No. 632

In the Supreme Court of the United States

OCTOBER TERM, 1969

BEATRICE ALEXANDER, ET AL., PETITIONERS

v.

HOLMES COUNTY BOARD OF EDUCATION, ET AL.

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

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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On October 7, 1969, the United States filed a memorandum in these cases in response to the petition for certiorari. We do not repeat the statement of facts or the arguments included there. The present paper, supplementing our earlier memorandum, is addressed primarily to the new submission presented by petitioners after the grant of certiorari.

I

As we have previously stated (Memorandum in response to Petition, p. 4), the United States is fully committed to the proposition that the "deliberate

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speed" formula is no longer relevant in achieving desegregation of public schools. We agree that the time of gradual accommodation is ended, that the so-called "period of transition" is over, and that today no unnecessary delay is tolerable. Indeed, we read this Court's decision in *Green* v. *County School Board,* 391 U.S. 430, 438–439, as having so held.

The fact remains, however, that desegregation does not occur automatically and that disestablishment of a dual school system is often a somewhat complicated process. That is why a *plan* is usually necessary; and, unavoidably, a plan requires some time to formulate and some time to implement. Thus, it is simply unreal to talk about instantaneous desegregation. Of course, resort to a plan should not become a cover for foot-dragging. Nor is there any reason today why all plans cannot be "terminal" plans, rather than blueprints for gradual step-by-step desegregation. But the mechanics of accomplishing the conversion from a segregated to a unitary school system inevitably involve some time. And that is so, even if one wholly ignores pleas against a brusque conversion, whether premised on concern for educational considerations or apprehension of hostile community reaction.

In sum, accepting the Court's mandate that desegregation must be accomplished both "realistically" and "now", we submit that the formulation of a workable plan, followed by its implementation, necessarily requires several weeks of informed effort. And, unfortunately, the process too often does not begin until an appropriate court order is entered. In our view, that is the only delay involved in these cases.

II

Besides strict time requirements, there is another dimension to the process of conversion from a dual to a unitary school system. The fact that we are, after all, dealing with the delicate and critical matter of educating children—together with the often complex technical problems involved—strongly counsels the courts to obtain the aid of educational experts. Regrettably, school officials of the affected districts tend to default in their obligation to submit a realistic desegregation plan. And, so, the courts have increasingly turned to the Office of Education of the Department of Health, Education, and Welfare.

The advantages of this technique, in which the Office of Education serves as a kind of Special Master for the court, are sufficiently obvious.[1] Nor do petitioners question the use of this procedure in these cases. Their complaint goes to the practice not the principle, namely, that the courts should not have acquiesced in the three-month delay requested by the Department of Health, Education and Welfare. But the question must be viewed from the vantage point of the court of appeals, in light of the considered judgment of the

[1] Other recent cases adopting this technique include *United States* v. *Choctaw County Board of Education* (C.A. 5, June 26, 1969); *Davis* v. *Board of Commissioners of Mobile County*, (C.A. 5, June 3, 1969); *Hall* v. *St. Helena Parish School Board*, (C.A. 5, May 28, 1969, August 25, 1969); *Whittenberg* v. *Greenville County School District*, 298 F. Supp. 784 (D. S.C.); *Tillman* v. *Board of Public Instruction of Volusia County*, M.D. Fla., C.A. No. 4501–J, Order of August 21, 1969; *Lee* v. *Macon County Board of Education*, M.D. Ala., C.A. No. 604–E, Order of August 6, 1969; *Moore* v. *Tangipahoa Parish School Board*, 298 F. Supp. 285 (E.D. La.).

Secretary that additional time was needed to study and perfect the desegregation plans which had been hurriedly filed, and in view of the record of the hearing in the district court which indicated that immediate implementation of the plans would encounter serious administrative problems.[2] Presumably, the school boards could not be expected to submit acceptable plans and the court itself would need equivalent time to devise, on its own, an appropriate plan for each of the 33 school districts involved. In these circumstances, we suggest the district court and the court of appeals could properly decide to wait until December 1 for the report of the Office of Education.

Of course, the educational experts cannot substitute for the courts. The court should "reserve final judgment to itself." *United States* v. *Lovett,* C.A. 8, No.

[2] Secretary Finch's letter of August 19 noted that school openings began August 23, 1969 (Pet. 53a). The Secretary requested "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." (Pet. 54a). The delay was requested, not on grounds of community hostility, but because of educational and administrative difficulties: "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" (opinion of district court, August 26, 1969, Pet. 65a). This finding was based on the detailed testimony, including cross-examination by petitioners, of the leader of the HEW teams that had formulated the plans, and of one of the experts who had drawn some of the plans. That testimony is summarized in the district court opinion (Pet. 63a–68a).

19,601 (Oct. 2, 1969), slip op. at p. 11. The court, too, may provide guidelines within which the experts must work. The court of appeals did provide guidelines and established a timetable. When the Secretary of HEW stated that, in his judgment, the timetable could not be adhered to, no decision of this Court required the court of appeals to rule that the timetable proposed by the United States and previously adopted by the court of appeals must be adhered to.

III

Even if one disagrees with the courts below, it is not apparent what remedy is now appropriate. Obviously, the time which has elapsed since the orders of last August cannot be recaptured. The Department of Health, Education and Welfare is committed to submitting terminal plans by December 1, five weeks hence. Plainly, no alternative plans can be formulated and implemented in the interim. Nor do petitioners suggest such a course.

What, then, remains? Petitioners propose that *this* Court should now order into effect the plans submitted by the Office of Education in August and effectively withdrawn two weeks later. That seems to us inappropriate. The Secretary of Health, Education and Welfare, whose Department wrote the plans, states that he needs additional time to study and perhaps correct or refine them, before he can give his approval. At present, then, the plans are not vouched for by the government's experts, and are not fully

developed.[3] Nor have the affected school boards had an opportunity to present their objections—a procedure contemplated by every order in this case. And, of course, the courts below have had no occasion to consider the plans. In these circumstances, we submit it would be wholly inappropriate for this Court, in the first instance, to order those plans into effect.

As a general proposition, we agree that the burden should be shifted from the school children to the school boards. The history set forth in petitioners' brief shows the need for depriving the school boards of further incentive for delay. This does not mean, however, that all other educational and administrative considerations must be set aside. For many of the still segregated school systems the "varied local school problems" recognized in *Brown I* have not been eliminated by the passage of fifteen years. And, at all events, the relief proposed by petitioners seems particularly out of place in these cases at this time, since the plans on file are not fully developed and the outstanding order of the court of appeals requires final plans to be submitted imminently.

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[3] For example, the plan previously filed for Holmes County calls for closing the Ambrose and Pickens schools—or for keeping Ambrose open to serve grade 1; for the drawing of zone lines for attendance centers; and for relocating portable buildings. Although 75% of the children are transported, the plan does not propose transportation routes. The North Pike plan calls for a complete change in the grade structures of all the schools in the system, but does not provide for the school plant alterations and curriculum plans needed to effect this change. These are the kinds of unfinished tasks now being completed in refining the plans for December 1.

The limitations of the approach urged by petitioners go beyond these particular cases. It is not clear how this approach is to work for the more than 450 systems which still have no plan for conversion to a unitary system. Nor is it clear what petitioners urge as to the 97 systems under orders to file plans in the next few months for the 1970–71 school year. See Appendix, *infra,* pp. 9–11.

On the other hand, since we agree that the school boards' obligation to desegregate their school systems is immediate and unqualified, we believe that the courts below may properly be authorized to require the implementation of the plans commencing at the most practical imminent juncture in the school year, as, for example, at Christmas recess or mid-semester. Moreover, the school boards should bear the burden of justifying below, in the context of an appropriately expedited appellate review schedule, any delay beyond those points.

For the foregoing reasons we urge that the order of the court below be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

OCTOBER 1969.

APPENDIX

There follows a status report on school districts in the Deep South showing, as of October 17, 1969, how many districts have some plan other than free choice for achieving integration and how many systems do not. This information was compiled from files of the Department of Health, Education and Welfare and of the Department of Justice and some information provided by attorneys in private suits. Every effort has been made to reconcile the sometimes conflicting information by using the most recent data, but absolute accuracy is not possible.

A brief explanation of the categories used may be helpful.

Under the heading "Systems with Terminal Plans" are included the following:

(1) "Unitary Prior to 1969–70" denotes:

those desegregated districts as enumerated by HEW; and

those districts ordered by district courts to desegregate totally before 1969–70.

(2) The systems indicated as having terminal plans for 1969–70, 1970–71 and 1971–72 are those for which such a plan has already been ordered by the courts or has been achieved through voluntary agreement with HEW.

(3) "Plans yet to be filed" denotes systems with respect to which a court order requires the filing of a terminal plan between November 1, 1969, and the spring of 1970.

Under the heading "Systems with No Terminal Plan" are the following:

(4) Systems in litigation where no order with respect to the filing of a terminal plan has yet been entered.

(5) Those districts "terminated by HEW," *i.e.,* where funds have been cut off and no court action has been initiated to date.

(6) Non-terminal plan districts currently in HEW Enforcement Proceedings.

(7) Non-terminal plan districts such as reneging districts, majority Negro districts, and Department of Justice referral districts, which are included as "others."

(8) Those systems with respect to which the status is unknown.

The use of the word "terminal" to describe a plan does not necessarily imply that the school district has achieved or will achieve conversion to a unitary system. Some terminal districts are on appeal, others may not be fully implemented, and others may be subject to challenge in the district courts.

Summary of status of school systems in nine Southern States

State	Ala.	Fla.	Ga.*	La.	Miss.	N.C.	S.C.	Tenn.	Va.	Total
(Total No. of Sch. Dist.)	(119)	(67)	(193)	(66)	(149)	(158)	(93)	(149)	(135)	(1129)
SYSTEMS WITH TERMINAL PLANS:										
Unitary Prior to 1969-70	21	11	28	1	8	20	4	99	70	262
1969-70:										
Ct. Order	12	7	9	11	8	9	1	1	21	79
Voluntary	0	16	26	2	12	38	12	4	13	123
1970-71:										
Ct. Order	11	2	4	32	13	1	13	2	6	84
Voluntary	0	5	10	2	5	20	13	5	3	63
1971-72:										
Ct. Order	1	1	0	6	9	0	0	0	2	19
Voluntary	0	0	1	0	0	0	0	0	0	1
Plans Yet To Be Filed:										
Ct. Order	25	3	11	0	31	9	10	5	3	97
Subtotal	70	45	89	54	86	97	53	116	118	728
SYSTEMS WITH NO TERMINAL PLAN:										
In Litigation	46	4	18	9	16	3	0	18	10	124
Terminated by HEW	0	4	30	3	28	0	8	0	1	74
HEW Enforcement Proceedings	0	11	22	0	8	17	18	5	2	83
Other	0	3	34	0	11	2	14	5	3	72
Subtotal	46	22	104	12	63	22	40	28	16	353
Status Unknown	3	0	0	0	0	39	0	5	1	48
Total	119	67	193	66	149	158	93	149	135	1,129

*There is pending in the Northern District of Georgia a suit brought by the United States against the State of Georgia and State Board and Superintendent of Education, to desegregate all these school systems.

U.S. GOVERNMENT PRINTING OFFICE: 1969