IN THE

Supreme Court of the United States

October Term, 1967

No. 695

CHARLES C. GREEN, *et al.*,

Petitioners,

—v.—

COUNTY SCHOOL BOARD OF NEW KENT COUNTY, VIRGINIA, *et al.*,

Respondents.

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

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on June 12, 1967.

Citations to Opinions Below

The District Court filed memorandum opinions on May 17, 1966 and on June 28, 1966. Both are unreported but are reprinted in the appendix at pp. 1-15a. The June 12, 1967 opinion of the Court of Appeals, reprinted in the appendix at p. 16a, is reported at —— F.2d ——.

Jurisdiction

The judgment of the Court of Appeals was entered June 12, 1967, appendix p. 41a, *infra*. Mr. Justice Black, on September 8, 1967, extended the time for filing the petition for certiorari until October 10, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Question Presented

Whether—13 years after *Brown* v. *Board of Education*—a school board adequately discharges its obligation to effect a unitary, non-racial school system, by adopting a freedom of choice desegregation plan, where the evidence shows that such plan is not likely to disestablish the dual system and where there are other methods, no more difficult to administer, which would immediately produce substantial desegregation.

Statutes and Constitutional Provisions Involved

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

Statement

Petitioners seek review of the adequacy of a freedom of choice desegregation plan adopted by defendant School Board and approved by the Court below *en banc*, Judges Sobeloff and Winter disagreeing with the majority opinion.

I. *The Pleadings and Evidence*

Petitioners, Negro parents and children of New Kent County, Virginia, filed on March 15, 1965, in the United States District Court for the Eastern District of Virginia, a class action seeking injunctive relief against the maintenance of separate schools for the races. The complaint named as defendants the County School Board, its individual members, and the Superintendent of Schools.[1]

To comply with Title VI of the Civil Rights Act of 1964, 78 Stat. 241, and regulations of the United States Department of Health, Education and Welfare, the New Kent County School Board, on August 2, 1965, adopted a freedom of choice desegregation plan and on May 10, 1966 filed copies thereof with the District Court.

New Kent is a rural county in Eastern Virginia, east of the City of Richmond. There is no residential segregation; both races are diffused generally throughout the

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[1] The action was filed pursuant to 28 U.S.C. § 1331 and § 1343, and 42 U.S.C. § 1981 and § 1983. The complaint alleged that (R. Vol. 2, p. 8):

> Notwithstanding the holding and admonitions in *Brown* v. *Board of Education,* 347 U.S. 483 (1954) and 349 U.S. 294 (1955), the defendant school board maintains and operates a biracial school system. . . .
>
> [that the defendants] ha[d] not devoted efforts toward initiating non-segregation in the public school system, [and had failed to make] a reasonable start to effectuate a transition to a racially non-discriminatory school system as under paramount law it [was] their duty to do.

The defendants filed, on April 5, 1965, a Motion to Dismiss the complaint on the sole ground that it failed to state a claim upon which relief could be granted (R. Vol. 2, p. 13). In an order entered on May 5, 1965, the district court deferred ruling on the motion and directed the defendants to file an answer by June 1, 1965 (R. Vol. 2, p. 15).

county.[2] (cf. PX "A" and "B"; see also the opinion of Judge Sobeloff at p. 23a.)[3]

Students:[4] During the 1964-1965 school year some 1291 students (approximately 739 Negroes, 552 whites) were enrolled in the only two schools maintained by the county: New Kent School, a combined all-white elementary and high school and George W. Watkins School, a combined all-Negro elementary and high school. There were no attendance zones. Each school served the entire county. During 1964-65, 11 Negro busses canvassed the entire county to deliver 710 of the 740 Negro pupils to Watkins, located in the western half of the county. Ten busses transported almost all of the 550 white pupils to New Kent in the eastern half. (See PX "A" and "B" and the answer to question No. 4).

There was no pupil desegregation whatever during the 1964-65 school year. Every Negro pupil attended Watkins and every white pupil attended New Kent. Eighteen Indian pupils living in New Kent were bussed to the Indian school in adjoining Charles City County.

From 1956 through the 1965-66 school year school assignments of New Kent pupils were governed by the Virginia Pupil Placement Act §22.232.1 *et seq.* Code of Vir-

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[2] The Census reports show that the Negro population was substantially the same in each of the four magisterial districts in New Kent County: Black Creek-479, Cumberland-637, St. Peters-633, and Weir Creek-565. See U.S. Bureau of the Census. *U.S. Census of Population:* 1960 *General Population Characteristics, Virginia.* Final Report PC(1)-48B.

[3] The prefix "PX" refers to plaintiffs' exhibits. Exhibits "A" and "B" show the bus routes for each of the two county schools. Each exhibit shows the routes travelled by the various busses bringing children to that particular school. Each school is served by busses that traverse all areas of the county.

[4] The information that follows was obtained from defendants' answers to plaintiffs interrogatories (R. Vol. 2, pp. 27-36).

ginia, 1950 (1964 Replacement Volume), repealed by Acts of Assembly, 1966, c. 590, under which any pupil could request assignment to any school in the county; children making no request were assigned to the school previously maintained for their race. The free choice plan the Board adopted in August, 1965 was not placed into effect until the 1966-67 school year by which time it had been approved by the district court.

Up to and including the 1964-65 school year, no Negro pupil ever sought admission to New Kent School and no white pupil ever sought admission to Watkins (R. Vol. 2, p. 28). Thus, at the close of the 1964-65 school year, 11 years after *Brown* v. *Board of Education,* 347 U.S. 483, none of the 739 Negro pupils in the county were in, or had ever attended, school with white students.

As the following table[5] indicates, the Negro school was more overcrowded and had a substantially higher pupil-teacher ratio, and larger class sizes than the white school:

Name of School	*Pupil-Teacher Ratio*	*Average Class Size*	*Overcrowding Variance from Capacity (Elem. Schools)*	*Number Buses*	*Average Pupils Per Bus*
New Kent (white) 1-12	22	21	+ 37 (9%)	10	54.8
George W. Watkins (Negro) 1-12	28	26	+118 (28%)	11	64.5

In the 1965-66 school year some 35 Negroes attended the formerly white New Kent High School but no white students attended Watkins. During the year just ended, 1966-1967, 111 of the 739 Negroes in the County attended New Kent.

[5] This table was compiled from defendants' answers to plaintiffs' interrogatories relative to the 1964-65 school year (R. Vol. 2, pp. 27-36).

No white students attended Watkins; all 628 pupils at Watkins were Negroes. Thus, as late as 13 years after the decision in *Brown,* 85% of the Negro students in the County attended school only with other Negroes.[6]

Faculty: Contracts with teachers are executed for a period of one year. No white teachers were assigned to the all-Negro Watkins School during 1964-65 nor Negro teachers to the all-white New Kent School, and none had ever been so assigned. The policy remained unchanged for 1965-66. During 1966-67 the extent of teacher desegregation was the assignment of a single Negro teacher two days each week to New Kent.

II. *The Plan Adopted by the Board*

As indicated above, the New Kent School Board on August 2, 1965, adopted a freedom of choice desegregation plan to be placed into effect in the 1966-67 school year.[7] The plan provides essentially for "permissive transfers" for 10 of the 12 grades. Only students eligible to enter grades one and eight are required to exercise a choice of schools. It provides further that "any student in grades other than grades one and eight for whom a choice is not obtained will be assigned to the school he is now attending." [8]

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[6] The record in this case, like the records in all school desegregation cases, is necessarily stale by the time it reaches this Court. In this case the 1964-65 school year was the last year for which the record supplied desegregation statistics. Information regarding student and faculty desegregation during the 1965-66 and 1966-67 school years was obtained from official documents, available for public inspection, maintained by the United States Department of Health, Education and Welfare. Certified copies thereof and an accompanying affidavit have been filed with this Court and served upon opposing counsel.

[7] The plan was included by the district court in its memorandum opinion of June 28, 1966, reproduced herein at p. 4a.

[8] By failing to require, at least in its initial year, that every student make a choice, the plan permits some students to be assigned under the former dual assignment system until approximately 1973. Under the plan

It states that no choice will be denied other than for overcrowding in which case students living nearest the school chosen will be given preference.

III. *The District Court's Decision*

On May 4, 1966, the case was tried before the District Judge, Hon. John D. Butzner, Jr., who, on May 17, 1966, entered a memorandum opinion and order: (a) denying defendants' motion to dismiss, and (b) deferring approval of the plan pending the filing by the defendants of "an amendment to the plan [which would provide] for employment and assignment of staff on a non-racial basis." (R. Vol. 2, pp. 51-56; 2a).

The Board filed on June 6, 1966, a supplement to its plan dealing with school faculties. On June 10, 1966, plaintiffs filed exceptions to the supplement contending

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students entering other than grades one or eight who do not exercise a choice are assigned to the school they are then attending. Thus, a student, who began school in fall, 1965, one year before the plan went into effect and was therefore assigned to a school previously maintained for his race would, unless he affirmatively exercised a choice to go elsewhere, be reassigned there for the remainder of his elementary school years. Similarly, students who entered high school prior to 1966-67 under the old dual assignment system, would, unless they took affirmative action to transfer elsewhere, be reassigned to that school until graduation. The plan, then, permits some students (those who began at a school before it went into effect) to be reassigned for as long as up to seven years (in the case of a first grader) to schools to which they originally had been assigned on the basis of race. It need hardly be said that such a plan—one which fails immediately to abolish continued racial assignments or reassignments —may not stand under *Brown* v. *Board of Education,* 347 U.S. 483 and 349 U.S. 294. The Fifth Circuit has rejected plans having that effect. See *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, 890-891, *aff'd with modifications on rehearing en banc,* No. 23345, March 29, 1967, *petition for certiorari pending,* Nos. 256, 282, 301. We point this out only in the interest of careful analysis. For overturning the decision below on this ground would be insufficient to protect petitioners' rights. As we more fully develop later what is objectionable about this plan is its employment of free choice assignment provisions to perpetuate segregation in an area, where, because of the lack of residential segregation, it could not otherwise result.

(a) that the supplement failed to provide sufficiently for faculty and staff desegregation, and (b) that plaintiffs would continue to be denied constitutional rights under the freedom of choice plan and that the defendants should be required to assign students pursuant to geographic attendance areas. (R. Vol. 2, pp. 61-62).

On June 28, 1966, the district court entered a memorandum opinion and an order approving the freedom of choice plans as amended. (R. Vol. 1, pp. 7-19; 4a.)

IV. *The Court of Appeals' Opinion*

On appeal to the Court of Appeals for the Fourth Circuit petitioners contended that in view of the circumstances in the county, the freedom of choice plan adopted by the defendants was the method least likely to accomplish desegregation and that the district court erred in approving it.

On June 12, 1967, the Court, *en banc,* affirmed the district court's approval of the freedom of choice assignment provisions of the plan, but remanded the case for entry of an order regarding faculty "which is much more specific and more comprehensive" and which would incorporate in addition to a "minimal objective time table," some of the faculty provisions of the decree entered by the Fifth Circuit in *United States* v. *Jefferson County Board of Education, supra* (22a).

Judges Sobeloff and Winter concurred specially with respect to the remand on the teacher issue but disagreed on other aspects. Said Judge Sobeloff (22a):[9]

[9] This case was decided together with a companion case *Bowman* v. *County School Board of Charles City County, Virginia,* No. 10793, for which no review is sought. While the opinion discussed herein was rendered in the *Charles City* case, it was expressly made applicable to *New Kent* (p. 15a); similarly Judge Sobeloff stated that his opinion in *Charles City* applied to *New Kent* (p. 22a).

> I think that the District Court should be directed not only to incorporate an objective time table in the School Board's plans but also to set up procedures for periodically evaluating the effectiveness of the Board's "Freedom-of-choice" plans in the elimination of other features of a segregated school system.
>
> . . . Since the Board's "Freedom-of-choice" plan has now been in effect for two years as to grades 1, 2, 8, 9, 10, 11 and 12 and one year as to all other grades, clearly this court's remand should embrace an order requiring an evaluation of the success of the plan's operation over that time span, not only as to faculty but as to pupil integration as well. (24a)

While they did not hold, as petitioners had urged, that the peculiar conditions in the county made freedom of choice constitutionally unacceptable as a tool for desegregation they recognized that it was utilized to maintain segregation (27-28a):

> As it is, the plans manifestly perpetuate discrimination. In view of the situation found in New Kent County, where there is no residential segregation, *the elimination of the dual school system and the establishment of a "unitary, non-racial system" could be readily achieved with a minimum of administrative difficulty by means of geographic zoning*—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School.
>
> Although a geographical formula is not universally appropriate, it is evident that here the Board, by separately busing Negro children across the entire county to the "Negro" school, and the white children to the "white" school, *is deliberately maintaining a*

> *segregated system which would vanish with non-racial geographic zoning.* The conditions in this county represent a classical case for this expedient. (Emphasis added.)

While the majority implied that freedom of choice was acceptable regardless of result, Judges Sobeloff and Winter stated the test thus (30a):

> 'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end.

REASONS FOR GRANTING THE WRIT

I.

Introduction

This case presents an issue of paramount importance regarding the desegregation of public schools throughout the southern and border states pursuant to *Brown* v. *Board of Education.*[10] More particularly, the question is whether in the mid-sixties, a full generation of public school children after *Brown,* school boards may continue to adopt so-called freedom of choice desegregation plans which tend to perpetuate racially identifiable schools, where there are other methods, equally if not more feasible to administer, which will more speedily disestablish the dual systems.

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[10] 347 U.S. 483 (*Brown I*); 349 U.S. 294 (*Brown II*).

The most marked and widespread innovation in school administration in the southern and border states in the last fifty years has been the change in pupil assignment method in the years since *Brown*,[11] from a geographic attendance zone system to so-called "free choice." Prior to *Brown*, systems in the North and South, with rare exception, assigned pupils by means of zone lines drawn around each school.[12]

Under an attendance zone system, unless a transfer request is granted for some special reason, students living in the zone of the school serving their grade would normally attend that school.

Prior to the relatively recent controversy concerning segregation in large urban systems, assignment by geographic attendance zones was viewed as the soundest method of pupil assignment. This was not without good reason; for placing children in the school nearest their home would often eliminate the need to furnish transportation, encourage the use of schools as community centers and generally facilitate the task of planning for an ever-expanding school population.[13]

In states where separate systems were required by law, the zone assignment method was implemented by drawing around each white school attendance zones designed to

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[11] See generally, Campbell, Cunningham and McPhee, *The Organization and Control of American Schools, 1965*. ("As a consequence of [*Brown* v. *Board of Education, supra*], the question of attendance areas has become one of the most significant issues in american education of this Century" (at 136)).

[12] See Meador, *The Constitution and The Assignment of Pupils to Public School,* 45 Va. L. Rev. 517 (1959), "until now the matter has been handled rather routinely almost everywhere by marking off geographical attendance areas for the various buildings. In the South, however, coupled with this method has been the factor of race."

[13] Campbell, Cunningham and McPhee, *supra,* Note 11 at 133-144.

accommodate whites in the area, and around each Negro school attendance zones for Negroes. In many areas, as in the cases before the Court, where the entire county was a zone, lines overlapped because of the lack of residential segregation. Thus, in most southern school districts, school assignment was largely a function of three factors: race, proximity and convenience.

After *Brown,* southern school boards were faced with the problem of "effectuating a transition to a racially nondiscriminatory system" (*Brown II* at 301). The easiest method was to convert the dual attendance zones, drawn according to race, into single attendance zones, without regard to race, so that assignment of all students would depend only on proximity and convenience. With rare exception, however, southern school boards, when finally forced to begin the desegregation process, rejected this relatively simple method in favor of the complex and discriminatory procedures of pupil placement laws and, when those were invalidated,[14] switched to what has in practice worked the same way—the so-called free choice.[15]

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[14] The Virginia Pupil Placement Law was invalidated in *Green* v. *County School Board of the City of Roanoke,* 304 F.2d 118 (4th Cir., 1962) and *Marsh* v. *County School Board of Roanoke County, Va.,* 305 F.2d 94 (4th Cir., 1962). For other cases invalidating or disapproving similar laws, see *Northcross* v. *Board of Education of the City of Memphis,* 302 F.2d 818 (6th Cir., 1962); *Gibson* v. *Board of Public Instruction of Dade County,* 272 F.2d 763 (5th Cir., 1959); *Manning* v. *Board of Public Instruction of Hillsboro County,* 277 F.2d 370 (5th Cir., 1960); *Dove* v. *Parham,* 282 F.2d 256 (8th Cir., 1960).

[15] According to the Civil Rights Commission, the vast majority of school districts in the south use freedom of choice plans. See *Southern School Desegregation, 1966-67,* A Report of the U.S. Commission on Civil Rights, July, 1967. The Report states, at pp. 71-72:

> All . . . districts [desegregating under voluntary plans] in Alabama, Mississippi, and South Carolina, without exception, and 83% of such districts in Georgia have adopted free choice plans. . . .

Under a so-called free choice plan of desegregation, students are given a privilege rarely enjoyed in the past —the opportunity to attend the school of their choice. Most often they are permitted to choose any school in the system, but in some areas, they are permitted to choose only either the previously all-Negro or previously all-white school in a limited geographic area. Not only are such plans more difficult to administer (choice forms now have to be processed and standards developed for passing on them, with provision for notice of the right to choose and for dealing with students who fail to exercise a choice),[16] they are, in addition, far less likely to disestablish the

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The great majority of districts under court order also are employing "freedom of choice."

See also *Survey of School Desegregation in the Southern and Border States, 1965-1966,* United States Commission on Civil Rights, February, 1966, at p. 47.

[16] The decree appended by the United States Court of Appeals for the Fifth Circuit, to its recent decision in *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, *aff'd with modification on rehearing en banc,* Civil No. 23345, March 29, 1967, shows the complexity of such plans. That Court had previously described such plans as a "haphazard basis" for the administration of schools. *Singleton* v. *Jackson Municipal Separate School District,* 355 F.2d 865, 871 (5th Cir. 1966).

Under such plans generally, and under the plan in this case, school officials are required to mail (or deliver by way of the students) letters to the parents informing them of their rights to choose within a designated period, compile and analyze the forms returned, grant and deny choices, noitfy students of the action taken and assign students failing to choose to the schools nearest their homes. Virtually each step of the procedure, from the initial letter to the assignment of students failing to choose, provides an opportunity for individuals hostile to desegregation to forestall its progress, either by deliberate mis-performance or non-performance. The Civil Rights Commission has reported on non-compliance by school authorities with their desegregation plans:

> In Webster County, Mississippi, school officials assigned on a racial basis about 200 white and Negro students whose freedom of choice forms had not been returned to the school office, even though the desegregation plan stated that it was mandatory for parents to exercise a choice and that assignments would be based on that choice [footnote omitted]. In McCarty, Missouri after the school board had

dual system. And, as demonstrated below, experience has proved them largely incapable of disestablishing the dual system.

Under free choice plans, the extent of actual desegregation varies directly with the number of students seeking, and actually being permitted to transfer to schools previously maintained for the other race. It should have been obvious, however, that white students—in view of general notions of Negro inferiority and the hard fact that in far too many areas Negro schools were vastly inferior to those furnished whites[17]—would not seek trans-

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distributed freedom of choice forms and students had filled out and returned the forms, the board ignored them.

Survey of School Desegregation in the Southern and Border States, at p. 47. Given the other shortcomings of free choice plans, there is serious doubt whether the constitutional duty to effect a non-racial system is satisfied by the promulgation of rules so susceptible of manipulation by hostile school officials. As Judge Sobeloff has observed:

> A procedure which might well succeed under sympathetic administration could prove woefully inadequate in an antagonistic environment.

Bradley v. *School Board of the City of Richmond,* 345 F.2d 310 (4th Cir. 1965) (concurring in part and dissenting in part).

[17] Watkins, the Negro school in New Kent County was more overcrowded and had substantially larger class sizes and teacher-pupil ratios than did the white school. (See p. 5, *supra*).

The Negro schools in the South compare unfavorably to white schools in other important respects. In *Equality of Educational Opportunity,* a report prepared by the Office of Education of the United States Department of Health Education and Welfare pursuant to the Civil Rights Act of 1964, the Commissioner states, concerning Negro schools in the Metropolitan South (at p. 206):

> The average white attends a secondary school that, compared to the average Negro is more likely to have a gymnasium, a foreign language laboratory with sound equipment, a cafeteria, a physics laboratory, a room used only for typing instruction, an athletic field, a chemistry laboratory, a biology laboratory, at least three movie projectors.

Essentially the same was said of Negro schools in the non-metropolitan South (*Id.* at 210-211). It is not surprising, therefore, quite apart from race, that white students have unanimously refrained from choosing Negro schools.

fers to the formerly Negro schools; and, indeed, very few ever have.[18] Thus, from the very beginning the burden of disestablishing the dual system under free choice plans was thrust squarely upon the Negro children and their parents, despite the admonition of this Court in *Brown II* (349 U.S. 294, 299) that "school authorities had the primary responsibility." That is what happened in this case. Although the majority stated that (17a):

> The burden of extracting individual pupils from discriminatory racial assignment may not be cast upon the pupils and their parents [and that] it is the duty of the school boards to eliminate the discrimination which inheres in such a system [,]

the very plan the court approved did just that. To be sure each pupil was given the unrestricted right to attend any school in the system. But, as previously noticed, desegregation never occurs except by transfers by Negroes to the white schools. Thus, the freedom of choice plan approved below, like all other such plans, placed the burden of achieving a single system upon Negro citizens.[19]

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[18] "During the past school year, as in previous years, white students rarely chose to attend Negro schools." *Southern School Desegregation, 1966-67* at p. 142, *United States* v. *Jefferson County, supra* at 889.

[19] The free choice plan adopted in this case is subject to serious question on the ground that it promotes invidious discrimination. By permitting students to choose a school, instead of assigning them on some rational non-racial basis, the school board allows students to utilize race as a factor in the school selection process. Thus it is that white students, almost invariably, choose the formerly white schools and not the Negro schools. To be sure the Constitution does not prohibit private discrimination. But states may not designedly facilitate the discriminatory conduct of individuals or lend support to that end. See *Reitman* v. *Mulkey,* 18 L. Ed. 831; *Robinson* v. *Florida,* 378 U.S. 153; *Anderson* v. *Martin,* 375 U.S. 399; *Goss* v. *Board of Education,* 373 U.S. 683. Cf. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715. Thus in *Anderson,* this Court held that although individual voters are constitutionally free to vote partly or even solely on the basis of race, the State may not designate the race of candidates on the ballot. Such governmental action promotes and facilitates

The fundamental premise of *Brown I* was that segregation in public education had very deep and long term effects upon the Negroes set apart. It was not surprising, therefore, that individuals, reared in that system and schooled in the ways of subservience (by segregation, not only in schools, but in every other conceivable aspect of human existence) when gratuitously asked to "make a choice," chose, by their inaction, that their children should remain in the Negro schools. In its *Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964* (hereinafter referred to as *Revised Guidelines*), the Department of Health, Education and Welfare states (45 C.F.R. Part 181.54):

> A free choice plan tends to place the burden of desegregation on Negro or other minority group students and their parents. Even when school authorities undertake good faith efforts to assure its fair operation, *the very nature of a free choice plan and the*

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the voters' succumbing to racial prejudice. So too here, giving students in a district formerly segregated by law the right to choose a school facilitates and promotes choices based on race.

It is no answer that some students may not, in fact, use race as a factor in the choice process. In *Anderson,* the statute was not saved because some persons might vote without regard to the race of the candidate. It is the furnishing of the opportunity that is prohibited by the Constitution.

We do not argue that a school board may never permit students to choose schools. And certainly systems using attendance zones would not run afoul of the Constitution by permitting students to transfer for good cause shown. Presumably in such instances a legitimate non-racial reason would have to be supplied.

Nor do we argue that freedom of choice may never be used where race is intended to be a factor. For in a system in which residential segregation is deeply entrenched, the allowance of a choice of schools based on race may be a useful way to achieve desegregation. There, however, the plan is being used to *undo* rather than *perpetuate* segregation as the plan in this case is being used to do. Cf. *Goss, supra* at 688, where this Court stated that "no plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment."

> *effect of longstanding community attitudes often tend to preclude or inhibit the exercise of a truly free choice by or for minority group students.* (Emphasis added.)

Beyond that, by making the Negro's exercise of choice the critical factor upon which the conversion depended, school authorities virtually insured its failure. Every community pressure militates against the affirmative choice by Negro parents of white schools. Moreover, intimidation of Negroes, a weapon well-known throughout the south, could equally be employed to deter them from seeking transfers to the white school. At best, school officials must have reasoned, only a few hardy souls would venture from the more comfortable atmosphere of the Negro school, with their all-Negro faculties and staff. Those that "dared," would soon be taught their place.[20]

Nor were they mistaken. The Civil Rights Commission, in its most recent reports on school desegregation in *Brown*-affected states, reports exhaustively of the violence, threats of violence and economic reprisals to which Negroes have been and are subjected to deter them from

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[20] A good example is *Coppedge* v. *Franklin County Board of Education,* C.A. No. 1796 (E.D. No. Car.), decided August 17, 1967. The Court found that there was marked hostility to desegregation in Franklin County, that Negroes had been subjected to violence, intimidation and reprisals, and that each successive year under the freedom of choice plan it had approved earlier had resulted in fewer requests by Negroes for reassignment to formerly all-white schools. Concluding that (slip op. 15):

> Community attitudes and pressures . . . have effectively inhibited the exercise of free choice of schools by Negro pupils and their parents

the Court directed that the defendants

> prepare and submit to the Court, on or before October, 1967, a plan for the assignment, at the earliest practicable date, of all students upon the basis of a unitary system of non-racial geographic attendance zones, or a plan for the consolidation of grades, or schools, or both. (*Id.* at 17.)

placing their children in white schools.[21] That specific episodes do not occur to particular individuals hardly prevents them from learning of them and acting on that knowledge.

With rare exception, then, school officials adopted, and the lower courts condoned, free choice knowing full well that it would produce less Negro students in white schools, and less injury to white sensibilities than under the geo-

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[21] *Southern School Desegregation, 1966-67* at pp. 70-113; *Survey of School Desegregation in the Southern and Border States, 1965-66,* at pp. 55-66. To relate but a few of the numerous instances of intimidation upon which the Commission reported: the 1966-67 study quotes the parents of 12 year old boy in Clay County, Mississippi as saying (at p. 76):

> white folks told some colored to tell us that if the child went [to a white school] he wouldn't come back alive or wouldn't come back like he went.

In Edgecombe County, North Carolina the home of a Negro couple whose son and daughter were attending the formerly all-white school was struck by gunfire (79). In Dooly County, Georgia, the father of a 14 year old boy, who had filled out his own form and attended the formerly white school, reported that "that Monday night the man [owner] came and said 'I want my damn house by Saturday.'" (83)

The Commission made the following findings, in its 1966-67 report, (at p. 142):

> 6. Freedom of choice plans, which have tended to perpetuate racially identifiable schools in the Southern and Border States, require affirmative action by both Negro and white parents and pupils before such disestablishment can be achieved. There are a number of factors which have prevented such affirmative action by substantial numbers of parents and pupils of both races:
>
> (a) Fear of retaliation and hostility from the white community . . .
>
> (b) [V]iolence, threats of violence and economic reprisal by white persons, [and the] harassment of Negro children by white classmates . . .
>
> (c) [improper influence by public officials].
>
> (d) Poverty. . . . Some Negro parents are embarrassed to permit their children to attend such schools without suitable clothing. In some districts special fees are assessed for courses which are available only in the white schools;
>
> (e) Improvements . . . have been instituted in all-Negro schools . . . in a manner that tends to discourage Negroes from selecting white schools.

graphic attendance zone method. Their expectations were justified. Meaningful desegregation has not resulted from the use of free choice. Even when Negroes have transferred, however, desegregation has been a one-way street—a few Negroes moving into the white schools, but no whites transferring to the Negro schools. In most districts, therefore, as in the case before the Court, the vast majority of Negro pupils continue to attend school only with Negroes.

Although the proportion of Negroes in all-Negro schools has declined since *Brown,* more Negro children are now attending such schools than in 1954.[22] Indeed, during the 1966-67 school year, a full 12 years years after *Brown,* more than 90% of the almost 3 million Negro pupils in the 11 Southern states still attended schools which were over 95% Negro and 83.1% were in schools which were 100% Negro.[23] And, in the case before the Court, 85% of the Negro pupils in New Kent County still attend schools with only Negroes. "This June, the vast majority of Negro children in the South who entered the first grade in 1955, the year after the *Brown* decision, were graduated from high school without ever attending a single class with a single white student." [24] Thus, as the Fifth Circuit has said, "[f]or all but a handful of Negro members of the High School Class of 1966, this right [to equal educational opportunities with white children in a racially non-discriminatory public school system] has been of such stuff as dreams are made on." [25]

In its most recent report, the Civil Rights Commission states:

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[22] *Southern School Desegregation,* 1966-67, at p. 11.

[23] *Id.* at 165.

[24] *Id.* at 147.

[25] *United States* v. *Jefferson County Board of Education, supra,* 372 F.2d 836 at 845.

> The review of desegregation under freedom of choice plans contained in this report, and that presented in last years commission's survey of southern school desegregation, show that *the freedom of choice plan is inadequate in the great majority of cases as an instrument for disestablishing a dual school system.* Such plans have not resulted in desegregation of Negro schools and therefore perpetuate one-half of the dual school system virtually intact. [Emphasis added][26]

II.

A Freedom of Choice Plan is Constitutionally Unacceptable Where There are Other Methods, no More Difficult to Administer, Which Would More Speedily Disestablish the Dual System.

The duty of a school board under *Brown,* in the mid-sixties (by now, the time for "deliberate speed" has long run out[27]) is to adopt that plan which will most speedily accomplish the effective desegregation of the system. We quite willingly concede that a court should not enforce its will where alternative methods are not likely to produce dissimilar results—that much discretion should still be the province of the school board. We submit, however, that a

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[26] *Southern School Desegregation, 1966-1967,* pp. 152-153. In an earlier report, *Racial Isolation in the Public Schools,* the Civil Rights Commission observed (at p. 69) that, ". . . the degree of school segregation in these free-choice systems remain high." and concluded that (*ibid*): "only limited school desegregation has been achieved under free choice plans in Southern and Border city school systems."

[27] Almost two years ago this Court stated, "more than a decade has passed since we directed desegregation of public school facilities with all deliberate speed. . . . Delays in desegregating school systems are no longer tolerable." *Bradley* v. *School Board of The City of Richmond,* 382 U.S. 103, 105. "There has been entirely too much deliberation and not enough speed . . ." *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 229. Cf. *Watson* v. *Memphis,* 373 U.S. 526, 533.

court may not—at this late date, in the absence of persuasive evidence showing the need for delay—permit the use of any plan other than that which will most speedily and effectively desegregate the system. Put another way, at this point, that method must be mandated which will do the job more quickly and effectively.

A. *The Obligation of a School Board Under Brown v. Board of Education is to Disestablish the Dual School System and to Achieve a Unitary, Non-racial System.*

At bottom, this controversy concerns the precise point at which a school board has fulfilled its obligations under *Brown I and II.* When free choice plans initially were conceived, courts generally adhered—mistakenly, we submit—to the belief that it was sufficient to permit each student an unrestricted free choice of schools. It was said that "desegregation" did not mean "integration" and that the availability of a free choice of schools, unencumbered by violence and other restrictions, was sufficient quite apart from whether any integration actually resulted.[28] Despite

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[28] The doctrine probably had its genesis in the now famous dictum of Judge Parker in *Briggs* v. *Elliot,* 132 F.Supp. 776, 777 (E.D.S.C. 1955) "The Constitution . . . does not require integration. It merely forbids segregation"; See generally *Jeffers* v. *Whitley,* 309 F.2d 621, 629 (4th Cir. 1962); *Borders* v. *Rippy,* 247 F.2d 268, 271 (5th Cir. 1957); *Boson* v. *Rippy,* 285 F.2d 43, 48 (5th Cir. 1960); *Vick* v. *Board of Education of Obion County,* 205 F.Supp. 436 (W.D. Tenn. 1962); *Kelley* v. *Board of Education of the City of Nashville,* 270 F.2d 209, 229 (6th Cir. 1959).

In recent years, several courts in addition to that in *United States* v. *Jefferson County Board of Education, supra* (See discussion *infra* at pp. 23-25), have rejected the dictum in *Briggs.* Even before *Jefferson County,* Judge Wisdom had tersely observed that "Judge Parker's well known dictum. . . . should be laid to rest". *Singleton* v. *Jackson Municipal Separate School District,* 348 F.2d 729, 730 (5th Cir. 1965). In *Kemp* v. *Beasley,* 352 F.2d 14, 21 (1965), the Eighth Circuit stated that "The dictum in *Briggs* has not been followed or adopted by this Circuit and is logically inconsistent with *Brown.*" To the same effect is *Kelley* v. *Altheimer Arkansas Public School District,* 378 F.2d 483, 488 (8th Cir. 1967). See also *Evans* v. *Ennis,* 281 F.2d 385, 389 (3rd Cir. 1960) where

its protestations, the majority below manifested much of this thinking (17-18a, 19a):

> Employed as descriptive of a system of permissive transfers out of segregated schools in which the initial assignments are both involuntary and dictated by racial criteria, [freedom of choice] is an illusion and an oppression which is constitutionally impermissible . . .
>
> Employed as descriptive of a system in which each pupil or his parents, must annually exercise an uninhibited choice, and the choices govern the assignments, it is a very different thing. * * *
>
> *Since plaintiffs here concede that their annual choice is unrestricted and unencumbered, we find in its existence no denial of any constitutional right not to be subjected to racial discrimination.* (Emphasis added.)

At no point in its opinion did the majority meet the essence of petitioners' claim—that in view of related experience under the Pupil Placement laws, there was no good reason to believe that free choice would, in fact, desegregate the system and that the district court should have mandated the use of geographic zones which, on the evidence before it, would produce greater desegregation.

The notion that the making available of an unrestricted choice satisfies the Constitution, quite apart from whether significant numbers of white students choose Negro schools or Negro students choose white schools, is, we submit, fundamentally inconsistent with the decisions of this Court in *Brown* I and II, *Cooper* v. *Aaron,* 358 U.S. 1; *Bradley* v.

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the court declared "The Supreme Court has unqualifiedly declared integration to be their constitutional right." Cf. *Blocker* v. *Board of Education of Manhasset,* 226 F.Supp. 208, 220, 221 (E.D.N.Y. 1964) and *Board of Education of Oklahoma City Public Schools, et al.* v. *Dowell,* 372 F.2d 158 (10th Cir. 1967).

School Board of the City of Richmond, 382 U.S. 103 and the entire series of school cases it has decided.[29] The Eighth Circuit has said:

> A Board of Education does not satisfy its obligation to desegregate by simply opening the doors of a formerly all-white school to Negroes. [footnote omitted]

Kelley v. *Altheimer Arkansas Public School District, supra* at 488. And only recently, the Fifth Circuit, in a major school desegregation decision[30] that necessarily conflicts with the Fourth Circuit's, specifically rejected the argument that *Brown* I and the Constitution do not require integration but only an end to enforced segregation. Concluding that "integration" and "desegregation" mean one and the same thing, the Court used the terms interchangeably to mean the achievement of a "unitary non-racial [school] system". Said the Court (372 F.2d 836, 847 at Note 5):

> Decision-making in this important area of the law cannot be made to turn upon a quibble devised over ten years ago by a court [*Briggs*] that misread *Brown,* misapplied the class action doctrine in the school desegregation cases, and did not foresee the development of the law of equal opportunities.
>
> * * *
>
> We use the terms "integration" and "desegregation" of formerly segregated public schools systems to mean the conversion of a formerly de jure system to a unitary, non-racial (non-discriminatory) system—lock,

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[29] See *Rogers* v. *Paul,* 382 U.S. 198; *Calhoun* v. *Latimer,* 377 U.S. 263; *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218; *Goss* v. *Board of Education,* 373 U.S. 683.

[30] *United States* v. *Jefferson County Board of Education,* 372 F.2d 836 (5th Cir. 1966), *aff'd with modifications on rehearing en banc.* Civ. No. 23345, March 29, 1967, *petition for certiorari pending,* Nos. 256, 282, 301.

> stock and barrel: students, faculty, staff, facilities, programs and activities.

On rehearing *en banc* the majority put it this way (slip op. at 5):

> [school] Boards and officials administering public schools in this circuit [footnote omitted] have the affirmative duty under the Fourteenth Amendment to bring about an integrated unitary school system in which there are no Negro schools and no white schools —just schools. Expressions in our earlier opinion distinguishing between integration and desegregation [footnote omitted] must yield to this affirmative duty we now recognize. In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the dual system in this circuit requires integration of faculties, facilities and activities, as well as students.

The Court went on to hold that the test for any school desegregation plan is whether the plan achieves the "substantial integration" which is constitutionally required and that a plan not accomplishing that result must be abandoned and another substituted (372 F.2d 836, 895-896).[31] We sub-

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[31] The Court conceded, as we do here, that the Constitution does not require that "each and every child . . . attend a racially balanced school," nor that school officials achieve "a maximum of racial mixing." (372 F.2d 836, 846). It concluded, however, that school officials in formerly *de jure* systems have "an absolute duty to integrate." (*Ibid.*)

The Department of Health, Education and Welfare has also taken the position that a freedom of choice plan must work—result in actual integration. And under the *Revised Guidelines* the commissioner has the power, where the results under a free choice plan continue to be unsatisfactory, to require, as a precondition to the making available of further federal funds, that the school system adopt a different type of desegregation plan. *Revised Guidelines,* 45 CFR 181.54. Although administrative

scribe to that view and urge its plain and explicit adoption by this Court.

The majority opinion below, in true *Briggs* form, neither states nor implies such a requirement—that the plan "work." The most it can be read to say is that while Negroes rightfully may complain if extraneous circumstances inhibit the making of a "truly free choice," they have no basis to complain and the Constitution is satisfied if no such circumstances are shown. This is not an overharsh reading of the opinion. Only recently a writer observed:

> The Fourth is apparently the only circuit of the three that continues to cling to the doctrine of *Briggs* v. *Elliot,* and embraces freedom of choice as a final answer to school desegregation in the absence of intimidation and harrassment.[32]

Judge Sobeloff perceived this and exhorted the majority to "move out from under the incubus of the *Briggs* v. *Elliot* dictum and take [a] stand beside the Fifth and Eighth[33] Circuits." (40a)

The Fifth Circuit in Jefferson did not hold, and we do not urge, that freedom of choice plans are unconstitutional *per se.* Indeed, in areas where residential segregation is

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regulations propounded under Title VI of the Civil Rights Act of 1964 are not binding on courts determining private rights under the Fourteenth Amendment, nonetheless they are entitled to great weight in the formulation by the judiciary of constitutional standards. See *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 137, 139-140; *United States* v. *American Trucking Associations, Inc.,* 310 U.S. 534; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294; *United States* v. *Jefferson County, supra, en banc* slip op. at p. 7.

[32] Dunn, *Title VI, The Guidelines and School Desegregation in the South,* 53 Va. L. Rev. 42, 72 (1967).

[33] See *Kemp* v. *Beasley,* 352 F.2d 14 (8th Cir. 1965) discussed in Note 28, *supra.*

substantial and entrenched, a free choice plan might well be the most effective method of desegregation. Rather, our position is that a freedom of choice plan is not an "adequate" desegregation plan (Brown II, *supra,* 349 U.S. at 301), if there is another plan, equally feasible to administer, which will more speedily and effectively disestablish the dual system.

B. ***The Record Clearly Showed That a Freedom of Choice Plan Was Not Likely to Disestablish and Has Not Disestablished the Dual School System and That a Geographic Zone Plan Would Immediately Have Produced Substantial Desegregation.***

Plaintiffs' exhibits showed, Judge Sobeloff observed, and the available census figures confirmed, that there was no residential segregation in New Kent County. Separate busses maintained for the races traversed all areas of the county picking up children to be taken to the school maintained for their race. Yet, instead of geographically zoning each school as logic and reason would seem to dictate,[34] and as it most certainly would have done had all children been of the same race, the School Board gratuitously adopted a free choice plan thereby incurring the administrative hardship of processing choice forms and of furnishing transportation to children choosing the school farthest from their homes. Indeed, in view of the lack of residential segregation it can fairly be concluded that the dual school system could not continue, as Judge Sobeloff has said (see p. 9 *supra*), but for free choice. Freedom of choice, then, has been, at least in this community, the means by which the

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[34] Compare Judge Sobeloff's suggestion quoted at pp. 9-10, *supra* (27-28a) that the dual system could immediately be eliminated and a unitary non-racial system achieved by the assignment of students in the eastern half of the county to New Kent and those in the western half to Watkins.

State has continued, under the guise of desegregation, to maintain segregated schools.

The Board could not, in good faith, have hoped that enough students would choose the school previously closed to them to produce a truly integrated system. The evidence belies this. The Board had, for several years prior to the adoption of free choice in 1965,[35] operated under the Virginia Pupil Placement Act, under which any student, could, as in free choice, choose any school. When the New Kent Board adopted free choice, no Negro student had ever chosen to transfer to the white school and no white student had ever chosen to attend the Negro school. (R. Vol. 2, p. 28). Thus, at the time the Board adopted free choice, it was fairly clear, based on related experience under the Pupil Placement Law, that free choice would not disestablish the separate systems and produce a "unitary non-racial system."

Nor has it done so in the years since its adoption. During the most recent school year, 1966-67, only 111 of the 739 Negroes in the New Kent School district attended school with whites at the New Kent School. No whites chose to attend and, indeed, none have ever attended, Watkins, the Negro school. A full generation of school children after *Brown,* 85% of New Kent's Negro children still attended a school that was entirely Negro.

Nor did the Board introduce any evidence to justify its method, which, if it could disestablish the dual system at all (and, we think it clear that it could not), would require a much longer period of time than the method petitioners had urged upon the Court. As this Court said in *Brown II* (349 U.S. at 300):

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[35] Although the Board adopted its plan in August, 1965, it was not approved by the Court and actually implemented until the Fall term of 1966.

> The burden rests upon the defendants to establish that such time [in which to effectuate a transition to a racially non-discriminatory system] is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.

It was, therefore, error for the Court below to approve the freedom of choice plan in the face of petitioner's proof, especially when the Board failed to show administrative reasons, cognizable by *Brown II,* justifying delay.

The data regarding assignment of teachers also reveal the failure of the Board to disestablish the dual system. The racial composition of the faculty at each school during the year just ended (1966-67) mirrored the racial composition of the student bodies. There were no Negroes among the 28 full-time teachers at the formerly all-white New Kent school. Only one Negro teacher was assigned there and that was for the equivalent of two days each week. No white teachers were assigned to the only Negro school, Watkins—all full-time teachers there were Negroes. Thus, neither of the only two schools in the county had lost, either in terms of its students or faculty, its racial identification.[36]

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[36] The failure of the Board to take meaningful steps to integrate its faculty is consistent with what the record shows: that the Board, by adopting freedom of choice, could not in good faith have believed or intended that the dual system would thereby be converted into the non-racial system required by the Constitution. "[F]aculty segregation encourages pupil segregation and is detrimental to achieving a constitutionally required non-racially operated school system". *Clark* v. *Board of Education, Little Rock School District,* 369 F.2d 661, 669-670 (8th Cir. 1966); *United States* v. *Jefferson County Board of Education, supra* (at 883-885); *Bradley* v. *School Board of the City of Richmond,* 382 U.S. 103; *Rogers* v. *Paul,* 382 U.S. 198.

The duty of the School Board was to convert the dual school system it had created in derogation of petitioners' rights into a "unitary non-racial system." As we have previously noticed it had alternatives—such as utilizing geographic zones or reshaping grade structures—which the record shows would have disestablished the dual system more speedily and with much less administrative hardship than that which it ultimately chose. More importantly, the success of its free choice plan depended on the ability of Negroes to unshackle themselves from the psychological effects of imposed racial discriminations of the past, and to withstand the fear and intimidation of the present and future. Neither of the other methods under which assignment would be involuntary—as it had been until *Brown* —would subject Negroes to the possibility of intimidation or give undue weight, as does free choice, to the very psychological effects of the dual system that this court found objectionable.[37] Instead of employing a procedure which would "as far as possible eliminate the discriminatory effects of the past" (cf. *Louisiana* v. *United States,* 380 U.S. 145) the Board has, by adopting free choice, utilized those discriminatory effects to maintain its essentially segregated system.

But for the relatively small number of Negro children attending the formerly white school, the schools in the county are operated substantially as before the *Brown* decision. "The transfer of a few Negro children to a white school does not", as the Fifth Circuit has observed, "do away with the dual system." *United States* v. *Jefferson County Board of Education, supra,* 372 F. 2d at 812. All

[37] In a related context, this Court has said:

> It must be remembered that we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise. *Lane* v. *Wilson,* 307 U.S. 268, 276.

white pupils in New Kent County still attend the schools formerly maintained for their race; the overwhelming majority of Negroes still attend school only with other Negroes at Watkins. Here, as in most of the other districts utilizing free choice, one-half of the dual system has been retained intact. Nothing but race can explain the continued existence of this all-Negro school and defer indefinitely its elimination, where all races are scattered throughout the county. Freedom of choice has been in this county, the instrument by which the State has used its resources and authority to maintain the momentum of racial segregation.

The statistics demonstrate that freedom of choice has not effected, either in the county before the Court or in most districts in the southern and border states generally, a unitary non-discriminatory system. While its use in the immediate post-*Brown* years might have been justified as an interim or transitional device, one can hardly conceive any justification for its adoption as late as 1966, twelve years after *Brown*. Certainly, the record furnishes no administrative or other reasons for its retention in this county.

In the 13 years since *Brown* I and II, this Court—consistent with its early statement in *Brown II* that "the [district] courts, because of their proximity to local conditions . . . can best perform this judicial appraisal (349 U.S. at 298)"—has rarely reviewed cases challenging desegregation plans (or provisions thereof) approved by the lower courts. But the rule is not without its exceptions and there have been several instances in which this Court has found it necessary to overturn the judgment of a lower court in a school desegregation case.[38]

[38] The school desegregation cases which the court has reviewed are collected in Note 29, *supra* and accompanying text.

Standing to one side are the school cases, in which the Court acted to preserve, reaffirm, and vindicate, in the face of crude local opposition, the very basis of federal authority. In this category are *Cooper* v. *Aaron,* 358 U. S. 1 and *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218.

The other cases are those in which the Court has reviewed the provisions of a plan; they are few and far between but have a common characteristic: the issue posed is one upon which the continuation of the desegregation process depended. In *Goss* v. *Board of Education,* 373 U.S. 683 (1963), the question concerned the validity of provisions in desegregation plans entitling a student, solely on the basis of race, to obtain a transfer from a school in which he would be in the racial minority, back to his former segregated school where his race would be in the majority. Such provisions were widely being adopted with the approval of the lower courts, even though, as this court found, their effect was to perpetuate segregation. It was absolutely necessary, therefore, to prevent the desegregation process (which had barely begun) from being brought to a resounding halt, that this Court, as it did, hear the case and instruct the lower courts that such provisions were constitutionally unacceptable. So too, in *Bradley* v. *School Board of the City of Richmond,* 382 U.S. 103 and *Rogers* v. *Paul,* 382 U.S. 198, this Court, faced with increasing litigation concerning teacher desegregation and the unwillingness of lower courts to afford relief, recognized that teacher desegregation was a necessary element of the overall desegregation process and directed that the courts turn their attention to it. We submit that the question in this case is as important to the ultimate successful dismantling of the dual systems in *Brown*—affected states as was the question in *Goss.*

The sheer ubiquitousness of freedom of choice plans,[39] the chorus with which they have uniformly been condemned and their evident failure to disestablish the dual systems a full thirteen years after the *Brown* decision demonstrates that the time has come for this Court to subject their use to careful scrutiny. We repeat, however, that our thrust is limited rather than general; we do not urge that a freedom of choice plan is unconstitutional *per se* and may never be used. Our submission is simply that it may not be used where on the face of the record there is little reason to believe it will be successful and there are other methods, more easily administered, which will more speedily and effectively disestablish the dual system.[40] The constitutionality of the continued use of a free choice plan in that context merits the attention of this Court.

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[39] See Note 15, *supra.*

[40] A trend away from freedom of choice seems to have developed recently in some of the lower courts. And a recent order of a district court in Virginia appears to have adopted the view we urge. See *Corbin* v. *County School Board of Loudon County, Virginia,* C.A. No. 2737, August 27, 1967. In Loudon County, as in this case, Negroes were scattered throughout the County. The district court had approved in May, 1963 a freedom of choice plan of desegregation. In April, 1967, plaintiffs and the United States filed motions for further relief contending that the freedom of choice plan had resulted in only token or minimal desegregation with the majority of Negroes still attending all Negro Schools. They requested that the district be ordered to desegregate by means of unitary geographic attendance zones drawn without regard to race. The district court agreed and on August 27th entered an order directing that:

> No later than the commencement of the 1968-69 school year the Loudon County Elementary Schools shall be operated on the basis of a system of compact, unitary, non-racial geographic attendance zones in which, there shall be no schools staffed or attended solely by Negroes. Upon the completion of the New Broad Run High School, the high schools shall be operated on a like basis.

Cf. Orders requiring the use of geographic zones in *Coppedge* v. *Franklin County Board of Education,* C.A. 1796, decided August 17, 1967, discussed in Note 20, *supra,* and *Braxton* v. *Board of Public Instruction of Duval County, Florida,* No. 4598 (M.D. Fla.), January 24, 1967.

CONCLUSION

WHEREFORE, for the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Memorandum of the Court

(Filed May 17, 1966)

The infant plaintiffs, as pupils or prospective pupils in the public schools of New Kent County, and their parents or guardians have brought this class action asking that the defendants be required to adopt and implement a plan which will provide for the prompt and efficient racial desegregation of the county schools, and that the defendants be enjoined from building schools or additions and from purchasing school sites pending the court's approval of a plan. The plaintiffs also seek attorney's fees and costs.

The defendants have moved to dismiss on the ground that the complaint fails to state a claim upon which relief can be granted. They have also answered denying the material allegations of the bill.

The facts are uncontested.

New Kent is a rural county located east of the City of Richmond. Its school system serves approximately 1,300 pupils, of which 740 are Negro and 550 are White. The school board operates one white combined elementary and high school, and one Negro combined elementary and high school. There are no attendance zones. Each school serves the entire county. Indian students attend a school in Charles City County.

On August 2, 1965 the county school board adopted a freedom of choice plan to comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000.d-1, *et seq.* The choices include the Indian school in Charles City County. The county had operated under the Pupil Placement Act, §§ 22-232.1, *et seq.*, Code of Virginia, 1950, as amended. As of September 1964 no Negro pupil had applied for

admission to the white school. No Negro faculty member serves in the white school and no white faculty member serves in the Negro school.

New construction is scheduled at both county schools.

The case is controlled by the principles expressed in *Wright* v. *School Bd. of Greenville County, Va.*, No. 4263 (E.D. Va., Jan. 27, 1966). An order similar to that entered in *Greenville* will deny an injunction restraining construction and grant leave to submit an amendment to the plan for employment and assignment of staff on a nonracial basis. The motion for counsel fees will be denied.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

Order

(Filed May 17, 1966)

For reasons stated in the Memorandum of the Court this day filed and in the Memorandum of the Court in *Wright* v. *County School Board of Greenville County, Virginia,* Civil Action No. 4263 (E.D. Va., Jan. 27, 1966),

It is ADJUDGED and ORDERED:

1. The defendants' motion to dismiss is denied;

2. The plaintiffs' prayer for an injunction restraining school construction and the purchase of school sites is denied;

3. The defendants are granted leave to submit on or before June 6, 1966 amendments to their plan which will provide for employment and assignment of the staff on a non-racial basis. Pending receipt of these amendments, the court will defer approval of the plan and consideration of other injunctive relief;

4. The plaintiffs' motion for counsel fees is denied:

5. The case will be retained upon the docket with leave granted to any party to petition for further relief.

The plaintiffs shall recover their costs to date.

Let the Clerk send copies of this order and the Memorandum of the Court to counsel of record.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

Memorandum of the Court

(Filed June 28, 1966)

This memorandum supplements the memorandum of the court filed May 17, 1966. The court deferred ruling on the school board's plan of desegregation until after the board had an opportunity to amend the plan to provide for allocation of faculty and staff on a non-racial basis. The board has filed a supplement to the plan to accomplish this purpose.

The plan and supplement are:

I.

ANNUAL FREEDOM OF CHOICE OF SCHOOLS

A. The County School Board of New Kent County has adopted a policy of complete freedom of choice to be offered in grades 1, 2, 8, 9, 10, 11, and 12 of all schools without regard to race, color, or national origin, for 1965-66 and all grades after 1965-66.

B. The choice is granted to parents, guardians and persons acting as parents (hereafter called 'parents') and their children. Teachers, principals and other school personnel are not permitted to advise, recommend or otherwise influence choices. They are not permitted to favor or penalize children because of choices.

II.

PUPILS ENTERING OTHER GRADES

Registration for the first grade will take place, after conspicuous advertising two weeks in advance of registration, between April 1 and May 31 from 9:00 A.M. to 2:00 P.M.

When registering, the parent will complete a Choice of

School Form for the child. The child may be registered at any elementary school in this system, and the choice made may be for that school or for any other elementary school in the system. The provisions of Section VI of this plan with respect to overcrowding shall apply in the assignment to schools of children entering first grade.

III.

Pupils Entering Other Grades

A. Each parent will be sent a letter annually explaining the provisions of the plan, together with a Choice of School Form and a self-addressed return envelope, by April 1 of each year for pre-school children and May 15 for others. Choice forms and copies of the letter to parents will also be readily available to parents or students and the general public in the school offices during regular business hours. Section VI applies.

B. The Choice of School Form must be either mailed or brought to any school or to the Superintendent's Office by May 31st of each year. Pupils entering grade one (1) of the elementary school or grade eight (8) of the high school must express a choice as a condition for enrollment. Any pupil in grades other than grades 1 and 8 for whom a choice of school is not obtained will be assigned to the school he is now attending.

IV.

Pupils Newly Entering School System or Changing Residence Within It

A. Parents of children moving into the area served by this school system, or changing their residence within it,

after the registration period is completed but before the opening of the school year, will have the same opportunity to choose their children's school just before school opens during the week of August 30th, by completing a Choice of School Form. The child may be registered at any school in the system containing the grade he will enter, and the choice made may be for that school or for any other such school in the system. However, first preference in choice of schools will be given to those whose Choice of School Form is returned by the final date for making choice in the regular registration period. Otherwise, Section VI applies.

B. Children moving into the area served by this school system, or changing their residence within it, after the late registration period referred to above but before the next regular registration period, shall be provided with registration forms. This has been done in the past.

V.

Resident and Non-resident Attendance

This system will not accept non-resident students, nor will it make arrangements for resident students to attend public schools in other school systems where either action would tend to preserve segregation or minimize desegregation. Any arrangement made for non-resident students to attend public schools in this system, or for resident students to attend public schools in another system, will assure that such students will be assigned without regard to race, color, or national origin, and such arrangement will be explained fully in an attachment made a part of this plan. Agreement attached for Indian children.

Memorandum of the Court

VI.

Overcrowding

A. No choice will be denied for any reason other than overcrowding. Where a school would become overcrowded if all choices for that school were granted, pupils choosing that school will be assigned so that they may attend the school of their choice nearest to their homes. No preference will be given for prior attendance at the school.

B. The Board plans to relieve overcrowding by building during 1965-66 for the 1966-67 session.

VII.

Transportation

Transportation will be provided on an equal basis without segregation or other discrimination because of race, color, or national origin. The right to attend any school in the system will not be restricted by transportation policies or practices. To the maximum extent feasible, busses will be routed so as to serve each pupil choosing any school in the system. In any event, every student eligible for bussing shall be transported to the school of his choice if he chooses either the formerly white, Negro or Indian school.

VIII.

Services, Facilities, Activities and Programs

There shall be no discrimination based on race, color, or national origin with respect to any services, facilities, activities and programs sponsored by or affiliated with the schools of this school system.

Memorandum of the Court

IX.

Staff Desegregation

A. Teacher and staff desegregation is a necessary part of school desegregation. Steps shall be taken beginning with school year 1965-66 toward elimination of segregation of teaching and staff personnel based on race, color, or national origin, including joint faculty meetings, in-service programs, workshops, other professional meetings and other steps as set forth in Attachment C.

B. The race, color, or national origin of pupils will not be a factor in the initial assignment to a particular school or within a school of teachers, administrators or other employees who serve pupils, beginning in 1966-67.

C. This school system will not demote or refuse to reemploy principals, teachers and other staff members who serve pupils, on the basis of race, color, or national origin; this includes any demotion or failure to reemploy staff members because of actual or expected loss of enrollment in a school.

D. Attachment D hereto consists of a tabular statement, broken down by race, showing: 1) the number of faculty and staff members employed by this system in 1964-65; 2) comparable data for 1965-66; 3) the number of such personnel demoted, discharged or not re-employed for 1965-66; 4) the number of such personnel newly employed for 1965-66. Attachment D further consists of a certification that in each case of demotion, discharge or failure to reemploy, such action was taken wholly without regard to race, color, or national origin.

Memorandum of the Court

X.

Publicity and Community Preparation

Immediately upon the acceptance of this plan by the U. S. Commissioner of Education, and once a month before final date of making choices in 1966, copies of this plan will be made available to all interested citizens and will be given to all television and radio stations and all newspapers serving this area. They will be asked to give conspicuous publicity to the plan in local news sections of the Richmond papers. The newspaper coverage will set forth the text of the plan, the letter to parents and Choice of School Form. Similar prominent notice of the choice provision will be arranged for at least one a month thereafter until the final date for making choice. In addition, meetings and conferences have been and will be called to inform all school system staff members of, and to prepare them for, the school desegregation process, including staff desegregation. Similar meetings will be held to inform Parent-Teacher Associations and other local community organizations of the details of the plan, to prepare them for the changes that will take place.

Supplement

"The School Board of New Kent County recognizes its responsibility to employ, assign, promote and discharge teachers and other professional personnel of the school systems without regard to race, color or national origin. We further recognize our obligation to take all reasonable steps to eliminate existing racial segregation of faculty that has resulted from the past operation of a dual system based upon race or color.

Memorandum of the Court

"The New Kent Board recognizes the fact that New Kent County has a problem which differs from most counties in that the white citizens are the minority group. The Board is also cognizant of the fact that race relations are generally good in this county, and Negro citizens share in county government. A Negro citizen is a member of the County Board of Supervisors at the present time.

"In the recruitment, selection and assignment of staff, the chief obligation is to provide the best possible education for all children. The pattern of assignment of teachers and other staff members among the various schools of this system will not be such that only white teachers are sought for predominantly white schools and only Negro teachers are sought for predominantly Negro schools.

"The following procedures will be followed to carry out the above stated policy:

1. The best person will be sought for each position without regard to race, and the Board will follow the policy of assigning new personnel in a manner that will work toward the desegregation of faculties. We will not select a person of less ability just to accomplish desegregation.

2. Institutions, agencies, organization, and individuals that refer teacher applicants to the schools system will be informed of the above stated policy for faculty desegregation and will be asked to so inform persons seeking referrals.

3. The School Board will take affirmative steps to allow teachers presently employed to accept transfers to schools in which the majority of the faculty members

are of a race different from that of the teacher to be transferred.

4. No new teacher will be hereafter employed who is not willing to accept assignment to a desegregated faculty or in a desegregated school.

5. All workshops and in-service training programs are now and will continue to be conducted on a completely desegregated basis.

6. All members of the supervisory staff will be assigned to cover schools, grades, teachers and pupils without regard to race, color or national origin.

7. All staff meetings and committee meetings that are called to plan, choose materials, and to improve the total educational process of the division are now and will continue to be conducted on a completely desegregated basis.

8. All custodial help, cafeteria workers, maintenance workers, bus mechanics and the like will continue to be employed without regard to race, color or national origin.

9. Arrangements will be made for teachers of one race to visit and observe a classroom consisting of a teacher and pupils of another race to promote acquaintance and understanding."

The plaintiffs filed exceptions to the supplement charging that it does not contain well defined procedures which will be put into effect on definite dates and that it demonstrates the board's refusal to take any initiative to desegregate the staff.

Memorandum of the Court

The plan for faculty desegregation is not as definite as some plans received from other school districts. The court is of the opinion, however, that no rigid formula should be required. The plan will enable the school board to achieve allocation of faculty and staff on a non-racial basis. The plan and supplement satisfy the criteria mentioned in *Wright* v. *School Board of Greensville County, Va.*, No. 4263 (E.D. Va., Jan. 27 and May 13, 1966).

Provision should be made for a registration period in the summer or immediately prior to the beginning of the 1966-67 term to allow pupils to exercise their choice of school. This is necessary because the supplement to the plan was adopted late in the school year. The summer or fall registration should present no administrative difficulties. Many of the schools which have adopted a freedom of choice plan provide for such registration as a matter of course.

It may become necessary for the board to modify the plan. It may become necessary to revoke in full or in part the approval that the court has given the plan. The case will remain on the docket for any of the parties to seek relief which future circumstances may require.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

Order

(Entered June 28, 1966)

For reasons stated in the memorandum of the court this day filed and in *Wright* v. *School Board of Greensville County, Va.,* No. 4263 (E.D. Va., Jan. 27 and May 13, 1966), it is ADJUDGED and ORDERED that the plan adopted by the New Kent County School Board is approved.

This case will be retained on the docket with leave granted to any party to seek further relief.

Let the Clerk send copies of this order and of the memorandum of the court to counsel of record.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

Decision of the United States Court of Appeals For the Fourth Circuit

No. 10,792.

Charles C. Green, Carroll A. Green and Robert C. Green, infants, by Calvin C. Green and Mary O. Green, their father and mother and next friends, and all others of the plaintiffs,
Appellants,

versus

County School Board of New Kent County, Virginia, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.
JOHN D. BUTZNER, JR., DISTRICT JUDGE.

(Argued January 9, 1967. Decided June 12, 1967.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN, J. SPENCER BELL,* WINTER and CRAVEN, Circuit Judges, sitting en banc.

S. W. Tucker (Henry L. Marsh, III, Willard H. Douglas, Jr., Jack Greenberg and James M. Nabrit, III, on brief) for Appellants, and Frederick T. Gray (Williams, Mullen & Christian on brief) for Appellees.

* Judge Bell sat as a member of the Court when the case was heard but died before it was decided.

Decision of the United States Court of Appeals For the Fourth Circuit

PER CURIAM:

The questions presented in this case are substantially the same as those we have considered and decided today in Bowman v. County School Bd. of Charles City County.[1] For the reasons stated there, the rulings of the District Court merit our substantial approval, but the case is necessarily remanded for further proceedings in accordance with the District Court's order and our opinion in *Bowman.*

Remanded.

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[1] 4 Cir. ..... F.2d ..... (Decided this day). The special concurring opinion of Judge Sobeloff, in which Judge Winter joins, in *Bowman* is applicable to this case also.

Opinion of the United States Court of Appeals For the Fourth Circuit

No. 10,793.

Shirlette L. Bowman, Rhoda M. Bowman, Mildred A. Bowman, Richard M. Bowman and Sandra L. Bowman, infants, by Richard M. Bowman, their father and next friend, and all others of the plaintiffs,
Appellants,

versus

County School Board of Charles City County, Virginia, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.
JOHN D. BUTZNER, JR., DISTRICT JUDGE.

(Argued January 9, 1967. Decided June 12, 1967.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN, J. SPENCER BELL,* WINTER and CRAVEN, Circuit Judges, sitting en banc.

S. W. Tucker (Henry L. Marsh, III, Willard H. Douglas, Jr., Jack Greenberg and James M. Nabrit, III, on brief) for Appellants, and Frederick T. Gray (Williams, Mullen & Christian on brief) for Appellees.

* Judge Bell sat as a member of the Court when the case was heard but died before it was decided.

Opinion of the United States Court of Appeals For the Fourth Circuit

HAYNSWORTH, Chief Judge:

In this school case, the Negro plaintiffs attack, as a deprivation of their constitutional rights, a "freedom of choice" plan, under which each Negro pupil has an acknowledged "unrestricted right" to attend any school in the system he wishes. They contend that compulsive assignments to achieve a greater intermixture of the races, notwithstanding their individual choices, is their due. We cannot accept that contention, though a related point affecting the assignment of teachers is not without merit.

I

"Freedom of choice" is a phrase of many connotations. Employed as descriptive of a system of permissive transfers out of segregated schools in which the initial assignments are both involuntary and dictated by racial criteria, it is an illusion and an oppression which is constitutionally impermissible. Long since, this court has condemned it.[1] The burden of extracting individual pupils from discriminatory, racial assignments may not be cast upon the pupils or their parents. It is the duty of the school boards to eliminate the discrimination which inheres in such a system.

Employed as descriptive of a system in which each pupil, or his parents, must annually exercise an uninhibited choice, and the choices govern the assignments, it is a very different

[1] Nesbit v. Statesville City Bd. of Educ., 4 Cir., 345 F.2d 333, 334 n. 3; Bradley v. School Bd. of Educ. of City of Richmond, 4 Cir., 345 F.2d 310, 319 & n. 18; Wheeler v. Durham City Bd. of Educ., 4 Cir., 309 F.2d 630, 633; Jeffers v. Whitley, 4 Cir., 309 F.2d 621; Marsh v. County School Bd. of Roanoke County, 4 Cir., 305 F.2d 94; Green v. School Bd. of City of Roanoke, 4 Cir., 304 F.2d 118; Hill v. School Bd. of City of Norfolk, 4 Cir., 282 F.2d 473; Jones v. School Bd. of City of Alexandria, 4 Cir., 278 F.2d 72.

thing. If each pupil, each year, attends the school of his choice, the Constitution does not require that he be deprived of his choice unless its exercise is not free. This we have held,[2] and we adhere to our holdings.

Whether or not the choice is free may depend upon circumstances extraneous to the formal plan of the school board. If there is a contention that economic or other pressures in the community inhibit the free exercise of the choice, there must be a judicial appraisal of it, for "freedom of choice" is acceptable only if the choice is free in the practical context of its exercise. If there are extraneous pressures whih deprive the choice of its freedom, the school board may be required to adopt affirmative measures to counter them.

A panel of the Fifth Circuit[3] recently had occasion to concentrate its guns upon the sort of "freedom of choice" plan we have not tolerated, but, significantly, the decree it prescribed for its district courts requires the kind of "freedom of choice" plan we have held requisite and embodies standards no more exacting than those we have imposed and sanctioned.

The fact that the Department of Health, Education and Welfare has approved the School Board's plan is not determinative. The actions of that department, as its guidelines, are entitled to respectful consideration, for, in large mea-

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[2] Wheeler v. Durham City Bd. of Educ., 4 Cir., 346 F.2d 768, 773; Bradley v. School Bd. of Educ. of City of Richmond, 4 Cir., 345 F.2d 310, 313, *vacated and remanded on other grounds,* 382 U.S. 103. See Jeffers v. Whitley, 4 Cir., 309 F.2d 621.

[3] United States v. Jefferson County Board of Education, 5 Cir., 372 F.2d 836, aff'd on rehearing en banc, ... F.2d .....; *see also,* Deal v. Cincinnati Board of Education, 6 Cir., 369 F.2d 55.

sure or entirely, they are a reflection of earlier judicial opinions. We reach our conclusion independently, for, while administrative interpretation may lend a persuasive gloss to a statute, the definition of constitutional standards controlling the actions of states and their subdivisions is peculiarly a judicial function.

Since the plaintiffs here concede that their annual choice is unrestricted and unencumbered, we find in its existence no denial of any constitutional right not to be subjected to racial discrimination.

II

Appropriately, the School Board's plan included provisions for desegregation of the faculties. Supplemented at the direction of the District Court, those provisions are set forth in the margin.[4]

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[4] The School Board of Charles City County recognizes its responsibility to employ, assign, promote and discharge teachers and other professional personnel of the school systems without regard to race, color or national origin. We further recognize our obligation to take all reasonable steps to eliminate existing racial segregation of faculty that has resulted from the past operation of a dual system based upon race or color.

In the recruitment, selection and assignment of staff, the chief obligation is to provide the best possible education for all children. The pattern of assignment of teachers and other staff members among the various schools of this system will not be such that only white teachers are sought for predominantly white schools and only Negro teachers are sought for predominantly Negro schools.

The following procedures will be followed to carry out the above stated policy:

1. The best person will be sought for each position without regard to race, and the Board will follow the policy of assigning new personnel in a manner that will work toward the desegregation of faculties.

2. Institutions, agencies, organizations, and individuals that refer teacher applicants to the school system will be informed of the

These the District Court found acceptable under our decision in Wheeler v. Durham City Board of Education, 363 F.2d 738, but retained jurisdiction to entertain applications for further relief. It acted upon a record which showed that white teachers had been assigned to the "Indian school"

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above stated policy for faculty desegregation and will be asked to so inform persons seeking referrals.

3. The School Board will take affirmative steps including personal conferences with members of the present faculty to allow and encourage teachers presently employed to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred.
4. No new teacher will be hereafter employed who is not willing to accept assignment to a desegregated faculty or in a desegregated school.
5. All Workshops and in-service training programs are now and will continue to be conducted on a completely desegregated basis.
6. All members of the supervisory staff have been and will continue to be assigned to cover schools, grades, teachers and pupils without regard to race, color or national origin.
7. It is recognized that it is more desirous, where possible, to have more than one teacher of the minority race (white or Negro) on a desegregated faculty.
8. All staff meetings and committee meetings that are called to plan, choose materials, and to improve the total educational process of the division are now and will continue to be conducted on a completely desegregated basis.
9. All custodial help, cafeteria workers, maintenance workers, bus mechanics and the like will continue to be employed without regard to race, color or national origin.
10. Arrangements will be made for teachers of one race to visit and observe a classroom consisting of a teacher and pupils of another race to promote acquaintance and understanding.
11. The School Board and superintendent will exercise their best efforts, individually and collectively, to explain this program to school patrons and other citizens of Charles City County and to solicit their support of it.

and one Negro teacher had been assigned to a formerly all white school.

The appellants' complaint is that the plan is insufficiently specific in the absence of an immediate requirement of substantial interracial assignment of all teachers.

On this record, we are unable to say what impact such an order might have upon the school ssytem or what administrative difficulties might be encountered in complying with it. Elimination of discrimination in the employment and assignment of teachers and administrative employees can be no longer deferred,[5] but involuntary reassignment of teachers to achieve racial blending of faculties in each school is not a present requirement on the kind of record before us. Clearly, the District Court's retention of jurisdiction was for the purpose of swift judicial appraisal of the practical consequences of the School Board's plan and of the objective criteria by which its performance of its declared purposes could be measured.

An appeal having been taken, we lack the more current information which the District Court, upon application to it, could have commanded. Without such information, an order of remand, the inevitable result of this appeal, must be less explicit than the District Court's order, with the benefit of such information, might have been.

While the District Court's approval of the plan with its retention of jurisdiction may have been quite acceptable when entered, we think any subsequent order, in light of the appellants' complaints should incorporate some minimal, objective time table.

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[5] Bradley v. School Bd. of Educ. of City of Richmond, 382 U.S. 103; Wheeler v. Durham City Bd. of Educ., 4 Cir., 363 F.2d 738.

Concurring Opinion of Judges Sobeloff and Winter

Quite recently, a panel of the Fifth Circuit Court of Appeals[6] has required some progress in faculty integration for the school year 1967-68. By that decree, school boards are required to take affirmative steps to accomplish substantial desegregation of faculties in as many of the schools as possible for the 1967-68 school year and, wherever possible, to assign more than one member of the minority race to each desegregated faculty. As much should be required here. Indeed, since there was an earlier start in this case, the District Court, with the benefit of current information, should find it appropriate to fashion an order which is much more specific and more comprehensive. What is done on remand, however, must be done upon a supplemented record after an appraisal of the practical, administrative and other problems, if any, remaining to be solved and overcome.

Remanded.

SOBELOFF, Circuit Judge, with whom WINTER, Circuit Judge, joins, concurring specially.

Willingly, I join in the remand of the cases* to the District Court, for I concur in what this court orders. I disagree, however, with the limited scope of the remand, for I think that the District Court should be directed not only to incorporate an objective timetable in the School Boards' plans for faculty desegregation, but also to set up proce-

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[6] United States v. Jefferson County Bd. of Educ., fn. 3, *supra*.

* This special concurrence is directed not only to Bowman v. County School Bd. of Charles City County, but also Green v. County School Bd. of New Kent County, ... F.2d ....., decided this day.

dures for periodically evaluating the effectiveness of the Boards' "freedom of choice" plans in the elimination of other features of a segregated school system.

With all respect, I think that the opinion of the court is regrettably deficient in failing to speel out specific directions for the guidance of the District Court. The danger from an unspecific remand is that it may result in another round of unsatisfactory plans that will require yet another appeal and involve further loss of time. The bland discussion in the majority opinion must necessarily be pitched differently if the facts are squarely faced. As it is, the opinion omits almost entirely a factual recital. For an understanding of the stark inadequacy of the plans promulgated by the school authorities, it is necessary to explore the facts of the two cases.

New Kent County. Approximately 1,290 children attend the public schools of New Kent County. The system operated by the School Board consists of only two schools—the New Kent School, attended by all of the county's white pupils, and the Watkins School, attended by all of the county's Negro pupils.

There is no residential segregation and both races are diffused generally throughout the county. Yet eleven buses traverse the *entire* county to pick up the Negro students and carry them to the Watkins School, located in the western half of the county, and ten other buses traverse the *entire* county to pick up the white students for the New Kent School, located in the eastern half of the county. One additional bus takes the county's 18 Indian children to the "Indian" school, located in an adjoining county. Each of the county's two schools has 26 teachers and they offer identical programs of instruction.

Concurring Opinion of Judges Sobeloff and Winter

Repated petitions from Negro parents, requesting the adoption of a plan to eliminate racial discrimination, were totally ignored. Not until some months after the present action had been instituted on March 15, 1965, did the School Board adopt its "freedom of choice" plan.[1]

The above data relate to the 1964-1965 school year.[2] Since the Board's "freedom of choice" plan has now been in effect for *two* years as to grades 1, 2, 8, 9, 10, 11 and 12 and one year as to all other grades, clearly this court's remand should embrace an order requiring an evaluation of the success of the plan's operation over that time span, not only as to faculty but as to pupil integration as well. While the court does not order an inquiry in the District Court as to pupil integration, it of course does not forbid it. Since the District Judge retained the case on the docket, the matter will be open on remand to a thorough appraisal.

Charles City County. Approximately 1,800 children attend public schools in Charles City County. As in New Kent County, Negroes and whites live in the same neighborhoods and, similarly, segregated buses (Negro, Indian and white) traverse many of the same routes to pick up their respective

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[1] As this circuit has elsewhere said, "Such a last minute change of heart is suspect, to say the least." Cypress v. The Newport News General & Nonsectarian Hospital Ass'n, ... F.2d ....., ... (4th Cir. Mar. 9, 1967). See also Lankford v. Gelston, 364 F.2d 197, 203 (4th Cir. 1966). Of course, in the present case, the District Court has noted that the plan was adopted in order to comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000.d-1 (1964), and thus ensure the flow of federal funds.

[2] These data are culled from answers to plaintiffs' interrogatories. Neither side has furnished us or the District Court with more recent data. In oral argument, the defendant replied obscurely and unspecifically to inquiries from the bench as to what progress the county had made.

charges.[3] The Board operates four schools in all—Ruthville, a combined elementary and high school exclusively for Negroes; Barnetts, a Negro elementary school; Charles City, a combined elementary and high school for whites; and Samaria, a combined elementary and high school for Indian children. Thus, as plaintiffs point out, the Board, well into the second decade after the 1954 *Brown* decision, still maintains "what is in effect three distinct school systems—each organized along racial lines—with hardly enough pupils for one system!" [4] The District Court found that "the Negro elementary schools serve geographical areas. The other schools serve the entire county." [5] This contrasting treatment of the races plainly exposes the prevailing discrimination. For the 1964-65 school year, only eight Negro children were assigned to grades 4, 6, 7, 8, 9, 10 and 11 at the all-white Charles City School—an instance of the feeblest and most inconsequential tokenism.

Again, as in New Kent County, Negro parents on several occasions fruitlessly petitioned the School Board to adopt a desegregation plan. This suit was instituted on March 15,

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[3] The Eighth Circuit has recently held that the operation of two school buses, one for Negro children and one for white, along the same route, is impermissible. "While we have no authority to strike down transportation systems because they are costly and inefficient, we must strike them down if their operation serves to discourage the desegregation of the school systems." Kelley v. Arkansas Public School District, 35 U.S.L. WEEK 2619 (8th Cir. Apr. 12, 1967).

[4] The Board seems to go to an extreme of inefficiency and expense in order to maintain the segregated character of its schools, indulging in the luxury of three separate high school departments to serve a total of approximately 600 pupils, 437 of whom are in one school, and three separate and overlapping bus services.

[5] ..... F.Supp. ....., ... (1966).

1965 and the Board adopted the plan presently under consideration on August 6, 1965. Not until June 1966 did the Board assign a single Negro teacher to the all-white faculty at Charles City School. Apart from this faint gesture, however, the faculties of the Negro and white schools remain totally segregated.[6]

The majority opinion implies that this court has gone as far as the Fifth Circuit and that the "freedom of choice" plan which that circuit has directed its district courts to prescribe "embodies standards no more exacting than those we have imposed and sanctioned." If this court is willing to go as far as the Fifth Circuit has gone, I welcome the resolve.[7] It may be profitable, therefore, to examine closely what the Court of Appeals of that jurisdiction has recently said and done.[8] We may then see how much further our court needs to go to bring itself abreast of the Fifth Circuit.

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[6] Three of the Board's eight teachers in the 175 pupil "Indian" school are white, the other five are Indian.

The Board asserts that it is "earnestly" seeking white teachers for the nine existing vacancies in the Negro schools, but so far its efforts have not met with success. This is not surprising, considering that the Board has formally declared that it "does not propose to advertise vacancies in papers as this would likely cause people of both races to apply who are not qualified to teach."

[7] A recent article in the Virginia Law Review declares the Fifth Circuit to be "at once the most prolific and the most progressive court in the nation on the subject of school desegregation." Dunn, *Title VI, the Guidelines and School Desegregation in the South,* 53 VA. L. REV. 42, 73 (1967).

[8] United States v. Jefferson County Bd. of Educ., ... F.2d ..... (5th Cir. 1966), *aff'd on rehearing en banc,* ..... F.2d ..... (5th Cir., Mar. 29, 1967).

Concurring Opinion of Judges Sobeloff and Winter

I. *Pupils*

Under the plans of both Charles City County and New Kent County, only children entering grades one *or* eight are *required* to express a choice. Freedom of choice is *permitted* children in all other grades, and "any pupil in grades other than grades 1 and 8 for whom a choice of school is not obtained *will be assigned to the school he is now attending.*"

In sharp contrast, the Fifth Circuit has expressly abolished "permissive" freedom of choice and ordered *mandatory* annual free choice for *all* grades, and "any student who has not exercised his choice of school within a week after school opens *shall be assigned to the school nearest his home* * * *." [9] This is all that plaintiffs have been vainly seeking in New Kent County—that students be assigned to the schools nearest their homes.

If, in our cases, those who failed to exercise a choice were to be assigned to the schools nearest their homes, as the Fifth Circuit plan provides, instead of to the schools they previously attended, as directed in the plans before us, there would be a measure of progress in overcoming discrimination. As it is, the plans manifestly perpetuate discrimination. In view of the situation found in New Kent County, where there is no residential segregation, the elimination of the dual school system and the establishment of a "unitary, non-racial system" could be readily achieved with a minimum of administrative difficulty by means of geographic zoning—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins

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[9] United States v. Jefferson County Bd. of Educ., ... F.2d ....., ... (5th Cir., Mar. 29, 1967) (en banc). (Emphasis supplied.)

School. Although a geographical formula is not universally appropriate, it is evident that here the Board, by separately busing Negro children across the entire county to the "Negro" school, and the white children to the "white" school, is deliberately maintaining a segregated system which would vanish with non-racial geographic zoning. The conditions in this county present a classical case for this expedient.

In Charles City County, *Negro* elementary school children are geographically zoned, while *white* elementary school children are not, despite the conceded fact that the children of both races live in all sections of the county. Surely this curious arrangement is continued to prop up and preserve the dual school system proscribed by the Constitution and interdicted by the Fifth Circuit . . .

> "The Court holds that boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an *integrated, unitary* school system in which there are no Negro schools and no white schools—just schools. * * * In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the *dual school system* in this circuit requires integration of faculties, facilities, and activities, as well as students." [10]

The Fifth Circuit stresses that the goal is "a unitary, nonracial system" and the question is whether a free choice plan will materially further the attainment of this goal.

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[10] ..... F.2d at ..... (en banc). (Emphasis supplied.)

Stating that courts must continually check the sufficiency of school boards' progress toward the goal, the Fifth Circuit decree requires school authorities to report regularly to the district courts to enable them to evaluate compliance "by measuring the performance." In fashioning its decree, that circuit gave great weight to the percentages referred to in the HEW Guidelines,[11] declaring that they establish "minimum" standards

> "for measuring the effectiveness of freedom of choice as a useful tool. * * * If the plan is ineffective, longer on promises than performance, the school officials charged with initiating and administering a unitary system have not met the constitutional requirements of the Fourteenth Amendment; *they should try other tools.*" [12]

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[11] "[S]trong policy considerations support our holding that the standards of court-supervised desegregation should not be lower than the standards of HEW-supervised desegregation. The Guidelines, of course, cannot bind the courts; we are not abdicating any judicial responsibilities. [Footnote omitted.] But we hold that HEW's standards are substantially the same as this Court's standards. They are required by the Constitution and, as we construe them, are within the scope of the Civil Rights Act of 1964. In evaluating desegregation plans, district courts should make few exceptions to the Guidelines and should carefully tailor those so as not to defeat the policies of HEW or the holding of this Court."

United States v. Jefferson County Bd. of Educ., ... F.2d ....., ... (5th Cir., Dec. 29, 1966), *adopted en banc,* ..... F.2d ..... (5th Cir., Mar. 29, 1967). *Cf.* Cypress v. Newport News Gen. Hosp., ... F.2d ....., ... n.15 (4th Cir., Mar. 9, 1967).

[12] ..... F.2d ..... . (Emphasis supplied.) The HEW Guidelines provide: (1) if 8 or 9 percent of the Negro students in a school district transferred from segregated schools during the first year of the plan, the total transfers the following year must be on the order of at least *twice* that percentage; (2) if only 4 or 5 percent transferred, a "substantial" increase in the transfers will be expected the following year—bringing the

"Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects.[13] If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a "unitary, non-racial system."

While I would prefer it if this court were more explicit in establishing requirements for periodic reporting by the school officials, I assume that the District Court will do this, rather than place the burden upon the plaintiffs to collect the esential data to show whether the free choice

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total to at least *triple* the percentage of the previous year; (3) if less than 4 percent transferred the previous year, then the rate of increase in total transfers for the following year must be proportionately greater than that under (2); and (4) if no students transferred under a free choice plan, then unless a very "substantial start" is made in the following year, the school authorities will "be required to adopt a different type of plan." HEW Reg. A., 45 C.F.R. § 181.54 (Supp. 1966).

In both New Kent County and Charles City County, at least some grades have operated under a "freedom of choice" plan for two years. In Charles City County, only 0.6% of the Negro students transferred to the white school for the 1964-65 session. Under the standards subscribed to by the Fifth Circuit, therefore, a minimum of 6% of the Negro pupils in that county should have transferred to the "white" school the following year. Less than this percentage would indicate that the free choice plan was "ineffective, longer on promises than performance," and that the school officials "should try other tools"—*e.g.*, geographic zoning or pairing of grades.

In New Kent County, no Negro students transferred during the first year of the plan. Thus, unless the requisite "substantial start" was made the following year, school officials *must* adopt a different plan—one that will work.

[13] Judge Wisdom, in Singleton v. Jackson Munic. Separate School Dist., 355 F.2d 865, 871 (5th Cir. 1966), referred to "freedom of choice" plans as a "haphazard basis" for the administration of schools.

plan is materially furthering the achievement of "a unitary, non-racial system." [14]

A significant aspect of the Fifth Circuit's recent decree that, by implication, this court has adopted, deserves explicit recognition. The *Jefferson County* decree orders school officials, "without delay," to take appropriate measures for the protection of Negro students who exercise a choice from "harassment, intimidation, threats, hostile words or acts, and similar behavior." Counsel for the school boards assured us in oral argument that relations between the races are good in these counties, and that no incidents would occur. Nevertheless, the *fear* of incidents may well intimidate Negroes who might otherwise elect to attend a "white" school.[15] To minimize this fear school

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[14] See Section IX of the decree issued in United States v. Jefferson County Bd. of Educ., ... F.2d ....., ... (5th Cir. Mar. 29, 1967) (en banc) providing for detailed reports to the district courts.

[15] Various factors, some subtle and some not so subtle, operate effectively to maintain the status quo and keep Negro children in "their" schools. Some of these factors are listed in the recent report issued by the U.S. Commission on Civil Rights:

> "Freedom of choice plans accepted by the Office of Education have not disestablished the dual and racially segregated school systems involved, for the following reasons: a. Negro and white schools have tended to retain their racial identity; b. White students rarely elect to attend Negro schools; c. Some Negro students are reluctant to sever normal school ties, made stronger by the racial identification of their schools; d. Many Negro children and parents in Southern States, having lived for decades in positions of subservience, are reluctant to assert their rights; e. Negro children and parents in Southern States frequently will not choose a formerly all-white school because they fear retaliation and hostility from the white community; f. In some school districts in the South, school officials have failed to prevent or punish harassment by white children who have elected to attend white schools; g. In some areas in the South where Negroes have elected to attend formerly all-white schools, the Negro com-

officials must demonstrate unequivocally that protection will be provided. It is the duty of the school boards actively to oversee the process, to publicize its policy in all segments of the population and to enlist the cooperation of police and other community agencies.[16]

The plaintiffs vigorously assert that the adoption of the Board's free choice plan in Charles City County, without further action toward equalization of facilities, will not cure present gross inequities characterizing the dual school system. A glaring example is the assignment of 135 commercial students to one teacher in the Negro school in contrast to the assignment of 45 commercial students per teacher in the white school and 36 in the Indian school. In the *Jefferson County* decree, the Fifth Circuit directs its attention to such matters and explicitly orders school *officials* to take "prompt steps" to correct such inequalities. School authorities, who hold responsibility for administration, are not allowed to sit back complacently and expect unorganized pupils or parents to effect a cure for these shockingly discriminatory conditions. The decree provides:

> "Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios shall, to the

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munity has been subjected to retaliatory violence, evictions, loss of jobs, and other forms of intimidation."

U.S. COMM'N ON CIVIL RIGHTS, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES—1965-66, at 51 (1966). In addition to the above enumeration, a report of the Office of Education has pointed out that Negro children in the high school grades refrain from choosing to transfer because of reluctance to assume additional risks close to graduation. Coleman & Campbell, Equality of Educational Opportunity (U.S. Office of Education, 1966). See also *Hearings Before the Special Subcommittee on Civil Rights of the House Committee on the Judiciary,* 89th Cong., 2d Sess., ser. 23 (1966).

[16] HEW Reg. A, 45 C.F.R. § 181.17(c) (Supp. 1966).

> extent feasible, be *distributed evenly* between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, * * * such school shall be *closed* as soon as possible, and students enrolled in the school shall be reassigned on the basis of freedom of choice." [17]

II. *Faculty*

Defendants unabashedly argue that they cannot be compelled to take any affirmative action in reassigning teachers, despite the fact that teachers are hired to teach in the *system,* not in a particular school. They assert categorically that "they are not required under the Constitution to desegregate the faculty." This is in the teeth of *Bradley* v. *School Bd. of Richmond,* 382 U.S. 103 (1965).

Having made this declaration, they say that they have nevertheless submitted a plan which does provide for faculty desegregation, but circumspectly they add that "it will require time and patience." They protest that they have done all that could possibly be demanded of them by providing a plan which would permit "a constructive beginning." This argument lacks appeal an eighth of a century after *Brown.*[18] Children too young for the first grade at

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[17] ..... F.2d at ..... (en banc). (Emphasis supplied.)

[18] "The rule has become: the later the start the shorter the time allowed for transition." Lockett v. Bd. of Educ. of Muscogee County, 342 F.2d 225, 228 (5th Cir. 1965). See Rogers v. Paul, 382 U.S. 198, 199 (1965); Bradley v. School Bd. of Richmond, 382 U.S. 103 (1965); Griffin v. County School Bd., 377 U.S. 218, 229 (1964); Watson v. City of Memphis, 373 U.S. 526, 530 (1963).

the time of that decision are beyond high school age by now. Yet their entire school experience, like that of their elder brothers and sisters, parents and grandparents, has been one of total segregation. They have attended only a "Negro" school with an all Negro staff and an all Negro student body. If their studies encompassed *Brown* v. *Bd. of Educ.* they must surely have concluded sadly that "the law of the land" is singularly ineffective as to them.

The plans of both counties grandly profess that the pattern of staff assignment "will not be such that only white teachers are sought for predominantly white schools and only Negro teachers are sought for predominantly Negro schools." No specific steps are set out, however, by which the boards mean to integrate faculties. It cannot escape notice that the plans provide only for assignments of "*new* personnel in a manner that will *work towards* the desegregation of faculties." As for teachers presently employed by the systems, they will be "allowed" (in Charles City County, the plan reads "allowed and encouraged") to accept transfers to schools in which the majority of the faculty members are of the opposite race. We are told that heretofore an average of only 2.6 new white teachers have been employed annually in New Kent County. Thus the plan would lead to desegregation only by slow attrition. There is no excuse for thus protracting the corrective process. School authorities may not abdicate their plain duty in this fashion. The plans filed in these cases leave it to the *teachers,* rather than the Board, to "disestablish dual, racially segregated school systems" and to establish "a unitary, non-racial system." This the law does not permit.

As the Fifth Circuit has put it, "school authorities have an *affirmative duty* to break up the historical pattern of segregated faculties, the hallmark of the dual system." [19]

> "[U]ntil school authorities recognize and carry out their affirmative duty to integrate faculties as well as facilities, there is not the slightest possibility of their ever establishing an operative non-discriminatory school system." [20]

In contrast to the frail and irresolute plans submitted by the appellees, the Fifth Circuit has ordered school officials within its jurisdiction not only to make *initial* assignments on a non-discriminatory basis, but also to *reassign* staff members "to eliminate *past* discriminatory patterns."

For this reason, I wholeheartedly endorse the majority's remand for the inclusion of an *objective* timetable to facilitate evaluation of the progress of school authorities in desegregating their faculties. I also join the majority in calling upon the District Court to fashion a specific and comprehensive order requiring the boards to take firm steps to achieve *substantial* desegregation of the faculties. At this late date a desegregation plan containing only an indefinite pious statement of future good intentions does not merit judicial approval.

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[19] ..... F.2d at ..... .

[20] United States v. Jefferson County Bd. of Educ., ... F.2d ....., ... (5th Cir. 1966), *adopted en banc,* ..... F.2d ..... (5th Cir. Mar. 29, 1967). This thought has been similarly expressed in Bradley v. School Bd. of City of Richmond, 345 F.2d 310, 323 (4th Cir. 1965) (concurring opinion):

> "It is now 1965 and high time for the court to insist that good faith compliance requires administrators of schools to proceed actively with *their* nontransferable duty to undo the segregation which both by action and inaction has been persistently perpetuated." (Emphasis in the original.)

Concurring Opinion of Judges Sobeloff and Winter

I must disagree with the prevailing opinion, however, where it states that the record is insufficiently developed to order the school systems to take further steps at this stage. No legally acceptable justification appears, or is even faintly intimated, for not immediately integrating the faculties. The court underestimates the clarity and force of the facts in the present record, particularly with respect to New Kent County, where there are only two schools, with identical programs of instruction, and each with a staff of 26 teachers. The situation presented in the records before us is so patently wrong that it cries out for immediate remedial action, not an inquest to discover what is obvious and undisputed.

It is time for this circuit to speak plainly to its district courts and tell them to require the school boards to get on with their task—no longer avoidable or deferrable—to integrate their faculties. In *Kier* v. *County School Bd. of Augusta County,* 249 F. Supp. 239, 247 (W.D. Va. 1966), Judge Michie, in ordering complete desegregation by the following years of the staffs of the schools in question, required that "the percentage of Negro teachers in each school in the system should approximate the percentage of the Negro teachers in the entire system" for the previous year. See *Dowell* v. *School Bd.,* 244 F. Supp. 971, 977-78 (W.D. Okla. 1965), *aff'd,* 35 U.S.L. WEEK 2484 (10th Cir., Jan. 23, 1967), *cert. denied,* 35 U.S.L. WEEK 3418 (U.S. May 29, 1967). While this may not be the precise formula appropriate for the present cases, it does indicate the attitude that district courts may be expected to take if this court speaks with clarity and firmness.

III. *The Briggs* v. *Elliott Dictum*

The defendants persist in their view that it is constitutionally permissible for *parents* to make a choice and assign their children; that courts have no role to play where segregation is not actively *enforced.* They say that *Brown* only proscribes enforced segregation, and does not command action to undo existing consequences of earlier enforced segregation, repeating the facile formula of *Briggs* v. *Elliott.*[21]

The court's opinion recognizes that "it is the duty of the school boards to eliminate the discrimination which inheres" in a system of segregated schools where the "initial assignments are both involuntary and dictated by racial criteria," but seems to think the system under consideration today "a very different thing." I fail to perceive any basis for a distinction. Certainly the two counties with which we are here concerned, like the rest of Virginia, historically had *de jure* segregation of public education, so that by the court's own definition, the boards are under a duty "to eliminate the discrimination which inheres" in such a system. Whether or not the schools now permit "freedom of choice," the segregated conditions initially created *by law* are still perpetuated by relying primarily on Negro pupils "to extricate themselves from the segregation which has long been firmly established and resolutely maintained * * * ." [22] "[T]hose who operate the schools formerly segre-

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[21] "Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination." 132 F. Supp. 776, 777 (E.D.S.C. 1955).

[22] Bradley v. School Bd. of City of Richmond, 345 F.2d 310, 322 (4th Cir. 1965) (concurring opinion).

gated by law, and not those who attend, are responsible for school desegregation." [23]

It is worth recalling the circumstances that gave birth to the *Briggs* v. *Elliott* dictum—it is no more that dictum. A three-judge district court over which Judge Parker presided had denied relief to South Carolina Negro pupils and when this decision came before the Supreme Court as part of the group of cases reviewed in *Brown* v. *Bd. of Educ.*, the Court overruled the three-judge court and issued its mandate to admit the complaining pupils to public schools "on a racially non-discriminatory basis with all deliberate speed." Reassembling the three-judge panel, Judge Parker understook to put his gloss upon the Supreme Court's decision and coined the famous saying.[24] This catchy apothegm immediately became the refuge of defenders of the segregation system, and it has been quoted uncritically to eviscerate the Supreme Court's mandate.[25]

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[23] Dunn, *Title VI, the Guidelines and School Desegregation in the South,* 53 VA. L. REV. 42, 45 (1967).

See Dowell v. School Bd., 244 F. Supp. 971, 975, 981 (W.D. Okla. 1965), *aff'd,* 35 U.S.L. WEEK 2484 (10th Cir. Jan. 23, 1967), *cert. denied,* 35 U.S.L. WEEK 3418 (U.S. May 29, 1967):

> "The Board maintains that it has no affirmative duty to adopt policies that would increase the percentage of pupils who are obtaining a desegregated education. But a school system does not remain static, and *the failure to adopt an affirmative policy is itself a policy,* adherence to which, at least in this case, has slowed up—in some cases—reversed the desegregation process.
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> * * *
>
> The duty to disestablish segregation is clear in situations such as Oklahoma City, where such school segregation policies were in force and their effects have not been corrected." (Emphasis supplied.)

[24] See n.21, *supra.*

[25] Judge Wisdom, in the course of a penetrating criticism of the *Briggs* decision, says:

Having a deep respect for Judge Parker's capacity to discern the lessons of experience and his high fidelity to duty and judicial discipline, it is unnecessary for me to speculate how long he would have adhered to his view, or when he would have abandoned the dictum as unworkable and inherently contradictory.[26] In any event, the dictum cannot withstand the authority of the Supreme Court or survive its exposition of the spirit of the *Brown* holding, as elaborated in *Bradley* v. *School Bd.*, 382 U.S. 103 (1965); *Goss* v. *Bd. of Educ.*, 373 U.S. 683 (1963); *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

"*Briggs* overlooks the fact that Negroes collectively are harmed when the state, by law or custom, operates segregated schools *or a school system with uncorrected effects of segregation.*

* * *

Adequate redress therefore calls for much more than allowing a few Negro children to attend formerly white schools; it calls for liquidation of the state's system of de jure school segregation and *the organized undoing of the effects of past segregation.*

* * *

The central vice in a formerly de jure segregated public school system is apartheid by dual zoning * * *. Dual zoning persists in the continuing operation of Negro schools identified as Negro, historically and because the faculty and students are Negroes. Acceptance of an individual's application for transfer, therefore, may satisfy that particular individual; it will not satisfy the class. The class is all Negro children in a school district attending, by definition, inherently unequal schools and wearing the badge of slavery separation displays. Relief to the class requires school boards to desegregate *the school from which a transferee comes* as well as the school to which he goes. * * * [T]he overriding right of Negroes as a class [is] to a *completely integrated* public education."

..... F.2d at ....., ... (Emphasis supplied.)

[26] Shortly after pronouncing his dictum, in another school case Judge Parker nevertheless recognized that children cannot enroll themselves and that the duty of enrolling them and operating schools in accordance with law rests upon the officials and cannot be shifted to the pupils or their parents. Carson v. Warlick, 238 F.2d 724, 728 (1956).

Concurring Opinion of Judges Sobeloff and Winter

Anything that some courts may have said in discussing the obligation of school officials to overcome the effects of *de facto* residential segregation, caused by private acts and not imposed by law, is certainly not applicable here. Ours is the only circuit dealing with school segregation resulting from past legal compulsion that still adheres to the *Briggs* dictum.

> "The Fourth is apparently the only circuit of the three that continues to cling to the doctrine of *Briggs* v. *Elliott* and embraces freedom of choice as a final answer to school desegregation in the absence of intimidation and harrassment." [27]

We should move out from under the incubus of the *Briggs* v. *Elliott* dictum and take our stand beside the Fifth and the Eighth Circuits.

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[27] Dunn, *Title VI, the Guidelines and School Desegregation in the South,* 53 VA. L. REV. 42, 72 (1967). See United States v. Jefferson County Bd. of Educ., ... F.2d ..... (5th Cir., Mar. 29, 1967) (en banc); Singleton v. Jackson Munic. Separate School Dist., 348 F.2d 729, 730 n.5 (5th Cir. 1965) ("[T]he second Brown opinion clearly imposes on public school authorities the duty to provide an integrated school system. Judge Parker's well known dictum * * * in Briggs v. Elliott * * * should be laid to rest. It is inconsistent with Brown and the later development of decisional and statutory law in the area of civil rights."); Kemp v. Beasley, 352 F.2d 14, 21 (8th Cir. 1965) ("The dictum in Briggs has not been followed or adopted by this Circuit and it is logically inconsistent with Brown and subsequent decisional law on this subject.")

Cf. Evans v. Ennis, 281 F.2d 385, 389 (3d Cir. 1960), *cert. denied,* 364 U.S. 933 (1961): "The Supreme Court has unqualifiedly declared *integration* to be their constitutional right." (Emphasis supplied.)

Judgment of United States Court of Appeals For the Fourth Circuit

No. 10,792

Charles C. Green, Carroll A. Green and Robert C. Green, infants, by Calvin C. Green and Mary O. Green, their father and mother and next friends, and all others of the plaintiffs,
Appellants,

versus

County School Board of New Kent County, Virginia, et al.,
Appellees.

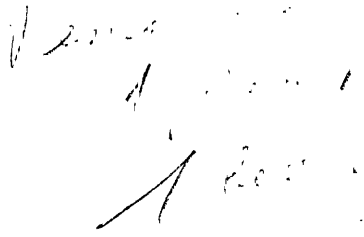
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Richmond, for further proceedings consistent with the opinion of the Court filed herein; and that each side bear its own costs on appeal.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

Filed: June 12, 1967
Maurice S. Dean, Clerk



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