prior orders and final decrees rendered prior to their admission in the proceeding, the Supreme Court in allowing intervention distinguished between the right to intervene and the possibility of contesting the prior orders and decrees.

11/ We urge the Court, if it considers that the United States was improperly denied intervention, to consider our objections to the court-approved plan. Because the court-approved plan for Caddo Parish is substantially identical to the court-approved plans for Bossier, Jackson, and Claiborne Parishes and because the four cases are appealed from the same district court, we believe that they can be properly disposed of together.

RELIEF

In Singleton v. Jackson Municipal Separate School District, 348 F. 2d 729 (C.A. 5, 1965), this Court said that "The time has come for foot dragging public school boards to move with celerity toward desegregation." The Court also said (348 F. 2d at 731):

> 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 we have the same objective. There should be a close correlation, therefore, between the judiciary's standards in enforcing the national policy requiring desegregation of public schools and the executive department's standards in administering this policy. Absent legal questions, the United States Office of Education is better qualified than the courts and is the more appropriate federal body to weigh administrative difficulties inherent in school desegregation plans.
>
> If in some district courts judicial guides for approval of a school desegregation plan are more acceptable to the community or substantially less burdensome than H.E.W. guides, school boards may turn to the federal courts as a means of circumventing the H.E.W. requirements for financial aid. Instead of a uniform policy relatively easy to administer, both the courts and the Office of Education would have to struggle with individual

> school systems on an ad hoc basis. If judicial standards are lower, recalcitrant school boards in effect will receive a premimum for recalcitrance; the more the intransigence, the bigger the bonus.

The Court emphasized that (348 F. 2d at 731). "As to details of the plan, the Board should be guided by the standards and policies announced by the United States Office of Education in establishing standards for compliance with the requirements of Title VI of the Civil Rights Act of 1964."

In Price v. Denison Independent School District, 348 F. 2d 1010, 1013-14 (C.A. 5, 1965), this Court repeated its language in Singleton regarding the weight to be given the standards of the Office of Education and then went on to say:

> More than that, we put these standards to work. To avoid the temptation to recalcitrant or reluctant school systems to seek judicial approval of a token plan as the basis for Federal aid under alternative (1) for court plans, the Court held the Jackson plan inadequate and directed that a plan modeled after the Commissioner of Education's requirements (note 11, supra) be submitted for the fall of 1965-66.
>
> This signals what will be a frequent approach to these cases as they come to District Courts and thereafter this Court. These executive standards, perhaps long overdue, are welcome. To many, both on and off the bench, there was great anxiety in two major respects with the Brown approach. The first was that probably for the one and only time in American

> constitutional history, a citizen -- was compelled to postpone the day of effective enjoyment of a constitutional right. In Ross v. Dyer, 5 Cir., 1963, 312 F. 2d 191, 194, we recognized that under "a stair-step plan Negroes not in the eligible classes continue to suffer discriminatory treatment." That there can be a moratorium on the enjoyment of such rights runs counter to our notions of ordered liberty. Second, this inescapably puts the Federal Judge in the middle of school administrative problems for which he was not equipped and tended to dilute local responsibility for the highly local governmental function of running a community's school under law and in keeping with the Constitution.
>
> By the 1964 Act and the action of HEW, administration is largely where it ought to be--in the hands of the Executive and its agencies with the function of the Judiciary confined to those rare cases presenting justiciable, not operational questions.

The Court of Appeals for the Eighth Circuit in Kemp v. Beasley, 352 F. 2d 14 (C.A. 8, 1965), discussed this Court's ruling in Singleton insofar as it relates to reliance upon the H.E.W. guidelines. While agreeing "that these standards must be heavily relied upon to determine what desegregation plans effectively eliminate discrimination," the Court of Appeals for that circuit equally emphasized the responsibility of a federal court to exercise its own judgment in determining constitutional issues." The court states its conclusion as follows, (352 F. 2d at 19):

> Therefore, to the end of promoting a degree of uniformity and discouraging reluctant school boards from reaping a benefit from their reluctance the courts should endeavor to model their standards after those promulgated by the executive. They are not bound, however, and when circumstances dictate, the courts may require something more, less or different from the H.E.W. guidelines.

Although the Court of Appeals for the Fourth Circuit has not had occasion to consider the effect of the H.E.W. standards, district courts in that circuit have relied on them. See Kier v. County School Board of Augusta County, 249 F. Supp. 239 (W.D. Va., 1966); Wright v. County School Board of Greenville County, Civil Action No. 4263 (E.D. Va., January 27, 1966); Miller v. Clarendon County School District No. 2, Civil Action No. 8752 (D. of S.C., April 21, 1966). In Miller, the most recent of these cases, the District Court for the District of South Carolina said, with reference to the H.E.W. standards:

> Those standards have been adopted and approved generally in other forums in this circuit [citing Kier and Wright]. The orderly progress of desegregation is best served if school systems desegregating under court order are required to meet the minimum standards promulgated for systems that desegregate voluntarily. Without directing absolute adherence to the "Revised Standards" guidelines at this juncture, this court will welcome their inclusion in any new, amended, or substitute plan which may be adopted and submitted.

This case, as well as each of the other school desegregation cases now before this Court, illustrate the need for this Court to review present judicial enforcement methods to the end that the orderly transition to desegregation can be accomplished with a minimum of expenditure of judicial energy and with a maximum correlation between current desegregation standards and current desegregation practices. We suggest that this end can best be realized by the adoption of a specific decree to be entered in these cases by the district courts. This is neither a fundamental change in judicial approach nor a departure from established standards for desegregation. It would place in the courts, as it must under our constitutional system the primary responsibility for declaring the rights of the parties, and it would look to the Office of Education, rather than to the school boards, for administrative guidelines affecting desegregation so that (1) the court will not be "in the middle of school administrative problems," (2) uniformity in solving operational problems may be achieved, and (3) an efficient method of supervising school board performance can be realized.

This Court in cases involving voter discrimination has approved the same type of relief here being urged.

See United States v. Ward 349 F. 2d 795 (C.A. 5, 1965), and United States v. Palmer ___ F. 2d ___ C.A. 5, (No. 21646, decided February 8, 1966). In the Ward case the Court in adopting the former decision there proposed (349 F. 2d at 805) said:

> [G]ood administration suggests that the proposed decree be indicated by an Appendix, not because of any apprehension that the conscientious District Judge would not faithfully impose every condition so obviously implied, but rather because of factors bearing upon administration itself.
>
> It is not possible, or even desirable, of course to achieve absolute uniformity. But in this ever growing class of cases which have their genesis in unconstitutional lack of uniformity as between races, courts within this single circuit should achieve a relative uniformity without further delay.

Similarly in a recent decision involving jury discrimination this Court has emphasized "the desirability of achieving uniformity of the handling of the substantial number of cases arising in this Court dealing with the same questions of law." Scott v. Walker, ___ F. 2d ____ (C.A. 5, No. 20814 decided March 31, 1966).

The necessary function of the court in desegregation cases is to guarantee that methods adopted for desegregation do not fall below constitutional limits. It is not necessary to this function that the courts define every administrative detail necessarily involved

in day-to-day school administration. Under Title VI of the Civil Rights Act of 1964 the Executive Branch of the federal government must guarantee the fair use of federal funds by prescribing the ordinary administrative details inevitably involved in any workable desegregation plan. For the courts to look to the regulations and guidelines of the Office of Education does not involve the abdication of any judicial function, but instead is a rational method of enforcement of law under a uniform national policy.

Those regulations and guidelines are the product of the expertise of the Office of Education. They reflect the experience and knowledge of persons involved in the day-to-day administration of the schools. The courts do not have the staff, the facilities, or the time to undertake with the same precision the function of defining the workings of the desegregation mechanism.

With these considerations in mind we submit to the Court the proposed decree set forth in the appendix filed in connection with this brief and the

six other school desegregation cases before this Court to which the government is a party. The substantive requirements of the proposed decree derive from the Fourteenth Amendment and the decisions of the courts. The administrative details are largely drawn from the HEW Guidelines. 12/

12/ Recent court-approved plans which draw on the new guidelines are: Carr, United States v. Montgomery County Board of Education, Civil Action No. 2072-N (M.D. Ala., March 22, 1966); Lee, United States v. Macon County Board of Education, Civil Action No. 604-E (M.D. Ala., March 11, 1966) (entered by consent); Harris, United States v. Bullock County Board of Education, Civil Action No. 2073-N (M.D. Ala., March 11, 1966) (entered by consent); United States v. Lowndes County Board of Education, Civil Action No. 2328-N (M.D. Ala., February 11, 1966) (entered by consent); McGhee, United States v. Nashville Special School District No. 1, Civil Action No. 962 (W.D. Ark., March 3, 1966) (entered by consent); Beckett, United States v. School Board of the City of Norfolk, Virginia, Civil Action No. 2214 (W.D. Va., March 17, 1966) (entered by consent). And see Miller v. Clarendon County School District No. 2, D.C.S.C., Civil Action No. 8752 decided April 21, 1966.

We have urged that this Court direct the district courts in these seven cases to enter a specific decree along the line proposed herein. The records in these cases fully support such relief. With the use of this method of individual enforcement there will no longer be occasion for the periodic submission by school boards of "desegregation plans," the hearing of objections to the plans and the submission of amended plans. Instead, the school boards will clearly understand their obligations, and will report to the court on a periodic basis. It may be that supplementary enforcement proceedings will occasionally be necessary, but hearings should be less frequent and should produce more effective results in bringing current practices and current standards closer. There will also be a higher probability that desegregation will proceed more uniformly among school districts under court orders and between such school districts and those desegregating on a voluntary basis under the supervision of the Office of Education.

The courts would continue to have the final responsibility for fixing constitutional standards and for compliance with its decrees. The option is

still open to any school board to come into court to prove that extraordinary circumstances compel modification of one or another of the provisions of the decree. The private plaintiffs and the United States also retain their right, as they must, under our constitutional system and Title IV of the Civil Rights Act of 1964, to come into court when necessary to seek modification of or compliance with any provision in the decree.

Special mention should be made of the faculty provisions in the proposed decree and of the district court decisions that have decreed specific and detailed relief on this subject.

Principally within the past year, district courts have been grappling with the problem of framing practical and effective relief for the desegregation of faculty. Some courts in framing their decrees have focused upon the specific results to be reached by reassignment of teachers who had theretofore been assigned solely upon the basis of their race. Dowell v. School Board of Oklahoma City, 244 F. Supp. 971 (W.D. Okla. 1965), Kier v. County School Board of Augusta County, Virginia, 249 F. Supp. 239 (W.D. Va.

1966). The orders entered in these cases required that the defendant school boards assign any employed teachers and reassign already-employed faculty so that the proportion of each race assigned to teach in each school will be the same as the proportion of teachers of that race in total teaching staff in the system, or at least, of the particular school level in which they are employed. This type of relief is justified on the ground that if faculty members had in the past been assigned without regard to race such assignments would, as a matter of mathematical probability, have yielded this same result.

Other district courts in framing their decrees on faculty desegregation have not been specific as to the number of teachers of each race that should be assigned to each school in order to remove the effects of past discriminatory assignments. These courts have focused upon the mechanics to be followed in removing the effect of past discrimination rather than upon the result as such. Thus, in Beckett v. School Board of the City of Norfolk, Civil Action No. 2214 (E.D. Va., 1966); Gilliam v. School Board

of the City of Hopewell, Virginia, Civil Action No. 3554 (E.D. Va. 1966); and Bradley v. School Board of City of Richmond, Civil Action No. 3353 (E.D. Va. 1966), the courts approved consent decrees setting forth in detail the considerations that would control the school administrators in filling faculty vacancies and in transferring already-employed faculty members in order to facilitate faculty integration.[13/]

13/ The faculty provisions in the Hopewell case, which were filed with the district court on April 8, 1966, read as follows:

> The School Board of the City of Norfolk recognizes its responsibility to employ, assign, promote and discharge teachers and other professional personnel of the Norfolk City Public School System without regard to race or color. It further recognizes its obligation to take all reasonable steps to eliminate existing racial segregation of faculty that has resulted from the past operation of a dual school system based upon race or color:
>
> In order to carry out these responsibilities, the School Board has adopted the following program:
>
> 1. Teachers and other professional personnel will be employed solely on the basis of qualifications and without regard to race or color.

(Cont. on following page.)

In yet other cases, the district court, while emphasizing the necessity of affirmative steps to undo the effects of past racial assignments of faculty and while requiring some tangible results,

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13/ (Cont. from preceding page.)

> 2. In the recruitment and employment of teachers and other professional personnel, all applicants and other prospective employees will be informed that the City of Norfolk operates a racially integrated school system and that the teachers and other professional personnel in the System are subject to assignment in the best interest of the System and without regard to their race or color.
>
> 3. The Superintendent of Schools and his staff will take affirmative steps to solicit and encourage teachers presently employed in the System to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred. Such transfers will be made by the Superintendent and his staff in all cases in which the teachers are qualified and suitable, apart from race or color, for the positions to which they are to be transferred.
>
> 4. In filling faculty vacancies which occur prior to the opening of each school year, presently employed teachers of the race opposite the race that is in the majority in the faculty at the school

(Cont. on following page.)

has not been specific either regarding the mechanics or the specific results to be achieved. See Harris v. Bullock County Board of Education, Civil Action No. 2073-N (M.D. Ala. 1966); United States v. Lowndes Board of Education, Civil Action No. 2328-N (M.D. Ala. 1966); Carr v. Montgomery County Board of

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13/ (Cont. from preceding page.)

> where the vacancy exists at the time of the vacancy will be preferred in filling such vacancy. Any such vacancy will be filled by a teacher whose race is the same as the race of the majority on the faculty only if no qualified and suitable teacher of the opposite race is available for transfer from within the System.
>
> 5. Newly employed teachers will be assigned to schools without regard to their race or color, provided, that if there is more than one newly employed teacher who is qualified and suitable for a particular position and the race of one of these teachers is different from the race of the majority of the teachers on the faculty where the vacancy exists, such teacher will be assigned to the vacancy in preference to one whose race is the same.

Education, Civil Action No. 2072-N (M.D. Ala. 1966).[14/]

14/ In the Montgomery case the court's decree contained the following provisions on faculty desegregation:

> Race or color will henceforth not be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff, with the exception that assignments shall be made in order to eliminate the effects of past discrimination. Teachers, principals, and staff members will be assigned to schools so that the faculty and staff is not composed of members of one race.
>
> In the recruitment and employment of teachers and other professional personnel, all applicants or other prospective employees will be informed that Montgomery County operates a racially integrated school system and that members of its staff are subject to assignment in the best interest of the system and without regard to the race or color of the particular employee.
>
> The Superintendent of Schools and his staff will take affirmative steps to solicit and encourage teachers presently employed to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred.
>
> Teachers and other professional staff will not be dismissed, demoted, or passed over for retention, promotion, or rehiring on the ground of race or color. In any instance, where one or more teachers or other professional staff members are to be displaced as a result of desegregation or school closings, they shall

(Cont. on following page.)

The proposed decree set forth in the appendix includes a faculty provision in general terms. It does not seem desirable for this Court to compel exact uniformity as to how faculty desegregation should be accomplished in every school district within the Fifth Circuit. The appellate court should not prescribe a detailed faculty provision from which a district court could not depart. District courts should be free to add specifics to meet the particular situation. By its decree, this Court will only be recognizing that there may be differences between large and small school districts and between urban and rural school districts.

At the same time, the decree does require that a reasonable beginning be made and that a reasonable program be achieved in the actual desegregation of the faculty. The decree makes it clear that the school officials are (1) restrained from

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14/ (Cont. from preceding page.)

be transferred to any position in the system where there is a vacancy for which they are qualified.

practicing racial discrimination in the hiring and assignment of new faculty members, and (2) are required to take affirmative steps to correct existing results of past racial assignments.

This, we believe, is the minimum to be required in any school desegregation decree. The district courts, however, would be open to the plaintiff and to the United States to seek more specific relief if the facts warrant it.

CONCLUSION

Deference to local responsibility for the administration of school systems is a long established principle in the law of school desegregation -- one that continues to be valid today. However, we think it disserves the principle of local responsibility to place upon school boards the difficult and technical task of articulating judicial standards and formulating workable mechanics for free choice plans. The result is too often an inadequate plan which necessitates further abrasive involvement of the federal courts in local school affairs. Instead, we urge the Court to make the legal obligations of local officials as clear as possible and to utilize the expertise of HEW in the formulation of free choice mechanics. Local responsibility can then be turned to the far more productive tasks of administration and performance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief and Appendix has been served by official United States mail in accordance with the rules of this Court to each of the attorneys for the appellees as follows:

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