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.*

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

BRIEF FOR THE PETITIONERS

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Citations to Opinions Below

The District Court filed memorandum opinions on May 17, 1966 and June 28, 1966. Both, unreported, are reprinted appendix at pp. 47-48a and 53-61a. The June 12, 1967 Court of Appeals opinions, reprinted appendix pp. 63-89a, are reported at 382 F. 2d 326 and 338.

Jurisdiction

The judgment of the Court of Appeals was entered June 12, 1967, appendix p. 90a. Mr. Justice Black, on September 8, 1967, extended time for filing the petition for

writ of certiorari until October 10, 1967 (91a). The petition for certiorari was filed October 9, 1967 and was granted December 11, 1967 (92a). 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 discharges its obligation to conduct 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.

Constitutional Provision Involved

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

Statement

Petitioners seek review of the constitutional 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*

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]

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 (13a). 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 (14a). Defendants answered asserting that plaintiffs were permitted under existing policy (the pupil placement law) to attend the school of their choice without regard to race, subject only to limitations of space and denied that the court had jurisdiction to grant any of the relief prayed (21-22a).

Thereafter, 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 (to be placed into effect in the 1966-67 school year) and on May 10, 1966 filed copies thereof with the District Court.

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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 (7-8a):

> 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.

II. *The Plan Adopted by the Board*

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." [2] 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 (34-40a).

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[2] 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 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,* 380 F. 2d 385, *cert. denied* sub nom. *Caddo Parish School Board* v. *United States,* 389 U. S. 840, 19 L. Ed. 2d 103. We point this out only to fully describe the workings of the plan. 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.

III. *The Evidence*

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 county[3] (cf. PX "A" and "B"; see also the opinion of Judge Sobeloff at pp. 72a, 23a).[4] There are only two public schools in the county: New Kent, the formerly all-white combined elementary and high school, and George W. Watkins, an all-Negro combined elementary and high school.

Students:[5] During the 1964-1965 school year some 1291 students (approximately 739 Negroes, 552 whites) were enrolled in the school system. There were no attendance zones. Each school served the entire county. Eleven Negro buses canvassed the entire county to deliver 710 of the 740 Negro pupils to Watkins, located in the western half of the county. Ten buses transported almost all of the 550 white pupils to New Kent in the eastern half (see PX "A" and "B" and 24a, no. 4).

As the following table[6] indicates, the Negro school was more overcrowded and had a substantially higher pupil-teacher ratio, and larger class sizes than the white school:

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[3] 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.

[4] The prefix "PX" refers to plaintiffs' exhibits. Exhibits "A" and "B" show the bus routes for each of the two county schools. Because of the difficulty in doing so, they have not been reproduced in the appendix. Each exhibit shows the routes travelled by the various buses bringing children to that particular school. Each school is served by buses that traverse all areas of the county.

[5] The information that follows was obtained from defendants' answers to plaintiffs' interrogatories (23-33a).

[6] The data was compiled from 23-33a, in particular nos. 1-c, 1-f, 1-g, and 4.

Name of School	Pupil-Teacher Ratio	Average Class Size	Overcrowding Variance From Capacity (Elem. Grades	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

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 Virginia, 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.[7] The free choice plan the Board adopted in August, 1965 was not placed into effect until the 1966-1967 school year by which time it had been approved by the district court.

Despite their rights under the pupil placement procedure, up to and including the 1964-1965 school year no Negro pupil ever sought admission to New Kent and no white

[7] Section 22-232.20 provided in part:

"... any child who wishes to attend a school other than the school which he attended the previous year shall not be eligible for placement in a particular school unless application is made therefor ..."

Section 22-232.6 provided:

"After December 29, 1956, each school child who has heretofore attended a public school and who has not moved from the county, city or town in which he resided while attending such school shall attend the same school which he last attended until graduation therefrom unless enrolled for good cause shown, in a different school by the Pupil Placement Board."

pupil ever sought admission to Watkins (25a, no. 7). Although, as the following table shows, some Negro students have since chosen to attend New Kent, no white pupil has ever attended Watkins:

STUDENT BODY BY RACE[8]

YEAR	NEW KENT			WATKINS		
	White	*Negro*	*Other*	*White*	*Negro*	*Other*
1964-65	552	0	0	0	739	0
1965-66	555	35	0	0	691	0
1966-67	517	111	0	0	628	0
1967-68	519	115	10	0	621	0

Thus, as late as 13 years after the decision in *Brown,* 85% of the Negro students in the county attend school only with other Negroes.

Faculty: Teachers' contracts are for one year only. Until the 1966-67 school year, the Board adhered to a policy of assigning only white teachers to New Kent and only Negro teachers to Watkins. Despite the declarations of the Board, its policy has remained essentially unchanged as the following table shows:

FACULTY COMPOSITION BY RACE[9]

	NEW KENT		WATKINS	
	White	*Negro*	*White*	*Negro*
1964-65	26	0	0	26
1965-66	26	0	0	27
1966-67	28.4	.4	0	27
1967-68	28	.2	1	29.8

[8] 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, 1966-67 and 1967-68 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.

[9] This information is taken from the HEW documents referred to in Note 8, *supra,* and from number 1-f on 24a. Principals, librarians and other non-teaching personnel are not included.

In sum, during the current year, 1967-68, faculty integration consists of the assignment of one full-time white (of a total of 30.8 teachers) to Watkins and one part-time (the equivalent of one day each week) Negro teacher to New Kent. All the full-time teachers at that school are still white.

IV. *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" (47-49a).

The Board filed on June 6, 1966, a supplement to its plan dealing with school faculties (50a). On June 10, 1966, plaintiffs filed exceptions to the supplement contending (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 (52a).

On June 28, 1966, the district court entered a memorandum opinion and an order approving the freedom of choice plan as amended (53-62a).

V. *The Court of Appeals' Opinion*

On appeal to the Court of Appeals for the Fourth Circuit petitioners contended that in view of the circum-

stances 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* (70-71a).

Judges Sobeloff and Winter concurred specially with respect to the remand on the teacher issue but disagreed on other aspects. Said Judge Sobeloff (71-72a):[10]

> I think that the District Court should be directed not only to incorporate an objective time table in the School Board's plans for faculty desegregation, but also to set up procedures for periodically evaluating the effectiveness of the Boards' "freedom-of-choice" plans in the elimination of other features of a segregated school system.
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> * * * * *
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> . . . 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,

[10] 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* (64a); similarly Judge Sobeloff stated that his opinion in *Charles City* applied to *New Kent* (p. 71a). The opinion in the *Charles City* case is at 65-89a.

> 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 (73a).

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 (76-77a):

> 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 (79a):

"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.

SUMMARY OF ARGUMENT

Brown condemned not only compulsory racial assignments of public school children, but required "a transition to a racially non-discriminatory system." That goal is not achieved if some schools are still maintained or identifiable as being for Negroes and others for whites. It cannot be achieved until the racial identification of schools, consciously imposed by the state during the era of enforced segregation, has been erased. The specific direction in *Brown II* and general equitable principles require that school districts formerly segregated by law, employ affirmative action to achieve this end.

If the time for deliberate speed has indeed ended, as this Court has said (Note 38, *infra*), lower courts must now fashion decrees which, consistent with educational and equitable principles, will speedily and effectively disestablish the dual system thereby achieving the unitary nonracial system mandated by the Constitution. That was not done here.

Freedom of choice desegregation plans typically leave the dual system undisturbed. The overwhelming majority of school districts in *Brown*-affected states have adopted such plans (Note 18, *infra*) and available statistics demon-

strate that they have not disestablished the dual system (*infra,* pp. 26-27). At best, such plans leave one segment, the Negro segment, intact (*Ibid.*). Yet, most, but not all, lower courts have not responded to the obvious: such plans are not only wasteful and inefficient, but by nature are incapable of effectuating that transition.

Lengthy related experience under the Virginia Pupil Placement Law demonstrated that plans under which students assign themselves were not likely to disestablish the dual system in New Kent County. Petitioners, moreover, furnished uncontradicted evidence that another method, more feasible to administer would immediately disestablish the dual system. Nonetheless, the Board failed to offer any reasons justifying delay in achieving a unitary non-racial system. There was no suggestion that administrative difficulties would preclude the division of the county into two school attendance areas or the assignment of elementary school pupils to one school and high school students to the other.

Where alternative means of immediate accomplishment of a unitary non-racial school system are so readily available, judicial approval of free choice is constitutionally impermissible.

ARGUMENT

I.

Introduction

The question here is whether in the late sixties, a full generation of public school children after *Brown* v. *Board of Education,*[11] school boards may employ so-called freedom of choice desegregation plans which perpetuate racially identifiable schools, where other methods, equally or more feasible to administer, will more speedily disestablish the dual systems.

Other plans or programs, similarly ineffective where adopted, are under review in *Monroe* v. *Board of Commissioners of the City of Jackson, Tenn.,* No. 740, and *Raney* v. *The Board of Education of the Gould School District,* No. 805.[12] The controversies in all three cases concern the precise point at which a school board has fulfilled its obligations under *Brown;* and all three present for determination the question whether school districts formerly segregated by law must employ affirmative action to erase state-imposed racial identification of their schools.

The most marked and widespread innovation in school administration in southern and border states in the last fifty years has been the change in pupil assignment method in the years since *Brown,*[13] from geographic attendance

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[11] 347 U. S. 483 (*Brown I*); 349 U. S. 294 (*Brown II*).

[12] All three cases will be argued together. See 36 U. S. L. W. 3286 (U. S. Jan. 15, 1968).

[13] 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).)

zones to so-called "free choice." Prior to *Brown,* systems in the north and south, with rare exception, assigned pupils by zone lines around each school.[14]

Under an attendance zone system, unless a transfer is granted for some special reason, students living in the zone of the school serving their grade would 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 for transportation, encourage the use of schools as community centers and generally facilitate planning for expanding school populations.[15]

In states where separate systems were required by law, this method was implemented by drawing around each white school attendance zones for whites in the area, and around each Negro school zones for Negroes. In many

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[14] "In the days before the impact of the *Brown* decision began to be felt, pupils were assigned to the school (corresponding, of course to the color of the pupils' skin) nearest their homes; once the school zones and maps had been drawn up, nothing remained but to inform the community of the structure of the zone boundaries." *Ventrees Moses* v. *Washington Parish School Board,* —— F. Supp. —— (slip op. 15-16) (E. D. La. 1967), discussed *infra,* p. 19. See also 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."

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

By showing that zone assignment was the norm prior to *Brown,* we intend merely to indicate the background against which free choice was developed. We do not suggest that the use of zones is always the most desirable method of pupil assignment.

areas, as in the case before the Court where the entire county was a zone, lines overlapped because there was no 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, administratively, was to convert the dual attendance zones into single attendance zones, without regard to race, so that assignment of all students would depend only on proximity and convenience.[16] With rare exception, however, southern school boards, when finally forced to begin desegregation, rejected this relatively simple method in favor of the complex and discriminatory procedures of pupil placement laws and, when those were invalidated,[17] switched to what has in practice worked the same way—so-called free choice.[18]

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[16] Indeed, it was to this method that this Court alluded in *Brown II* when it stated "[t]o that end, the courts may consider problems related to administration, arising from . . . revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis" (349 U. S. at 300-301).

[17] For cases invalidating or disapproving such 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).

[18] 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. 45-46:

> Free choice plans are favored overwhelmingly by the 1,787 school districts desegregating under voluntary plans. All such

In Virginia, the freedom of choice concept was resorted to after the state's "massive resistance" [19] measures had failed.[20] The Pupil Placement Board, first created by legislation approved September 29, 1956[21] placed no Negro child in any white school until after the June 28, 1960 decision in *Farley* v. *Turner,* 281 F. 2d 131 (4th Cir.). During the next two years, 1960-61 and 1961-62, that board conducted individual hearings in the cases of those Negro children and their families who, having protested against assignments to Negro schools and having had the fact of such

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> districts in Alabama, Mississippi, and South Carolina, without exception, and 83% of such districts in Georgia have adopted free choice plans. . . .
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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.

[19] In *National Association for the Advancement of Colored People* v. *Patty,* 159 F. Supp. 503, 511, Judge Soper discusses the legislative history of the massive resistance program.

[20] The State statute requiring the closing of any public school wherein both white and Negro children might otherwise be enrolled was invalidated on January 19, 1959 in *Harrison* v. *Day,* 200 Va. 439, 106 S. E. 2d 636. See also, *James* v. *Almond,* 170 F. Supp. 331 (E. D. Va. 1959) (three-judge court); but not until after one or more schools had been closed in Norfolk (see *James* v. *Almond,* 170 F. Supp. 331) (E. D. Va. 1959), in Charlottesville (see *School Board of City of Charlottesville* v. *Allen,* 263 F. 2d 295 (4th Cir. 1959)) and in Warren County (see Governor's proclamation reported in 3 Race Rel. L. Rep. 972); and the threat of closed schools had effectively deterred desegregation in Arlington County (see *Hamm* v. *County School Board of Arlington County,* 264 F. 2d 945, 946 (4th Cir. 1960)).

[21] Chapter 70, Acts of Assembly, 1956, Extra Session, codified as §22-232.1 *et seq.* of the Code of Virginia 1950, 1964 Repl. Vol. (repealed by Acts 1966, c. 590).

protest publicized in the local newspaper, were subjected to tests and other criteria not required of white children. The unconstitutionality of such discriminatory practices was declared in *Green* v. *School Board of the City of Roanoke,* 304 F. 2d 118 (4th Cir. 1962) and *Marsh* v. *County School Board of Roanoke County,* 305 F. 2d 94 (4th Cir. 1962). Thereafter,[22] the timely applications for the assignment of Negro children to named schools attended by their white neighbors were routinely granted[23] except in a few communities where boundaries for school attendance zones have been drawn around racially segregated residential areas.[24]

Under so-called free choice students are allowed to attend the school of their choice. Most often they are permitted to choose any school in the system. 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 have to be processed and standards developed for passing on them, with provision for

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[22] See *United States* v. *County School Board of Prince George County, Va.,* 221 F. Supp. 93, 105 (E. D. Va. 1963), viz.: "The Pupil Placement Board suggested in oral argument that this suit is premature because *recently* the Board has adopted a policy of assigning Negro applicants to schools attended by white children without regard to academic achievement or residence requirements different from those required of white children." (Emphasis added.)

[23] See, e.g., *Pettaway* v. *County School Board of Surry County, Virginia,* 230 F. Supp. 480 (E. D. Va. 1964), *modified and remanded,* 339 F. 2d 486 (4th Cir.); *Franklin* v. *County School Board of Giles County, Virginia,* 242 F. Supp. 371 (W. D. Va. 1965) *reversed* 360 F. 2d 325 (4th Cir. 1966).

[24] See, e.g., *Gilliam* v. *School Board of the City of Hopewell, Virginia,* 345 F. 2d 325 (4th Cir. 1965), *remanded* 382 U. S. 103 (1965).

notice of the right to choose and for dealing with students who fail to exercise a choice),[25] they are, in addition,—as experience demonstrates (*infra* pp. 25-27)—far less likely to disestablish the dual system.

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[25] Section II of 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,* 380 F. 2d 385, *cert. denied sub nom. Caddo Parish School Board* v. *United States,* 389 U. S. 840, 19 L. Ed. 2d 103, 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, notify 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 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, 1965-1966, 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).

Only recently a district court, in what has proved to be the most important judicial scrutiny of free choice plans, observed (*Moses* v. *Washington Parish School Board,* —— F. Supp. —— (E. D. La., October 19, 1967):

> Free choice systems, as every southern school official knows, greatly complicate the task of pupil assignment in the system and add a tremendous workload to the already overburdened school officials (—— F. Supp. ——; Slip Op. 15).
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> * * * * *
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> If this Court must pick a method of assigning students to schools within a particular school district, barring very unusual circumstances, we could imagine *no method more inappropriate, more unreasonable, more needlessly wasteful in every respect,* than the so-called "free-choice" system. (Emphasis added.) (*Id.* at 21)
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> * * * * *
>
> Under a "free-choice" system, the school board cannot know or estimate the number of students who will want to attend any school, or the identity of those who will eventually get their choice. Consequently, the board cannot make plans for the transportation of students to schools, plan curricula, or even plan such things as lunch allotments and schedules; moreover, since in no case except by purest coincidence will an appropriate distribution of students result, and each school will have either more or less than the number it is designed to efficiently handle, many students at the end of the free-choice period have to be reassigned to schools other than those of their choice—this time on a strict geographical-proximity basis, see the *Jeffer-*

> *son County* decree, thus burdening the board, in the middle of what should be a period of firming up the system and making final adjustments, with the awesome task of determining which students will have to be transferred and which schools will receive them. Until that final task is completed, neither the board nor any of the students can be sure of which school they will be attending; and many students will in the end be denied the very "free choice" the system is supposed to provide them. (*Id.* at 21-22)

Although the court never explicitly answers its own question—why was the Washington Parish Board willing to undergo the uncertainty and unreasonable burdens imposed by such a system (slip. op. at 21-22)—it ordered the abandonment of free choice and, in its place the institution of a geographical zoning plan.[26]

Under free choice plans, the extent of actual desegregation varies directly with the number of students seek-

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[26] As we more fully develop *infra* pp. 23-25, we think the answer obvious: that the Washington Parish Board, and indeed most boards, adopted free choice knowing and intending that it would result in fewer Negro students in white schools and, conversely, fewer (if any at all) white students in Negro schools, than would otherwise result under a rational non-racial system of pupil assignment.

To be sure, a free choice plan might make some sense, as Judge Heebe recognized, in the context of grade by grade desegregation and where all grades in a given building had not yet been reached (*Id.* at 18-19). In such circumstances, it might indeed have been easier to assign by "choices" rather than have to draw new zones for each building each time a new grade level was reached under the plan. But, as Judge Heebe pointed out, "the usefulness of such plans logically ended with the end of the desegregation process [when the plan reached all grades]" (*Ibid.*). Thus, even conceding some interim usefulness for free choice, in some other situation, it was entirely out of place in New Kent County which desegregated *all grades* at the time the plan was approved and which had but two schools.

ing, 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 that far too often Negro schools are vastly inferior to those furnished whites[27] —would not transfer to formerly Negro schools; and, indeed, very few have.[28] Thus, from the beginning the burden of disestablishing the dual system under free choice was thrust upon the Negro children and their parents, despite this Court's admonition 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 (66a):

> The burden of extracting individual pupils from discriminatory, racial assignments may not be cast upon the pupils or their parents [and that] it is the duty

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[27] 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. 6, *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.

[28] "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 Board of Education, supra,* 372 F. 2d at 889.

> 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.

The fundamental premise of *Brown I* was that segregation in public education had very deep and long term effects. 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 asked to "make a choice," chose, by inaction, that their children 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 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.[29] Moreover, intimidation of Negroes, a weapon well-known throughout the south, could equally be employed to deter them from seeking transfers to white schools. 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.[30] Those that "dared," would soon be taught their place.[31]

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[29] Compare the following (M. Hayes Mizell, *The South Has Genuflected and Held on to Tokenism,* Southern Education Report, Vol. 3, No. 6 (January/February, 1968), at p. 19):

> Freedom of choice . . . has not brought significant school desegregation . . . simply because it is a policy which has proved too fragile to withstand the political and social forces of Southern life. The advocates of freedom of choice assumed that school desegregation would somehow be insulated from these forces while, in reality, it was central to them.
>
> In embracing the freedom of choice plan Southern school systems understood, even if HEW did not, that man's choices are not made within a vacuum, but rather they are influenced by the sum of his history and culture.

[30] "Negro students who choose white schools are, as we know from many cases, only Negroes of exceptional initiative and fortitude." *United States* v. *Jefferson County Board of Education, supra,* 372 F. 2d at 889.

[31] A good example is *Coppedge* v. *Franklin County Board of Education,* 273 F. Supp. 289 (E. D. N. C. 1967), appeal pending. 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 (*Id.* at 296):

> 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 15th, 1967, a plan for the assignment, at the earliest practicable date,

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 placing their children in white schools.[32] That specific

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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 299-300).

[32] *Southern School Desegregation, 1966-67* at pp. 45-69; *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 a 12 year old boy in Clay County, Mississippi as saying (at p. 48):

> 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 (50). 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'" (52).

The Commission made the following findings, in its 1966-67 report (at p. 88):

> 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].

(footnote continued on following page)

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 that it would produce fewer Negro students in white schools, and less injury to white sensibilities than under the geographic 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 Negro schools. In most districts, therefore, as here, 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.[33] Indeed, during the 1966-67 school year, a full 12 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.[34] And, in the case before the Court, 85% of the Negro pupils in New Kent County still attend schools with

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(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.

[33] *Southern School Desegregation, 1966-67,* at p. 8.

[34] *Id.* at 103.

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." [35] 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.'" [36]

In its most recent report, the Civil Rights Commission states (*Southern School Desegregation, 1966-67,* at p. 3):

> . . . the slow pace of integration in the Southern and border states was attributable in large measure to the fact that most school districts in the South had adopted so-called "free choice plans" as the principal method of desegregation . . .
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> * * * * *
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> The review of desegregation under freedom of choice plans contained in this report, and that presented in last year's Commission's survey of southern school desegregation, shows 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 (*Id.* at 94).
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> * * * * *

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[35] *Id.* at 90-91.

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

> Freedom of choice plans . . . [have] failed to disestablish the dual school systems in the Southern and border states . . . [*Id.* at 3].[37]

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 late sixties is to adopt that plan which will most speedily accomplish the effective desegregation of the system. By now, the time for "deliberate speed" has long run out.[38] We concede that a court should not enforce its will where

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[37] HEW has apparently reached the same conclusion. According to the Director of its Office of Civil Rights, F. Peter Libassi, "[freedom of choice] . . . often doesn't finish the job of eliminating the dual school system. We had to follow the freedom of choice plan to prove its ineffectiveness, and this was the year that it did prove its ineffectiveness, so that now we're ready to move into the next phase." *N. Y. Times,* Sept. 24, 1967, at p. 57. And, in the *Palm Beach Post-Times* of Oct. 8, 1967 at p. B-7, he was reported to have said, "you can't eliminate the dual system by free choice."

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 remains high," and concluded that (*ibid.*): "only limited school desegregation has been achieved under free choice plans in Southern and Border city school systems."

[38] 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. "The time for more 'deliberate speed' has run out . . . " *Id.* at 234. Cf. *Watson* v. *Memphis,* 373 U. S. 526, 533.

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 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 disestablish the dual 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.*

1. The Fourth Circuit's Adherence to Briggs.

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. (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."[39]) Despite

[39] 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).

its protestations, the majority below manifested much of this thinking (66-67a, 68a):

> 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[40] exercise an uninhibited choice, and the choices govern the assignments, it is a very different thing.
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> *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.* [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 law, 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 opinion, in true *Briggs* form, neither states nor implies a requirement that the plan actually "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

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[40] Contrary to the court's statement, the plan did not require that "each pupil or his parents *must annually* exercise [a] choice." See Note 2, *supra*.

free choice," they have no basis to complain and the Constitution is satisfied if no such circumstances are shown.[41]

2. Brown Contemplated Complete Reorganization.

The notion that the making available of an ostensibly unrestricted choice satisfies the Constitution, quite apart from whether significant numbers of white students choose Negro schools or Negro students white schools, is fundamentally inconsistent with *Brown I* and *II*, *Bolling* v. *Sharpe*, 347 U. S. 497, *Cooper* v. *Aaron*, 358 U. S. 1, *Bradley* v. *School Board of the City of Richmond*, 382 U. S. 103 and other decisions of this Court.[42] *Brown*, in our view, condemned not only compulsory racial assignments but also, more generally, the maintenance of a dual public school system based on race—where some schools are maintained or identifiable as being for Negroes and others for whites. It presupposed major reorganization of the educational systems in affected states. The direction in *Brown II*, to the district courts demonstrates the thorough-

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[41] 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 harassment.

See Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 Va. L. Rev. 42, 72 (1967). 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 Circuits" (89a). Cf. *Swann* v. *Charlotte Mecklenburg Board of Education*, 369 F. 2d 29 (4th Cir. 1966) where essentially the same philosophy—that a desegregation plan need not result in actual integration—was expressed in a case involving geographic zones.

[42] 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.

ness of the reorganization envisaged. They were held to consider:

> problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems (349 U. S. at 300-301).[43]

If a "racially non-discriminatory system" could be achieved with Negro and white students continuing as before to attend schools designated for their race, none of the quoted language was necessary. It would have been sufficient merely to say "compulsory racial assignments shall cease." But the Court did not stop there. It ordered, rather, a pervasive reorganization which would transform the system into one that was "unitary and non-racial," one, in other words, in which schools would no longer be identifiable as being for Negroes or whites.

That students have been permitted to choose a school does not destroy its racial identification if it previously was designated for one race, continues to serve students of, and is staffed solely by, teachers of that race. The only way the racial identification of a school—consciously imposed by the state during the era of enforced segregation—can be erased is by having it serve students of both races, through teachers of both races. Only when racial identification of schools has thus been eliminated will the dual system have been disestablished.

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[43] Much the same was implied in *Cooper* v. *Aaron, supra,* at 358 U. S. 7: "state authorities were thus duty bound to devote every effort toward initiating desegregation . . . "

3. Case and Statutory Law.

Decisional and statutory[44] law support this reading of *Brown.* Only two—the Fourth and the Sixth[45]—of the six

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[44] Dissatisfied with the snail's pace of southern school desegregation (caused mainly by the early approval by the lower courts of pupil placement laws and, when they were invalidated as administered, by judicial acceptance of free choice), Congress enacted Titles IV (42 U. S. C. 2000-c et seq.) and VI (42 U. S. C. 2000-d et seq. (1964)) of the Civil Rights Act of 1964.

Pursuant to Title VI, the Department of Health, Education and Welfare adopted a series of "Guidelines," for school districts desegregating pursuant to *Brown.* In its most recent—the *Revised Guidelines,* dated December, 1966—the Department has taken the position that desegregation plans must work—result in actual integration. Under these *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 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 Board of Education, supra,* 380 F. 2d at 390.

That HEW accepts free choice plans as establishing the eligibility of a district for federal aid does not, of course, mean that such plans are constitutional. The available evidence indicates that HEW has approved such plans, despite the massive evidence of their inability to disestablish the dual system, only because they have received approval in the courts. It feels, perhaps properly, that it may not enforce requirements more stringent than those imposed by the Fourteenth Amendment. Cf. 45 CFR 181.2(1) and 181.6 which provide, in effect, that districts under court order are eligible for aid. See also, the materials collected in Dunn, *Title VI, The Guidelines and School Desegregation in the South,* 53 Va. L. Rev. 42 (1967); Note, *The Courts, HEW and Southern School Desegregation,* 77 Yale L. J. 321 (1967). Change then must come from the courts.

[45] In the Sixth Circuit, see *Brenda K. Monroe* v. *Board of Commissioners of the City of Jackson, Tenn.,* 380 F. 2d 955 (1967),

circuits which have spoken to the question have taken the position that a desegregation plan need not "work"—that is disestablish the dual system by destroying racial identification of schools. In *United States* v. *Jefferson County Board of Education,* 372 F. 2d 836 (5th Cir. 1966) *aff'd with modifications on rehearing en banc,* 380 F. 2d 385 (1967), *cert. den. sub nom. Caddo Parish School Board* v. *United States,* 389 U. S. 840, the Fifth Circuit, in what has so far been the most thorough judicial examination of school desegregation, specifically rejected the *Briggs* theory 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." Judge Wisdom analyzed the problem (372 F. 2d 836, 866):

> We do not minimize the importance of the Fourteenth Amendment rights of an individual, but there was more at issue in *Brown* than the controversy between certain schools and certain children. *Briggs* overlooks the fact that Negroes are collectively harmed when the state by law or custom operates segregated schools or a school system with uncorrected effects of segregation.
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> What is wrong about *Briggs* is that it drains out of *Brown* that decision's significance as a class action to secure equal educational opportunities for Negroes by

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now under review in No. 740 and *Kelley* v. *Board of Education of the City of Nashville, Tenn.,* 270 F. 2d 209 (6th Cir. 1959).

compelling the states to reorganize their public school systems (*Id.* at 865).

He concluded (*Id.* at 866):

> Segregation is a group phenomenon . . . 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.
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> * * * * *
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> . . . *the only adequate redress for a previously overt system-wide policy of segregation directed at Negroes as a collective entity is a system wide policy of integration* (*Id.* at 869). (Emphasis in original.)
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> * * * * *
>
> We use the terms "integration" and "desegregation" of formerly segregated public schools to mean the conversion of a de jure segregated dual system to a unitary, non-racial (non-discriminatory) system—lock, stock and barrel; students, faculty, staff, facilities, programs and activities (*Id.* at 846, Note 5).[46]

On rehearing *en banc,* the majority, while reaffirming the panel opinion, put it this way (380 F. 2d 385, 389);

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[46] The Court held that school officials in formerly de jure systems have "an absolute duty to integrate, in the sense that a disproportionate concentration of Negroes in certain schools cannot be ignored" (372 F. 2d 836, 846). The test for any school desegregation plan, said the court, is whether it achieves the "substantial integration" which is constitutionally required and that a plan not accomplishing that result must be abandoned and another substituted (*Id.* at 895-896).

> [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.* Expression in our earlier opinions 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.[47] (Emphasis added.)

Most of the other circuits have joined the Fifth Circuit in requiring that school boards employ affirmative action to "undo" the racial segregation they had previously created and that desegregation plans "work"—result in inte-

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[47] Even before *Jefferson,* the Fifth Circuit had said (*Singleton* v. *Jackson Municipal Separate School District,* 355 F. 2d 865, 869 (1966)):

> The Constitution forbids unconstitutional state action in the form of segregated facilities, including segregated public schools. School authorities, therefore, are under the constitutional compulsion of furnishing a single, integrated school system . . . .
>
> This has been the law since *Brown* v. *Board of Education* . . . . Misunderstanding of this principle is perhaps due to the popularity of an over-simplified dictum that the constitution "does not require integration."

And in an earlier stage of the same case: "Judge Parker's well-known dictum . . . should be laid to rest." 348 F. 2d 729, 730 (1965).

gration sufficient to disestablish the prior state-imposed racial identification of schools. In *Kemp* v. *Beasley,* 352 F. 2d 14, 21 (1965), the Eighth Circuit stated "the dictum in Briggs has not been followed in this Circuit and is logically inconsistent with *Brown.*" In a later case, *Kelley* v. *The Altheimer, Arkansas Public School District, No. 22,* 378 F. 2d 483 (8th Cir. 1967), emphasizing the obligation of formerly *de jure* school boards to disestablish, by affirmative action the identities of formerly all-Negro and all-white schools, the court stated:

> We have made it clear that 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] (Id. at 488).
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> * * * * *
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> The appellee School District will not be fully desegregated nor the appellants assured of their rights under the Constitution so long as the Martin School clearly *remains identifiable as a Negro school.* The requirements of the Fourteenth Amendment are not satisfied by having one segregated and one desegregated school in a District. We are aware that it would be difficult to desegregate the Martin School. However, while the difficulties are perhaps largely traditional in nature, the Board of Education has taken no steps since *Brown* to attempt to change its identity from a racial to a nonracial school (*Id.* at 490).[48] (Emphasis added.)

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[48] *Raney* v. *The Board of Education of the Gould School District,* 381 F. 2d 252 (8th Cir. 1967) suggests a withdrawal from *Kelley* and a return to *Briggs* (cf. 381 F. 2d at 255-256). Appellants in that case moved for rehearing *en banc* or by the panel adverting to the conflict between panels. The motion was denied September 18, 1967.

To the same effect are *Board of Education of Oklahoma City Public Schools* v. *Dowell,* 375 F. 2d 158 (10th Cir. 1967), *cert. den.,* 387 U. S. 931,[49] and *Evans* v. *Ennis,* 281 F. 2d 385, 389 (3rd Cir. 1960), "The Supreme Court has unqualifiedly declared integration to be their constitutional right."

This Court granted certiorari January 15, 1968, No. 805. See p. 13, *supra.*

The recent decision in the second appeal in *Kemp* v. *Beasley,* —— F. 2d ——, No. 19017, January 9, 1968, is, however, a reaffirmation of the principles enunciated in the first *Kemp* decision (352 F. 2d 14) and in *Kelley.*

[49] In the *Oklahoma City* case, the School District adopted in 1955, in response to *Brown,* a unitary zoning plan which preserved, because of residential housing patterns, substantial segregation of the races and over which it superimposed a "minority to majority" transfer provision of the type condemned by this court in *Goss* v. *Board of Education of the City of Knoxville, Tenn.,* 373 U. S. 683. At the time of the district court's final decision in 1965, 80% of the Negro students in the system were still attending schools which were all-Negro or at least 95% Negro. In addition, little or nothing had been done to integrate faculties. The district court found (244 F. Supp. 971, 976 (W. D. Okla. 1965)):

> That the Board had failed to desegregate the public schools in a manner so as to eliminate . . . the tangible elements of the segregated system.
>
> . . . where the cessation of assignment and transfer policies based solely on race is insufficient to bring about more than token change in the segregated system, *the Board must devise affirmative action reasonably purposed to effectuate the desegregation goal.* (Emphasis added.)

It ordered, *inter alia,* as a panel of educational administrators had recommended, changes in the grade structures of some schools and the adoption of a "majority to minority" transfer provision. Although such a provision—one which permits a student to transfer only from a school in which his race is in the majority to a school where his race will be in the minority—is not a racially neutral rule, and, in fact, has the effect of promoting integration, the Tenth Circuit approved the district court order. Said the Court, "[u]nder the factual situation here we have no difficulty in sustaining the trial court's authority to compel the board to take specific action in compliance with the decision so long as such compelled action can be said to be necessary for the elimination of . . . unconstitutional evils . . . " (375 F. 2d at 166). It found all such actions necessary.

4. Equitable Analogies.

The second *Brown* decision, declared that "in fashioning and effectuating the decrees, the courts will be guided by equitable principles" (349 U. S. at 300). Equity courts have broad power to mold their remedies and adapt relief to the circumstances and needs of particular cases. Where, as here, the public interest is involved "those equitable powers assume an even broader and more flexible character . . ." *Porter* v. *Warner Holding Co.,* 328 U. S. 395, 398. Accordingly, such courts have required wrongdoers to do more than cease unlawful activities and compelled them to take affirmative steps to undo effects of their wrongdoing. *Louisiana* v. *United States,* 380 U. S. 145, 154 involved such a decree:

> The court has not merely the power but the duty to render a decree which will so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future.

Under the Sherman Anti-trust Act, unlawful combinations are dealt with by dissolution and stock divestiture. See e.g., *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 189 and cases cited; *Schine Chain Theatres* v. *United States,* 334 U. S. 110, 126-130. Similarly, where a corporation has unlawful monopoly power which would operate as long as it retains a certain form, equity has required dissolution. *United States* v. *Standard Oil Co.,* 221 U. S. 1.

The same has been accomplished under the National Labor Relations Act where it was recognized early that disestablishment of an employer-dominated labor organization, "may be the only effective way of wiping the slate

clean and affording the employees an opportunity to start afresh in organizing . . . ", *N. L. R. B.* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 250; *American Enka Corp.* v. *N. L. R. B.*, 119 F. 2d 60, 63 (4th Cir. 1941); *Sperry Gyroscope Co. Inc.* v. *N. L. R. B.*, 129 F. 2d 922, 931-932 (2nd Cir. 1942); *Carpenter* v. *Steel Co.*, 76 NLRB 670 (1948).

5. Summary.

Of course, nothing we have said is directed to the question whether school boards in all places and all circumstances are under a constitutional duty to eradicate school segregation no matter how engendered. That question is not here.

Nor, do we think, as Judges Gewin and Bell have argued forcefully in their dissent in *Jefferson,* that to insist that a desegregation plan (of a district formerly segregated by law) "work" is to impose a special rule on 17 states but not on other states whose schools might equally be segregated. See 380 F. 2d at 397-398, 413-414. Segregation in the systems before that court was directly traceable to state action. It was certainly within the court's power (and, indeed, its duty under the *Brown* decisions) to require that that segregation be undone. In any event, the fact that segregation caused by residential patterns might have the same effect on Negro pupils as segregation caused by state law does not insulate the latter from the Fourteenth Amendment merely because no remedy has yet been prescribed for the former.

Our submission is: where racial segregation is the product of unconstitutional acts or policies, the mere allowance of a choice of schools does not satisfy the duty to effect

a unitary non-racial system, if, in fact, the overwhelming majority of students continue to attend schools previously designated by law for their race.

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 substantial and entrenched, a free transfer system might be of assistance in the achievement of desegregation. Rather, our position is that a freedom of choice plan is not, in the late sixties, an "adequate" desegregation plan (*Brown II, supra,* 349 U. S. at 301), where, as here, there is another plan, more feasible to administer, which will more speedily and effectively disestablish the dual system.[50]

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[50] The dissenters' opinions in *Jefferson* create the mistaken impression that free choice is an established, sensible method of pupil assignment:

> Freedom of choice means the unrestricted, uninhibited, unrestrained, unhurried and unharried right to choose where a student will attend public school . . . (380 F. 2d at 404).
>
> * * * * *
>
> Accordingly while professing to vouchsafe freedom and liberty to Negro children, [the Judges in the majority] have destroyed the freedom and liberty of all students, Negro and white alike (*Id.* at 405).

But, as we point out in the Introduction (pp. 13-27, *supra*), permitting students to assign themselves is entirely novel, administratively wasteful, racially motivated, and incapable of disestablishing the dual system. "Freedom of choice," despite its appealing title, should constantly be viewed as what it is: another sophisticated device school boards have developed in their long fight to neutralize the *Brown* decision.

III.

The Record Clearly Shows 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 or Consolidation 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 buses 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,[51] and as it almost 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. 10 *supra*), but for free choice. Freedom of choice has been, at least in this community, the means by which the State has continued, under the guise of desegregation, to maintain segregated schools.

The Board could not, in good faith, have expected that enough students would choose the school previously closed

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[51] Compare Judge Sobeloff's suggestion quoted at p. 10, *supra* (76-77a) 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.

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,[52] operated under the Virginia Pupil Placement Act, under which any student, could, as in free choice, choose either 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 (25a, no. 7). Thus, at the time the Board adopted free choice, it was 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." [53]

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[52] 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.

[53] The use, in this case, of a free choice plan 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 invidiously to utilize race as a factor in the school selection process. Thus it is that white students invariably choose the formerly white school and not the Negro school. 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,* 387 U. S. 369; *Robinson* v. *Florida,* 378 U. S. 153; *Anderson* v. *Martin,* 375 U. S. 399; *Goss* v. *Board of Education,* 373 U. S. 683. See also, Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection and California's Proposition 14,* 81 Harv. L. Rev. 69 (1967). 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 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

Nor has it done so in the years since its adoption. But for the relatively small number of Negro children attending the formerly white school the two schools are operated substantially as before *Brown*. "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.[54] During the current school year, 1967-68, only 115 (approximately 15%) of the 736 Negroes in the New Kent School District attend school with whites at the New Kent school. No whites are attending 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 attend a school that is entirely Negro. Here, as in most districts utilizing free

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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."

[54] The Eighth Circuit puts it another way:

> School boards must recognize the constitutional inadequacy of maintaining school systems where the formerly all white school has the appearance of only token integration and the all Negro school is still perpetuated as a separate unit."

Kemp v. *Beasley,* —— F. 2d ——, No. 19017, January 9, 1968, slip op. at 4.

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 both races are scattered throughout the county. "Perpetuation of [this] all-Negro school in a formerly de jure segregated school system is simply constitutionally impermissible." *Kemp* v. *Beasley,* —— F. 2d ——, No. 19,017, January 9, 1968, slip op. at 8.

The duty of the Board was to convert the dual school system created by state law and local rules in derogation of petitioners' rights into a "unitary non-racial system." It had a common sense alternative—geographic zoning—which the record shows would have disestablished the dual system more speedily and with much less administrative hardship than the free choice device it ultimately chose. But that was not the only alternative: the Board could have consolidated the two facilities into one school with one site, for example, serving grades 1-7 and the other grades 8-12.[55] This would have resulted in a more efficiently operated system enabling better equipment and expanded course offerings,[56] and immediately would have produced an integrated system. The most important study of secondary education in this country, James Bryant Conant's, *The American High School Today* (1959), gives highest priority to the elimination of small high schools graduating

[55] New Kent has apparently never utilized separate junior high schools. Both Watkins and New Kent are operated on the basis of 7 elementary grades and 5 high school grades (no. 14, 26a).

[56] No extended argument is needed to support the proposition that a school board can more economically furnish one well-equipped science laboratory, than two of mediocre quality. Similarly, where particular course offerings depend on student demand, more such courses might be offered after consolidation.

classes of less than one hundred.[57] Here, New Kent County, despite this opportunity to provide a broader and more intensive educational experience to all students, both Negro and white, continues wastefully to maintain two separate sites, each graduating but 30-35 students each year.

To be sure, the Fourteenth Amendment does not require that school administrators in *Brown*-affected states operate their systems in the most efficient manner. But the motive of a school board which has needlessly converted to free choice in an area where the races are interspersed comes more clearly into focus when examined against the background of available options.

The Board's construction policies shed further light on its motives. As late as June, 1965, the Board announced its intention to make identical additions at both Watkins and New Kent (at each, 4 classrooms—2 seventh, 2 sixth) (no. 19, 27-28a). And, in December 1966, six months after the district court had approved its desegregation plan (allegedly designed to achieve a unitary non-racial system), both four room additions were opened. Adding equally, in the context of free choice, to each of two sites, one traditionally maintained for Negroes, the other for whites,

[57] "The enrollment of many American public high schools is too small to allow a diversified curriculum except at exorbitant expense . . . The prevalence of such high schools—those with graduating classes of less than one hundred students—constitutes one of the serious obstacles to good secondary education throughout most of the United States. I believe such schools are not in a position to provide a satisfactory education for any group of their students—the academically talented, the vocationally oriented, or the slow reader. The instructional program is neither sufficiently broad nor sufficiently challenging. A small high school cannot by its very nature offer a comprehensive curriculum. Furthermore, such a school uses uneconomically the time and efforts of administrators, teachers, and specialists, the shortage of whom is a serious national problem" (p. 76).

indicates, we submit, an intention by the Board to *reinforce,* rather than *disestablish* the dual system.[58]

Most important, however, the success of free choice depended on the ability of Negroes to unshackle themselves from the psychological effects of prior state-imposed racial discrimination, and to withstand the fear and intimidation of the present and future. Neither of the other alternatives (geographic zones or restructuring grades) under which assignments would be made by the Board—as they 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.[59] Instead of fashioning a decree which would "as far as possible eliminate the discrimina-

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[58] Its construction policies have apparently remained unchanged. Only a few months ago the Board voted unanimously to construct, *inter alia,* two new gymnasiums, one at Watkins, the other at New Kent. *Richmond Times-Dispatch,* Thursday, Aug. 24, 1967, p. B-8.

A similar inference (of an intention to reinforce rather than disestablish the dual system) was made in *Kelley* v. *Altheimer Arkansas Public School District No. 22,* 378 F. 2d 483 (8th Cir., 1967) discussed at p. 36, *supra.* There, as here, the school board added additional classrooms at each of two complexes, one traditionally maintained for Negroes, the other for whites. Said the Court (*Id.* at 497):

> We conclude that the construction of the new classroom buildings had the effect of helping to perpetuate a segregated school system and should not have been permitted by the lower court.

See also *Id.* at 495-496. Cf. section VII of the decree appended by the United States Court of Appeals for the Fifth Circuit to its opinion in the *Jefferson County* case, where the court ordered that school officials (380 F. 2d at 394)

> locate new school[s] and [expansions of] existing schools with the objective of eradicating the vestiges of the dual system.

[59] 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. Cf. pp. 22-23 and Note 29, *supra.*

tory effects of the past" (cf. *Louisiana* v. *United States,* 380 U. S. 145, and the other cases discussed at pp. 38-39, *supra*), the lower courts have, by approving free choice, permitted the Board to utilize those discriminatory effects to maintain its essentially segregated system.

Nor did the Board introduce any evidence to justify its method, which, if it could disestablish the dual system at all, 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):

> 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 petitioners' 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 current year (1967-68) mirrors the racial composition of the student bodies. No Negroes are among the 28 full-time teachers at the formerly all-white New Kent school; only one Negro teacher is assigned there and that is for the equivalent of one day each week. At Watkins, only one of some 30 teachers is white. Thus, neither of the only two schools in the county has lost, either in terms of its students or faculty, its racial identification.[60]

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[60] The failure of the Board to take meaningful steps to integrate its faculties is consistent with what the record shows: that the

Only occasionally in the fourteen years since *Brown* has this Court reviewed lower court supervision of the transition to non-discriminatory systems. This may have been due in part to the belief voiced in *Brown II,* that "the [district] courts, because of their proximity to local conditions . . ." could best oversee the transition. (349 U. S. at 298). With the enactment of Title VI, however, the situation has changed. Whereas the first decade of litigation produced only token compliance with *Brown,* more has been accomplished by HEW's implementation of Title VI.[61] Indeed, as the Civil Rights Commission has found, "the major federal role in Southern school desegregation [has] shifted from the federal courts to [HEW]."[62]

Title VI enforcement by HEW has at its disposal ample resources not available to courts. In assisting a district to regain or attain eligibility for federal funds it can utilize educational experts, field investigators and other professional personnel. But HEW relies on the courts to articulate the standards it implements. (Note 44 *supra.*) Thus, its effectiveness in converting the principles enunciated in *Brown* into living experience for school children, will

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Board, by adopting free 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,* 372 F. 2d at 883-885; *Bradley* v. *School Board of the City of Richmond,* 382 U. S. 103; *Rogers* v. *Paul,* 382 U. S. 198.

[61] ". . . [M]ore Negro children have entered schools with white children during this period [the 3 years since enactment of Title VI] than during all of the 10 previous years." *Southern School Desegregation, 1966-67,* at 90.

[62] *Id.* at 1.

be enhanced by this Court's articulation of governing standards.

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.[63]

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[63] A trend away from freedom of choice seems to have developed recently in some of the lower courts. 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, E. D. Va., 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.

See also *Moses* v. *Washington Parish School Board,* —— F. Supp. —— (E. D. La., October 19, 1967), discussed at pp. 19-20, *supra.* Cf. Orders requiring the use of geographic zones in *Coppedge* v. *Franklin County Board of Education,* 273 F. Supp. 289 (E. D. N. C. 1967) appeal pending, discussed in Note 31, *supra,* and *Braxton* v. *Board of Public Instruction of Duval County, Florida,* No. 4598 (M. D. Fla.), January 24, 1967.

So far as we are aware the first and only court order disapproving free choice, prior to the cases discussed above, was entered in *Mason* v. *Jessamine County Board of Education,* 8 Race Rel. L. Rep. 530 (E. D. Ky. 1963).

CONCLUSION

WHEREFORE, for the foregoing reasons it is respectfully submitted that the judgment of the United States Court of Appeals should be reversed. The case should be remanded to the district court with instructions to conduct immediately a hearing on whether some other method of pupil assignment would, consistently with sound educational principles, sooner disestablish the dual system. If such be the case that court should order that the speedier method be employed by defendants.

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