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

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Following this Court's decision in *Green* v. *County School Board,* 391 U.S. 430, these cases, involving some thirty-three school districts in Mississippi, were before the United States Court of Appeals for the Fifth Circuit, in *Adams* v. *Mathews,* 403 F. 2d 181. Prior to that the district court had approved "freedom of choice" plans. In the *Adams* decision, all of these cases, and others, were reversed, and sent back to district courts to determine whether the plans would lead to "a unitary system in which racial discrimination would be eliminated root and branch," and whether the proposed changes would produce "a desegregation plan that 'promises realistically to work now'" (403 F. 2d at 188).

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On remand, the district court again approved the "freedom of choice" plans (Pet. App. 1a–23a). The United States again appealed to the court of appeals, and an expedited procedure was followed in that court. The United States asked for orders which would lead to desegregation in most of the schools beginning in the fall of 1969. In the proceedings before the court of appeals, the United States stated its belief that such plans could be developed and put into effect within the time available, and the United States proposed a timetable for the development and implementation of the plans.

In these proceedings in the court of appeals, the United States also suggested that the Department of Justice was not expert in educational administration, and that better progress might be made if experienced educators from the Department of Health, Education and Welfare were brought into the picture.

The court of appeals adopted all of the recommendations of the United States (Pet. App. 28a–37a). It ordered the district court to formulate plans which would "disestablish the dual school systems in question" (Pet. App. 36a). It also ordered the district court to 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" which would carry out the court's order (Pet. App. 35a-36a). Finally, it set up a timetable—admittedly a very tight one—under which plans should be presented to the district court by August 11, 1969, for hearing on August 21, 1969, and to be implemented by the district

court no later than August 25, 1969—a date which was later changed by the court of appeals to September 1, 1969 (Pet. App. 38a).

The Department of Health, Education and Welfare filed plans by August 11, 1969 (Pet. App. 40a–52a). On August 19, 1969, Robert H. Finch, Secretary of Health, Education and Welfare of the United States, sent a letter to Chief Judge Brown of the court of appeals, and to the three district judges involved in the case, requesting the court to grant an extension of time until December 1, 1969, for the filing of plans after more thorough study (Pet. App. 53a–54a). The court of appeals directed the district court to consider this request, and a motion filed by the United States based on the request, and to make recommendations with respect to it. The district court held a hearing, and recommended that the Secretary's request be granted (Pet. App. 56a–70a). This has been approved by the court of appeals, which has amended its earlier order, by eliminating the September 1, 1969, deadline, and fixing a new deadline of December 1, 1969 (Pet. App. 71a–78a). The court, at the suggestion of the Department of Justice, also ordered each of the Boards, in conjunction with the Office of Education, to "develop a program to prepare its faculty and staff for the conversion from the dual to the unitary system" and to do this by October 1, 1969 (Pet. App. 77a). Finally, also at the suggestion of the Department of Justice, the Boards were ordered not to construct any new facilities "until a terminal plan has been approved by the Court" (Pet. App. 78a).

On August 30, 1969, petitioners applied to Mr. Justice Black for an order vacating the court of appeals' modification of its previous order. On September 5, 1969, Mr. Justice Black denied the application (Pet. App. 79a–83a). The petition for a writ of certiorari followed.

2. We agree with much that is said in the petition for certiorari, and we have no quarrel with the statement in Mr. Justice Black's opinion in Chambers that "the phrase 'with all deliberate speed' should no longer have any relevancy whatsoever in enforcing the constitutional rights" of students to education in a unitary, desegregated school system (Pet. App. 81a). The United States did not rely on a concept of "deliberate speed" in seeking the extension of time granted by the court below, and there is nothing in the court of appeals decision, the district court opinion, or the motion of the United States that condones any delay past December 1, 1969, in formulating a terminal desegregation plan. Indeed, it has been, and remains, our understanding that this Court has already indicated that the "deliberate speed" formula is no longer appropriate to the remedial aspects of school desegregation suits and that, instead, school boards today are constitutionally obligated to devise and implement plans that will accomplish, both "realistically" and *"now"*, the conversion of dual, segregated school systems into unitary, desegregated school systems. *Green* v. *County School Board,* 391 U.S. 430, 438–439, and cases there cited.

While we believe that it might be useful for this

Court to reiterate these governing principles in an appropriate case, we fail to perceive what relief petitioners are seeking from this Court in the present posture of this matter. The Office of Education of the Department of Health, Education and Welfare, in its capacity as a sort of collective "Special Master" assisting the courts below, is presently proceeding, not with "deliberate speed," but with dispatch, to formulate the plans for converting the thirty-three school systems involved in these consolidated cases to unitary, desegregated systems. In compliance with the order of the court of appeals, these plans will be submitted as quickly as possible, in no event later than December 1, 1969, and will include provisions for "significant action toward disestablishment of the dual school systems during the school year September 1969–June 1970" (Pet. App. 78a).[1] It cannot now be known whether petitioners will deem any of the provisions of these plans to be unsatisfactory in any respect. If they should, they would be entitled to file their objections or suggested amendments within fifteen days of the submission of the plans to the district court and that court would be required to act thereon and approve a plan conforming to constitutional standards during the next ensuing fifteen days (Pet. App. 76a–77a). In the meantime, the Office of Education has, in compliance with the order of the

[1] The steps which might be taken during the present school year could include for example, the pairing or zoning of schools at midterm, teacher reassignments, use of team teaching, integration of athletic programs and adoption of a midterm program to prepare students and the community for total disestablishment of the dual system in the 1970–1971 school year.

court below (Pet. App. 77a), reported to that court on October 1, 1969, with respect to the program which has been developed to prepare the faculty and staff of each school district for conversion from the dual to the unitary system.

Petitioners do not claim that any of the above-described provisions of the order of the court of appeals are inappropriate in the present posture of these cases. They complain, instead, that that court erred in granting the government's request for an extension of time for the filing of the plans by the Office of Education and thereby permitting the current school year to begin in these districts under constitutionally inadequate "freedom of choice" plans. Obviously, however, the clock cannot be turned back so as to begin the school year in any other way. The pertinent question now, we submit, is not whether, in the extremely difficult circumstances of late summer, the court below should or should not have granted the extension of time deemed necessary by the Secretary of Health, Education and Welfare in order to enable his Department realistically and responsibly to make up for the tragic and frustrating default of the local school officials in these districts by doing the work which it was their obligation under the Constitution to have done.[2]

[2] Petitioners correctly state that "the school boards had made no attempt to solve [the administrative difficulties] in the fifteen years since *Brown*" (Pet. 10). Undeniably, the obligation to solve those difficulties is immediate and absolute, and the school boards involved may not profit from their own intransigence. But school systems are run for children, not boards or courts. If genuine requirements of educational administration were to be disregarded in providing the remedies for school boards' neglect of their duties, the resulting harm would fall on the very pupils for whom better education through equal opportunity is sought.

The question now is how, in the present circumstances, the overriding objective of these lawsuits, to which the United States is firmly dedicated, can be successfully and expeditiously achieved. We believe that the order of the court of appeals—formulated in the light of that court's close familiarity with these cases and distinguished experience in this field—constitutes an appropriate answer to this question. Petitioners do not suggest how the order could be improved or how, in any other respect, the objectives of these lawsuits would be furthered by this Court's review of the order at the present stage of these cases.

Accordingly, we suggest the Court should deny certiorari or, alternatively, withhold action on the petition until the situation clarifies after the scheduled filing of the plans in December.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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