IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 632

BEATRICE ALEXANDER, *et al.*,

Petitioners,

v.

HOLMES COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

MOTION TO ADVANCE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MOTION TO ADVANCE

Petitioners, by their undersigned counsel, move the Court to advance consideration and disposition of this case, and in support thereof would show that this case presents an issue of national importance requiring prompt resolution by this Court, for the reasons stated in the annexed petition for writ of certiorari.

WHEREFORE, petitioners pray that the Court: 1) consider this motion in vacation; 2) shorten the time for filing respondents' response to 15 days; 3) consider the petition during the conference week of October 6, 1969, or as soon thereafter as possible; and 4) grant certiorari and summarily reverse the judgment below or set an expedited brief-

ing schedule and advance the case on the calendar for argument.

Respectfully submitted,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered August 28, 1969, amending its order of July 3, 1969, as modified July 25, 1969.

Opinions Below

The order of the United States Court of Appeals for the Fifth Circuit of which review is sought is unreported and is set forth in Appendix E. Earlier opinions of the Court of Appeals and of the United States District Court for the Southern District of Mississippi are unreported and are set forth in Appendices A through D.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered August 28, 1969 (Appendix E, p. 71a, *infra*).

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) to review the Court of Appeals' order delaying the implementation of school desegregation plans in 14 school districts in Mississippi.

Question Presented

Did the Court of Appeals err in granting 14 Mississippi school districts an indefinite delay in implementing school desegregation plans based upon generalized representations by the United States Department of Health, Education and Welfare that delay was necessary for preparation of the communities?

Constitutional Provision Involved

This case involves the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement

These cases[1] test how much longer Negro schoolchildren in 14 substantially segregated school districts in Mississippi

[1] These cases were filed in the United States District Court for the Southern District of Mississippi between the years 1963 and 1967. Jurisdiction was predicated upon 28 U.S.C. §1343(3) and 42 U.S.C. §§1981, 1983 and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Plaintiffs in school desegregation cases in Mississippi often sue several school boards located within the same geographical area under one civil action number;

will have to wait to exercise their right to a desegregated education decreed by this Court more than 15 years ago in *Brown* v. *Board of Education.*[2]

For 10 years after *Brown* v. *Board of Education,* the public schools of Mississippi remained totally segregated. Thereafter, the school boards involved in this litigation adopted freedom of choice plans indistinguishable from that condemned last year by this Court in *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968). These freedom of choice plans did not work to disestablish the dual school system. Indeed, the token results achieved

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the nine cases brought here by this petition involve fourteen separate school districts.

First, there are three cases wherein suit was brought by Negro schoolchildren against six separate school districts: *Harris* v. *Yazoo County Board of Education, Yazoo City Board of Education* and *Holly Bluff Line Consolidated School District; Alexander* v. *Holmes County Board of Education; Killingsworth* v. *The Enterprise Consolidated School District* and *Quitman Consolidated School District.*

Second, there are four cases wherein suit was brought by Negro schoolchildren against six school districts and the United States subsequently intervened: *Hudson and United States* v. *Leake County School Board; Blackwell and United States* v. *Issequena County Board of Education* and *Anguilla Line Consolidated School District; Anderson and United States* v. *Canton Municipal Separate School District* and *Madison County School District; Barnhardt and United States* v. *Meridian Separate School District.*

Third, there are two cases which were filed by the United States wherein Negro schoolchildren subsequently intervened: *United States and George Williams* v. *Wilkinson County Board of Education; United States and George Magee, Jr.* v. *North Pike County Consolidated School District.*

This petition formally embraces only school desegregation suits involving private plaintiffs. But the disposition of this petition will govern an additional 16 suits involving 19 school districts against whom the United States is the sole plaintiff in companion cases below.

[2] 347 U.S. 483 (1954) (*Brown I*); 349 U.S. 294 (1955) (*Brown II*).

by these plans were even less than the results held insufficient in *Green.*[3]

In July, 1968, petitioners moved the district court to require each respondent school board to adopt a new desegregation plan which "promises realistically to work, and promises realistically to work *now*" (*Green, supra,* 391 U.S. at 439 (1968) (emphasis Court's)). The district court refused to schedule an early hearing on petitioners' motions, thus allowing the defective freedom of choice plans to be employed during the 1968-69 school year. Accordingly, petitioners moved the Court of Appeals for summary reversal of the district court's refusal to grant relief for the 1968-69 school year. The Court of Appeals denied summary re-

[3] The extent of student desegregation in the school districts at bar is shown in the following table:

District	*Percentage of Negroes in All-Negro Schools*		*Percentage of Negroes in Predominantly White Schools*	
	*1968-69**	*1969-70** (Projected)*	*1968-69**	*1969-70** (Projected)*
Anguilla	94.4%	96.1%	5.6%	3.9%
Canton	99.5%	99.9%	0.5%	0.1%
Enterprise	84%		16%	
Holly Bluff		98.9%		1.1%
Holmes County		95.5%		4.5%
Leake County	97.1%	95.7%	2.9%	4.3%
Madison County	99.1%	99.1%	0.9%	0.9%
Meridian	91.4%	84.8%	8.6%	15.2%
North Pike County	99.2%	99.7%	0.8%	0.3%
Quitman		96.1%		3.9%
Sharkey-Issaquena	94.6%	93.6%	5.4%	6.4%
Wilkinson County	98.1%	97.3%	1.9%	2.7%
Yazoo		91.2%		8.8%
Yazoo County		93.3%		6.7%

* These figures are based upon the school districts' reports to the district court.

** The projections are based for the most part upon the freedom of choice forms completed during the Spring of 1969, as compiled by the United States and submitted to the Court of Appeals.

versal, but ordered the district court to conduct hearings no later than November 4, 1969. *Adams* v. *Mathews,* 403 F.2d 181 (5th Cir. 1968). Upon remand, the district court consolidated these school desegregation cases brought by the Negro plaintiffs with those brought by the United States and conducted hearings *en banc* during October and December, 1968.[4]

At the October hearings, the respondent school boards presented lengthy testimony to the effect that achievement test results justified the continued use of free choice assignments and the concomitant token integration of white schools and perpetuation of all-Negro schools.[5] Indeed, the cases were consolidated principally to permit the school boards to join in this "expert" testimony. The respondent school boards also resisted any alteration of the free choice plans on the ground that more than token integration would be followed by withdrawal of white children from the public schools and the proliferation of private schools.[6]

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[4] The consolidated cases proceeded under the caption *United States* v. *Hinds County Board of Education* and *Alexander* v. *Holmes County Board of Education.* They embraced 19 districts against whom the United States was the sole plaintiff, plus the 14 districts at bar. See note 1, *supra.*

[5] This position was urged by Mississippi school districts and white parent intervenors in 1964 to retain totally segregated schools. Voluminous expert testimony was presented and the district court entered findings of fact supporting the proposition that Negroes were innately inferior; but the district court felt bound by Court of Appeals' rulings to deny defendants' request that *Brown* v. *Board of Education* be overruled. The defendants appealed and the Court of Appeals ordered an end to such efforts to justify segregation. *Jackson Municipal Separate School Districts* v. *Evers; Biloxi Municipal Separate School District* v. *Mason;* and *Leake County School Board* v. *Hudson,* 357 F.2d 653 (5th Cir. 1966). The last case cited, *Hudson,* is the same case before the Court in this petition.

[6] Mississippi's first effort to retain segregated schools through tuition grant legislation was held unconstitutional on the ground that the legislation's purpose and effect was to perpetuate segrega-

Nine months after the Court of Appeals' admonition to the district court to treat the cases "as entitled to the highest priority" (403 F.2d at 188), the district court, on May 13, 1969, approved freedom of choice plans for all the respondent school districts.[7]

On June 7, 1969, the United States filed alternative motions for summary reversal or expedited consideration of the cases. On June 25, 1969, the Court of Appeals entered a letter directive expediting consideration of the cases. See Appendix B, p. 24a, *infra.*

On July 3, 1969, the Court of Appeals reversed the district court and directed it to require from the school boards plans of desegregation other than freedom of choice. See Appendix B, pp. 28a-37a, *infra.* The Court found:

(a) that not a single white child attended a Negro school in any of the districts;

(b) that the percentage of Negro children attending white schools ranged from zero to 16 per cent;

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tion. *Coffey* v. *State Educational Finance Commission,* 296 F. Supp. 1389 (S.D. Miss., 1969) (3-judge court).

The Mississippi legislature recently enacted a new tuition grant program, in the nature of student loans, to enable white students to attend private schools (House Bill No. 67). Also passed by the House of Representatives (under consideration by the Senate) is a bill which would grant up to $500. in credits toward Mississippi income taxes for all payments or donations to schools, "public or private."

[7] The opinion and orders of the district court are set forth in Appendix A. The order in *Alexander* v. *Holmes County Board of Education* is set forth at p. 20a, *infra* and is representative of the orders entered in eight of these nine cases. The ninth order, entered in *Killingsworth* v. *Enterprise Consolidated School District* is set forth at p. 21a, *infra.* It differed from the others in that it dismissed the petitioners' motion on the ground, later held erroneous by the Court of Appeals, that the petitioners had not explicitly authorized their attorney to file the motion.

(c) that token faculty integration continued in force; and,

(d) that school activities continued substantially segregated.

Quoting *Adams* v. *Mathews, supra,* the Court held that "as a matter of law, the existing plan fails to meet constitutional standards as established in *Green*" (Appendix B, p. 32a, *infra*). The Court of Appeals directed that the respondent school boards be required to collaborate with the United States Office of Education in formulating new desegregation plans effective for the 1969-70 school year[8] (Appendix B, pp. 35a-36a, *infra*). A precise timetable for the submission and implementation of the plans was established to protect petitioners' right to relief effective for the 1969-70 school year (Appendix B, pp. 36a-37a, *infra*). The Court directed that the mandate be issued forthwith (Appendix B, p. 37a, *infra*).[9]

On August 11, 1969, the deadline established for submission of the new desegregation plans, the Office of Education submitted terminal plans of desegregation for the 33 school districts to the district court. Thirty of the 33 plans provided for implemenation of pairing and/or zoning plans of desegregation to be effective with the commencement of the 1969-70 school year.[10] In his transmittal letter of August 11 (See Appendix C, pp. 40a-52a), Dr. Gregory Anrig, Director of the Equal Educational Opportunities Division

[8] This had been consistent practice following *Hall* v. *St. Helena Parish School Board,* No. 26450 (5th Cir., May 28, 1969).

[9] On July 25, 1969, the Court of Appeals modified its order in respects not important here (Appendix B, p. 38a, *infra*).

[10] The exceptions were for Hinds County, Holmes County and Meridian, in which it was asserted that problems peculiar to those districts required postponing full implementation until the beginning of the 1970-71 school year.

of the Office of Education—the educational expert responsible for the final review of the plans—stated to the district court (Appendix C, p. 44a, *infra*):

> I believe that each of the enclosed plans is educationally and administratively sound, both in terms of substance and in terms of timing. In the cases of Hinds County, Holmes County and Meridian, the plans that we recommend provide for full implementation with the beginning of the 1970-71 school year. The principal reasons for this delay are construction, and the numbers of pupils and schools involved. In all other cases, the plans that we have prepared and that we recommend to the Court provide for complete disestablishment of the dual school system at the beginning of the 1969-70 school year.

On August 19, 1969, the Secretary of the Department of Health, Education and Welfare sent a letter to the Chief Judge of the Court of Appeals and the judges of the district court requesting that the plans submitted by the Office of Education be withdrawn and that the 1969-70 deadline for implemenation of plans be rescinded (Appendix C, pp. 53a-54a, *infra*). The Secretary did not dispute Dr. Anrig's view that the plans were "educationally and administratively sound." Instead, the Secretary noted that he had reviewed these plans "as the Cabinet officer of our Government charged with the ultimate responsibility for the education of the people of our Nation" (Appendix C, p. 52a, *infra*). He continued (Appendix C, p. 54a, *infra*):

> In this same capacity, and bearing in mind the great trust reposed in me, together with the ultimate responsibility for the education of the people of our Nation, I am gravely concerned that the time allowed

> for the development of these terminal plans has been much too short for the educators of the Office of Education to develop terminal plans which can be implemented this year. The administrative and logistical difficulties which must be encountered and met in the terribly short space of time remaining must surely in my judgment produce chaos, confusion, and a catastrophic educational setback to the 135,700 children, black and white alike, who must look to the 222 schools of these 33 Mississippi districts for their only available educational opportunity.

The Secretary requested that the Office of Education and the respondent school boards be given until December 1, 1969 to formulate new plans for desegregation, with implementation of those plans to be left to an unspecified future time (Appendix C, p. 52a, *infra*).

The next day, August 20, 1969, the Court of Appeals entered an order acknowledging receipt of the Secretary's letter (Appendix C, p. 55a, *infra*). The next day, the Department of Justice filed a motion in the Court of Appeals requesting modification of the Court's order of July 3, 1969, based upon the Secretary's letter, and petitioners filed their opposition thereto. The next day, the Court of Appeals orally granted leave to the district court "to receive, consider and hear the Government's motion for extension of time until December 1, 1969" (see order of the Court of Appeals of August 28, 1969, Appendix E, p. 75a, *infra*). On August 25, 1969, the district court held a hearing on the Government's request.

At the hearing, the Government presented two witnesses employed by the Office of Education, who testified that the desegregation plans were educationally sound, but that implementation of them should be delayed due to adminis-

trative difficulties, generally stated, in implementing the plans' provisions—difficulties which the school boards had made no attempt to solve in the fifteen years since *Brown*. In opposition, petitioners presented the testimony of an expert witness who testified that there were no sound educational reasons for delay and that the reasons given by the Government's witnesses were generalities unrelated to a single specific situation in any of the school districts involved.

The next day, the district court entered its findings of fact and conclusions of law (see Appendix D, pp. 56a-70a, *infra*), which, together with the transcript of the hearing, were transmitted to the Court of Appeals. Two days later, on August 28, 1969, the Court of Appeals entered an order granting the government's request for delay (see Appendix E, pp. 71a-78a, *infra*).

On August 30, 1969, petitioners applied to Mr. Justice Black for an order vacating the Court of Appeals' suspension of its July 3rd order. On September 5, 1969, Mr. Justice Black denied the application, but stated that his disposition did not "comport with my ideas of what ought to be done in this case when it comes before the entire Court. I hope these applicants will present the issue to the full Court at the earliest possible opportunity" (Appendix F, p. 83a, *infra*).

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted to Review and Reverse the Court of Appeals' Delay of Desegregation Because the Time for Delay Has Run Out.

These cases test whether Negro schoolchildren in 14 substantially segregated school districts in Mississippi are—15 years after *Brown* v. *Board of Education*—at last "entitled to have their constitutional rights vindicated now without postponement for any reason" (Opinion in Chambers of Mr. Justice Black, Appendix F, p. 81a, *infra*).

When, 14 years ago, this Court declared that segregated schools would be disestablished not immediately but only "with all deliberate speed," it made a unique departure from the principle that "[t]he basic guarantees of our Constitution are warrants for the here and now" (*Watson* v. *Memphis,* 373 U.S. 526, 533 (1963)).[11] But it did so upon the explicit condition that school boards establish "that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date" (*Brown II,* 349 U.S. at 300). This Court could hardly have envisioned the extent to which that narrowly circumscribed period of grace would be exploited by local school boards and state officials. In Mississippi, a school generation of youngsters passed through the segregated system while school boards showed not the slightest interest in "good faith compliance at the earliest practicable date."

Although Mississippi state officials initially experimented with open defiance, see *United States* v. *Barnett,* 330 F.2d

[11] "[P]robably for the one and only time in American constitutional history, a citizen—indeed a large group of citizens—was compelled to postpone the day of effective enjoyment of a constitutional right" (*Price* v. *Denison Independent School District Board of Education,* 348 F.2d 1010, 1013 (5th Cir. 1965).

369 (5th Cir. 1963), they soon learned to rely upon less obvious—and sometimes ingenious—devices for delay.

A pupil placement law was passed, which established a labyrinth of administrative procedures to ensnare those Negro students hardy enough to attempt to desegregate white schools. For a season that worked. The first public school desegregation suits brought in federal court in Mississippi were dismissed for failure to exhaust administrative remedies under the Pupil Placement Law. So it was that while this Court, in 1964, was holding that "the time for mere 'deliberate speed' has run out" (*Griffin* v. *School Board,* 377 U.S. 218, 234 (1964), not a single child in Mississippi attended an integrated school.

That year, the Court of Appeals reversed the district court's dismissal of the first school desegregation suits. *Evers* v. *Jackson Municipal Separate School District,* 328 F.2d 408 (5th Cir. 1964). Upon remand, the school boards and white intervenors delayed the trials with voluminous testimony as to the innate inferiority of Negroes as a rational basis for continued segregation. The district court, after further delay, entered findings of fact supporting the defendants' theories of racial superiority, but held that it was compelled by the Court of Appeals to require a grade-a-year plan—thus seeking to insure that the time for "deliberate speed" would run until 1976. That decision was overturned in *Singleton* v. *Jackson Municipal Separate School District,* 348 F.2d 729 (5th Cir. 1965) (injunction pending appeal); 355 F.2d 865 (5th Cir. 1966).

The Civil Rights Act of 1964 promised a new era in school desegregation, through a "national effort, bringing together Congress, the executive, and the judiciary [which]

may be able to make meaningful the right of Negro children to equal educational opportunities." [12]

Under Title VI of the Act, the Department of Health, Education and Welfare fixed minimum standards to be used in determining the qualifications for schools applying for federal financial aid. This administrative enforcement by H.E.W. produced a dramatic increase in the level of desegregation in the South. See United States Commission on Civil Rights, *Federal Enforcement of School Desegregation,* p. 31 (September 11, 1969). The courts accorded "great weight" to those minimum standards and established "a close correlation . . . 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" (*Singleton, supra,* 348 F.2d at 731).

By 1969, the united action of the courts and the executive in advancing toward their common objective of school desegregation nourished hopes that the end of the desegregation process was in sight. To be sure, progress under Mississippi's freedom of choice plans continued to be minimal. See note 3, *supra.* But following this Court's decision in *Green,* numerous decisions of the Court of Appeals set the constitutional deadline for compliance at the 1969-70 school year. See *Adams* v. *Mathews, supra; United States* v. *Greenwood Municipal Separate School District,* 406 F.2d 1086 (5th Cir. 1969); *Henry* v. *Clarksdale Municipal Separate School District,* 409 F.2d 682 (5th Cir. 1969); *United States* v. *Indianola Municipal Separate School District,* 410 F.2d 626 (5th Cir. 1969). And the executive also directed its efforts toward full compliance

[12] *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, 847 (5th Cir. 1966), affirmed *en banc* 380 F.2d 385 (5th Cir. 1967), cert. denied 389 U.S. 840 (1967) (Emphasis Court's).

during the 1969-70 school year. As late as July 3, 1969, in a joint statement by the Attorney General and the Secretary of the Department of Health, Education and Welfare, the executive announced that "the 'terminal date' must be the 1969-70 school year." Only a narrowly circumscribed exception was to be permitted:

> Additional time will be allowed only where those requesting it sustain the heavy factual burden of proving that compliance with the 1969-70 time schedule cannot be achieved; where additional time is allowed, it will be the minimum shown to be necessary.[13]

In this context of a united judicial and executive front against the crumbling barriers of school desegregation, the Court of Appeals entered its orders of July 3rd and 25th enforcing the 1969-70 "terminal date." See Appendix B, *infra.*

Then, on August 19, 1969, there occurred "a major retreat in the struggle to achieve meaningful school desegregation" (Statement of the United States Commission on Civil Rights, p. 2, September 11, 1969). H.E.W. essayed an initiative for delay, based upon nothing more than a generalized reference to "administrative and logistical difficulties" and speculation that enforcement of the 1969-70 "terminal date" would result in "chaos [and] confusion" (Letter of August 19, 1969 from the Secretary of the Department of Health, Education and Welfare to the Chief Judge of the Court of Appeals, Appendix C, p. 54a, *infra*). The delay requested called for a new deadline of December 1, 1969 for the school districts to formulate plans, *with implementation to be accomplished at some unspecified future time.*

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[13] The statement is set forth in *Federal Enforcement of School Desegregation, supra,* Appendix C.

In support of this initiative for delay, no attempt was made to meet the "heavy factual burden" which had earlier been demanded of school boards seeking delay. Without particularized reference to the conditions in individual school districts, a blanket assessment was made that more time was needed in the 33 school districts. No effort was made to show that the delay sought was "the minimum shown to be necessary" for each of the districts.

The Court of Appeals' order of August 28, 1969 accepted H.E.W.'s new open-ended timetable. It did so without explanation or elaboration, indicating it felt it had no choice but to acquiesce. (see Appendix E, *infra*).

The Solicitor General recognized that HEW's action and the Court of Appeals' acquiescence meant that yet another segregated school year would probably pass into history. He characterized this as "a tragedy and a default" (Memorandum for the United States, p. 5). But nothing, he said, could be done.

Petitioners disagree. This initiative for delay, based upon nothing more than undifferentiated apprehension that further "preparation of the community" [14] is required, can and should be corrected, for it raises a threat to school desegregation of profound national importance, for two reasons.

First, if the ingenuity of the federal government is to be applied to the task of fashioning excuses for delay, it can hardly fail to inspire local school boards to do the same. Administrative enforcement under Title VI will be crippled as recalcitrant school boards press for further relaxation of enforcement and those boards that reluctantly did comply begin to feel they acted in haste. Dissident segregationist groups will feel good reason to redouble

[14] Memorandum for the United States, p. 4.

their pressures on school officials who kept their pledge to the Constitution in the face of opposition.

Second, judicial enforcement will be undermined if the federal courts are deprived of the kind of effective assistance upon which they had rightly come to rely. As Chief Judge Brown observed in *Price, supra,* executive cooperation had taken the federal judge out of the role of school administrator—a role "for which he was not equipped" (348 F.2d at 1013). In this context, then, it is perhaps not surprising that the court below acquiesced in H.E.W.'s request for delay, without comment or explanation. It was in no position to analyze whether the delay requested for each of the 33 school districts was "the minimum shown to be necessary." Only if it had held that there was no longer "a 'transition period' during which federal courts would continue to supervise the passage of the Southern schools from dual to unitary systems" (Opinion in Chambers of Mr. Justice Black, Appendix F, p. 81a, *infra*), could it have freed itself from the difficult, if not impossible, position into which it was thrust. But the court below may have felt as did Mr. Justice Black, that this decision must come from this Court.

In *Brown II,* this Court held that school boards which made a "prompt and reasonable start toward full compliance" might be granted "additional time" to solve administrative problems (349 U.S. at 300). The problems this Court foresaw concerned (349 U.S. at 300-01):

(1) "Physical condition of the school plant";

(2) "School transportation system";

(3) "Personnel"; and,

(4) "Revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis."

After 15 years, plans calling for the revision of school districts and attendance areas into compact units to achieve a unitary system were finally submitted. But the other problems had not yet been solved by the school districts at bar, found the district court. It found a present need for (Appendix D, p. 65a, *infra*):

(1) "Building renovations, including the adjusting of laboratories and like facilities";

(2) "Bus routes [to] be redrawn"; and,

(3) "Faculty and student preparation, including various meetings and discussions of the problems to be presented and the solutions therefor."

Petitioners do not doubt that in some districts there remain obstacles to the "workable, smooth desegregation which is desired" (*Ibid*). But why? "There can be little doubt where the basic fault lies in this matter. The reason why the plans are so difficult to formulate and to implement is largely because the local school boards involved in this case have generally done nothing but resist; they have continuously failed and refused to develop plans for the effective desegregation of their schools, so as to eliminate the long-established dual school system." (Memorandum for the United States, p. 4).

More delay might make for smoother desegregation. But experience does not favor that prediction. Delays in the past have served to embolden the recalcitrant, discourage voluntary compliance and nourish new schemes for evasion. Fifteen years of history teach us that every possibility for delay, however circumscribed, will be treated as an invitation for ready ingenuity to exploit. Moreover, as any school administrator will testify, there will always be administrative problems in the operation of a school district. The

constitutional goal is not the smoothest possible desegregation; it is the realization of personal and present rights[15] against which, at this late date, administrative convenience amounts to nothing.[16]

But petitioners see no need to indulge in speculation when a sharper answer is called for: these school districts have had 15 years to eliminate barriers to desegregation and that is enough. If the desegregation process is ever to be successfully concluded, this Court must act. The question is one of constitutional rights and that is a question which under our system can only be finally resolved by this Court. This Court should grant review and hold, with Mr. Justice Black, "that there is no longer the slightest excuse, reason, or justification for further postponement of the time when every public school system in the United States will be a unitary one" (Opinion in Chambers of Mr. Justice Black, Appendix F, p. 81a, *infra*).

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[15] *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337, 351-2 (1938).

[16] The Court of Appeals has held in this and other cases that interruption of the school year will be no bar to implementation of desegregation plans. See Appendix B, p. 37a, *infra; United States* v. *Jefferson County Board of Education,* 5th Cir., No. 27444, June 26, 1969.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the District Court Approving Freedom of Choice Plans

[Caption omitted]

These twenty-five school cases involving thirty-three school systems are before the Court on motions of the plaintiffs to update the *Jefferson* decree in all of these cases to comport with the requirements of *Green.*[1] The *Jefferson* decree is sometimes referred to as the model decree for the establishment of a unitary school system as such plan was designed and approved by the United States Court of Appeals for the Fifth Circuit en banc.[2] The right of these movants under existing circumstances to institute and maintain this proceeding is challenged in limine. The challenge questions the right of these plaintiffs to institute this proceeding for supplemental relief in these cases where no child or parent admittedly has complained of any discriminatory treatment by the school. In some of these cases, a final judgment was entered and it is contended that such judgments cannot be reopened for the purpose of enlarging and expanding the relief granted in the original judgment. Under Civil Rule 65(d), an injunction must be specific to be enforced. But no additional relief is sought. These plaintiffs seek not to expand or enlarge upon the relief previously granted, but simply seek to require these schools to adopt and apply a plan

[1] *Charles C. Green, et al.* v. *County School Board of New Kent County, Virginia, et al.,* 391 U.S. 430, 88 St.Ct. 1689.

[2] *United States* v. *Jefferson County Board of Education,* (5 C.A.) (1966) 372 F.2d 836, affirmed on rehearing en banc 380 F.2d 385, certiorari denied.

which will accomplish the purpose enjoined by the model decree. There is no merit in either of these motions for the reason indicated; and for the further reason that the Supreme Court of the United States has enjoined upon the United States District Courts the duty to keep these school cases open, and to supervise them to the end that ultimately the principles in *Brown* (and allied school cases)[3] are made to effectively operate so that no child in any public school is in any manner denied any equal protection right by any school. Those motions of the defendants to dismiss these motions for that reason will be denied.

The Enterprise and Quitman schools in Civil Action No. 1302(E), supra, move the Court to dismiss the motion in that case because of the lack of authority of the attorney to have filed it. The Court heard testimony on this question and finds as a fact that the attorney who filed such motion never represented the plaintiffs in that case and that he had no express or implied power or authority to have filed such motion here. The facts and circumstances thereasto will be set forth in detail in the accompanying footnote.[4]

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[3] *Charles C. Green, et al.* v. *County School Board of New Kent County, Virginia, et al.*, 391 U.S. 430, 88 S.Ct. 1689; *Arthur Lee Raney, et al.* v. *Board of Education of Gould School District*, 391 U.S. 443, 88 S.Ct. 1697; *Brenda K. Monroe, et al.* v. *Board of Commissioners of City of Jackson, Tennessee*, 391 U.S. 450, 88 S.Ct. 1700.

[4] This matter is before the Court on motion of the defendants to dismiss the motion of the *attorney* for supplemental relief. The facts show and the Court finds: That the attorney who filed the motion for supplemental relief was not one of the attorneys who initially instituted the suit; that original local counsel resigned as attorney and withdrew from the case with approval of the Court; that present counsel seeking such relief graduated from law school two or three years ago and that he does not know any of the plaintiffs and was never requested by any plaintiff (parent or child of this school) to seek any supplemental relief; that no

That motion of the defendants in said Civil Action No. 1302(E), supra, will be sustained.

Most of the schools in these cases when judged by their statistics alone do not present any impressive accomplishment or measure up to the minimum requirements of *Green* in the disestablishment of every vestige of desegregation under the old system. Most of the schools in these cases still can be recognized and operate as schools clearly identifiable by race. The facts and underlying circumstances in these cases unmistakably show that very little progress has been made in desegregating these schools, except in a very few instances. It is incumbent upon the plaintiffs in these cases to show a lack of substantial progress toward the disestablishment of a dual school system and the establishment of a unitary school system of both races. It there-

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parent, or child communicated with counsel and advised him of any discrimination, or unsatisfactory compliance by either school in its progress toward complying with the requirements of the model decree and the Court thus finds from such undisputed testimony and reasonable inferences deducible from it that counsel who signed the motion in this case for supplemental relief had no express or implied authority from any plaintiff, or parent, or child from either school to do so; that no parent or child from either school appeared at the hearing, and no representative of any parent, or any child from either school appeared at the trial during the two weeks while these school cases were being heard to testify that anybody connected with either of said schools had authorized present counsel to seek such supplemental relief, and the Court finds that present counsel (Anderson) had no such power or authority (express or implied), and that defendants' motion to dismiss his application for such relief as being unauthorized will be granted. This suit was initially instituted by non-resident counsel who never appeared in the case, and local counsel who withdrew from the case prior to the hearing, so that only Reuben V. Anderson, a young Jackson lawyer, appeared as attorney for this motion and sought by his own testimony to establish his right to do so, but entirely without factual support or justification therefor.

upon devolves upon the defendants to explain or overcome such showing by the plaintiffs. The rule is that the burden of proof always rests upon the plaintiff (or movant) who must establish proof of his claim. When the plaintiff makes out a prima facie case, then the *burden of evidence* devolves upon the defendant to explain, or justify the facts and circumstances surrounding his position, but the burden of proof never shifts from the plaintiff.

There are many variable conditions which exist in these twenty-five defendants cases that require some special and separate consideration and treatment. In some of these schools such as the Noxubee County School District, Civil Action No. 1372(E), there are from three to four colored students to each white student in these schools. A forced mixing of those schools by a mathematical formula of indiscriminate mixing would result in the creation of all Negro schools. All of these schools complain of the provision in the model decree which denies the school authorities the right to persuade parents and children to transfer to schools of the opposite race.[5] The facts in this case show that all of these schools have very faithfully obeyed that injunction of the Court. No school board member or teacher or representative of any school has tried to influence any child or any parent to send any child to any school predominantly of the opposite race. But it is the oft repeated law in this Circuit that the school board (and nobody else) has the nondelegable duty to adopt a plan which will con-

[5] That provision appears in paragraph II(o) of the *Jefferson* decree and provides: "At no time shall any *official, teacher* or *employee* of the school system influence any parent, or other adult person serving as a parent, or any student, in the exercise of a choice or favor; or penalize any person because of the choice made.

form to all of the requirements of the model decree and to see that such plan works. Every school official who testified in every one of these cases before the Court testified convincingly before this Court that this provision of this model decree had interfered with a fair and just and proper operation of the freedom of choice plan in these schools. Yet, like Prometheus (chained to a rock) these schools are ordered by the Court to shoulder this very positive and important duty of desegregating these schools while the Court denies them the right to counsel with and persuade parents to let their children enter a school predominantly of the opposite race. This Circuit has steadfastly refused to modify that provision in the model decree in any manner, or to any extent and considers such provision as an important matter of policy to be changed only by the United States Court of Appeals for this Circuit sitting en banc. This Court is unable to assay the degree to which such provision in the injunction of this Court has contributed to the failure of these schools to accomplish more impressive results than are revealed by the bare figure statistics as to mixing of the races in these schools. Certainly, these statistics cannot be ignored or disregarded and are well calculated to have an impressive effect upon any trier of facts in search of some means for determining whether or not the freedom of choice plan has worked. But there is nothing in *Green*, or its two companion cases, to indicate that statistics alone are to determine whether or not a plan works. Otherwise, a mathematical formula would have been prescribed by the Court and sound judicial discretion of this Court would have been discarded. But, instead, *Green* said: "We do not hold that 'freedom of choice' can have no place in such a plan." * * * "Although the general ex-

perience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation, there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, non-racial system there might be no objection to allowing such a device to prove itself in operation." The facts and circumstances in practically all of these cases (with a very few exceptions) show this Court to its entire satisfaction that these schools, operating under the freedom of choice plan, have operated in the very best of good faith with the Court in an honest effort to comply with and conform to all of the requirements of the model decree. In these cases so much progress has been made in the attitude and cooperation of the parents, children and teachers that they are entitled to much credit and commendation of the Court as good citizens who wish to comply with all of the requirements of the law, and to lay aside any inbred and ingrained former adverse opinions about the operation of a unitary school system.

This Court has long entertained and often expressed the view that the freedom of choice plan would not work effectively, so long as mere lip service was paid the plan by the school authorities, when the facts and circumstances would disclose that actually the parent and the child in some of these schools would not in truth and in fact be a free agent as to the school to be attended by the colored child. But a very careful examination of the witnesses and analysis of their testimony in these cases revealed to the Court not one instance where any colored parent, or colored child did not do exactly what they wanted to do in deciding as to the school which the colored child would

attend. There are many reasons (*and very important reasons*) why colored children have not sought to attend formerly all-white schools. The primary reason is that the vast majority of all schools attended by colored children qualify for the government subsidiary as "target schools." They are provided by the government with free lunches, and even improved facilities and working tools in their shops, because the majority of the parents in such schools are in low income brackets. A disruption of those benefits would be disastrous to those children who would be obliged to leave school and lose all educational advantages now available to them there. It is such facts and circumstances which have caused the courts to wisely observe, time and again, that there is no easy and quick and ready-made cure for the past ills of state enforced segregation. The problem and its cure must yield to the facts and circumstances in each particular school case. The cure must not result in a destruction of the wholesome objective of the plan. It is a sorry and very strange principle of constitutional law which would foster by its application a catastrophic destruction of the right sought to be protected and enjoyed.

Well trained colored teachers in active service in formerly colored schools and in formerly white schools in this district have appeared before this Court and convincingly testified under oath as a matter of fact that freedom of choice was actually working in their schools; that perfect harmony and understanding existed in the school and that no danger to the school system lurked in the implementation of the freedom of choice plan, but that any kind of forced mixing of the races against the wishes of the involved parents and children (colored and white) would result in an absolute and complete destruction of the school

and its system. That is likewise a fair analysis and characterization of the uncontradicted testimony of experienced expert witnesses who have spent their lives in school service in many other states. This testimony does not show that desegregation is unpopular with some parents and some children, but does positively show that any rushed and random forced mixing applied for the sake of immediate mathematical statistics would literally destroy the school system for both races. In many instances where the ratio of colored people to white people is very high, the result would be not to create just schools, but to create predominantly colored schools, readily identifiable as such in every instance. The same corresponding result would follow in areas where the white population is very dense and few Negroes live.

Surely, the policy and practice burden of these schools is not on the parents and children to provide a unitary school system, but is squarely upon the shoulder of these school boards. But what can a school board member do who is enjoined under penalty of contempt by the *Jefferson* decree not to try to persuade, or dissuade any child, or any parent as to the school which the child will attend? That *Jefferson* decree has not been amended and suggestion as to amendment of the particular section has been rejected. These board members have thus been deprived of the valuable right and opportunity to properly discharge and perform this duty so heavily resting upon them alone. Outsiders may converse with parents and children as to the school to be attended, where such others have no duty or responsibility in the connection, but school board members cannot do so. The paid agitators and transients and meddlers simply have not produced impressive results

which are statistically favorable to the school board, which has been mandated by the Court to perform its duty, but not allowed by the Court to discharge its responsibility in that connection. The Court finds from such circumstances and conditions that the mathematical statistics as to the working progress of the freedom of choice plan for this reason alone is unfair, unjust, unrealistic and misleading. The plan has not failed. The Court just has not allowed it to work.

There is nothing in *Green* which condemns the freedom of choice plan as it is working in the designated schools in this district. The Court has simply not afforded these schools a fair and just opportunity to try to improve the figure statistics of the plan at work. That opportunity should not be denied or withheld.[6]

The Natchez schools, appearing as Civil Action No. 1120 (W), have demonstrated outstanding progress with the freedom of choice plan. These schools accommodate approximately 10,400 children, 55% of whom are Negro and 45% of whom are white. There are 40 Negro teachers in the predominantly white schools and 53 white teachers in the predominantly Negro schools. There are 456 Negro children in the predominantly white schools. There are 40 white and 70 Negro children in the vocational schools. A

[6] One of the authors of the majority opinion in the *Jefferson* school case (Judge Thornberry) speaking for a panel composed of Judge Brown and District Judge Taylor, in *United States* v. *Greenwood Municipal Separate School District,* (5 C.A.) 406 F.2d 1086 held: "If it develops that no children in the school district are being denied equal protection of the laws, then no relief will be granted. This was the position taken by the Court below and by another district court which considered the same question. See *United States* v. *Junction City School District,* W.D., Arkansas, 1966, 253 F.Supp. 766. We agree."

Negro is on the school board. All decisions of the school board have been unanimous. It is the view of the Court in this case that these schools have shown satisfactory and acceptable progress under all of the facts and circumstances in complying with all of the requirements of the model decree. In this case, as in all of these cases, the bare figure statistics are misleading and tell only part of the story. There would appear to be no occasion or necessity for any updating of the model decree to meet the requirements of *Green*. The movants in this case have simply not shown that any child in this school district has been denied equal protection of the law in any instance. The defendants in this case have satisfied the Court that the freedom of choice plan has worked in that system and the plaintiffs have not shown the contrary by the greater weight of the credible evidence (including statistics). That ends our inquiry here, as set forth in footnote 6. The plaintiff's motion to update the decree in this particular case for the additional reason stated in this case will be denied.

As to the other cases, the plaintiffs have not shown by the greater weight of the more convincing evidence that the freedom of choice plan as to the other schools has not worked and that there is no probable prospect of such plan working. The plan has not been afforded an opportunity and chance to work, and it simply cannot be honestly said that the plan has not worked. It cannot be said from the evidence in this case that the plan will not work if given a chance to do so. The Court, therefore, finds as a fact and holds as a matter of law that the movants in these cases have failed to prove that such freedom of choice plan should be discarded as not workable, and that the schools should be required to adopt another plan which would work

more effectively under the model decree. That conclusion represents the best exercise by this Court of its sound judicial discretion in making that determination, and is surely not clearly erroneous on this record. Insofar as such question is committed to the sound judicial discretion of this Court even though disagreed with by an appellate court, no appellate court can pass judgment anew on that question which is addressed to the trial court and not an appellate court, as was said in *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 US 240, 84 S.Ct. 769. There it was held: "The District Court's use of an inappropriate factor did not empower the Court of Appeals to order the transfers. The function of the Court of Appeals in this case was to determine the appropriate criteria and then leave their application to the trial judge on remand." The motions of these plaintiffs to update the remaining twenty-three cases to conform with *Green* as to the working of the freedom of choice plan to desegregate the student body of these schools will be denied. The status of the faculties in these schools is another matter later to be discussed.

The underlying fundamental principle which is decreed in *Brown* and its satellite decisions is that a denial of his equal protection rights accrues to a Negro not afforded an education in public unitary school system. State enforced segregation in public schools is condemned as an obstacle and barrier to the enjoyment of such vested right. It is universally decreed by the courts at this time that every vestige and influence of such state enforced segregation must be completely eradicated from the state supported public schools; that a unitary school system shall replace the dual system of schools, so that henceforth the system shall operate schools without regard to race or color.

Opinion of the District Court Approving Freedom of Choice Plans

Most of the schools involved in these cases before the Court have accepted and adopted such principles in good faith and have made impressive strides in that field in compliance with the requirements of the model decree. But the statistics which this Circuit says speaks so loudly, that they listen thereto, do not by themselves make a very attractive bare figure picture of any rewarding or impressive accomplishment. But these statistics alone are misleading, and do not truly and convincingly reflect the facts and circumstances as they actually exist. Surely, a school board is not responsible and is not accountable for a completely voluntary choice of a Negro child who wishes to attend the school which is attended predominantly by Negroes; yet, such a choice would be reflected in these statistics as a failure of the school board to discharge its duty, when the school board is enjoined not to persuade or dissuade the child or the parent in such decision. It simply may not be honestly said under such circumstances that the freedom of choice plan has not worked in such a case! The vast majority of colored children simply do not wish to attend a school which is predominantly white, and white children simply do not wish to attend a school which is predominantly Negro, and that ingrained and inbred influence and characteristic of the races will not be changed by any pseudo teachers, or sociologists in judicial robes. If forced mixing is the ultimate goal in these cases, then extreme care must be exercised by more knowledgeable and more experienced men than mere judges of trial and appellate courts to avoid a complete disruption of our entire educational system in this district. It is easy for a judge in an ivory tower, aloof and afar from the actual working circumstances and conditions in these schools, to rationalize and unilaterally decree the

answer to problems with which he is not familiar and without regard to and consideration for the completely insurmountable barriers to the suggested course of solution. This Court certainly does not possess any of the training, or skill, or experience or facilities necessary to operate any kind of schools; and unhesitatingly admits to its utter incompetence to exercise, or exert any helpful power or authority in that area. These school boards are thus confronted with many very serious and perplexing school problems which will command the very highest skill of their expertise in discharging and performing in accordance with the requirements of law. The responsibility is strictly theirs to carry out the mandate of this Court under penalty of sanctions. If the HEW has any competent and experienced administrative people who could completely divest themselves of all political ambitions and influence, it is possible that they could be of some help to these boards in devising and administering plans for the complete desegregation of these schools without injury to the educational objective. But plans heretofore have not been meaningful or helpful in criticisms thereof before this Court, and have resulted in nothing but a waste of time. Nobody needs any more guidelines or plans any longer to be completely informed of the duty of these school boards. It is unmistakably clear now that this duty does not rest on the parent or on the child to make these plans work, but such duty rests squarely and alone upon the shoulders of these school board members. It is their duty under the injunction heretofore issued by this Court to see that the existing freedom of choice plan for the desegregation of these public schools works now, or will work in the immediate future. If and when it becomes apparent to the Court that a plan is working to the

degree that no parent or child of either race can convince the Court that some child is being denied the equal protection of the laws under the Fourteenth Amendment to the Federal Constitution by the policy and operating practices of a publicly supported school, then the plan in operation must be said to be working and any additional relief requested should be denied. Those are exactly the facts and circumstances established before this Court without any dispute, or contradiction in the evidence in this record on that question. The rule in this Circuit under such facts and circumstances is that further relief should be denied. That is the rule of this Circuit as declared in *United States* v. *Greenwood Municipal Separate School District,* supra, where it is said: "If it develops that no children in the school district are being denied equal protection of the laws, then no relief will be granted. This was the position taken by the Court below and by another district court which considered the same question. See *United States* v. *Junction City School District,* W.D., Arkansas, 1966, 253 F.Supp. 766. We agree."

Now as to the faculty. Very little progress has been made by any of these other schools in desegregating the faculties. That is a monumental job as the evidence in this record shows for several reasons. Teachers are not well paid in this district, and the schools are simply not in a position to crack any whip over their heads. Actually, the facts show that there is such a scarcity of available teachers in this district that many of the Schools have been unable to complete their present faculty requirements. The evidence in this record does not show one single instance where there has been any discrimination on the part of any school authority in hiring teachers. In many of these schools, the

teachers are married and simply teach schools as sort of an avocation without regard to the adequacy of the salary, because they live in the town where the school is situated and they are not dependent for their livelihood on such salary. Several of these schools are obliged to compete with the United States Government where their schools are operated on Indian reservations financed by the Government. Such teachers are paid much more attractive salaries than the neighboring adjoining state schools can afford to pay from their limited budgets. These teachers who thus contract with these school boards insist upon designating in the contract the school at which they will teach at such reduced salary. Now, it is very unrealistically suggested that the school board should disregard such provision in their contract, and should stand upon the suggestion or legal advice (as dicta in this Circuit) that such teachers be assigned without regard to terms of the contract, and use such court advice as a defense, if sued upon such contract, or breach thereof. Surely, a teacher has a vested right to teach where he or she pleases, and the teacher owes no duty to the contrary to anybody. It is certainly not difficult to foresee the calamitous result which would follow the pursuit of such a suggestion in the state court trial, and the result which would accrue to the school. That simply is not the answer to the problem, and no panacea is offered here, but these schools surely do have a very positive duty to uproot and remove every vestige of the former segregated policies which were for so long state enforced in this area. This Circuit has frequently expressed its impatience, and at times with some petulance, at the schools' lack of progress in complying with the literal requirements of the *Jefferson* decree. *United States* v. *Board of Education of*

the City of Bessemer, (5 C.A.) 396 F.2d 44 imposes upon school boards the positive duty to desegregate faculties, with the sanction of discharge, if a teacher refuses an assignment in furtherance of an order of the board. Target dates must be set for the ultimate accomplishment of such result of complete integration of the faculty by the school year 1970-1971 says this Circuit. Cf: *United States* v. *Greenwood Municipal Separate School District,* 406 F.2d 1086, 1093-4.

Montgomery County Board of Education v. *Arlam Carr, Jr.,* (5 C.A.) 400 F.2d 1 holds: That good faith in a court of equity in this sensitive area of desegregation is an important element; that there must be target dates for the accomplishment of faculty desegregation; that there can be no mixing by any numerical or racial percentage ratio of faculty which would enlarge upon the requirements of the model decree; that there shall be no hard and fast rule as to exact percentages, but only approximations of such ratios that must remain flexible. [Certiorari granted and set for argument on April 21 and April 28 calendars in United States Supreme Court.]

In sum, and by way of recap of the finding of facts by the Court as to all remaining schools before the Court in this record, the Court expressly finds from the uncontradicted, undisputed credible evidence offered before it in this case that:

(1) The freedom of choice plan in all of these cases is universally acclaimed by both races in all schools as being most desirable, most workable and acceptable by everybody. Nobody testified to anything to the contrary or to anything better. Every witness who testified on both sides testified substantially to the same effect. There is no substantial dis-

pute or contradiction of such fact to be found anywhere in this record as to any school. The movants had no witnesses of their own, but used only teachers or officials of these schools as their witnesses.

(2) The target schools are accomplishing a very effective and wholesome purpose and these schools should not be disturbed or disrupted in their service under federal law to these underprivileged children who could not otherwise afford to attend any school.

(3) Extracurricula activities are being engaged in on a gradual and cautious basis in this particular delicate area, which can easily result in a destruction of the entire program for both races by any precipitous action of a court in the exercise of its equity jurisdiction even in the very best of good faith.

(4) No parent and no child in any school has complained to anybody of any discriminatory treatment accorded any child, or of any alleged failure of the freedom of choice plan to operate effectively as to anybody in any one of these schools before the Court; and no parent and no child in any school before the Court appeared here to testify in support of any one of the plaintiffs' motions to show any necessity or propriety for updating the model decree.

(5) No school in the district has attained the figure degree of mixing of the races among the students to equal that condemned in *Green* as being unsatisfactory, but it cannot be said as a matter of fact that the freedom of choice plan has failed in these school sprimarily because the board (and all teachers and officials) have been enjoined and are still enjoined not to try to persuade any child or any parent to mix with the opposite race so as to make such freedom of

choice plan work. No school can be criticized or penalized for not making such plan work when they were enjoined by the Court not to try to make it work.

(6) There is no proof anywhere to be found in this record that any school board or other school authority has done anything (or not done something that should have been done) which has denied any child (black or white) of the equal protection of the laws under the Federal Constitution. That should end the inquiry here under footnote 6, supra.

(7) No school has violated, or neglected any duty under the *Jefferson* decree entered by this Court in any one of these cases.

(8) Each school board has done everything possible, which it was authorized by the model decree to do, to establish and operate a unitary school system in each of the districts before the Court and have made satisfactory and acceptable progress to that end.

(9) Faculties should and must be desegregated as required by the model decree. A target date must be set by a plan and must be met, as the orders of the United States Court of Appeals for this Circuit demand. *United States* v. *Bessemer,* 396 F.2d 44; *United States* v. *Greenwood Municipal Separate School District,* 406 F.2d 1086, 1093-4; *Montgomery County Board of Education* v. *Arlam Carr, Jr.,* 400 F.2d 1.

(10) The detailed facts as to progress figures as to mixing of the races in the various schools are as shown in the reports of the schools filed with the Court, and are not impressive as figure statistics in such limited and distorted view of the workings of the freedom of choice plan.

(11) Any additional findings or conclusions, under Civil Rule 52, desired by any party may be submitted to the Court for its proper action within ten days after date of this opinion.

Finally, it is the duty of each of these remaining twenty-three schools to adopt a plan for the desegregation of the faculties of such schools, and for the fixation of a target date therefor, and to meet such target date in accordance with the cited decisions of this Circuit on that question. Time is too short between now and the commencement of the fall sessions of school to contemplate filing plans and having hearings on such plans in the interim. As previously stated, these hearings accomplish absolutely nothing, and result in extensive arguments and delays with no corresponding benefit or accomplishment. But each school in this group will be enjoined more specifically than heretofore to commence and make some substantial progress in the desegregation of the faculty at each school at the 1969 fall session with the target date as fixed by the cited decisions from this Circuit. The motions of the plaintiffs in the twenty-three remaining cases before the Court will be sustained to the extent stated.

The plaintiffs (or movants) in each of the twenty-five school cases before the Court are directed to furnish the Court with all separate orders in these cases in conformity with the provisions of this opinion, and within the time required by the rules of this Court.

May 13, 1969

/s/ HAROLD COX
United States District Judge
/s/ DAN M. RUSSELL, JR.
United States District Judge
/s/ WALTER L. NIXON, JR.
United States District Judge

Order of the District Court dated May 16, 1969

[Caption omitted]

Pursuant to the opinion of Court dated May 13, 1969, it is hereby ordered:

1. That plaintiffs' Motion for a New Plan of Desegregation is denied;

2. That defendants will continue to operate schools located within the Holmes County School District under a freedom of choice plan of desegregation;

3. That defendants shall take positive and affirmative steps to achieve complete desegregation of school facilities so that by the 1970-71 school year the pattern of teacher assignments to each school is not identifiable as tailored for a heavy concentration of either Negro or white pupils. In order to insure full compliance by the commencement of the 1970-71 school year, defendants shall achieve substantial faculty and staff desegregation by the 1969-70 school year.

ORDERED, this 16th day of May, 1969.

/s/ HAROLD COX
United States District Judge

Order of the District Court dated May 16, 1969

[Caption omitted]

Pursuant to the opinion of this Court, dated May 13, 1969, it is hereby ordered that defendants' Motion to Dismiss plaintiffs' Motion for a New Plan of Desegregation is sustained.

ORDERED, this 16th day of May, 1969.

/s/ HAROLD COX
United States District Judge

Order of the District Court dated May 29, 1969

[Caption omitted]

This cause came on to be heard on the Motion of defendants for an order making additional findings herein, said Motion having been filed in this cause by defendants on May 21, 1969, and requesting that the Court amend the Opinion of this Court in this cause dated May 13, 1969 by adding thereto additional findings, and it appearing that the Motion should be granted, it is ordered that the following additional findings be added to the findings heretofore made in this action in the Opinion of this Court dated May 13, 1969:

From the uncontradicted, undisputed, credible evidence offered in this case, that:

1. The disparity between the achievement of the vast majority of the white pupils of the district and the achievement of the vast majority of the Negro pupils of the district is such that an indiscriminate forced attendance of any substantial preconceived percentage or ratio of both races to any particular school would result in pupils of such widely varying achievement abilities being placed in the same class or grade that irreparable damage would be done to the education of all of the pupils in such class or grade and the education of all such pupils would be seriously and adversely affected.

2. The educational desirability of permitting pupils to be in classes or grades where they can identify with the other pupils and where they, within reason, can achieve along with the other pupils in such class or grade is highly important and, under the facts in this case, more than offsets any advantages that might be

obtained by attempting to compel or force pupils to attend a particular school because of his race in order to achieve a larger percentage of an ethnic group at such school.

3. The freedom of choice plan in effect in this school district will result in more statistical mixing of the ethnic groups in the schools of this school district than will any other plan available to the defendants.

4. There is no basis for assuming that the percentage or ratio of ethnic groups at any particular school in a school district would be of more significance in a school district that has a history of *de jure* segregation than in a school district that has a history of *de facto* segregation.

It is further ordered that the making of these additional findings does not require any change in or amendment to the order of this Court dated May 16, 1969, which was entered pursuant to the foregoing opinion.

ORDERED, this the 29th day of May, 1969.

/s/ HAROLD COX
United States District Judge
/s/ DAN M. RUSSELL
United States District Judge
/s/ WALTER M. NIXON
United States District Judge

APPENDIX B

Letter Directive of the Court of Appeals of June 25, 1969

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

ROOM 408-400 ROYAL ST.
NEW ORLEANS, LA. 70130

June 25, 1969

To COUNSEL LISTED BELOW

Nos. 28030 and 28042
United States v. Hinds County School Board, et al.

Gentlemen:

I am directed by the Court to forward the following instructions regarding the 25 consolidated Mississippi school cases (U.S. v. Hinds County School Board, et al.):

1. The Court will hear oral argument on all of these cases on the motion for summary reversal and the merits in all of the cases both private plaintiffs and those of the United States. The argument will be held in New Orleans beginning 9:30 A.M., Wednesday, July 2. Counsel should hold themselves in availability for Thursday, July 3, as well. The parties will work out amongst themselves a suitable proposed schedule of orders and probable times. The Court does not put any specific limitation on time but of course desires no unnecessary repetition.

Letter Directive of the Court of Appeals of June 25, 1969

2. The United States is to arrange for a court reporter, the cost to be charged as costs in the case.

3. The parties are free to file in typewritten form, with xerox copies or similar reproduction, any additional memomoranda or briefs and it would be helpful if copies are simultaneously sent both to the Clerk and to the Judges at their home stations. Special effort should be made to have any memoranda, responses, etc. in the Clerk's office by Noon, Tuesday, July 1. Responses and rejoinders will be permitted as desired.

4. The District Clerk is to furnish, and the U .S. Department of Justice is to procure and have available in the courtroom for use by the Judges on the bench, with respect to each school district involved, copies of the latest statistical report required to be filed with the District Court under the Jefferson type decree theretofore entered. Counsel are also directed to supply hopefully in a mutually agreeable way a consolidated recap which sets out the statistical data substantially in the format of the Exhibit "J" attached to the motion of the private plaintiffs-appellants covering each of the Boards of Education. If desired, these tables may be adapted to show relative percentages of all pertinent items including those set forth in Exhibits A through D attached to the response to motion for summary reversal filed June 20 by Messrs. Bridforth and Satterfield.

5. The Court takes notice of Judge Cox's order with respect to the record but since the appeal is being expedited on the original record without reproduction required or permitted, the U. S. Attorney shall make ar-

rangements with the District Clerk to transmit to the Clerk of the Court of Appeals the entire record of the District Court including the transcript of the evidence in all of the cases so that it will be available to the Court as needed during argument and submission. The Court contemplates, however, that the record may be returned in a very short time. If the District Clerk prefers, it would be quite in order for him, one of his deputies, or the U.S. Attorney to transport and deliver the record to the Clerk of the Court of Appeals.

6. The Court's general approach will be to accept the fact findings of the District Court and to determine what, if any, legal relief is now required best thereon. To the extent that appellants, private or government, assert that any one or more specific fact findings (as distinguished from mixed questions of law and fact) are clearly erroneous, the appellants' concerned shall xerox copies of pertinent excerpts of the transcript of the evidence for use by the Judges (4 copies) which may be made available during argument.

7. To enable the Court to announce a decision as quickly as possible after submission, the appellants are requested to file in 15 copies a proposed opinion-order with definitive time table and provisions on the hypothesis that the appeal will be sustained. These should be modeled somewhat on the form used by the Court in its recent opinions in *Hall, et al.* v. *St. Helena Parish School Board, et al.*, No. 26450, May 28, 1969, and *Davis, et al.* v. *Board of School Commissioners of Mobile County, et al.*, No. 26886, June 3, 1969. When and as additional opinion-orders of this type are issued in other school desegregation cases, copies will be

immediately transmitted to all counsel so that the parties can make appropriate comments during argument with respect to suggested modifications or changes in their proposed opinion-orders.

The Court hopes that the appellants, private and government, can collaborate and submit a mutually agreeable proposed opinion-order and it desires from the appellees contrary proposed orders covering separately (a) on the hypothesis that the decrees of the District Court will be affirmed, and (b) on the hypothesis that the appellants' motion and appeals will be sustained for reversal.

8. The Court recognizes that this is a huge record involving a large number of parties and matters of great public interest and importance. Everyone will be heard but the Court also expects the distinguished counsel who appear in this case to collaborate in the best traditions of the bar to the end that waste of time and effort is eliminated and repetition avoided as much as possible. The Clerk will stand ready to be of whatever assistance he can in meeting this very compressed time schedule.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ GILBERT F. GANUCHEAU
Gilbert F. Ganucheau
Chief Deputy Clerk

GFG:adg

cc: (See attached list)

Opinion of the Court of Appeals of July 3, 1969

[Caption omitted]

Before

BROWN, *Chief Judge,*

THORNBERRY and MORGAN, *Circuit Judges.*

PER CURIAM:

As questions of time present such urgency as we approach the beginning of the new school year September 1969-70, the court requested in advance of argument that the parties submit proposed opinion-orders modeled after some of our recent school desegregation cases. We have drawn freely upon these proposed opinion-orders.

These are twenty-five school desegregation cases in a consolidated appeal from an en banc decision of the U. S. District Court for the Southern District of Mississippi. These cases present a common issue: whether the District Court erred in approving the continued use by these school districts of freedom of choice plans as a method for the disestablishment of the dual school systems.

The plaintiffs' position is that the District Court erred in failing to apply the principles announced in recent decisions of the Supreme Court and of this Court.

These same school districts, along with others, were before this Court last year in *Adams* v. *Mathews,* 403 F.2d 181 (5th Cir., 1968). The cases were there remanded with instructions that the district courts determine:

> (1) whether the school board's existing plan of desegregation is adequate "to convert [the dual system] to a unitary system in which racial discrimination

> would be eliminated root and branch" and (2) whether the proposed changes will result in a desegregation plan that "promises realistically to work now."

403 F.2d at 188. In determining whether freedom of choice would be acceptable, the following standards were to be applied:

> If in a school district there are still all-Negro schools or only a small fraction of Negroes enrolled in white schools, or no substantial integration of faculties and school activities then, as a matter of law, the existing plan fails to meet constitutional standards as established in *Green.*

Ibid.

In all pertinent respects, the facts in these cases are similar. No white student has ever attended any traditionally Negro school in any of the school districts. Every district thus continues to operate and maintain its all-Negro schools. The record compels the conclusion that to eliminate the dual character of these schools alternative methods of desegregation must be employed which would include such methods as zoning and pairing.

Not only has there been no cross-over of white students to Negro schools, but only a small fraction of Negro students have enrolled in the white schools.[1] The highest per-

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[1] Illustrative are the following tables, corrected to the latest available data furnished and checked by counsel, in the cases in which the Government is a party showing the racial character of the schools in each district and the enrollment by race:

centage is in the Enterprise Consolidated School District, which has 16 percent of its Negro students enrolled in white schools—a degree of desegregation held to be inadequate in *Green* v. *County School Board,* 391 U. S. 430 (1968). The statistics in the remaining districts range from a high of 10.6 percent in Forrest County to a low of 0.0 percent in Neshoba and Lincoln Counties. For the most part school activities also continue to be segregated. Although Negroes attending predominantly white schools do participate on teams of such schools in athletic contests, in none of the districts do white and all-Negro schools compete in athletics.

RACIAL CHARACTER

District	*Total Number of Schools*	*All-Negro*	*All-White*	*Predominantly White*
Amite	5	2	1	2
Canton	5	3	–	2
Columbia	4	1	–	3
Covington	7	3	1	3
Forrest	9	1	2	6
Franklin	3	1	–	2
Hinds	22	10	1	11
Kemper	5	2	1	2
Lauderdale	5	1	2	2
Lawrence	7	2	3	2
Leake	7	3	3	1
Lincoln	6	2	3	—
Madison	8	4	–	4
Marion	5	1	2	2
Meridian	19	8	–	11
Natchez-Adams	15	7	–	8
Neshoba	2	1	–	1
North Pike	4	1	2	1
Noxubee	6	3	–	3
Philadelphia	3	1	1	1
Sharkey-Issaquena	5	4	–	1
Anguilla-Line	3	2	–	1
South Pike	7	2	–	5
Wilkinson	4	2	–	2

(Continued on opposite page)

These facts indicate that these cases fall squarely within the decisions of the Supreme Court in *Green* and its companion cases and the decisions of this Court. See *United States* v. *Greenwood Municipal Separate School District,* 406 F.2d 1086 (5th Cir. 1969); *Henry* v. *Clarksdale Municipal Separate School District,* No. 23,255 (5th Cir., March 6, 1969); *United States* v. *Indianola Municipal Separate School District,* No. 25,655 (5th Cir., April 11, 1969; *An-*

ENROLLMENT BY RACE AND PERCENTAGE OF NEGROES IN WHITE SCHOOLS

	1968-1969 Enrollment		*Negroes in White Schools*	
District	*Negro*	*White*	*Number*	*Percentage*
Amite	2,649	1,484	63	2.4 %
Canton	3,440	1,352	4	.11%
Columbia	912	1,553	60	6.6 %
Covington	1,422	1,968	89	5.1 %
Forrest	480	3,085	81	16.9 %
Franklin	1,029	1,124	38	3.7 %
Hinds	7,409	6,559	481	6.5 %
Kemper	1,896	786	11	.58%
Lauderdale	1,872	3,060	26	1.4 %
Lawrence	1,263	1,889	32	2.5 %
Leake	1,568	1,950	67	4.3 %
Lincoln	941	1,149	5	.2 %
Madison	3,198	1,128	41	1.3 %
Marion	1,082	1,741	34	3.1 %
Meridian	3,974	5,805	606	15.2 %
Natchez-Adams	5,509	4,496	541	9.8 %
Neshoba	591	1,875	1	.16%
North Pike	632	708	2	.31%
Noxubee	3,002	829	95	3.2 %
Philadelphia	406	923	11	2.7 %
Sharkey-Issaquena	1,241	603	104	6.4 %
Anguilla-Line	769	207	30	3.9 %
South Pike	1,737	994	46*	2.6 %
Wilkinson	2,032	689	55	2.7 %

Note: There is a disagreement over proper accounting for some special classes which, for these purposes, we consider unimportant.

thony v. *Marshall County Board of Education,* No. 26,432 (5th Cir., April 15, 1969); *Hall* v. *St. Helena Parish School Board,* No. 26,450 (5th Cir., May 28, 1969); *Davis* v. *Board of School Commissioners of Mobile County,* No. 26,886 (5th Cir., June 3, 1969); *United States* v. *Jefferson County Board of Education,* No. 27,444 (5th Cir., June 26, 1969); *United States* v. *Choctaw County Board of Education,* 5 Cir. 1969, F.2d (No. 27, 297, July 1, 1969); *United States* v. *The Board of Education of Baldwin County,* 5 Cir. 1969, F.2d (No. 27,281, July 1, 1969); *United States* v. *The Board of Education of the City of Bessemer,* 5 Cir. 1969, F.2d (Nos. 26,582; 26,583; 26,584; July 1, 1969). The proper conclusion to be drawn from these facts is clear from the mandate of *Adams* v. *Mathews, supra*: "as a matter of law, the existing plan fails to meet constitutional standards as established in *Green.*"

We hold that these school districts will no longer be able to rely on freedom of choice as the method for disestablishing their dual school systems.

This may mean that the tasks for the courts will become more difficult. The District Court itself has stated that it "does not possess any of the training or skill or experience or facilities to operate any kind of schools; and unhesitatingly admits to its utter incompetence to exercise or exert any helpful power or authority in that area." And this Court has observed that judges "are not educators or school administrators." *United States* v. *Jefferson County Board of Education, supra* at 855. Accordingly, we deem it appropriate for the Court to require these school boards to enlist the assistance of experts in education as well as desegregation; and to require the school boards to cooperate with them in the disestablishment of their dual school systems.

With respect to faculty desegregation, little progress has been made.[2] Although Natchez-Municipal Separate District has a level of 19.2% and Lawrence County a level of 10.6%, seven school districts have less than one full-time teacher per school assigned across racial lines. In the remaining systems, fewer than 10 percent of the full-time faculties teach in schools in which their race is in the minority. Faculties must be integrated. United States v. Montgomery

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[2] The latest corrected figures (see Note 1 supra) are:

	Full & part time teachers		*Full time desegregating teachers*		*Part time desegregating teachers*	
District	*Negro*	*White*	*Negro*	*White*	*Negro*	*White*
Amite	95	66	0	0	0	0
Canton	120	81	3	11	1	9
Columbia	43	71	5	4	0	4
Covington	64	103	3	3	1	5
Forrest	43	122	4	3	1	2
Franklin	44	45	3	4	1	1
Hinds	295	281.9	22	0		
Kemper	68	45	0	1	0	3
Lauderdale	82	131	8	3	0	0
Lawrence	50	81	10	4	0	1
Leake	87	90	0	3	0	1
Lincoln	38	74	0	0	0	0
Madison	147	66	0	8	0	1
Marion	48	96	4	6	0	0
Meridian	180	317	8	17	4	10
Natchez-Adams	484		0	0	40	53
Neshoba	35	86	0	3	0	2
North Pike	26	30	1	2	1	2
Noxubee	135	61	6	1	0	0
Philadelphia	25	46	0	0	0	2
Sharkey-Issaquena	71	31	0	0	0	0
Anguilla-Line			0	0	0	0
South Pike	78	52.8	2	3.3	0	2
Wilkinson	97	39	0	6	0	0

County Board of Education, No. 798, at 8 (Sup.Ct., June 2, 1969). Minimum standards should be established for making substantial progress toward this goal in 1969 and finishing the job by 1970. United States v. Board of Education of the City of Bessemer, 5 Cir., 1968, 396 F.2d 44; Choctaw County, supra, Baldwin County, supra.

The Court on the motion to summarily reverse or alternatively to expedite submission of the case filed by the Government and the private plaintiffs concluded that fundamental constitutional rights of many persons would be jeopardized, if not lost, if this Court routinely calendared this case for briefing and argument in the regular course. Before we could ever hear it, the opening of the school year September 1969-1970 would have gone by. With this and the total absence of any new issue even resembling a constitutional issue in this much litigated field, we therefore concluded that the appeals should be expedited. Full arguments were had and representatives from every District were heard from. In the course of these arguments, several contentions were made as to which we make these additional specific comments.

Based upon opinion surveys conducted by presumably competent sampling experts, testimony of school administrators, board members, and educational experts, the School Districts urged, and the District Court found in effect, that the failure of a single white student to attend an all-Negro school was due to the provisions of our *Jefferson* decree which in effect prohibited school authorities from influencing the exercise of choice by students or parents. We find this completely unsupported. This record affords no basis for any expectation of any substantial change were the provision modified.

Based upon similar testimony, the School Districts urged a related contention that the uncontradicted statistics showing only slight integration are not a reliable indicator of the commands of *Green*. This argument rests on the assertion that quite apart from a prior dual race school system, there would be concentration of Negroes or white persons from what was described as "polarization." To bolster this, they pointed to school statistics in non-southern communities. Statistics are not, of course, the whole answer, but nothing is as emphatic as zero, and in the face of slight numbers and low percentages of Negroes attending white schools, and no whites attending Negro schools, we find this argument unimpressive.

In the same vein is the contention similarly based on surveys and opinion testimony of educators that on stated percentages (e.g., 20%, 30%, 70%, etc.), integration of Negroes (either from influx of Negroes into white schools or whites into Negro schools), there will be an exodus of white students up to the point of almost 100% Negro schools. This, like community response or hostility or scholastic achievement disparities, is but a repetition of contentions long since rejected in Cooper v. Aaron, 1958, 358 U.S. 1, —— S.Ct. ——, —— L.Ed. ——; Stell v. Savannah-Chatham County Bd. of Ed., 5 Cir., 1964, 333 F.2d 55, 61; and United States v. Jefferson County Bd. of Ed., 5 Cir., 1969 —— F.2d —— [No. 27444, June 26, 1969].

The order of the District Court in each case is reversed and the cases are remanded to the District Court with the following direction:

1. These cases shall receive the highest priority.

2. The District Court shall forthwith request that educators from the Office of Education of the United States

Department of Health, Education and Welfare collaborate with the defendant school boards in the preparation of plans to disestablish the dual school systems in question. The disestablishment plans shall be directed to student and faculty assignment, school bus routes if transportation is provided, all facilities, all athletic and other school activities, and all school location and construction activities. The District Court shall further require the school boards to make available to the Office of Education or its designees all requested information relating to the operation of the school systems.

3. The board, in conjunction with the Office of Education, shall develop and present to the District Court before August 11, 1969, an acceptable plan of desegregation.

4. If the Office of Education and a school board agree upon a plan of desegregation, it shall be presented to the District Court on or before August 11, 1969. The court shall approve such plan for implementation commencing with the 1969 school year, unless within seven days after submission to the court any party files any objection or proposed amendment thereto alleging that the plan, or any part thereof, does not conform to constitutional standards.

5. If no agreement is reached, the Office of Education shall present its proposal to the District Court on or before August 11, 1969. The Court shall approve such plan for implementation commencing with the 1969 school year, unless within seven days a party makes proper showing that the plan or any part thereof does not conform to constitutional standards.

6. For plans to which objections are made or amendments suggested, or which in any event the District Court will not approve without a hearing, the District Court shall

hold hearings within five days after the time for filing objections and proposed amendments has expired. In no event later than August 21, 1969.

7. The plans shall be completed, approved, and ordered for implementation by the District Court no later than August 25, 1969. Such a plan shall be implemented commencing with the beginning of the 1969-1970 school year.

8. Because of the urgency of formulating and approving plans to be implemented for the 1969-70 school term it is ordered as follows: The mandate of this Court shall issue immediately and will not be stayed pending petitions for rehearing or certiorari. This Court will not extend the time for filing petitions for rehearing or briefs in support of or in opposition thereto. Any appeals from orders or decrees of the District Court on remand shall be expedited. The record on any appeal shall be lodged with this court and appellants' brief filed, all within ten days of the date of the order or decree of the district court from which the appeal is taken. Appellee's brief shall be due ten days thereafter. The court will determine the time and place for oral argument if allowed. The court will determine the time for briefing and for oral argument if allowed. No consideration will be given to the fact of interrupting the school year in the event further relief is indicated.

REVERSED AND REMANDED WITH DIRECTIONS

Modification of Order of the Court of Appeals of July 25, 1969

[Caption omitted]

Before

BROWN, *Chief Judge,*
THORNBERRY and MORGAN, *Circuit Judges.*

PER CURIAM:

The opinion published in the above styled cases on July 3, 1969 is hereby modified by renumbering former paragraph 8 to be number 7 and striking from such order, on pages 17 and 18, paragraphs 5, 6 and 7 in their entirety, and inserting in lieu thereof new paragraphs 5 and 6 which shall read as follows:

5. If no agreement is reached, the Office of Education shall present its proposal for a plan for the school district to the district court on or before August 11, 1969. The parties shall have ten (10) days from the date such a proposed plan is filed with the district court to file objections or suggested amendments thereto. The district court shall hold a hearing on the proposed plan and any objections and suggested amendments thereto, and shall enter a plan which conforms to constitutional standards no later than ten (10) days after the time for filing objections has expired.

6. A plan for the school district shall be entered for implementation by the district court no later than September 1, 1969 and shall be effective for the beginning of the 1969-1970 school year. The district court shall enter Findings of Fact and Conclusions of Law

regarding the efficacy of any plan which is approved or ordered to immediately disestablish the dual school system in question. Jurisdiction shall be retained, however, under the teaching of *Green* v. *County School Board of New Kent County,* 391 U. S. 430, 439 (1968), and *Raney* v. *Board of Education of Gould School District,* 391 U.S. 443, 449 (1968), until it is clear that disestablishment has been achieved.

APPENDIX C

Letter of August 11, 1969 Transmitting Desegregation Plans From United States Office of Education to the District Court

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION
WASHINGTON, D. C. 20202

August 11, 1969

Judge William H. Cox
United States District Court
Southern District of Mississippi
Post Office Drawer 2447
Jackson, Mississippi 39205

Dear Judge Cox:

Re: United States of America v.
Hinds County School Board et al
and related cases subject to the
Court's Order of July 5, 1969

The enclosed desegregation plans were developed as a result of the Court's Order of July 5, 1969, in the above-referenced cases.

The technical assistance teams who carried out this work were made up of 27 educators and were under the direction of Mr. Jesse J. Jordan, Senior Program Officer of the Division of Equal Educational Opportunities, U. S. Office of Education, Department of Health, Education, and Welfare, headquartered in Atlanta, Georgia. (Attachment A contains identifying information for each of the 27 educators involved.)

Letter of August 11, 1969 Transmitting Desegregation Plans From United States Office of Education to the District Court

On July 11, 1969, I wrote to the superintendent of each school district named in the Order, advising him of the availability of services in the development of a desegregation plan. The letter provided the name, address, and telephone number of Mr. Jordan, and described the various types of information which would be needed from the school district for us to use in preparing a desegregation plan. (Attachment B is an example of this letter.)

Shortly after I sent my letter of July 11 to the Superintendents, we contacted each by telephone and an appointment was made for a technical assistance team to visit the school district to gather all the materials necessary for developing a desegregation plan. As a result of cooperation between the local school officials and the technical assistance personnel, the following data were acquired:

1) Building information—by school, the number of permanent teaching stations, capacity of each building, current student enrollment by race and grade, number of full-time and part-time teachers by race, number of students transported, age of building, type of construction, size of school site, and list of facilities such as cafeteria, gymnasium, library, etc.

2) Proposed building information—future construction plans.

3) Pupil Locator Maps (where available)—to show residence of Negro and white students.

4) School and School Site Map—to show location of each school in the district, coded as to grade levels of students.

5) Demographic Information (where available)—giving population distribution of the community by race.

Letter of August 11, 1969 Transmitting Desegregation Plans From United States Office of Education to the District Court

A technical assistance team, composed of at least two (2) trained educators, visited or offered to visit each of the school districts at least three (3) times during this period. On the first visit, they viewed existing school facilities, gathered data, and discussed with local school officials their ideas for school desegregation and the administrative problems involved. On the second visit, they discussed with local school officials the team's tentative thoughts concerning a desegregation plan for the district, and attempted to elicit the ideas of the school officials as to alternative sound and feasible desegregation plans. Where the offer of a third visit was accepted, the team presented to the school officials the plan which the Office of Education intended to recommend to the Court, subject to amendments resulting from this meeting. At all times the Office of Education staff attempted to collaborate with the school officials in developing an effective and mutually acceptable plan.

The information we have used in formulating our plans was obtained, unless otherwise stated, from school district officials. For example we have described in each plan the information on which it is based. At the end of the proposed plans, we have inserted photocopies of reports and building information forms. While these are not signed, the information in them was furnished by officials of the school district. We were unable to duplicate maps which we used. We have attempted to indicate those instances where information is the result of observation of our staff.

In some cases school officials were not able to furnish precise information about student residences by race (pupil locator), or other demographic information. Also, in *most* instances, school officials did not furnish us with an estimate of enrollment for the 1969-70 school year, other than projec-

tions of the 1968-69 enrollment. The enrollment of each school district is stable enough to make use of such projections, a generally acceptable practice, in planning for the use of schools for the 1969-70 school year. In some cases, however, it is possible that these projections do not accurately reflect the numbers of children who reside in the area of a given school. This possibility stems from the fact that traditionally in these school districts there has been extensive bussing of children to schools outside the areas of their residence.

Where our information was not precise enough, we avoided drawing exact geographic boundaries for school attendance areas. Rather, we provided guides from which these lines can be drawn to achieve at least the measure of desegregation indicated in the projection tables of our proposals. Because each proposal was not prepared by the same individual, this concept is worded in several different ways. In each case, however, we intend the same meaning. For example, when we recommend that children attending a certain school shall be assigned as specified or that children from a particular school be assigned to a specified place, we mean that all children living in the area of the school that is named should be so assigned through adoption of attendance lines so drawn as to utilize properly the school facilities and achieve at least the measure of desegregation indicated in the proposal. It should be clear that in such a case, we do not intend to recommend that a child who has been bussed into the area from another area under freedom of choice is to continue to attend that school, except possibly pursuant to a proper transfer policy, including one for majority-to-minority transfer as described in Section VI of our proposals.

Letter of August 11, 1969 Transmitting Desegregation Plans From United States Office of Education to the District Court

I believe that each of the enclosed plans is educationally and administratively sound, both in terms of substance and in terms of timing. In the cases of Hinds County, Holmes County, and Meridian, the plans that we recommend provide for full implementation with the beginning of the 1970-71 school year. The principal reasons for this delay are construction, and the numbers of pupils and schools involved. In all other cases, the plans that we have prepared and that we recommend to the Court provide for complete disestablishment of the dual school system at the beginning of the 1969-70 school year. Should the Court decide, however, to defer complete desegregation in any of these school districts beyond the opening of the coming school term, we have prepared and set out in the plans, steps which could, in our judgment, be taken this fall to accomplish partial desegregation of the school system at the opening of the 1969-70 school term.

The entire staff who participated wish to express appreciation for the cooperation we received from the school districts and for the opportunity the Court has given us to assist in the development of these desegregation plans.

Sincerely yours,

/s/ Gregory R. Anrig
Gregory R. Anrig, Director
Equal Educational Opportunities
U. S. Office of Education

Attachments:
A
B

Attachment A Annexed to Letter of August 11, 1969

Name	*Experience*	*Number of Years*
Gregory R. Anrig	Teacher	3
	Asst. Principal	1
	Principal	4
	Superintendent	3
	Division Director, U. S. Office of Education	2
James E. Barnes	Teacher	4
	Executive Director, Berkshire Co. Action Council	1
	Education Coordinator, Hartford County, Conn.	2
	Director, Education Programs for Disadvantaged	2
	OE Fellowship, Title IV, U. S. Office of Education	1
Edwin Blue	Teacher-Principal	26
	Superintendent	4
	Field Representative, Auburn University	½
Walter D. Branch	Teacher	1
	Teaching Principal	2½
	Principal	9
	Asst. Superintendent	2
	Research Assoc. & Program Coord., Southeastern Education Laboratory	1
	Program Officer, Title IV, U. S. Office of Education	1⅙

Attachment A Annexed to Letter of August 11, 1969

Name	*Experience*	*Number of Years*
Frank Carter	Assistant Dir. of Student Teaching, Virginia State College	2
	Dir. Student Personnel, Virginia State College	7
	Program Officer, Title IV, U. S. Office of Education	1¼
E. H. Cooper	Teacher-Coach	11
	Principal	4
	Superintendent	5
	Program Officer, Title IV, U. S. Office of Education	1⅙
Edna Ellicott	Education Program Specialist, U. S. Office of Education	2
Thomas W. Fagin	Curriculum Asst. & Consult	2
	Teacher	4
	Program Officer, Title IV, U. S. Office of Education	¼
Alfred P. Fain	Teacher	5
	Teaching Principal	4
	Principal	4
	Asst. Superintendent	1
	Superintendent	1
	Asst. to Commissioner on Education—Guam	2
	Director, Vocational & Secondary Education, Virgin Islands	2

Attachment A Annexed to Letter of August 11, 1969

Name	*Experience*	*Number of Years*
Alfred P. Fain (cont'd)	Director, Peace Corps Training	4½
	Program Officer, Title IV, U. S. Office of Education	1
Richard L. Fairley	Teacher	5
	Education Specialist	3
	Education Specialist, U. S. Office of Education	3
	Branch Chief, U. S. Office of Ed.	2
Joseph J. Franchina	Teacher	5
	Assistant Principal	4
	Principal	19
	Superintendent	5
	Program Officer, Title III, ESEA	1⅙
	Program Officer, Title IV, U. S. Office of Education	1¼
Marilyn C. Galvin	Education Program Specialist U. S. Office of Education	4
Illard J. Hunter	Teacher	2
	Principal	2
	Superintendent	6
	Program Officer, Title IV, U. S. Office of Education	1⅓
J. C. James	Teacher	8
	Dean of Admissions	6
	Education Specialist, U. S. Office of Education	3

Attachment A Annexed to Letter of August 11, 1969

Name	*Experience*	*Number of Years*
J. J. Jordan	Teacher	3
	Principal	3
	Director, Transp., Maint. & Operations, & Federal Prog., Asst. Superintendent	12
	Program Officer, Title IV, U. S. Office of Education	1⅓
Wilmer Kerns	Teacher	1½
	Guidance Counselor	5
	Visiting Teacher	2½
	Education Program Specialist, U. S. Office of Education	1⅔
John R. Lovegrove	Teacher	8
	Principal	8
	College Instructor	1
	N.Y. State Central School Study Research	2
	Supv. Instr., State Dept. of Ed.	2
	Dir., Guidance & Testing, State Dept. of Education	2
	Program Officer, Title IV, U. S. Office of Education	1⅙
Hilda Maness	Teacher	1
	Educational Research, Library of Congress	¼
	Teacher—Peace Corps	½
	Textbook Writer, Ethiopia, Ministry of Education	½

Attachment A Annexed to Letter of August 11, 1969

Name	*Experience*	*Number of Years*
Hilda Maness (cont'd)	Education Program Specialist, U. S. Office of Education	2
Clyde W. Matthews	Teacher	2
	College Instructor	3
	Director, Neighborhood Youth Corps, Greenville, N.C.	2
	Program Officer, Title IV, U. S. Office of Education	1
Robert T. Morris	Teacher	1
	College Instructor	1
	Program Officer, Title IV, U. S. Office of Education	1⅙
William T. Nallia	Teacher-Coach	3
	Principal	2
	Asst. Superintendent	2
	Asst. Coord. Title I, State Dept. of Education	1
	Coord. Field Services, Title IV, University of S. Alabama	2
Robert A. Skaife	Teacher	10
	Supervisor	1
	Principal	5
	NEA Field Secretary	8
	Teacher Organ— Executive Secretary	9
	College Teacher	½

Attachment A Annexed to Letter of August 11, 1969

Name	*Experience*	*Number of Years*
Robert A. Skaife (cont'd)	Education Program Specialist, Title IV, U. S. Office of Education	3
Howard Sullins	Teacher	4
	Principal	13
	Superintendent	3
	Program Officer, Title IV, U. S. Office of Education	1
M. Edward Sullivan	Teacher	4
	Principal	7
	Asst. Superintendent	1
	Education Program Specialist, Title IV, U. S. Office of Educ.	2
Albert G. Tippitt	Principal	21
	Dean of College	1
	College Instructor	1
	Teacher	3
	Program Specialist, Title IV U. S. Office of Education	1
Charlie T. Trussell	Teacher	7
	Principal	12
	Program Director, Title III	1
	Program Officer, Title IV, U. S. Office of Education	1½
Bobby M. Bowen	Teacher-Coach	8
	Program Officer, Title IV, U. S. Office of Education	1¼

Attachment B Annexed to Letter of July 11, 1969

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION
WASHINGTON, D. C. 20202

Bureau of Elementary and
Secondary Education

July 11, 1969

Dear Superintendent:

In accordance with the July 5, 1969, order of the United States District Court for the Southern District of Mississippi, I wish to call to your attention the technical assistance available to you under Title IV of the Civil Rights Act of 1964. For assistance in developing a desegregation plan for your district, contact the following person:

Mr. Jesse J. Jordan
Senior Program Officer
Equal Education Opportunities
Office of Education/BESE
50 Seventh Street, NE.
Atlanta, Georgia 30323
Telephone: Area Code 404 526-3076

Because of the number of districts to be served under this order and the limited time for plan development, we will be asking each district which requests Title IV assistance to make available pupil locator, transportation, and—where

appropriate—zone maps for the district as currently organized. Mr. Jordan can answer any questions regarding these maps.

A brochure describing our services is enclosed for your information.

Sincerely yours,

/s/ Gregory R. Anrig
Gregory R. Anrig, Director
Division of Equal Educational Opportunities

Enclosure

Letter of August 19, 1969 From the Secretary of the Department of Health, Education and Welfare to the Chief Judge of the Court of Appeals

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE
Washington, D.C. 20201

August 19, 1969

Dear Judge Brown:

In accordance with an Order of the United States Court of Appeals for the Fifth Circuit, experts from the Office of Education in the Department of Health, Education, and Welfare have developed and filed terminal plans to disestablish the dual school systems in 33 Mississippi school district cases.

These terminal plans were developed, reviewed with the school districts, and filed with the United States District Court for the Southern District of Mississippi on August 11, 1969, as required by the Order of the United States Court of Appeals for the Fifth Circuit. These terminal plans were developed under great stress in approximately three weeks; they are to be ordered for implementation on August 25, 1969, and ordered to be implemented commencing with the beginning of the 1969-1970 school year. The schools involved are to open for school during a period which begins two days before August 25, 1969, and all are to be open for school not later than September 11, 1969.

On Thursday of last week, I received the terminal plans as developed and filed by the experts from the Office of Education. I have personally reviewed each of these plans. This review was conducted in my capacity as Secretary of the Department of Health, Education, and Welfare and as the Cabinet officer of our Government charged with the ultimate responsibility for the education of the people of our Nation.

Letter of August 19, 1969 From the Secretary of the Department of Health, Education and Welfare to the Chief Judge of the Court of Appeals

In this same capacity, and bearing in mind the great trust reposed in me, together with the ultimate responsibility for the education of the people of our Nation, I am gravely concerned that the time allowed for the development of these terminal plans has been much too short for the educators of the Office of Education to develop terminal plans which can be implemented this year. The administrative and logistical difficulties which must be encountered and met in the terribly short space of time remaining must surely in my judgment, produce chaos, confusion, and a catastrophic educational setback to the 135,700 children, black and white alike, who must look to the 222 schools of these 33 Mississippi districts for their only available educational opportunity.

I request the Court to consider with me the shortness of time involved and the administrative difficulties which lie ahead and permit additional time during which experts of the Office of Education may go into each district and develop meaningful studies in depth and recommend terminal plans to be submitted to the Court not later than December 1, 1969.

Sincerely,

Secretary
/s/ Robert H. Finch

cc: Hon. Dan M. Russell, Jr.

Hon. Walter L. Nixon, Jr.

Order of the Court of Appeals of August 20, 1969

[Caption omitted]

Before

BROWN, *Chief Judge,*
THORNBERRY and MORGAN, *Circuit Judges.*

PER CURIAM:

On August 19, 1969, Judge John R. Brown received by safehand courier the attached communication of August 9, 1969 (marked Exhibit 1) from the Secretary of Health, Education and Welfare which in turn enclosed a copy of his communication of like date to Judges Cox, Russell and Nixon (marked Exhibit 2). Presumably this was delivered directly to the Judges concerned because the orders of this Court and the District Court pursuant thereto call upon the Department of Health, Education and Welfare to take certain action.

As the timetable heretofore fixed was substantially that recommended by the United States Attorney General in response to the request made by this Court to all parties prior to the argument of this case in July 1969, the Court, being of the opinion that it was essential to know at the earliest time the position of the parties as expressed in due order through their respective counsel, made inquiry of the Department of Justice. The Court was informed that motions were in the course of preparation for immediate filing in the District Court with appropriate similar motions in the Court of Appeals seeking the entry of orders granting the suggested extension to December 1, 1969.

The Court has taken no action other than to record these facts.

ENTER: August 20, 1969.

APPENDIX D

Findings of Fact and Conclusions of Law of the District Court Entered August 26, 1969

[Caption omitted]

In an opinion-order of July 3, 1969, a panel of three Judges on the Fifth Circuit Court of Appeals, reversed the decision of three District Judges sitting as the District Court of the Southern District of Mississippi upholding freedom of choice plans for the desegregation of students and faculties in twenty-five cases including thirty school districts on the docket of this Court.

The opinion-order, as amended, directed the District Court in each case to request educators from the Office of Education of the United States Department of Health, Education and Welfare, hereinafter called HEW, to collaborate with the respective defendant school boards in the preparation of plans to disestablish "the dual school systems." The opinion-order provided that each school board shall develop and present to the District Court before August 11, 1969, an acceptable plan of desegregation. It provided that if the board and HEW agreed upon a plan, the plan should be presented to the District Court on or before August 11, 1969, and the Court should approve such plan unless within seven days after submission any party should file an objection or proposed amendment alleging that the plan, or any part thereof, did not conform to constitutional standards. The opinion-order further provided that if no agreement be reached HEW should present its proposed plan on or before August 11, 1969, and the parties should have 10 days from the date of filing to file objections or suggested amendments thereto. The opinion-order further directed the District Court to hold

a hearing on the proposed plan and objections and amendments thereto and to enter a plan no later than September 1, 1969, to be effective for the beginning of the 1969-70 school year, retaining jurisdiction until it was clear to the Court that disestablishment had been achieved.

With respect to three school districts, those of Hinds County, Holmes County, and Meridian, the HEW recommended plans provided for full implementation beginning with the 1970-71 school year. As to all other districts, HEW has submitted two proposals—one for complete disestablishment beginning with the 1969-70 school year, and one for partial or interim desegregation at the opening of the 1969-70 term.

On the date of August 20, 1969, one day prior to the deadline set by the United States Court of Appeals for the Fifth Circuit in its Opinion and Mandate for all parties to file their proposed plans, objections, suggested modifications and affidavits, this Court was informed through telephone conversation with Chief Judge John R. Brown of the Fifth Circuit that he was in receipt of a letter dated August 19, 1969 from Honorable Robert H. Finch, Secretary of Health, Education and Welfare, the substance of which was that the Secretary had received the terminal plans as developed and filed by the experts in the Office of Education of the Department of HEW, and had reviewed each of the plans, he being charged with the ultimate responsibility for the education of the people of the United States in this letter, which was subsequently hand-delivered to both of the undersigned on the same date, namely, August 20, 1969, and which is attached to the original Motion filed in the Court of Appeals on August 21, 1969, by the United States For Leave to File Motion Seeking

Modification of Mandate, the Secretary stated that he was gravely concerned that the time allowed for the development of these terminal plans was much too short for the educators of the Office of Education to develop terminal plans which can be implemented in the school year 1969-70, which this Court finds was to open on August 20, in some of the school districts involved, with various other opening dates between that date and September 2, 1969. The Secretary further stated in his letter that the administrative and logical difficulties which must be encountered and met in the "terribly short space of time remaining" must surely in his judgment, "produce chaos, confusion, and a catastrophic educational setback to the 135,700 children, black and white alike, who must look to the 222 schools of these 33 (sic) school districts for their only available educational opportunity." The Secretary, therefore, in the concluding paragraph of his letter requested the Court of Appeals and this Court to consider the shortness of time involved and the administrative difficulties which lie ahead and permit additional time during which experts of the Office of Education may go into each school district and develop meaningful, studies in depth and recommended terminal plans to be submitted to the Court not later than December 1, 1969.

The above letter from the Secretary was attached to a motion filed on August 21, 1969 by the United States, entitled Motion of the United States for Leave to File Motion Seeking Modification of Mandate, to which was attached a proposed order of the United States Court of Appeals for the Fifth Circuit. Due to the extreme emergency resulting from the shortness of time, Chief Judge Brown of the Fifth Circuit, in a telephone conversation with the under-

signed Judges suggested and requested that this Court conduct a hearing on the motion filed by the United States, and make a record thereon, and enter findings of fact and conclusions of law, all of which should be transmitted to the three judges composing the panel which reversed the decisions of this Court in an opinion of July 3, 1969, which was subsequently modified on July 25, 1969. Chief Judge Brown directed that the record, which would be transcribed immediately, and this Court's written Findings of Fact and Conclusions of Law be filed forthwith with the Clerk of the United States Court of Appeals for the Fifth Circuit in New Orleans and that copies be transmitted to the three Judges composing the panel which reversed this case, at their home offices, namely, Chief Judge John R. Brown, Judge Homer Thornberry and Judge Lewis R. Morgan. The Chief Judge also instructed this Court to inform all counsel of record, which this Court has done, that anyone objecting to or wishing to offer any evidence on this motion, which was subsequently amended by the Government on August 25, 1969, must do so by presenting in person or in some other suitable manner, their objections and affidavits together with memoranda to the above three judges on the panel at their home offices no later than the morning of Wednesday, August 27, 1969.

The Amended Motion filed by the United States in the Court of Appeals and in this Court moves the United States Court of Appeals for an order amending its order or mandate of July 3, 1969 and subsequent amendments thereto, in accordance with the new proposed "New Amended Order" attached to said amended motion. The substance of the Amended Motion and the proposed "New Amended Order" filed by the United States in these cases, all of

which were consolidated in the United States Court of Appeals and are being treated as consolidated cases here, is that Paragraphs 3-7 should be deleted and the paragraphs contained in the suggested New Order, 3—7, be substituted therefor. For the sake of brevity and because of the time limitation, this Court will not recite in detail the Amended Motion and proposed "New Amended Order", but in effect it provides that the school boards, in conjunction with the Office of Education, shall develop and present to the United States District Court for the Southern District of Mississippi on or before December 1, 1969, an acceptable plan of desegregation, and if the Office of Education and the school boards agree upon the plan it shall be presented to the District Court on or before that date and shall be approved, unless within fifteen days after submission to the Court, any party files an objection or proposed amendment thereto in accordance with the terms of said order. If no agreement is reached, the Office of Education shall present its plan for desegregation of the school districts to this Court on or before December 1, 1969, and the parties shall have 15 days within which to object or file suggested amendments thereto. The proposed New Amended Order further provides that this Court shall hold a hearing on the proposed plan and any objections and suggested amendments thereto and promptly approve a plan which shall conform to constitutional standards, while at the same time, entering findings of fact and conclusions of law regarding the efficacy of any approved plan.

Paragraph 6 of the proposed New Amended Order, as modified by the Government through dictation into the record in this case, provides that by October 1, 1969 the Board of Trustees, in conjunction with the Office of Education shall develop a program to prepare its faculty and

staff for the conversion from dual to unitary school system and that the Office of Education shall report to this Court on October 1, 1969 with respect to this program. In the event that the Board fails to develop a program, the Office of Education shall submit a program which the Court may approve unless meritorious objection shall be made thereto.

Paragraph 7, as modified and revised by counsel for the Government through dictation into the record during the hearing on the motion before this Court, provides "The Boards shall not let any new contracts for the construction of any new facilities nor materially alter any existing facilities until a terminal plan has been approved by the court, except with the prior agreement of all parties or by order of the court upon motion and hearing. The Boards shall present its proposals to the parties and seek their consent at least fifteen days prior to moving for court approval."

Attorneys for private plaintiffs filed in the Court of Appeals an "Opposition to Motion for Permission to Withdraw Plans Filed by the Department of Health, Education and Welfare".

Attorneys for private plaintiffs filed a motion dated August 21, 1969 in the United States Court of Appeals for the Fifth Circuit, but did not file a copy thereof with this Court, and therefore this Court does not know its filing date. Private plaintiffs appear alone as plaintiffs in Civil Actions numbered 1209, 1302 and 3779, which encompass six separate school districts, and prior to being allowed to intervene and being aligned as plaintiffs in several additional cases during this hearing of yesterday, appeared as plaintiffs together with the United States in Civil Actions numbered 1096, 1300, 3382 and 3700, involving six separate school districts, and now also appear as plaintiffs as of yesterday in Civil Actions numbered 1160.

Findings of Fact and Conclusions of Law of the District Court Entered August 26, 1969

It was agreed by all counsel in the hearing conducted by this Court that private plaintiffs' opposition to withdrawal of the HEW plan apply to only those cases in which they appear as parties, but that the Government's amended motion applied to all of these cases in which the HEW had filed proposed plans pursuant to the order and mandate of the United States Court of Appeals. Motion was also granted allowing all of the defendant school boards in all of these cases before the Court to join in the Motion and Amended Motion filed by the United States and the proposed New Amended Order with the exception of Paragraph 7 thereof, which relates to new construction and alteration of present structures.

This Court conducted a full-day hearing on August 25, 1969, receiving testimony on the Amended Motion filed by the United States, during which three witnesses testified, two for the United States in support of its motion, and one for the private plaintiffs in opposition to the motion.

The Court finds that the testimony by Dr. Myron Leiberman, the only witness to testify for the private plaintiffs in opposition to the Government's motion, is not entitled to much weight, if any, due to the fact that he had never visited any of the school districts in question and was not familiar with the facilities, school bus routes, qualifications of the faculty, physical composition of the various classrooms, including laboratories in the various buildings, or any other of the vital aspects necessary to form an opinion or make a judgment in connection with the relief sought in the motion filed herein. On cross examination, this witness, who appeared to be more an integration expert than an education expert, interested more in the constitutional aspect rather than educational aspect of the plans under consideration,

admitted on cross examination that he had no experience as a principal or assistant principal of any elementary or high school and had no administrative experience nor operating experience in any school as a superintendent thereof; had never drawn a curriculum or student assignment plan nor any transportation plan for any high school or elementary school; had never participated in the opening of an elementary or high school; and that his only familiarity with the plans of the HEW concerning which he testified, was a two-hour perusal of these plans the night before this hearing, from 9:30 to 11:30 PM, and a short discussion with the attorneys for the private plaintiffs. In any event, the Court finds that his testimony is clearly and convincingly outweighed by that of the two witnesses who testified in support of the motion.

Mr. Jessie J. Jordan, of Smyrna, Georgia, who has been with the Department of Health, Education and Welfare for approximately two years, serving as Senior Program Officer for Title IV of the Civil Rights Act of 1964, received a Bachelor of Science degree in Education and Mathematics, and a Masters degree in School Administration. This witness has been a classroom teacher for three years, has served as high school principal for three years, and was an administrative officer, director of transportation, director of maintenance and operation and assistant superintendent over a twelve-year period in the Cobb County, Georgia school system. This school district has 55 schools with approximately 40,000 to 50,000 students and involves the utilization of about 150 buses. Mr. Jordan testified that he has done desegregation work in a six-state area for HEW,

including Mississippi, South Carolina, Georgia, Florida, Alabama and Tennessee, and has worked with school boards within these various states, usually in response to requests by these boards or the superintendents of school districts for assistance in formulating and implementing desegregation plans. He first became involved in this case on July 15, 1969 when he attended a meeting in Mobile, Alabama, at which ten field teams were formed and sent to the defendant school districts on July 16, where they worked until July 23, gathering statistics which they took to Atlanta, having spent approximately one and one-half days in each district. A second trip was made by these teams on July 29 through August 1, 1969, during which they met with various school boards and their superintendents, asking for suggestions. These meetings involved approximately one-half day in each school district. Information was taken back to Atlanta, where plans were formalized and between the dates of August 7 and August 9, these HEW plans were presented to the various school boards and superintendents and then filed with this Court. Although the witness made no trips to Mississippi in connection with the formalization of these plans, he did work with the review teams, asking their members various questions concerning these plans and acted in an advisory capacity. The witness was of the opinion that a unitary school system was far superior to a dual school system because all people living in an integrated society and attending school together familiarizes each with the culture of the other and also helps disadvantaged students. It was his opinion that the HEW plans in question are basically sound, but that sufficient time was not had for the in depth peripheral studies such as curriculum study and financial

study required to implement these new plans. The Court finds in accordance with his testimony that these plans call for massive and substantial changes involving changes in curriculum, building renovations, including the adjusting of laboratories and like facilities, and faculty and student preparation, including various meetings and discussions of the problems to be presented and the solutions therefor. The Court further agrees with the witness and finds that inadequate time remains between this period and the opening of school in the 1969-70 school year to accomplish a workable, smooth desegregation which is desired. This witness requested further time of Dr. Anrig, his superior in the Office of Education, but this was denied in view of the fact that the Court Order had set the time limitation. The witness was of the further opinion, and the Court so finds, that bus routes must be redrawn, teachers reassigned in accordance with their capabilities and certifications, which were not considered by HEW, classrooms will have to be converted and that there must be some meaningful educational program involving teachers and students, to prepare for the implementation of the terminal plans. This Court finds further in accordance with the testimony of this witness that the necessary delay requested would allow collaboration between the Office of Education and the defendant school districts to prepare for implementation of the terminal plans, thus resulting in better education and better community relations and consequently, an effective, workable desegregation of the defendant school districts and the conversion from a dual to a unitary system.

The second and last witness who testified in support of the Government's motion was Mr. Howard O. Sullins, of Charlottesville, Virginia, who received a B.A. degree from

Emory Henry College, and an M.A. degree in Education from Columbia University, and has completed all of his work for a doctorate in Education at the University of Virginia, with the exception of completion of his dissertation, on which he is now working. This witness has been a classroom teacher for two years, has served as principal of various high schools for a period of thirteen years, and was a superintendent of schools in Stafford County, Virginia for three years. In addition, he has been working with the United States Office of Education as Program Officer, Equal Educational Opportunities Program, Region Three, HEW, in Charlottesville, Virginia since June 15, 1968. As Program Officer, his area of responsibility is Virginia and West Virginia and involves furnishing technical assistance to school districts in the process of desegregation. This witness worked on desegregation plans in New Kent County, Virginia, Prince George County, Maryland, and various other counties in the State of Virginia. His total experience in education is approximately twenty years.

Mr. Sullins was the team leader for the team that visited, and had the responsibility of recommending desegregation in three of the defendant school districts, Hinds County, Madison County and Canton. He visited these districts during the above stated dates as team leader, talking to school boards and superintendents, as well as attorneys for the three defendant school districts. It was his opinion that the unitary school system is far superior to a dual school system; and that although adequate time was had to develop the basic plans in question, however, he strongly feels that there is insufficient time to implement these plans in order to have an effective school year in 1969-70 for the children affected, because these plans call for a massive

reorganization of school systems which takes months of planning to accomplish with required outside consultation, expert assistance, particularly to set up junior high school systems and restructuring of grades; some districts have no fixed boundary lines because of the freedom of choice system under which they have been operating and this would have to be publicized and the students and parents acquainted therewith; it would be necessary to revamp transportation systems, which takes a great deal of time; there must be adequate planning in "real troubled spots", which would involve proper training and instruction of teachers and the placing of teachers in jobs where they will be most effective; all pupils will be uprooted and entered into new schools and they must have the opportunity to learn and know what they will face, which must be done through project programs, including the meeting of student leaders of both races with each other and with teachers; the school administration will need time to rethink and redo things to properly plan the expenditures of Title I funds well in advance, which funds may be lost without proper and adequate planning, and which HEW did not have time to consider; school boards and superintendents need a program also to build communities' support for the unitary sysem. The witness was of the opinion and the Court finds, that in order to formulate and implement successful and effective desegregation plans, the additional time requested will be required. This witness suggested additional programs which should be undertaken to effect a smooth, workable conversion to a completely unitary school system, such as a workshop for teachers and pupils to discuss potential problems of desegregation and their solution, as was done in other districts in which

this witness worked, including some in South Carolina. These committees of students and teachers must meet with experts to obtain more knowledge on how to solve problems that will arise. The witness stated that all defendant school districts with which he dealt cooperated fully with his team but that his team was not authorized to negotiate any differences with the school boards. The first time that the defendant school districts saw the HEW plan in written form was on August 7, 1969, at which time there could be no more collaboration from HEW's standpoint, that is, there could be no further change in the HEW plan which was filed subsequently in this Court in all these school district cases.

Even if the motion of the Government for additional time had not been filed in this case with all due deference, it is extremely doubtful if this Court could have physically complied with the mandate of the United States Court of Appeals for the Fifth Circuit, because of the devastating effect of super Hurricane Camille, which this Court does not have to take judicial notice of, because it has personal and actual knowledge thereof. This deadly, gigantic "hurricane-tornado" struck not only the Mississippi Gulf Coast where the undersigned Judges reside, but also caused great damages to many other parts of the State of Mississippi, including many of the areas in which the defendant school districts are located. The storm not only resulted in many deaths, but in addition, caused considerable loss of and damage to property, disruption of communications, the complete elimination of electrical power, water and telephones to homes and offices of the undersigned Judges and many others, causing utter lack of communication and inability to travel. Not only were the undersigned Judges

deprived of electrical power and facilities with which and in which to work, but their staffs were scattered and without communication for many days and sustained considerable personal damage which required their immediate attention and care. Much more could be said about the devastation and complete destruction caused by this killer hurricane, however, it is felt that the members of the United States Court of Appeals for the Fifth Circuit, and especially the members of this panel, are completely aware of many of these factors and are sympathetic with and understand the inability of the undersigned Judges to consider and study the various plans in question, together with all other pleadings filed by the parties, to assemble a staff and equipment necessary to dictate their findings and orders, while at the same time being deeply concerned with the necessary safety and welfare of their families and the preservation of their property. In addition, many schools were destroyed or severely damaged in the coastal area, which will require the transportation or reassignment of students therefrom to other school districts, some of which are defendants herein, and various schools within the defendant school districts have sustained damage which will require transfer of students and rescheduling of classes, which will result in overcrowding and considerable confusion and chaos.

In view of all of the above, this Court finds and concludes that it has jurisdiction to consider this motion and make findings of fact thereon and suggestions and recommendations to the appropriate panel of the United States Court of Appeals for the Fifth Circuit in these cases. This Court is further of the opinion and finds, as a matter of fact and of law, that the motion filed by the Government,

joined in by the defendant school districts, is meritorious and should be granted for the foregoing reasons and for the further reasons that the granting of the requests made by the Government will, in truth and in fact, probably result in a smooth, workable conversion of the defendant school districts from a dual to a unitary system, with the elimination of the many problems of chaos and confusion referred to by the Secretary of HEW in his letter.

It is therefore the recommendation of this Court that the appropriate panel of the Court of Appeals grant the amended motion filed by the Government in all of these cases, and then adopt and enter the proposed "New Amended Order" as revised in this hearing, which was filed by the United States and attached to its Amended Motion filed here and in the Court of Appeals.

RESPECTFULLY SUBMITTED, this 26th day of August, 1969.

DAN M. RUSSELL, JR.
United States District Judge

WALTER L. NIXON, JR.
United States District Judge

APPENDIX E

Order of the Court of Appeals of August 28, 1969

[Caption omitted]

Before BROWN, *Chief Judge,* THORNBERRY and MORGAN, *Circuit Judges.*

PER CURIAM:

The United States Attorney General by motion filed with this Court on August 21, 1969, with parallel motions filed in the District Court for the Southern District of Mississippi as of the same date, requests, in effect, that this Court modify the mandate and orders heretofore entered, and, on the permission of this Court being granted, that the District Court do likewise, to extend the time for filing the terminal plans required in our order of July 3, 1969, to a date not later than December 1, 1969.

Because of the relative shortness of time and in order to permit the appeals to be heard, decided and effective action to be taken by the opening of the school term September 1969-70, this Court expedited the initial appeal from the decision of the District Court entered in May 1969. By letter-directive from the Clerk, dated June 25, 1969, we set the case for oral argument at 9:30 a.m. July 2 at New Orleans.

Paragraph 7 of that letter-directive read as follows:

> 7. To enable the Court to announce a decision as quickly as possible after submission, the appellants are requested to file in 15 copies a proposed opinion-order with definitive time table and provisions on the hypothesis that the appeal will be sustained. These should be modeled somewhat on the form used by the Court

in its recent opinions in *Hall, et al.* v. *St. Helena Parish School Board, et al.,* No. 26450, May 28, 1969, and *Davis, et al.* v. *Board of School Commissioners of Mobile County, et al.,* No. 26886, June 3, 1969. When and as additional opinion-orders of this type are issued in other school desegregation cases, copies will be immediately transmitted to all counsel so that the parties can make appropriate comments during argument with respect to suggested modifications or changes in their proposed opinion-orders.

The Court hopes that the appellants, private and government, can collaborate and submit a mutually agreeable proposed opinion-order and it desires from the appellees contrary proposed orders covering separately (a) on the hypothesis that the decrees of the District Court will be affirmed, and (b) on the hypothesis that the appellants' motion and appeals will be sustained for reversal.

In response to this request of the Court several proposed decrees were supplied by one or more of the parties, including a detailed proposed opinion-order submitted by the United States Attorney General on the eve of the hearing. As pointed out later, this proposed opinion-order prescribed a precise timetable.

On the argument the Court heard from some 18 counsel over a period of the entire day. On the following day, July 3, 1969, the Court handed down its opinion-order, which in its opening paragraph stated:

"As questions of time present such urgency as we approach the beginning of the new school year September 1969-70, the Court requested in advance of argument that the parties submit proposed opinion-orders modeled after some of our recent school desegregation

cases. We have drawn freely upon these proposed opinion-orders."

Both the "opinion" portion and, more specifically, the "order" portion of the opinion-order of July 3rd (see slip opinion p. 16 et seq) was substantially that proposed by the United States Attorney General in response to the Court's invitation (see paragraph 7 of letter-directive above). Except that the Court allowed aproximately 10 additional days, the timetable schedule fixed by the Court was substantially that recommended by the United States Attorney General:

Paragraph of Order	*Requirement*	*Government Proposed Date*	*Date Fixed By Court*
3	Deadline for Boards to file plan	Aug. 1	Aug. 11
4	Deadline for presenting agreed plans to Court	Aug. 1	Aug. 11
5	Deadline for HEW filing plan	Aug. 1	Aug. 11
6	Deadline for Court hearings	Aug. 13	Aug. 23
7	Deadline for Court approval of plans	Aug. 15	Aug. 27

Order of the Court of Appeals of August 28, 1969

Subsequently, on July 25, 1969, the Court on its own motion modified its July 3rd opinion-order by renumbering former paragraph 8 to be number 7 and striking from such order paragraphs 5, 6 and 7 to insert in lieu thereof new paragraphs 5 and 6 with the following resulting timetable:

New Paragraph	*Requirement*	*Revised Date fixed By Court*
5	Deadline for HEW filing plan	Aug. 11
5	Deadline for filing objections to HEW plan	Aug. 21
5	Deadline for Court order approving plan	Sept. 1

Thus it is shown that the timetable adopted was substantially that recommended by the United States Attorney General to be feasible and appropriate.

From the numerous other cases referred to in the letter-directive, the Court was conscious that precise timetables were in order. Consequently, in the course of the arguments heard on July 3, 1969, the Court addressed specific questions to all counsel in the case concerning the proposed timetables. Questions were specifically directed to the Assistant Attorney General appearing on behalf of the Government. Without qualification in response to precise inquiries he affirmed the Government's view that the timetable proposed by the Government was reasonable. And, with emphasis on the Attorney General's proposed order that HEW should be called in to advise with the Boards and the District Court, he affirmed that sufficient resources

of the Executive Department would be made available to enable the Office of Education of the United States Department of Health, Education and Welfare to fulfill its role as specified in the order proposed by it and actually thereafter entered by the Court.

Except for the entry of the modification order on July 25 which moved the deadline for the effective date of the plans from August 27 to September 1, 1969, no further action has been taken by this Court. Likewise, until the motion of August 21, 1969, there has been no suggestion by the United States Attorney General that the times fixed by the Court should be relaxed or extended or that such timetable was unattainable.

The first information that the proposed and adopted timetable was not appropriate came on August 19, 1969 when Judge John R. Brown, Chief Judge and presiding Judge of this panel, received by safehand courier the communication from the Secretary of Health, Education and Welfare dated August 19, 1969, which in turn enclosed a copy of the Secretary's communication of like date to Judges Cox, Russell and Nixon. These matters are set forth in this Court's order (with Exhibits 1 and 2) of August 20, 1969, copies of which are annexed as schedule A.

As time was so short, this Court by oral order communicated to the District Court granted full leave to the District Court to receive, consider and hear the Government's motion for extension of time to December 1, 1969. Upon the hearings to be held after notice to counsel representing all parties not later than Monday, August 25, it further requested the District Court to make its recommendations to the Court of Appeals. The District Court is to communicate its recommended decision and transmit a copy of the transcript of any evidence to each of the Judges at

his home station. This Court further prescribed that in view of the shortness of time, all counsel were required to forward directly to their home stations any memorandum briefs in support of or opposition to the motion and recommended decision of the District Court so that it would be in the Judge's hands not later than 11:00 a.m. Wednesday, August 27.

Following this the Court has received and considered the findings of fact, conclusions of law and recommendations of the District Court, the record of the hearings, and the briefs and arguments of counsel, pro and con. On the basis of the matter set forth herein, the Court amends its order further as follows:

FIRST:

The order of this Court dated July 3, 1969, as amended by order entered July 25, 1969 is hereby further amended by renumbering Paragraph 7 to be Paragraph 9 and by deleting Paragraphs 3, 4, 5, and 6, and the following paragraphs are substituted therefor:

3. The Board, in conjunction with the Office of Education, shall develop and present to the District Court on or before December 1, 1969, an acceptable plan of desegregation.

4. If the Office of Education and a school board agree upon a plan of desegregation, it shall be presented to the District Court on or before December 1, 1969. The Court shall approve such plan, unless within 15 days after submission to the Court any parties file any objections or proposed amendments thereto alleging that the plan, or any part thereof, does not conform to constitutional standards.

5. If no agreement is reached, the Office of Education shall present its proposal for a plan for the school district to the District Court on or before December 1, 1969. The parties shall have 15 days from the date such a proposed plan is filed with the District Court to file objections or suggested amendments thereto. The District Court shall hold a hearing on the proposed plan and any objections and suggested amendments thereto, and within 15 days after the time for filing objections has expired shall by order approve a plan which shall conform to constitutional standards.

6. The District Court shall enter Findings of Fact and Conclusions of Law regarding the efficacy of any plan which is approved or ordered to disestablish the dual school system in question. Jurisdiction shall be retained, however, under the teaching of Green v. County School Board of New Kent County, 1968, 391 U.S. 430, 439, 88 S.Ct. 1689, ——, 20 L.Ed.2d 716, 724, and Raney v. Board of Education of Gould School District, 1968, 391 U.S. 443, 449, 88 S.Ct. 1967, ——, 20 L.Ed.2d 727, 732, until it is clear that disestablishment has been achieved.

7. By October 1, 1969 the Board of Trustees in conjunction with the Office of Education shall develop a program to prepare its faculty and staff for the conversion from the dual to the unitary system. The Office of Education shall report to the Court on October 1, 1969 with respect to this program. If the Board fails to develop a program, the Office of Education shall submit a program which the Court may approve unless meritorious objections supported by affidavit or other documentary evidence are made by any party.

8. The Board shall not let any new contracts for the construction of any new facilities nor materially alter any existing facilities until a terminal plan has been approved by the Court, except with the prior agreement of all parties or by order of the Court upon motion and hearing. The Board shall present its proposals to the parties and seek their consent at least 15 days prior to moving for Court approval.

SECOND:

It is a condition of this extension of time that the plan as submitted and the plan as finally approved shall require significant action toward disestablishment of the dual school systems during the school year September 1969-June 1970.

THIRD:

In all other respects the order of this Court of July 3, 1969, as amended July 25, 1969, remains in full force and effect.

APPENDIX F

Opinion in Chambers of Mr. Justice Black of September 5, 1969

[Caption omitted]

MR. JUSTICE BLACK, Circuit Justice.

For a great many years Mississippi has had in effect what is called a dual system of public schools, one system for white students only and one system for Negro students only. On July 3, 1969, the Fifth Circuit Court of Appeals entered an order requiring the submission of new plans to be put into effect this fall to accelerate desegregation in 33 Mississippi school districts. On August 28, upon the motion of the Department of Justice and the recommendation of the Secretary of Health, Education & Welfare, the Court of Appeals suspended the July 3 order and postponed the date for submission of the new plans until December 1, 1969. I have been asked by Negro plaintiffs in 14 of these school districts to vacate the suspension of the July order. Largely for the reasons set forth below, I feel constrained to deny that relief.

In *Brown* v. *Board of Education*, 347 U. S. 483 (1954), and *Brown* v. *Board of Education*, 349 U. S. 294 (1955), we held that state-imposed segregation of students according to race denied Negro students the equal protection of the law guaranteed by the Fourteenth Amendment. *Brown I* was decided 15 years ago, but in Mississippi as well as in some other States the decision has not been completely enforced, and there are many schools in those States which are still either "white" or "Negro" schools and many that are still *all*-white or *all*-Negro. This has resulted in large part from the fact that in *Brown II* the Court declared this

unconstitutional denial of equal protection should be remedied not immediately, but only "with all deliberate speed." Federal courts have ever since struggled with the phrase "all deliberate speed." Unfortunately this struggle has not eliminated dual school systems, and I am of the opinion that so long as that phrase is a relevant factor they will never be eliminated. "All deliberate speed" has turned out to be only a soft euphemism for delay.

In 1964 we had before us the case of *Griffin* v. *School Board*, 377 U. S. 218, and we said the following:

> "The time for mere 'deliberate speed' has run out and that phrase can no longer justify denying these Prince Edward County School children their constitutional right to an education equal to that afforded by the public schools in the other parts of Virginia." *Id.*, at 234.

That sentence means to me that there is no longer any excuse for permitting the "all deliberate speed" phrase to delay the time when Negro children and white children will sit together and learn together in the same public schools. Four years later—14 years after *Brown I*—this Court decided the case of *Green* v. *County School Board of New Kent County*, 391 U. S. 430 (1968). In that case MR. JUSTICE BRENNAN, speaking for a unanimous Court said:

> " 'The time for mere "deliberate speed" has run out. . . .' The burden on a school today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." *Id.*, at 438-439.
>
> "The Board must be required to formulate a new plan . . . which promise[s] realistically to convert promptly

> to a system without a 'white' school and a 'Negro' school, but just schools." *Id.*, at 442.

These cases, along with others, are the foundation of my belief that there is no longer the slightest excuse, reason, or justification for further postponement of the time when every public school system in the United States will be a unitary one, receiving and teaching students without discrimination on the basis of their race or color. In my opinion the phrase "with all deliberate speed" should no longer have any relevancy whatsoever in enforcing the constitutional rights of Negro students. The Fifth Circuit found that the Negro students in these school districts are being denied equal protection of the law, and in my view they are entitled to have their constitutional rights vindicated now without postponement for any reason.

Although the foregoing indicates my belief as to what should ultimately be done in this case, when an individual Justice is asked to grant relief, such as a stay, he must consider in light of past decisions and other factors what action the entire Court might possibly take. I recognize that, in certain respects, my views as stated above go beyond anything this Court has expressly held to date. Although *Green* reiterated that the time for all deliberate speed had passed, there is language in that opinion which might be interpreted as approving a "transition period" during which federal courts would continue to supervise the passage of the Southern schools from dual to unitary systems.* Although I feel there is a strong possibility that

* "The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of de-

the full Court would agree with my views, I cannot say definitely that they would, and therefore I am compelled to consider the factors relied upon in the courts below for postponing the effective date of the original desegregation order.

On August 21 the Department of Justice requested the Court of Appeals to delay its original desegregation timetable, and the case was sent to the district court for hearings on the Government's motion. At those hearings both the Department of Justice and the Department of Health, Education & Welfare took the position that time was too short and the administrative problems too difficult to accomplish a complete and orderly implementation of the desegregation plans before the beginning of the 1969-1970 school year. The district court found as a matter of fact that the time was too short, and the Court of Appeals found that these findings were supported by the evidence. I am unable to say that these findings are not supported. Therefore, deplorable as it is to me, I must uphold the court's order which both sides indicate could have the effect of

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segregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. *Green* v. *County School Board, supra,* at 439.

"Where [freedom-of-choice] offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, non-racial system there might be no objection to allowing such a device to prove itself in operation. . . .

"The New Kent School Board's 'freedom-of-choice' plan cannot be accepted as a sufficient step to 'effectuate the transition' to a unitary system. . . ." *Id.,* at 440-441.

delaying total desegregation of these schools for as long as a year.

This conclusion does not comport with my ideas of what ought to be done in this case when it comes before the entire Court. I hope these applicants will present the issue to the full Court at the earliest possible opportunity. I would then hold that there are no longer any justiciable issues in the question of making effective not only promptly but at once—*now*—orders sufficient to vindicate the rights of any pupil in the United States who is effectively excluded from a public school on account of his race or color.

It has been 15 years since we declared in the two *Brown* cases that a law which prevents a child from going to a public school because of his color violates the Equal Protection Clause. As this record conclusively shows, there are many places still in this country where the schools are either "white" or "Negro" and not just schools for all children as the Constitution requires. In my opinion there is no reason why such a wholesale deprivation of constitutional rights should be tolerated another minute. I fear that this long denial of constitutional rights is due in large part to the phrase "with all deliberate speed." I would do away with that phrase completely.

Application to vacate suspension of order denied.