INDEX

	Page
Introduction	
A. Consent for Filing	1
B. Preliminary Statement	2
C. Issues Involved	3
Discussion	
A. Failure of Courts to Provide Guidelines	3
B. Neighborhood School Concept	6
C. Busing to Achieve Racial Balance, Maintaining a Racial Balance—Equal Educational Opportunities	8
D. De Jure—De Facto Distinction	14
E. Consideration of Race is Unconstitutional—Proportionate Representation Prohibited	19
F. Distinction between Schools not Mathematically Integrated and Segregated Schools	23
G. Meaning of Fourth Circuit Court's Decision—Rule of Reason	25
H. Issues Court Must Resolve	27
Conclusion	31
Appendix	
Certificate of Service	

LoneDissent.org

AUTHORITY TO FILE

Cases	*Page*
Alexander v. Holmes County, (1969) 396 US 19, 24 L.Ed.2d. 19	19, 23
Allen v. Board of Public Instruction of Broward County, Slip Opinion Number 30032, Aug. 18, 1970	23
Bell v. School City of Gary, Indiana, U.S.C.A., 7 Cir. (1963) 324 F.2d. 209, cert. denied, 377 U.S. 924, 84 S.Ct. 1223; 12 L.Ed.2d. 216	19
Bivins v Bibb County Board of Public Education, U.S.D.C., M.D. Ga. (Jan. 21, 1970) No. 1926	10
Briggs v. Elliott, E.D.S.C. (1955) 132 F. Supp. 776	16
Brown v. Board of Education, (1955) 349 U.S. 294, 99 L.Ed. 1083, 1089	22
Carter v. West Feliciana Parish School Board, et al. U.S.D.C., S.D. Ala., Case No. 28,340	11
Cassell v. Texas, (1950) 339 U.S. 282; 94 L.Ed. 840, 847; 339 U.S. 291, 94 L.Ed. 849	19
Deal v. Cincinnati Board of Education, U.S.C.A., 6 Cir. (1966) 369 F.2d. 55 (*Deal* I) cert. denied, 389 US 847, 88 S.Ct. 39, 19 L.Ed.2d. 114	9, 13
Deal v. Cincinnati Board of Public Instruction, U.S.C.A., 6 Cir. (1969) 419 F.2d. 1387, 1391-2 (*Deal* II)	7, 10
Downs v. Board of Education of Kansas City, U.S.C.A. 10 Cir., (1964) 336 F.2d. 988, cert.	

LoneDissent.org

Cases	*Page*
denied, 380 US 914, 85 S.Ct. 898, 13 L.Ed. 2d. 800	19
Ellis v. Orange County Board of Public Instruction, U.S.C.A., 5 Cir. M.D. Fla. (Feb. 17, 1970) No. 29,124	6, 18
Gilliam v. School Board of City of Hopewell, Va. U.S.C.A., 4 Cir., 345 F.2d. 325	11
Goins v. Allgood, U.S.C.A., 5 Cir. (1968) 391 F.2d. 692	20
Green v. County School Board of New Kent County, (1968) 391 U.S. 430, 439, 88 S.Ct. 1689, 20 F.2d. 716	29
Harvest, et al. v. Board of Public Instruction of Manatee County, et al., Slip Opinion No. 29425, 5 Cir., June 26, 1970	12
Henry v. Clarksdale Municipal Separate School District, U.S.C.A., 5 Cir., (1969) 409 F.2d. 682	11
Holland v. Board of Public Instruction of Palm Beach County, U.S.C.A., 5 Cir. (1958) 258 F.2d. 730	19
Kelley, et al. v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al., U.S.D.C. Nashville Div., M.D. August 25, 1970	31
Northcross vs. Board of Education, (1970) —— U.S. ——, 25 L.Ed.2d. 246, 250	27
Singleton v. Jackson Municipal Separate School District, et al., U.S.C.A., 5 Cir., Case No. 26,285 (January 21, 1970)	4, 5, 11, 18, 31, 33

LoneDissent.org

Cases	*Page*
Singleton, et al. v. Jackson Municipal Separate School District, et al., U.S.C.A. 5 Cir., Case No. 29,226 (May 5, 1970)	6
Swain v. Alabama, (1965) 380 U.S. 202, 208; 13 L.Ed.2d. 759, 766	20
Taylor v. Board of Education of City School District of New Rochelle, U.S.C.A., 2 Cir. (1961) 294 F.2d. 36	10
Thomie v. Houston County Board of Education, U.S.D.C., M.D. Ga. (January 21, 1970) No. 2077	10
U.S. v. Jefferson County Board of Education, U.S.C.A. 5 Cir. (1966), 372 F.2d. 836 (Jefferson I) affirmed and adopted en banc 380 F.2d. 385, (Jefferson II) cert. denied sub. nom., Caddo Parish School Board v. United States (1967) 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d. 103	9, 12, 14, 15, 17
U.S. v. Wiman, U.S.C.A., 5 Cir. (1962) 304 F.2d. 53	20

Other

Civil Rights Act of 1964	
Section 401(b)	8
Section 407(a)	8, 9
Fourteenth Amendment, U.S. Constitution	21, 22
Statement by the President on Elementary and Secondary School Desegregation, March 4, 1970	26, 29, 32

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 281

JAMES E. SWANN, ET AL.,

Petitioners,

v.

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION, ET AL.,

Respondents.

AMICUS CURIAE BRIEF
OF
GOVERNOR CLAUDE R. KIRK, JR.

INTRODUCTION

I.

CONSENT FOR FILING

In accordance with Rule 42 of the Supreme Court Rules, written consent to the filing of this Brief has been granted by the Petitioners and Respondents in this cause. (Appendix hereto Exhibit B 35—6)

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II.

PRELIMINARY STATEMENT

Claude R. Kirk, Jr., as Governor of the State of Florida, files this Brief as Amicus Curiae for the purpose of presenting to this Court, legal considerations which may be of assistance in the ultimate disposition of the issues. Amicus respectfully submits that he is not conversant with all the factual considerations; and, consequently, will endeavor to rely upon the factual representations contained in the Briefs filed by the parties in the presentation of any legal considerations to this Court.

The Governor appeared as Amicus Curiae in the proceedings before the Fourth Circuit Court of Appeals. The Governor also has appeared both as a party and as Amicus in numerous judicial proceedings before the district courts of the State of Florida, Fifth Circuit Court of Appeals, and this Honorable Court. In an original suit instituted in this Court in January, the Governor sought to have this Court declare and define the meaning of a "unitary system," thereby fixing an ascertainable standard of conduct to be followed by the school boards in all states. The suit further sought to have this Court declare that no state of the United States, in establishing a unitary system, be compelled to transport pupils for the purpose of achieving a racial balance. Unfortunately, the Court dismissed the suit for lack of jurisdiction.

The legal issues involved in this cause are also strikingly similar to those previously considered by the Fifth Circuit Court of Appeals and the District Courts in Florida. Recent decisions by the Fifth Circuit and the District Court clearly demonstrate the necessity for this Court to resolve clearly and unmistakably, once and for all, questions of busing and balance.

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III.

ISSUES INVOLVED

1. Does the Constitution require or permit the courts to order the busing of pupils for the purpose of achieving a racial balance?

2. Does the Constitution require or permit the courts to direct school boards to adopt plans designed to bring about mathematical racial balances within school systems?

IV.

DISCUSSION OF ISSUES

The Constitution neither requires nor permits the courts to direct the establishment of a mathematical racial balance whether by busing or otherwise.

It was the position of Amicus before the Fourth Circuit Court of Appeals, and it remains the position of Amicus before this Court, that the concept of forced busing, that is to say involuntary transportation of pupils from one school to another for the purpose of achieving racial balance, and the concept of establishing a racial balance, whether by busing or otherwise, is neither required nor permitted under the Constitution of the United States and is inconsistent with the Civil Rights Act of 1964, the statements made by the President of the United States on Elementary and Secondary School Desegregation and applicable judicial declarations.

Amicus respectfully submits that we are where we are today largely as a result of the failure of the Courts to provide the necessary guidance. This was so aptly pointed out by Judge

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Coleman in his dissent in *Singleton v. Jackson Municipal Separate School District, et al.*, U.S.C.A., 5 Cir., Case No. 26,285 (January 21, 1970), when he observed:

"What I dissent from is the continuing failure of this Court to provide a lighthouse in the new storm which is upon us. The school authorities and the District Judges need something to steer by.

In United States v. Jefferson County Board of Education, 372 F.2d 836, 380 F.2d 385 (1966 and 1967), when freedom of choice was an acceptable method of seeking desegregation, this Court formulated a detailed decree for use by the District Courts and forbade any variation therefrom. Now that freedom of choice is held to have generally failed we lapse into silence and wash our hands in the water of taciturnity. I strongly protest this approach. In *Jefferson* I, 372, F.2d 836, 849 (1966), the majority announced, 'We grasp the nettle.' I think the District Courts need help. They are being forced to act without our answer to many unanswered questions. I shall discuss some of them and state my view of what answers ought to be.

On September 30, 1969, at an en banc session in New Orleans, this Court ordered the cases now before us to be considered en banc. We were acutely aware of the critical nature of the problem—critical for the eradication of unconstitutional discrimination and critical for the future of public education, the great hope of nearly all children, black and white. It was my understanding then that upon the en banc hearing in Houston on November 17, 1969, we would attempt to supply some judicial compasses for

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use in a forest which had not been anticipated in 1966. Regrettably, we did not really do so.

Certainly as the Supreme Court said in *Brown* II, and as we have often repeated, local school authorities have the primary responsibility for elucidating, assessing, and solving these problems, 349 U.S. 299. *It does no good now to say that these school districts have had fifteen years in which to do something and have not done it. As a matter of fact, most of the school districts now before us, if not all of them, have been under the supervision of the federal courts for as much as five years. I think it is quite clear what this proves.*

Regardless of who is, or has been at fault, the Supreme Court has told us in no uncertain terms that it will brook no further delays. Do we, then, stand by and see innumerable schools go crashing on the rocks and educational processes seriously impaired or shall we bestir ourselves and advance judicial solutions which will dismantle the dual school system without dismantling the schools as well? Samson slew his enemies, all right, but he likewise destroyed the hall and liquidated himself—all because of bad judgment, previously exercised." (emphasis ours)

Judge Clark joined with Judge Coleman in a separate dissent in *Singleton*, supra, and also expressed a deep concern about the failure of the higher courts to provide the necessary specifics to assist the lower courts in determining constitutionally acceptable plans. Judge Clark keenly observed:

"Nobody knows what constitutes 'a unitary school system within which no person is to be effectively excluded from any school because of race or color.' This is not to

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say that this court hasn't drawn some negative limits around the phrase 'unitary school.' We have frequently decreed that systems coming before us were not unitary for one reason or another. However, what is here urged is our duty to speak *affirmatively*, to tell the litigants, in advance of attacks made on them, precisely what such a 'unitary system' is. We have said such a system must be racially integrated and that its faculty must approximate the racial balance of the whole system. These are the only affirmatives known."

It was not until the decision by the Fifth Circuit Court of Appeals in *Ellis v. Orange County Board of Public Instruction*, U.S.C.A., 5 Cir., M.D. Fla. (February 17, 1970) No. 29,124, (see also *Singleton, et al. v. Jackson Municipal Separate School District, et al.*, U.S.C.A. 5 Cir., Case No. 29,226, May 5, 1970) that we had some indication of an acceptable educationally sound approach to the establishment of a unitary school system—namely the neighborhood school concept without the necessity of forced bussing. In *Ellis,* the Fifth Circuit Court observed in part:

"As stated, based on the supplemental findings of fact, it appears that a true neighborhood assignment system, assigning students to the school nearest the student's home up to the capacity of the given school, will result in the desegregation of eight of the remaining eleven all-Negro student body schools in the Orange County, system, leaving three elementary schools."

* * * * * *

"There are a number of all-white student body schools in the Orange County system. This is due to the preponderant white student population (82 percent) and to

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residential patterns. The three all-Negro student body schools which will remain, if the neighborhood assignment system is properly invoked, are also the result of residential patterns. The majority to minority transfer provision under the leadership of the bi-racial committee is a tool to alleviate these conditions now. Site location, also under the guidance of the bi-racial committee, will guarantee elimination in the future. In addition, open housing, Title VIII, Civil Rights Act of 1968, 42 USCA, SS 3601, Et Seq., Jones v. Mayer, 1968, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189, will serve to prevent neighborhood entrapment."

Ample precedent for the neighborhood school system is reflected in *Deal v. Cincinnati Board of Public Instruction*, U.S.C.A., 6 Cir., 1969, 419 F.2d. 1387, *1391–2* (*Deal* II):

> " 'The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through use of neutral, easily determined standards, and better home-school communications.' "

* * * * * *

> "In *Northcross v. Board of Education of the City of Memphis, Tennessee.*, 302 F.2d. 818 (6th Cir. 1962), cert. denied, 370 U.S. 944, we outlined the minimal requirements for non-racial schools:
>
> > 'Minimal requirements for non-racial schools are geographic zoning, according to the capacity and

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> facilities of the buildings and admission to a school according to residence as a matter of right.' Id. at 823."

The plan which was approved by the District Court in this case, as we understand it, involves extensive busing for the purpose of achieving racial balance and, apparently, rejects the reasonable efforts made by the Charlotte-Mecklenburg Board of Education to implement an assignment plan based on the neighborhood school concept and not on racial quotas. Although there is some indication that the order of the District Court was not promulgated to achieve a "racial balance," the fact that the court directed the balancing of certain schools demonstrates that the achieving of a racial balance was a controlling factor in the court's determination. Although this may not have been the lower court's intention, the fact remains from our understanding of the approved plan, that there is extensive involuntary busing for the purpose of achieving a racial balance. The clear wording and the intent of the Civil Rights Act of 1964 completely negates any intention to approved forced busing.

Section 401(b) of the Civil Rights Act of 1964 provides as follows:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' *shall not mean the assignment of students to public schools in order to overcome racial imbalance.*" (emphasis ours)

Section 407(a) of the Civil Rights Act of 1964 provides in part as follows:

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> ". . . provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. . ." (42 U.S.C. Sec. 2000c-6 (a))

In *U. S. v. Jefferson County Board of Education*, U.S.C.A., 5. Cir. (1966), 372 F.2d. 836 (*Jefferson* I) affirmed and adopted en banc 380 F.2d. 385, (*Jefferson* II) cert. denied sub. nom. *Caddo Parish School Board v. United States* (1967) 389 US 840, 88 S.Ct. 67, 19 L.Ed. 103, this Court, in *Jefferson* I observed at page 856:

> ". . . When Congress declares national policy, the duty the two other coordinate branches owe to the Nation requires that, within the law, the judiciary and the executive respect and carry out that policy. . ."

In the enactment of Section 407 (a), supra, Congress declared a national policy with regard to the busing of pupils solely to achieve a racial balance. Unless Section 407 (a), supra, is declared to be unconstitutional and void, having no force and effect, it is respectfully suggested that the provisions of this Act are applicable and controlling.

In *Deal v. Cincinnati Board of Education*, U.S.C.A., 6 Cir. (1966) 369 F.2d. 55, (*Deal* I) cert. denied 389 US 847, 88 S.Ct. 39, 19 L.Ed.2d. 114, the United States Court of Appeals for the Sixth Circuit held:

> "We hold that there is no constitutional duty on the part of the Board *to bus* Negro or white children out of their

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> neighborhoods or to transfer classes *for the sole purpose of alleviating racial imbalance* that it did not cause, nor is there a like duty to select new school sites solely in furtherance of such a purpose." (emphasis ours)

See also *Deal v. Cincinnati Board of Education*, supra, (Deal II); *Bivins v. Bibb County Board of Public Education*, U.S.D.C., M.D. Ga. (January 21, 1970) No. 1926; and *Thomie v. Houston County Board of Education*, U.S.D.C., M.D. Ga. (January 21, 1970) No. 2077.

In *Taylor v. Board of Education of City School District of New Rochelle*, U.S.C.A., 2 Cir. (1961) 294 F.2d. 36, Judge Moore, in his dissent observed at page 41:

> "The best account of the problems presented to the Board during the last ten years (1950–1960) is found in the testimony of Kenneth B. Low who from 1950 to 1960 served on the Board and was its President from 1958 to 1960. He had had a distinguished career in the field of interracial relations and for seven years had served as Chairman of the Westchester County Council appointed by the State Commission Against Discrimination . . . '*Solutions*, he said, *which sent 'youngsters out of the district because of their race,' as discussed before the Board brought about discrimination in reverse because you are creating special conditions for people on account of their race and that it could and perhaps should apply equally to other schools which had either a racial imbalance or a religious imbalance of national backgrounds, and the result is that it would establish a precedent for sending children, because of any of these factors, to schools, which was believed to be a violation of basic principle.*' (One school was over 90% Jewish

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and one over 90% Italian.) 'But (said Mr. Low) I am not going to violate what I consider to be basic constitutional principles, and the mere fact that this (Lincoln) happens to be a badly imbalanced racial school is not due to any act of the Board of Education. It is a residential condition.' " (emphasis ours)

If the courts are required to correct racial imbalances, then they would also be equally required to correct religious imbalances or imbalances of national backgrounds. It is respectfully suggested that the courts cannot constitutionally make a selective distinction between religious or racial imbalance and that it would be inviting the opening of a Pandora's box if correction of any type of mathematical imbalance becomes a constitutional imperative.

The comments made by Judge Coleman in *Carter v. West Feliciana Parish School Board, et al.*, U.S.D.C., S.D. Ala., Case No. 28,340, and *Singleton v. Jackson Municipal Separate School District*, supra, are indeed pertinent:

"The High Court has never arbitrarily commanded that there must be racial balance in the student body of any school purely for the sake of racial balance. It has never commanded that little children be required to walk unreasonable distances, *or to be bussed to strange communities just to obtain racial balance.* It has ordered us to quit operating two systems within a system, one all black, and one all white, judges by five criteria, *not one.* Neither has it left the door open to tokenism." (emphasis ours)

Judge Cox, in his dissenting opinion, in *Henry v. Clarksdale Municipal Separate School District*, U.S.C.A., 5 Cir. (1969) 409 F.2d. 682 at page 692, refers to the holding in *Gilliam v.*

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School Board of City of Hopewell, Va., U.S.C.A., 4 Cir., 345 F.2d. 325, as follows:

> "'. . . The constitution does not require the abandonment of neighborhood schools and the transportation of pupils from one area to another solely for the purpose of mixing the races in the schools. . .'"

In *Jefferson* I, supra, at page 847, footnote 5, the Fifth Circuit, while indicating that in its opinion, racial balance was to be given a high priority, it is not constitutionally required:

> ". . . The law does not require a maximum of racial mixing or striking a racial balance accurately reflecting the racial composition of the community or the school population. It does not require that each and every child shall attend a racially balanced school. . ."

In *Harvest, et al. v. Board of Public Instruction of Manatee County, et al.*, slip Opinion No. 29425, 5 Cir., June 26, 1970, Judge Clark in an opinion concurring with the majority commenting on the Fourth Circuit's decision in the instance cause observed in part:

> ". . . The court there emphasized what the district court here has consistently recognized—that racial balancing is not the sine qua non of a unitary system—that educational reasonableness and realities must prevail over any artificial racial ratios. . ."

In a dissenting opinion written by Judge Bell (Judge Bell wrote the majority opinion in *Ellis v. Board of Public Instruction of Orange County*, Supra) in *Jefferson* II, supra, it is observed in part at page 417:

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". . . The Supreme Court has not said that every school must have children from each race in its student body, or that every school room must contain children from each race, or that there must be a racial balance or a near racial balance, or that there be assignments of children based on race to accomplish a result of substantial integration. The Constitution does not require such. We would do well to 'stick to our last' so as to carry out the Supreme Court's present direction. It is no time for new notions of what a free society embraces. Integration is not an end in itself; a fair chance to attain personal dignity *through equal educational opportunity is the goal. . .*" (emphasis ours)

In *Deal* I, supra, Chief Judge Weick similarly observed at page 59:

". . . If factors outside the schools operate to deprive some children of some of the existing choices, the school board is certainly not responsible therefor.

"Appellants, however, argue that the state must take affirmative steps to balance the schools to counteract the variety of private pressures that now operate to restrict the range of choices presented to each school child. Such a theory of constitutional duty would destroy the well-settled principle that the Fourteenth Amendment governs only state action. Under such a theory, all action would be state action, either because the state itself had moved directly, or because some private person had acted and thereby created the supposed duty of the state to counteract any consequences.

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> The standard to be applied is '*equal educational opportunity*'. The Court in *Brown* cast its decision thus because it recognized that it was both unnecessary and impossible to require that each child come through the complex process of modern education with the same end result. This approach grants due respect for the unavoidable consequences of variations in individual ability, home environment, economic circumstances, and occupational aspirations. Equal opportunity requires that each child start the race without arbitrary official handicaps; it does not require that each shall finish in the same time." (emphasis ours)

It appears that whether busing to achieve racial balance is permissible has been held to depend on a so-called distinction between "de jure" or "de facto" segregation situations. In this regard, Judges Bell and Coleman in their dissent in *Jefferson* II, supra, observe at pages 413 and 418:

> "The unfairness which inheres in the majority opinion stems from the new doctrine which the original panel fashioned under the concept of classifying segregation into two types: de jure segregation, called apartheid, for the seventeen southern and border states formerly having legal segregation; and de facto segregation for the other states of the nation. This distinction, which must be without a difference and somewhat hollow to a deprived child wherever located, is used as a beginning. The original opinion then goes on to require affirmative action on the part of the school authorities in the de jure systems to integrate the schools. The neighborhood school systems of the nation with their de facto segregation are excused. The Constitution does not reach them.

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"This reasoning is necessary to reach the end of compulsory integration in the so-called de jure states. It is the counterpart to overruling the settled construction of the Fourteenth Amendment, to be next discussed, that integration is not commanded. *The restrictions in the Civil Rights Act of 1964 against requiring school racial balances by assignment and transportation are written out of the law with respect to the de jure states by using the de jure-de facto theory*. Title IV, subsection 401(b), 407(a), 42 U.S.C.A. subsection 2000c(b), 2000c-6. The overruling of the constitutional limitation removes the other impediment to compulsory integration. The way is thus cleared for the new dimension. The only question left is when, and to what extent. The authority to HEW is carte blanche. We should disavow the de jure-de facto doctrine as being itself violative of the equal protection clause. It treats school systems differently. It treats children differently. It is reverse apartheid. It poses the question whether legally compelled integration is to be substituted for legally compelled segregation. It is unthinkable that our Constitution does not contemplate a middle ground-no compulsion one way or the other." (emphasis ours)

* * * * * *

"*I further believe that whatever the Fourteenth Amendment requires of any State it requires of all States*. If we are requiring something here in the enforcement of Fourteenth Amendment rights that should not be required of all fifty states then we have exceeded our authority and we have misapplied the Constitution. . ." (emphasis ours)

Judge Gewin in *Jefferson* II, supra, observes at page 398:

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". . . One of the chief difficulties which I encounter with the opinion is that it concludes that the Constitution means one thing in 17 states of the nation and something else in the remaining states. This is done by a rather ingenious though illogical distinction between the terms de facto segregation and de jure segregation. While the opinion recognizes the evils common to both types, it relies heavily on background facts to justify the conclusion that the evil will be corrected in one area of the nation and not in the other. In my view the Constitution cannot be bent and twisted in such a manner as to justify or support such an incongruous result."

The application which some courts have given to the antibussing philosophy expressed in Section 407(a), supra, appears to have been occasioned by the apparent rejection of the decision in *Briggs v. Elliott,* E.D.S.C. (1955) 132 F.Supp. 776, where it was held at page 777:

". . . it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. *It has not decided that the federal courts are to take over or regulate the public schools of the states.* It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or *must deprive them of the right of choosing the schools they attend.* What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races

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voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals." (emphasis ours)

Judge Gewin in *Jefferson* II, supra, in commenting on the apparent rejection of the *Briggs* doctrine, supra, observed at page 409:

"If the alleged Briggs dictum is so clearly erroneous and constitutionally unsound, it is difficult to believe that it would have been accepted for a period of almost twelve years and quoted so many times. Even the majority concedes that the court in Briggs was composed of distinguished jurists, Judges Parker, Dobie and Timmerman. If the majority is correct, it is entirely likely that never before have so many judges been misled, including judges of this Court, for so long by such a clear, understandable direct, and concise holding as the language in Briggs which the opinion now condemns. The language is straightforward and simple: 'The Constitution, in other words, does not require integration. It merely forbids discrimination.'

It is interesting also to observe that the Supreme Court has never disturbed the Briggs language although it has

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had numerous opportunities to do so. As a matter of fact, it has come very close to approving it; if it has not actually done so . . .

The majority rule requiring compulsory integration is new and novel, and it has not been accepted by the Supreme Court or by the other circuits. . ." (emphasis ours)

In this regard, Judge Young, who was the trial judge in the *Ellis* case, supra, observed as follows:

". . . A student who because of his color is scooped up within a gerrymandered zone to be transported to a distant school in the same zone and deprived of the right of attending a school a few blocks from his home which is placed in another zone (where such zones are gerrymandered for racial balance alone) is 'effectively excluded' from a school because of race or color which is contra to Alexander v. Holmes County Board of Education, supra." (emphasis ours)

Judge Clark in his dissent in *Singleton*, supra, very similarly observed:

"The assignment of specific racial quotas and the establishment of minimum, acceptable, percentage, racial guidelines for students, most assuredly cannot be the terms of definition, for when a child of any race wishes to attend a school because of its location close to home, because of the deemed excellence of its faculty or facilities, because it is attended by brothers or sisters or close friends or because it is on Dad's way to work or in Mother's car pool, and his wishes accord with valid edu-

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> cational policy, *yet that child winds up being excluded from that school solely because the color of his or her skin doesn't conform to a predetermined arbitrary racial quota or percentage guideline, that child's right to be free of racial distinctions is gone. By the very wording of the phrase to be defined, a school system can't be 'unitary' if a child is effectively excluded from any school because of his or her race or color.* It's easy to see what it isn't, the challenge is to show what it is." (emphasis ours)

(See also *Holland v. Board of Public Instruction of Palm Beach County*, U.S.C.A., 5 Cir. (1958) 258 F.2d. 730; *Bell v. School City of Gary, Indiana*, U.S.C.A., 7 Cir. (1963) 324 F.2d. 209; cert. denied, 377 US 924, 84 S.Ct. 1223, 12 L.Ed.2d. 216; *Downs v. Board of Education of Kansas City*, U.S.C.A. 10 Cir., (1964) 336 F.2d. 988, cert. denied, 380 US 914, 85 S.Ct. 898, 13 L.Ed. 2d. 800).

Amicus respectfully suggests that busing as contemplated by the District Court's order would be contrary to the principles set forth in *Alexander v. Holmes County*, (1969) 396 US 19, 24 L.Ed.2d. 19. As we understand it, the order of the District Court requires that the school children administered by the plan which the court has approved are to be bused on the basis of race so as to achieve proportionate racial representation in the schools; and, because of their race, certain children would be excluded from the school within the neighborhood of their choice and bused to another solely on the basis of race. This inherently violates the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution. In *Cassell v. Texas*, (1950) 339 U.S. 282, 287; 94 L.Ed. 840, 847, this Court said:

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"... Proportional racial limitation is therefore forbidden. An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race..."

At 339 U.S. 291, 94 L.Ed. 849, a concurring opinion speaking through Mr. Justice Frankfurter stated:

"... But discrimination in this context means purposeful, systematic, non-inclusion because of color... It does not mean absence of proportional representation..."

The principle of Cassell has been re-announced in recent times in *Swain v. Alabama,* (1965) 380 U.S. 202, 208; 13 L.Ed.2d. 759, 766, wherein the following statement appears:

"Similarly, since there can be no exclusion of Negroes as a race because of color, proportional limitation is not permissible. (Cassell v. Texas, 339 U.S. 292; 94 L.Ed. 839) ..."

This court has given the *Cassell* principle some recognition in the cases of *U. S. v. Wiman,* U.S.C.A., 5 Cir. (1962) 304 F.2d. 53 and *Goins v. Allgood,* U.S.C.A., 5 Cir. (1968) 391 F.2d. 692, wherein it is said that proportionate representation is not required.

Each of the foregoing cases is concerned with jury selection. However, there is no difference between the constitutional prohibitions against discrimination in the assignment of jurors and the assignment of students. Proportionate representation is prohibited because it requires that the state exclude on the basis of race those who exceed the portion

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allotted to their race. The law must be color-blind. If the law requires that the race of the administered be known in order to enforce the law, then clearly race is made a controlling characteristic or issue. The plan approved by the lower court can only be effectuated if the race of the child is disclosed. It is a plan clearly racial in characteristic and as such is unconstitutional per se. The plan requires that a child, on the basis of race, graduate in a high school other than that which he has attended for perhaps three and a half years. It requires that he be bused out of his neighborhood. If the child falsifies his race and leaves all other factors the same he achieves the desirable circumstance of stability. Change can be legitimately imposed on him but not on the basis of race. A law which clearly discriminates on the basis of race cannot gain a constitutional exception because it is thought to promote a desirable social amelioration.

The Court should also consider that the Fourteenth Amendment concludes with the provision:

> "Section 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article."

Congress has exercised the power specifically given by passing legislation which prohibits busing. It is respectfully suggested that such legislation prohibits the racial discrimination characteristic of the plan in question. The Court should not give any construction of the Congressional enactment which would pervert any intent which may be clearly shown by the Congressional record or by the language of the act. Certainly the court should not say to its fountain head of jurisdictional power that it has not prohibited forced busing on the basis of race if only a distortion of the clear intent would permit such conclusion. To do so would require of

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Congress that it limit the Court's power to review certain Congressional enactments by a provision in the Act so stating, because such provision would be the only method whereby Congress could effectively exercise the power specifically given by Amendment XIV, Section 5, of the Federal Constitution.

Congressional power to enforce the Fourteenth Amendment is not exclusive. However, in light of the specific provisions of Section 5, it must be controlling.

If the Fourteenth Amendment of the Federal Constitution permitted, without requiring, proportionate representation on the basis of race, the decision of a United States District Court requiring proportionate representation would have to be reversed as imposing what was not required. A fortiori the order of a U. S. District Court must be reversed for imposing proportional racial representation when such is actually prohibited by the Fourteenth Amendment. As the Honorable Thurgood Marshall stated in his Brief in *Brown v. Board of Education*, (1955) 349 U.S. 294, 99 L.Ed. 1083, 1089:

> "The Fourteenth Amendment requires that a decree be entered directing that appellants be admitted forthwith to public schools without distinction as to race or color."

Amicus asks but the same.

Amicus would be remiss in his responsibility to this Court if some comment were not made regarding the arguments of the parties in this proceeding. The Brief filed by the Charlotte-Mecklenburg Board of Education (Cross-Petitioner) sets forth with great particularity and specificity their opposition to compulsory busing and racial balancing. At page 29 of their Brief, the Cross-Petitioner states, in part,

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that, "We do not think that the Constitution requires this racial balancing nor the busing necessary to implement it . . ." The Brief filed by James Swann, et al, (Petitioners) urges acceptance of the concept of a racially balanced school system and busing to achieve such balance; such concept, it is argued, as being the constitutional imperative which the school boards have been mandated by the courts to follow. Petitioner submits that these "techniques" are required to "eliminate segregation" and "integrate the school system."

Amicus respectfully submits that there is indeed a distinction between school systems which are "segregated" and school systems which vary in the degree of mathematical "integration." Amicus suggests that there is a vast difference between the elimination of school segregation as commanded by the Court in the *Brown* cases, and directing a more racially balanced system as ordered by the District Court. Amicus respectfully submits that the inability of the Courts to make this distinction has contributed to the judicial confusion. It has been commonplace and perhaps an oversimplification to interchange these two concepts. In many instances, the courts were, in reality, dealing with school systems which were not "segregated," but rather which did not have a sufficient degree of "integration" to "satisfy" the courts' concept of a unitary system.

The principle that this Court clearly enunciated in *Alexander vs. Holmes County Board of Education*, supra, was the necessity and requirement of school boards to establish a unitary system "within which no person is to be effectively excluded from any schools because of *race or color*."

In *Allen vs. Board of Public Instruction of Broward County*, slip Opinion Number 30032, August 18, 1970, the Fifth Circuit observed, in part, as follows:

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> "The Supreme Court has commanded courts and school boards to eliminate *school segregation* 'root and branch,' *Green, supra,* 391 U.S. at 438, and to do it *now.* See *Green, supra; Alexander v. Holmes County Board of Education,* 1969, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed. 2d 19; *Carter v. West Feliciana Parish School Board,* 1970, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed. 2d 477. We must be responsive to this constitutional mandate." (emphasis ours)

Indeed, the courts must be responsive to this mandate—but what is this mystical mandate? Is it to command the establishment of a racially balanced school system? Must the courts forever be saddled with a perennial abacus, reviewing plans every term and every time the population shifts adjusting them mathematically? This certainly could not be the intent of *Alexander;* providing *equal educational opportunities* should be the goal.

The Petitioner attempts to distort this, as well as the significance of the opinion of the Fourth Circuit, in suggesting a "new" legal principle has been established below, to-wit: "that in each case a court must decide whether the goal of complete desegregation of all schools is a reasonable goal . . . whether the Court thinks desegregation is worthwhile, giving the circumstances of the district . . ." (page 24, Petitioner's Brief). This interpretation is completely inconsistent with the meaning and significance of the opinion of the Fourth Circuit. The question is not whether desegregation is worthwhile—this issue was resolved in 1954 by this Court and is no longer a matter to be resurrected. Nor is it fair to this Court to infer that the Fourth Circuit's decision is one that is in opposition to desegregation. This suggestion is nothing more than a smoke screen designed to obscure the real issues and divert attention from the resolution of these

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issues. Nowhere in the majority opinion of the Fourth Circuit is there any intent to question the reasonableness of the goal of desegregation and this Court should pierce this illusory inference. The Fourth Circuit, in adopting what it referred to as "the test of reasonableness, instead of one that calls for absolutes" observed, in part:

> ". . . if a school board makes every *reasonable effort* to integrate the pupils under its control, an interactable remnant of segregation, we believe, should not void an otherwise exemplary plan for the creation of a unitary school system. *Ellis vs. Board of Public Instruction of Orange County*, Number 29124, February 17, 1970—F.2d.—Fifth Circuit." (emphasis ours)

With regard to the question of busing, the Fourth Circuit went on to observe:

> "Bussing is a permissible tool for achieving integration, but is not a panacea. In determining who should be bussed and where they should be bussed, a school board should take into consideration the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources. The board should view bussing for integration in the light that it views bussing for other legitimate improvements, such as school consolidation and the location of new schools. In short, the board should draw on its experience with bussing in general—the benefits and the defects—so that it may intelligently plan the part that bussing will play in a unitary school system
>
> * * * * * *
>
> ". . . The board, we believe, should not be required to undertake such extensive additional busing to discharge its obligation to create a unitary school system."

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The Petitioner expresses great concern about applying a "rule of reason," seemingly suggesting that this rule has some sinister connotation. The Petitioner submits that applying the test of reasonableness "must leave every board or court which seeks to apply the formula, essentially at sea." (page 39, Petitioner's Brief) Yet, while suggesting the vagueness of using a standard of reasonableness in approving the efforts of the school board in the adoption of a school plan, Petitioner unhesitatingly suggests that there is a "reasonable basis for the District Court's decision;" that the Fourth Circuit Court's order was not governed by traditional rules of appellate review because in order to set aside the equity decree, the appellant "must demonstrate that there was no *reasonable basis* for the District Court's decision." How does one determine or demonstrate the existence or non-existence of a "reasonable basis" for a District Court's decision, if the phrase or term "reasonable" is as vague as Petitioner suggests? Why is the test of reasonableness adopted by the Fourth Circuit, any the less vague than the test used by an appellate court or an appellant to sustain or set aside a lower court's decision.

The "rule of reason" which is the foundation for all jurisprudence is now alleged to be fraught with danger. Amicus would respectfully suggest that a determination of what is "reasonable" is perhaps far easier (and a much more equitable standard) than determining what is meant by a "unitary system," which latter phrase the courts have spoken of with such forcefulness and understanding—yet what does *that* phrase really mean?

In his Statement on Elementary and Secondary School Desegregation, made on March 24, 1970, President Nixon prophetically observed (even *before* the Fourth Circuit ruled):

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". . . There is a Constitutional mandate that dual school systems and other forms of *de jure* segregation be eliminated totally. But within the framework of that requirement an area of flexibility—a "*rule of reason*"—exists, in which school boards, acting in good faith, can formulate plans of desegregation which best suit the needs of their own localities." (emphasis ours) (Appendix hereto Exhibit A 1—34, 12)

The issue is not whether the Fourth Circuit Court is correct in adopting a test based upon reasonableness; for no one can logically quarrel with any judicial determination founded upon a rule of reason. The issues are those which Mr. Chief Justice Burger correctly observed in *Northcross vs. Board of Education* this past March:

". . . whether, as a Constitutional matter, any particular racial balance must be achieved in the schools; to what extent the school districts or zones may or must be altered as a Constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court. . ." (—U.S.—, 25 L.Ed.2d 246, 250)

To these issues we must add: to what extent must school districts pair or cluster schools as a Constitutional matter, where such pairing is designed to achieve or maintain a racial balance. Pairing or clustering is a division of grade levels among several comparable schools located within a relatively short distance of each other. This is a device which many courts have utilized in improving the racial balance in school systems, in lieu of redrawing of zone lines. Although the question of whether to redraw zone lines (if done without

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regard to race) or whether to utilize pairing and clustering, should be left to the sound discretion of the school boards, many courts have taken it upon themselves to direct pairing because the ratios of black to white within a given school system would be improved or more equally balanced.

Pairing and clustering have been criticized as being inconsistent with sound educational principles. Recently, the Superintendent of Schools of Broward County, Florida, prepared a report discussing implementation of the Fifth Circuit Court of Appeals order, entered on August 18, 1970. In this report, Dr. Benjamin C. Willis states in part:

> "The essential condition of school pairing by grade levels will work in direct opposition to the reorganization of our school program, which is already under way. All of these plans have been formulated, seeking only to provide the best possible, and most appropriate education for each child, considering him only as an individual and not as a racial statistic. . ."
>
> * * * * * *
>
> "The conclusion can be only that clustering/pairing, using only statistics, is educationally, logistically, economically unsound." (C 48, 52)

This Court's attention is also invited to this report, because it graphically demonstrates the frustrations in which educators and school systems have found themselves, as a result of educationally unrealistic judicial directives. (Appendix hereto Exhibit C 37—52)

Pairing and clustering have resulted in creating unnecessary safety hazards. Small children are now forced to walk

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past a neighborhood school over heavily traveled and congested thoroughfares such as U. S. highways in order to reach their "paired" school. Many children are not eligible for normal school bus transportation because they live within two miles of their school (Florida Statutes 234.01). Fifth Circuit Court decisions reversals directing pairing and clustering have occurred a few days before school opening leaving school officials little time to adequately correct these hazardous conditions.

It is true, as the courts have announced, that this Court has stated that "there is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." *Green vs. County School Board of New Kent County*, 1968, 391 U.S. 430, 439, 88 S.Ct. 1689 20 F.2d 716. Yet it would seem that if a school system adopts a geographic zone plan and draws its zone lines in such a manner to insure that no person is effectively excluded from any school because of race or color, then a unitary system would be established and the mandate of this Court satisfied, notwithstanding that the particular method selected does not statistically provide as much of a racial balance as would pairing, clustering or other devices. No device or technique is a guaranteed panacea. There are numerous instances of hardship resulting from preoccupation with balance—classical examples are the parent whose seven children will now be attending six different grade schools, and the parent whose children have been transferred several times during the school year.

In attempting to summarize the prevailing trend of the judicial opinion, the President's statement observes:

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". . . Where school boards have demonstrated a good-faith effort to comply with court rulings, the courts have generally allowed substantial latitude as to method—often making the explicit point that administrative choices should, wherever possible, be made by the local school authorities themselves." (A 11)

The President's statement also expresses his position on the neighborhood school concept and busing.

"The neighborhood school would be deemed the most appropriate base for such a system.

Transportation of pupils beyond normal geographic school zones for the purpose of achieving racial balance will not be required." (A 23)

* * * * * *

"I am dedicated to continued progress toward a truly desegregated public school system. But, considering the always heavy demands for more school operating funds, I believe it is preferable, when we have to make the choice, to use limited financial resources for the improvement of education—for better teaching facilities, better methods, and advanced educational materials—and for the upgrading of the disadvantaged areas in the community rather than buying buses, tires and gasoline to transport young children miles away from their neighborhood schools." (A 10)

Of particular significance is the President's observation that:

"Demands that an arbitrary 'racial balance' be established as a matter of right misinterpret the law and misstate the priorities.

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> As a matter of educational policy, some schools have chosen to arrange their school systems in such a way as to provide a greater measure of racial integration. The important point to remember is that where the existing racial separation has not been caused by official action, this increased integration is and should remain a matter for local determination." (A 17)

CONCLUSION

The quandry in which many of the courts find themselves is a result of the absence of ascertainable standards. As Judge Clark in *Singleton, supra,* "The Court seeks to bring mighty things to pass, but just how is not explained . . ." ". . . The hard truth is that the courts have not fixed an adequate and a precise remedy. It is this court, not the school districts, that is to blame for any disparity between what the court now wants and what the districts actually are. . ."

Only a few days ago, Judge Miller, a Circuit Judge sitting as a District Judge, by designation, in the Middle District of Tennessee, refused to implement a school plan, observing in part as follows:

> ". . . In the absence of further and more specific guidelines from the Supreme Court, no lower federal court is in a position to make a definitive ruling on these important issues . . . therefore, the Court is of the opinion that the implementation of such a plan, by order of this Court, might result in harm to those whose interests must be deemed paramount, the students . . ." (*Kelley, et al. v. Metropolitan County Board of Education of Nashville and Davidson County, Tenn., et al.,* U.S.D.C. Nashville Div., M.D., Aug. 25, 1970)

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Therefore, the necessity for this Court to set forth specific guidelines cannot sufficiently be over-emphasized. Consideration of race, whether it be for the purposes of segregation or integration, is unconstitutional and as objectionable as would the consideration of religion or national origin. The Constitution must be color blind, *not* color conscious. The goal is not the level of integration to be achieved; instead, the goal is as Judge Bell pointed out in his dissent in *Jefferson* II, supra, "a fair chance to attain personal dignity through equal educational opportunity. . ."

President Nixon, in his school statement, supra, makes several pertinent observations which merit quotation:

> "One of the mistakes of past policy has been to demand too much of our schools: They have been expected not only to educate but also to accomplish a social transformation. Children in many instances have not been served, but used—in what all too often has proved a tragically futile effort to achieve in the schools the kind of a multiracial society which the adult community has failed to achieve for itself.
>
> If we are to be realists, we must recognize that in a free society there are limits to the amount of government coercion that can reasonably be used; that in achieving desegregation we must proceed with the least possible disruption of the education of the nation's children; and that our children are highly sensitive to conflict, and highly vulnerable to lasting psychic injury.
>
> Failing to recognize these factors, past policies have placed on the schools and the children too great a share

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of the burden of eliminating racial disparities throughout our society. A major part of this task falls to the schools. But they cannot do it all or even most of it by themselves. Other institutions can share the burden of breaking down racial barriers, but only the schools can perform the task of education itself. If our schools fail to educate, then whatever they may achieve in integrating the races will turn out to be only a pyrhhic victory." (A 16—17)

In his concluding comments in his dissent in *Singleton*, supra, Judge Clark summed up the position in which he felt the Court was now finding itself. Judge Clark observed:

"With the glare of this publicity turned on us, this court is no less than on trial itself—on trial to see if it can make justice the handmaiden of liberty, or whether we make her serve tyranny. There is more at stake here than the tremendously valuable rights that lie on the surface of this controversy. Much of the vitality of the rule of law hangs in the balance, for we here deal not only with a vast number of people but also with perhaps the most sensitive area to any citizen—the welfare of his children. Respect for courts and for their decrees is a *sine qua non* to the acceptance of law as an ingrained way of life. We should do all we can as judges to promote that respect . . ."

This Court has the opportunity to resolve the issues which have caused wide-spread concern and confusion. The time has long passed for the formulation of realistic guidelines which are consistent with sound constitutional and educational imperatives. It is respectfully requested that this Court

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reject the concept of balancing and busing and instead recognize the goal of equal educational opportunity through reasonable means.

Respectfully submitted,

s/ Claude R. Kirk

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APPENDIX

Statement by the President on Elementary and Secondary School Desegregation 1A–34B

Consent to File 35B–36B

Statement by Superintendent of Education of Broward County 37C–52C

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EMBARGOED FOR *ALL* WIRE TRANSMISSION
UNTIL 10:00 A.M., EST, MARCH 24, 1970
EMBARGOED FOR RELEASE UNTIL 11:00 A.M., EST

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT ON ELEMENTARY AND SECONDARY SCHOOL DESEGREGATION

My purpose in this statement is to set forth in detail this Administration's policies on the subject of desegregation of America's elementary and secondary schools.

Few public issues are so emotionally charged as that of school desegregation, few so wrapped in confusion and clouded with misunderstanding. None is more important to our national unity and progress.

This issue is not partisan. It is not sectional. It is an American issue, of direct and immediate concern to every citizen.

I hope that this statement will reduce the prevailing confusion and will help place public discusion of the issue on a more rational and realistic level in all parts of the nation. It is time to strip away the hypocrisy, the prejudice and the ignorance that too long have characterized discussion of this issue.

My specific objectives in this statement are:

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—To reaffirm my personal belief that the 1954 decision of the Supreme Court in *Brown* v. *Board of Education* was right in both Constitutional and human terms.

—To assess our progress in the 16 years since *Brown* and to point the way to continuing progress.

—To clarify the present state of the law, as developed by the courts and the Congress, and the Administration policies guided by it.

—To discuss some of the difficulties encountered by courts and communities as desegregation has accelerated in recent years, and to suggest approaches that can mitigate such problems as we complete the process of compliance with *Brown*.

—To place the question of school desegregation in its larger context, as part of America's historic commitment to the achievement of a free and open society.

Anxiety over this issue has been fed by many sources.

On the one hand, some have interpreted various Administration statements and actions as a backing away from the principle of *Brown*—and have therefore feared that the painstaking work of a decade and a half might be undermined. We are not backing away. The Constitutional mandate will be enforced.

On the other hand, several recent decisions by lower courts have raised widespread fears that the nation might face a massive disruption of public education: that wholesale compulsory busing may be ordered and the neighborhood school virtually doomed. A comprehensive review of school desegregation cases

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indicates that these latter are untypical decisions, and that prevailing trend of judicial opinion is by no means so extreme.

Certain changes are needed in the nation's approach to school desegregation. It would be remarkable if sixteen years of hard, often tempestuous experience had not taught us something about how better to manage the task with a decent regard for the legitimate interests of all concerned—and especially the children. Drawing on this experience, I am confident the remaining problems can be overcome.

WHAT THE LAW REQUIRES

In order to determine what ought to be done, it is important first to be as clear as possible about what *must* be done.

We are dealing fundamentally with inalienable human rights, some of them constitutionally protected. The final arbiter of Constitutional questions is the United States Supreme Court.

The President's Responsibility

There are a number of questions involved in the school controversy on which the Supreme Court has not yet spoken definitively. Where it has spoken, its decrees are the law. Where it has not spoken, where Congress has not acted, and where differing lower courts have left the issue in doubt, my responsibilities as Chief Executive make it necessary that I determine, on the basis of my best judgment, what must be done.

In reaching that determination, I have sought to ascertain the prevailing judicial view as developed in decisions by the Supreme Court and the various Circuit Courts of Appeals. In this

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statement I list a number of principles derived from the prevailing judicial view. I accept those principles and shall be guided by them. The Departments and agencies of the Government will adhere to them.

A few recent cases in the lower courts have gone beyond those generally accepted principles. Unless affirmed by the Supreme Court, I will not consider them as precedents to guide Administration policy elsewhere.

What the Supreme Court Has Said

To determine the present state of the law, we must first remind ourselves of the recent history of Supreme Court rulings in this area.

This begins with the *Brown* case in 1954, when the Court laid down the principle that deliberate segregation of students by race in the public schools was unconstitutional. In that historic ruling, the court gave legal sanction to two fundamental truths—that separation by law establishes schools that are inherently unequal, and that a promise of equality before the law cannot be squared with use of the law to establish two classes of people, one black and one white.

The Court requested further argument, however, and propounded the following questions, among others:

> "Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
>
> "a. would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

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"b. may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?"

In its second *Brown* decision the following year, the Court addressed itself to these questions of manner and timing of compliance. Its ruling included these principles:

—Local school problems vary: school authorities have the primary responsibility for solving these problems; courts must consider whether these authorities are acting in good faith.

—The courts should be guided by principles of equity, which traditionally are "characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."

—Compliance must be achieved "with all deliberate speed," including "a prompt and reasonable start" toward achieveing full compliance "at the earliest practicable date."

In 1964, the Supreme Court spoke again: "The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these . . . children their constitutional rights."

At the same time, Congress also added to the impetus of desegregation by passing the Civil Rights Act of 1964, an Act that as a private citizen I endorsed and supported.

Although the Supreme Court in the *Brown* cases concerned itself primarily, if not exclusively, with pupil assignments, its decree applied also to teacher assignments and school facilities as a whole.

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In 1968, the Supreme Court reiterated the principle enunciated in prior decisions, that teacher assignments are an important aspect of the basic task of achieving a public school system wholly freed from racial discrimination. During that same year, in another group of Supreme Court decisions, a significant and new set of principles also emerged.

—That a school board must establish "that its proposed plan promises meaningful and immediate progress toward disestablishing State-imposed segregation," and that the plan must "have real prospects for dismantling the State-imposed dual system 'at the earliest practicable date.' "

—That one test of whether a school board has met its "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch" is the extent to which racial separation persists under its plan.

—That the argument that effective desegregation might cause white families to flee the neighborhood cannot be used to sustain devices designed to perpetuate segregation.

—That when geographic zoning is combined with "free transfers," and the effect of the transfer privilege is to perpetuate segregation despite the zoning, the plan is unacceptable.

The most recent decisions by the Supreme Court have now rejected any further delay, adding to the Court's mandate:

—"The obligation of every school district is to terminate dual systems at once and to operate now and hereafter only unitary schools."

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—That the obligation of such districts is an affirmative one and not a passive one.

—That freedom of choice plans could no longer be considered as an appropriate substitute for the affirmative obligation imposed by the Court unless they, in fact, discharge that obligation immediately.

The Court has dealt only in very general terms with the question of what constitutes a "unitary" system, referring to it it as one "within which no person is to be effectively excluded from any school because of race or color." It has not spoken definitely on whether or not, or the extent to which, "desegregation" may mean "integration."

In an opinion earlier this month, Chief Justice Burger pointed out a number of "basic practical problems" which the Court had not yet resolved, "including whether, as a Constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a Constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of this Court."

One of these areas of legal uncertainty cited by Chief Justice Burger—school transportation—involves Congressional pronouncements.

In the 1964 Civil Rights Act, the Congress stated, ". . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the

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existing power of the court to insure compliance with constitutional standards."

In the 1966 amendments to the Elementary and Secondary Education Act, the Congress further stated, ". . . nothing contained in this Act shall . . . require the assignment or transportation of students or teachers in order to overcome racial imbalance."

I am advised that these provisions cannot constitutionally be applied to *de jure* segregation. However, not all segregation as it exists today is *de jure*.

I have consistently expressed my opposition to any compulsory busing of pupils beyond normal geographic school zones for the purpose of achieving racial balance.

What the Lower Courts Have Said

In the absence of definitive Supreme Court rulings, these and other "basic practical problems" have been left for case-by-case determination in the lower courts—and both real and apparent contradictions among some of these lower court rulings have generated considerable public confusion about what the law really requires.

In an often-cited case in 1955 (*Briggs* v. *Elliott*), a District Court held that " the Constitution . . . does not require integration. . . . It merely forbids the use of governmental power to enforce segregation."

But in 1966 another court took issue with this doctrine, pointing out that it had been used as justifying "techniques for perpetuating school segregation," and declaring that:

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". . . the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration."

In 1969, the 4th Circuit Court of Appeals declared:

"The famous *Briggs* v. *Elliott* dictum—adhered to by this court for many years—that the Constitution forbids segregation but does not require integration . . . is now dead."

Cases in two circuit courts have held that the continued existence of some all-black schools in a formerly segregated district did *not* demonstrate unconstitutionality, with one noting that there is "no duty to balance the races in the school system in conformity with some mathematical formula."

Another circuit court decision declared that even though a district's geographic zones were based on objective, non-racial criteria, the fact that they failed to produce any signficant degree of integration meant that they *were* unconstitutional.

Two very recent Federal court decisions continue to illustrate the range of opinion: a plan of a southern school district has been upheld even though three schools would remain all-black, but a northern school system has been ordered by another Federal court to integrate all of its schools completely "by the revising of boundary lines for attendance purposes as well as busing so as to achieve maximum racial integration."

This range of differences demonstrates that lawyers and judges have honest disagreements about what the law requires. There have been some rulings that would divert such huge sums of money to non-educational purposes, and would create such severe dislocations of public school systems, as to impair

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the primary function of providing a good education. In one, for example—probably the most extreme judicial decree so far—a California State court recently ordered the Los Angeles School Board to establish a virtually uniform racial balance throughout its 711 square mile district, with its 775,000 children in 561 schools. Local leaders anticipate that this decree would impose an expenditure of $40,000,000 over the next school year to lease 1,600 buses, to acquire site locations to house them, to hire drivers, and to defray operating costs. Subsequent costs would approximate $20,000,000 annually. Some recent rulings by federal district courts applicable to other school districts appear to be no less severe.

I am dedicated to continued progress toward a truly desegregated public school system. But, considering the always heavy demands for more school operating funds, I believe it is preferable, when we have to make the choice, to use limited financial resources for the improvement of education—for better teaching facilities, better methods, and advanced educational materials—and for the upgrading of the disadvantaged areas in the community rather than buying buses, tires and gasoline to transport young children miles away from their neighborhood schools.

What Most of the Courts Agree On

Despite the obvious confusion, a careful survey of rulings both by the Supreme Court and by the Circuit Courts of Appeals suggests that the basic judicial approach may be more reasonable than some have feared. Whatever a few lower courts might have held to the contrary, the prevailing trend of judicial opinion appears to be summed up in these principles:

—There is a fundamental distinction between so-called "*de jure*" and "*de facto*" segregation: *de jure* segregation

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arises by law or by the deliberate act of school officials and is unconstitutional; *de facto* segregation results from residential housing patterns and does not violate the Constitution. (The clearest example of *de jure* segregation is the dual school system as it existed in the South prior to the decision in *Brown*—two schools, one Negro and one White, comprised of the same grades and serving the same geographical area. This is the system with which most of the decisions, and the Supreme Court cases up until now, have been concerned.)

—Where school boards have demonstrated a good-faith effort to comply with court rulings, the courts have generally allowed substantial latitude as to method—often making the explicit point that administrative choices should, wherever possible, be made by the local school authorities themselves.

—In devising particular plans, questions of cost, capacity, and convenience for pupils and parents are relevant considerations.

—Whatever the racial composition of student bodies, faculties and staff must be assigned in a way that does not contribute to identifying a given school as "Negro" or "White."

—In school districts that previously operated dual systems, affirmative steps toward integration are a key element in disestablishing the dual system. This positive integration, however, does not necessarily have to result in "racial balance" throughout the system. When there is racial separation in housing, the Constitutional requirement has been held satisfied even though some schools remained all-black.

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—While the dual school system is the most obvious example, *de jure* segregation is also found in more subtle forms. Where authorities have deliberately drawn attendance zones or chosen school locations for the express purpose of creating and maintaining racially separate schools, *de jure* segregation is held to exist. In such a case the school board has a positive duty to remedy it. This is so even though the board ostensibly operates a unitary system.

—In determining whether school authorities are responsible for existing racial separation—and thus whether they are Constitutionally required to remedy it—the *intent* of their action in locating schools, drawing zones, etc., is a crucial factor.

—In the case of genuine *de facto* segregation (i.e., where housing patterns produce substantially all-Negro or all-White schools, and where this racial separation has not been caused by deliberate official action) school authorities are not Constitutionally required to take any positive steps to correct the imbalance.

To summarize: There is a Constitutional mandate that dual school systems and other forms of *de jure* segregation be eliminated totally. But within the framework of that requirement an area of flexibility—a "*rule of reason*"—exists, in which school boards, acting in good faith, can formulate plans of desegregation which best suit the needs of their own localities. (emphasis ours)

De Facto segregation, which exists in many areas both North and South, is undesirable but is not generally held to violate the Constitution. Thus, residential housing patterns may result in the continued existence of some all-Negro schools even in a system which fully meets Constitutional standards. But in any event, local school officials *may*, if they so choose, take steps

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beyond the Constitutional minimums to diminish racial separation.

SCHOOL DESEGREGATION TODAY

The Progress

Though it began slowly, the momentum of school desegregation has become dramatic.

Thousands of school districts throughout the South have met the requirements of law.

In the past year alone, the number of black children attending southern schools held to be in compliance has doubled, from less than 600,000 to nearly 1,200,000—representing 40 per cent of the Negro student population.

In most cases, this has been peacefully achieved.

However, serious problems are being encountered both by communities and by courts—in part as a consequence of this accelerating pace.

The Problems

In some communities, racially mixed schools have brought the community greater interracial harmony; in others they have heightened racial tension and exacerbated racial frictions. Integration is no longer seen automatically and necessarily as an unmixed blessing for the Negro, Puerto Rican or Mexican-American child. "Racial balance" has been discovered to be neither a static nor a finite condition; in many cases it has turned out to be only a way station on the road to resegregation. Whites have deserted the public schools, often for grossly inadequate private schools. They have left the now re-segregated public schools foundering for lack of support. And when whites flee the central city in pursuit of all- or predominantly-white

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schools in the suburbs, it is not only the central city schools that become racially isolated, but the central city itself.

These are not theoretical problems, but actual problems. They exist not just in the realm of law, but in the realm of human attitudes and human behavior. They are part of the real world, and we have to take account of them.

The Complexities

Courts are confronted with problems of equity, and administrators with problems of policy. For example: To what extent does desegregation of dual systems require positive steps to achieve integration? How are the rights of individual children and their parents to be guarded in the process of enforcement? What are the educational impacts of the various means of desegregation—and where they appear to conflict, how should the claims of education be balanced against those of integration? To what extent should desegregation plans attempt to anticipate the problem of *re*segregation?

These questions suggest the complexity of the problems. These problems confront us in the North as well as the South, and in rural communities, suburbs and central cities.

The troubles in our schools have many sources. They stem in part from deeply rooted racial attitudes; in part from differences in social, economic and behavioral patterns; in part from weaknesses and inequities in the educational system itself; in part from the fact that by making schools the primary focus of efforts to remedy longstanding social ills, in some cases greater pressure has been brought to bear on the schools than they could withstand.

The Context

Progress toward school desegregation is part of two larger processes, each equally essential:

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—The improvement of educational opportunities for all of America's children.

—The lowering of artificial racial barriers in all aspects of American life.

Only if we keep each of these considerations clearly in mind—and only if we recognize their separate natures—can we approach the question of school desegregation realistically.

It may be helpful to step back for a moment, and to consider the problem of school desegregation in its larger context.

The school stands in a unique relationship to the community, to the family, and to the individual student. It is a focal point of community life. It has a powerful impact on the future of all who attend. It is a place not only of learning, but also of living—where a child's friendships center, where he learns to measure himself against others, to share, to compete, to cooperate—and it is the one institution above all others with which the parent shares his child.

Thus it is natural that whatever affects the schools stirs deep feelings among parents, and in the community at large.

Whatever threatens the schools, parents perceive—rightly—as a threat to their children.

Whatever makes the schools more distant from the family undermines one of the important supports of learning.

Quite understandably, the prospect of any abrupt change in the schools is seen as a threat.

As we look back over these sixteen years, we find that many changes that stirred fears when they first were ordered have turned out well. In many Southern communities, black and

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white children now learn together—and both the schools and the communities are better where the essential changes have been accomplished in a peaceful way.

But we also have seen situations in which the changes have not worked well. These have tended to command the headlines, thus increasing the anxieties of those still facing change.

Overburdening the Schools

One of the mistakes of past policy has been to demand too much of our schools: They have been expected not only to educate, but also to accomplish a social transformation. Children in many instances have not been served, but used—in what all too often has proved a tragically futile effort to achieve in the schools the kind of a multiracial society which the adult community has failed to achieve for itself.

If we are to be realists, we must recognize that in a free society there are limits to the amount of government coercion that can reasonably be used; that in achieving desegregation we must proceed with the least possible disruption of the education of the nation's children; and that our children are highly sensitive to conflict, and highly vulnerable to lasting psychic injury.

Failing to recognize these factors, past policies have placed on the schools and the children too great a share of the burden of eliminating racial disparities throughout our society. A major part of this task falls to the schools. But they cannot do it all or even most of it by themselves. Other institutions can share the burden of breaking down racial barriers, but only the schools can perform the task of education itself. If our schools

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fail to educate, then whatever they may achieve in integrating the races will turn out to be only a pyrrhic victory.

With housing patterns what they are in many places in the nation, the sheer numbers of pupils and the distances between schools make full and prompt school integration in every such community impractical—even if there were a sufficient desire on the part of the community to achieve it. In Los Angeles, 78 per cent of all Negro pupils attend schools that are 95 per cent or more black. In Chicago the figure is 85 per cent—the same as in Mobile, Alabama. Many smaller cities have the same patterns. Nationwide, 61 per cent of all Negro students attend schools which are 95 per cent or more black.

Demands that an arbitrary "racial balance" be established as a matter of right misinterpret the law and misstate the priorities.

As a matter of educational policy, some school boards have chosen to arrange their school systems in such a way as to provide a greater measure of racial integration. The important point to bear in mind is that where the existing racial separation has not been caused by official action, this increased integration is and should remain a matter for local determination.

Pupil assignments involve problems which do not arise in the case of the assignment of teachers. If school administrators were truly color blind and teacher assignments did not reflect the color of the teacher's skin, the law of averages would eventually dictate an approximate racial balance of teachers in each school within a system.

Not Just a Matter of Race

Available data on the educational effects of integration are neither definitive nor comprehensive. But such data as we have

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suggest strongly that, under the appropriate conditions, racial integration in the classroom can be a significant factor in improving the quality of education for the disadvantaged. At the same time, the data lead us into several more of the complexities that surround the desegregation issue.

For one thing, they serve as a reminder that, from an educational standpoint, to approach school questions solely in terms of race is to go astray. The data tell us that in educational terms, the significant factor is not race but rather the educational environment in the home—and indeed, that the single most important educational factor in a school is the kind of home environment its pupils come from. As a general rule, children from families whose home environment encourages learning—whatever their race—are higher achievers; those from homes offering little encouragement are lower achievers.

Which effect the home environment has depends on such things as whether books and magazines are available, whether the family subscribes to a newspaper, the educational level of the parents, and their attitude toward the child's education.

The data strongly suggest, also, that in order for the positive benefits of integration to be achieved, the school must have a majority of children from environments that encourage learning—recognizing, again, that the key factor is not race but the kind of home the child comes from. The greater concentration of pupils whose homes encourage learning—of whatever race—the higher the achievement levels not only of those pupils, but also of others in the same school. Students learn from students. The reverse is also true: the greater concentration of pupils from homes that discourage learning, the lower the achievement levels of all.

We should bear very carefully in mind, therefore, the distinction between educational difficulty as a result of race, and edu-

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cational difficulty as a result of social or economic levels, of family background, of cultural patterns, or simply of bad schools. Providing better education for the disadvantaged requires a more sophisticated approach than mere racial mathematics.

In this same connection, we should recognize that a smug paternalism has characterized the attitudes of many white Americans toward school questions. There has been an implicit assumption that blacks or others of minority races would be improved by association with whites. The notion that an all-black or predominantly-black school is automatically inferior to one which is all or predominantly-white—even though not a product of a dual system—inescapably carries racist overtones. And, of course, we know of hypocrisy; not a few of those in the North most stridently demanding racial integration of public schools in the South at the same time send their children to private schools to avoid the assumed inferiority of mixed public schools.

It is unquestionably true that most black schools—though by no means all—are in fact inferior to most white schools. This is due in part to past neglect or shortchanging of the black schools; and in part to long-term patterns of racial discrimination which caused a greater proportion of Negroes to be left behind educationally, left out culturally, and trapped in low paying jobs. It is not really because they serve black children that most of these schools are inferior, but rather because they serve poor children who often lack the home environment that encourages learning.

Innovative Approaches

Most public discussion of overcoming racial isolation centers on such concepts as compulsory "busing"—taking children out

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of the schools they would normally attend, and forcing them instead to attend others more distant, often in strange or even hostile neighborhoods. Massive "busing" is seen by some as the only alternative to massive racial isolation.

However, a number of new educational ideas are being developed, designed to provide the educational benefits of integration without depriving the student of his own neighborhood school.

For example, rather than attempting dislocation of whole schools, a portion of a child's educational activities may be shared with children from other schools. Some of his education is in a "home-base" school, but some outside it. This "outside learning" is in settings that are defined neither as black nor white, and sometimes in settings that are not even in traditional school buildings. It may range all the way from intensive work in reading to training in technical skills, and to joint efforts such as drama and athletics.

By bringing the children together on "neutral" territory friction may be dispelled; by limiting it to part-time activities no one would be deprived of his own neighborhood school; and the activities themselves provide the children with better education.

This sort of innovative approach demonstrates that the alternatives are not limited to perpetuating racial isolation on the one hand, and massively disrupting existing school patterns on the other. Without uprooting students, devices of this kind can provide an additional educational experience within an integrated setting. The child gains both ways.

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Good Faith and The Courts

Where desegregation proceeds under the mandate of law, the best results require that the plans be carefully adapted to local circumstances.

A sense of compassionate balance is indispensable. The concept of balance is no stranger to our Constitution. Even First Amendment freedoms are not absolute and unlimited; rather the scales of that "balance" have been adjusted with minute care, case by case, and the process continues.

In my discussion of the status of school desegregation law, I indicated that the Supreme Court has left a substantial degree of latitude within which specific desegregation plans can be designed. Many lower courts have left a comparable degree of latitude. This does not mean that the courts will tolerate or the Administration condone evasions or subterfuges; it does mean that if the essential element of good faith is present, it should ordinarily be possible to achieve legal compliance with a minimum of educational disruption, and through a plan designed to be responsive to the community's own local circumstances.

This matter of good faith is critical.

Thus the far-sighted local leaders who have demonstrated good faith by smoothing the path of compliance in their communities have helped lay the basis for judicial attitudes taking more fully into account the practical problems of compliance.

How the Supreme Court finally rules on the major issues it has not yet determined can have a crucial impact on the future of public education in the United States.

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Traditionally, the Court has refrained from deciding Constitutional questions until it became necessary. This period of legal uncertainty has occasioned vigorous controversy over what the thrust of the law should be.

As a nation, we should create a climate in which these questions, when they finally are decided by the Court, can be decided in a framework most conducive to reasonable and realistic interpretation.

We should not provoke any court to push a Constitutional principle beyond its ultimate limit in order to compel compliance with the court's essential, but more modest, mandate. The best way to avoid this is for the nation to demonstrate that it does intend to carry out the full spirit of the Constitutional mandate.

POLICIES OF THIS ADMINISTRATION

It will be the purpose of this Administration to carry out the law fully and fairly. And where problems exist that are beyond the mandate of legal requirements, it will be our purpose to seek solutions that are both realistic and appropriate.

I have instructed the Attorney General, the Secretary of Health, Education and Welfare, and other appropriate officials of the Government to be guided by these basic principles and policies:

Principles of Enforcement

—Deliberate racial segregation of pupils by official action is unlawful, wherever it exists. In the words of the Supreme

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Court, it must be eliminated "root and branch"—and it must be eliminated at once.

—Segregation of teachers must be eliminated. To this end, each school system in this nation, North and South, East and West, must move immediately, as the Supreme Court has ruled, toward a goal under which "in each school the ratio of White to Negro faculty members is substantially the same as it is throughout the system."

—With respect to school facilities, school administrators throughout the nation, North and South, East and West, must move immediately, also in conformance with the Court's ruling, to assure that schools within individual school districts do not discriminate with respect to the quality of facilities or the quality of education delivered to the children within the district.

—In devising local compliance plans, primary weight should be given to the considered judgment of local school boards—provided they act in good faith, and within Constitutional limits.

—The neighborhood school will be deemed the most appropriate base for such a system.

—Transportation of pupils beyond normal geographic school zones for the purpose of achieving racial balance will not be required.

—Federal advice and assistance will be made available on request, but Federal officials should not go beyond the requirements of law in attempting to impose their own judgment on the local school district.

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—School boards will be encouraged to be flexible and creative in formulating plans that are educationally sound and that result in effective desegregation.

—Racial imbalance in a school system may be partly *de jure* in origin, and partly *de facto*. In such a case, it is appropriate to insist on remedy for the *de jure* portion, which is unlawful, without insisting on a remedy for the lawful *de facto* portion.

—*De facto* racial separation, resulting genuinely from housing patterns, exist in the South as well as the North; in neither area should this condition by itself be cause for Federal enforcement actions. *De jure* segregation brought about by deliberate schoolboard gerrymandering exists in the North as the South; in both areas this must be remedied. In all respects, the law should be applied equally, North and South, East and West.

This is one nation. We are one people. I feel strongly that as Americans we must be done, now and for all future time, with the divisive notion that these problems are sectional.

Policies for Progress

—In those communities facing desegregation orders, the leaders of the communities will be encouraged to lead—not in defiance, but in smoothing the way of compliance. One clear lesson of experience is that local leadership is a fundamental factor in determining success or failure. Where leadership has been present, where it has been mobilized, where it has been effective, many districts have found that they could, after all, desegregate their schools successfully. Where local leadership has failed, the com-

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munity has failed—and the schools and the children have borne the brunt of that failure.

—We shall launch a concerted, sustained and honest effort to assemble and evaluate the lessons of experience: to determine what methods of school desegregation have worked, in what situations, and why—and also what has not worked. The Cabinet-level working group I recently appointed will have as one of its principal functions amassing just this sort of information and helping make it available to the communities in need of assistance.

—We shall attempt to develop a far greater body of reliable data than now exists on the effects of various integration patterns on the learning process. Our effort must always be to preserve the educational benefit for the children.

—We shall explore ways of sharing more broadly the burdens of social transition that have been laid disproportionately on the schools—ways, that is, of shifting to other public institutions a greater share of the task of undoing the effects of racial isolation.

—We shall seek to develop and test a varied set of approaches to the problems associated with "*de facto*" segregation, North as well as South.

—We shall intensify our efforts to ensure that the gifted child—the potential leader—is not stifled intellectually merely because he is black or brown or lives in a slum.

—While raising the quality of education in all schools, we shall concentrate especially on racially-impacted schools,

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and particularly on equalizing those schools that are furthest behind.

Words often ring empty without deeds. In government, words can ring even emptier without dollars.

In order to give substance to these commitments, I shall ask Congress to divert $500 million from my previous budget requests for other domestic programs for Fiscal 1971, to be put instead into programs for improving education in racially-impacted areas, North and South, and for assisting school districts in meeting special problems incident to court-ordered desegregation. For Fiscal 1972, I have ordered that $1 billion be budgeted for the same purposes.

I am not content simply to see this money spent, and then to count the spending as the measure of accomplishment. For much too long, national "commitments" have been measured by the number of Federal dollars spent rather than by more valid measures such as the quality of imagination displayed, the amount of private energy enlisted or, even more to the point, the results achieved.

If this $1.5 billion accomplishes nothing, then the commitment will mean nothing.

If it enables us to break significant new ground, then the commitment will mean everything.

This I deeply believe:

Communities desegregating their schools face special needs—for classrooms, facilities, teachers, teacher training—and the nation should help meet those needs.

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The nation also has a vital and special stake in upgrading education where de facto segregation persists—and where extra efforts are needed if the schools are to do their job. These schools, too, need extra money for teachers and facilities.

Beyond this, we need to press forward with innovative new ways of overcoming the effects of racial isolation and of making up for environmental deficiencies among the poor.

I have asked the Vice President's Cabinet Committee on School Desegregation, together with the Secretary of Health, Education and Welfare, to consult with experts in and out of government and prepare a set of recommended criteria for the allocation of these funds.

I have specified that these criteria should give special weight to four categories of need:

—The special needs of desegregating (or recently desegregated) districts for additional facilities, personnel and training required to get the new, unitary system successfully started.

—The special needs of racially-impacted schools where *de facto* segregation persists—and where immediate infusions of money can make a real difference in terms of educational effectiveness.

—The special needs of those districts that have the furthest to go to catch up educationally with the rest of the nation.

—The financing of innovative techniques for providing educationally sound inter-racial experiences for children in racially isolated schools.

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This money—the $500 million next year, and $1 billion in Fiscal 1972—must come from other programs. Inevitably, it represents a further reordering of priorities on the domestic scene. It represents a heightened priority for making school desegregation work, and for helping the victims of racial isolation learn.

Nothing is more vital to the future of our nation than the education of its children; and at the heart of equal opportunity is equal educational opportunity. These funds will be an investment in both the quality and the equality of that opportunity.

This money is meant to provide help *now,* where help is needed now.

As we look to the longer-term future, it is vital that we concentrate more effort on understanding the process of learning—and improving the process of teaching. The educational needs we face cannot be met simply with more books, more classrooms and more teachers—however urgently these are needed now in schools that face shortages. We need more effective methods of teaching, and especially of teaching those children who are hardest to reach and most lacking in a home environment that encourages learning.

In my message on education reform earlier this month, I proposed creation of a National Institute of Education to conduct and to sponsor basic and applied educational research—with special emphasis on compensatory education for the disadvantaged, on the Right to Read, on experimental schools and on the use of television for educational purposes.

I repeat that proposal—and I ask that the Congress consider it a matter of high priority.

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A FREE AND OPEN SOCIETY

The goal of this Administration is a free and open society. In saying this, I use the words "free" and "open" quite precisely.

Freedom has two essential elements: the *right* to choose, and the *ability* to choose. The right to move out of a mid-city slum, for example, means little without the means of doing so. The right to apply for a good job means little without access to the skills that make it attainable. By the same token, those skills are of little use if arbitrary policies exclude the person who has them because of race or other distinction.

Similarly, an "open" society is one of open choices—and one in which the individual has the mobility to take advantage of those choices.

In speaking of "desegregation" or "integration," we often lose sight if what these mean within the context of a free, open, pluralistic society. We cannot be free, and at the same time be required to fit our lives into prescribed places on a racial grid—whether segregated or integrated, and whether by some mathematical formula or by automatic assignment. Neither can we be free, and at the same time be denied—because of race—the right to associate with our fellow-citizens on a basis of human equality.

An open society does not have to be homogeneous, or even fully integrated. There is room within it for many communities. Especially in a nation like America, it is natural that people with a common heritage retain special ties; it is natural and right that we have Italian or Irish or Negro or Norwegian neighborhoods; it is natural and right that members of those

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communities feel a sense of group identity and group pride. In terms of an open society, what matters is mobility: the right and the ability of each person to decide for himself where and how he wants to live, whether as part of the ethnic enclave or as part of the larger society—or, as many do, share the life of both.

We are richer for our cultural diversity; mobility is what allows us to enjoy it.

Economic, educational, social mobility—all these, too, are essential elements of the open society. When we speak of equal opportunity we mean just that: that each person should have an equal chance at the starting line, and an equal chance to go just as high and as far as his talents and energies will take him.

This Administration's programs for helping the poor, for equal opportunity, for expanded opportunity, all have taken a significantly changed direction from those of previous years—and those principles of a free and open society are the keys to the new direction.

Instead of making a man's decisions for him, we aim to give him both the *right* and *ability* to choose for himself—and the mobility to move upward. Instead of creating a permanent welfare class catered to by a permanent welfare bureaucracy, for example, my welfare reform proposal provides job training and a job requirement for all those able to work—and also a regular Family Assistance payment instead of the demeaning welfare handout.

By pressing hard for the "Philadelphia Plan," we have sought to crack the color bar in the construction unions—and thus to give black and other minority Americans both the right and

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the ability to choose jobs in the construction trades, among the highest paid in the nation.

We have inaugurated new Minority Business Enterprise programs—not only to help minority members get started in business themselves, but also, by developing more black and brown entrepreneurs, to demonstrate to young blacks, Mexican-Americans and others that they, too, can aspire to this same sort of upward economic mobility.

In our education programs, we have stressed the need for far greater diversity in offerings to match the diversity of individual needs—including more and better vocational and technical training, and a greater development of 2-year community colleges.

Such approaches have been based essentially on faith in the individual—knowing that he sometimes needs help, but believing that in the long run he usually knows what is best for himself. Through them also runs a belief that education is the key that opens the door to personal progress.

As we strive to make our schools places of equal educational opportunity, we should keep our eye fixed on this goal: To achieve a set of conditions in which neither the laws nor the institutions supported by law any longer draw an invidious distinction based on race; and going one step further, we must seek to repair the human damage wrought by past segregation. We must give the minority child, that equal place at the starting line that his parents were denied—and the pride, the dignity, the self-respect, that are the birthright of a free American.

We can do no less and still be true to our conscience and our Constitution. I believe that most Americans today, whether North or South, accept this as their duty.

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The issues involved in desegregating schools, reducing racial isolation and providing equal educational opportunity are not simple. Many of the questions are profound, the factors complex, the legitimate considerations in conflict, and the answers elusive. Our continuing search, therefore, must be not for the perfect set of answers, but for the most nearly perfect and the most constructive.

I am aware that there are many sincere Americans who believe deeply in instant solutions and who will say that my approach does not go far enough fast enough. They feel that the only way to bring about social justice is to integrate all schools now, everywhere, no matter what the cost in the disruption of education.

I am aware, too, that there are many equally sincere citizens—North and South, black and white—who believe that racial separation is right, and wish the clock of progress would stop or be turned back to 1953. They will be disappointed, too.

But the call for equal educational opportunity today is in the American tradition. From the outset of the nation, one of the great struggles in America has been to transform the system of education into one that truly provided equal opportunity for all. At first, the focus was on economic discrimination. The system of "fee schools" and "pauper schools" persisted well into the 19th century.

Heated debates preceded the establishment of universal free public education—and even in such States as New York, New Jersey and Connecticut, the system is barely a century old.

Even today, inequities persist. Children in poor areas often are served by poor schools—and unlike the children of the

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wealthy, they cannot escape to private schools. But we have been narrowing the gap—providing more and better education in more of the public schools, and making higher education more widely available through free tuition, scholarships and loans.

In other areas, too, there were long struggles to eliminate discrimination that had nothing to do with race. Property and even religious qualifications for voting persisted well into the 19th century—and not until 1920 were women finally guaranteed the right to vote.

Now the focus is on race—and on the dismantling of all racial bars to equality of opportunity in the schools. As with the lowering of economic barriers, the pull of conscience and the pull of national self-interest both are in the same direction. A system that leaves any segment of its people poorly educated serves the nation badly; a system that educates all of its people well serves the nation well.

We have overcome many problems in our 190 years as a nation. We can overcome this problem. We have managed to extend opportunity in other areas. We can extend it in this area. Just as other rights have been secured, so too can these rights be secured—and once again the nation will be better for having done so.

I am confident that we can preserve and improve our schools, carry out the mandate of our Constitution, and be true to our national conscience.

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August 17, 1970

The Honorable Clerk of Supreme Court
of the United States
Washington, D.C. 20543

Re: Swann et al v. Charlotte-Mecklenburg Board of Education et al, No. 281, October Term 1970—Consent to Filing Brief Amicus Curiae.

Dear Sir:

Pursuant to Rule 42 to the Supreme Court Rules, the Charlotte-Mecklenburg Board of Education consents to the Honorable Claude R. Kirk, Jr., Governor of the State of Florida, filing a brief Amicus Curiae in the above action now pending in the Supreme Court.

Very sincerely yours,

Benj. S. Horack

/k

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970
No. 281

JAMES E. SWANN, et al., Petitioners v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al., Respondents.	*CONSENT*

Pursuant to Rule 42 of the Rules of the Supreme Court, James E. Swann, et al., Petitioners, do hereby consent to the filing of brief amicus curiae by the Honorable Claude R. Kirk, Jr., Governor of the State of Florida.

This 31st day of August, 1970.

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IMPLEMENTATION

OF

THE FIFTH CIRCUIT COURT OF APPEALS ORDER

NO. 30032

Benjamin C. Willis
Superintendent of Schools
August 24, 1970

The School Board of Broward County, Florida
1320 Southwest Fourth Street
Fort Lauderdale, Florida 33312

For dedicated service to education in Broward County and for performance above and beyond the call of defined duties, I gratefully acknowledge the assistance of the following people in the formulation and compilation of this document.

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TOPICAL OUTLINE

Commendation

Historical Background and Accomplishments

Concerns of Implementation

Discriminatory Aspects and Conclusions

Imposed Mediocrity

Summary

The imposition of a social decree can be as delicate as the dew, as omnipotent as the sun, and as accepted as both—it is the timing that that makes it bitter or sweet.

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INTRODUCTION

On April 30, 1970, the School Board of Broward County, Florida accepted from Judge Cabot the final order of District Court for achieving a "unitary school system" in Broward County. The Board appreciates the fact that Judge Cabot carefully considered its own plan for school integration which he measured against constitutional standards.

In his comprehensive review of the matter, Judge Cabot supported the Board's contention that the pairing of schools is educationally unsound by specifically rejecting the recommendations for pairing of schools submitted by the Desegregation Consulting Center with whom staff members of the Broward School System had worked on orders of the District Court itself.

In this current review of the issue, the School Board of Broward County and its staff wishes to pay tribute to the careful procedures and judicious understanding of Judge Cabot in formulating a decision which, while it was a difficult one to execute in a period of three and one-half months, has been accomplished without a serious disruption of the improving race relations in our community and without threatening a sound instructional program for the 120,000 elementary and secondary school students in Broward County.

The School Board of Broward County is dismayed at the untimely and seemingly arbitrary ruling of the Fifth Circuit Court of Appeals in New Orleans which so abruptly dismisses the "decidedly impressive" efforts of its staff members to effect, by the opening of school on August 31, 1970, the order of Judge Cabot, which was accepted, developed, and implemented in good faith. It is to Judge Cabot's credit and it is a measure

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of his astute grasp of the issues involved that he provided an adequate, if not ample, time period within which multitudinous problems could be defined and solutions found.

HISTORICAL BACKGROUND AND ACCOMPLISHMENTS

Even prior to the decision handed down by Judge Cabot, the Broward School Board, its Superintendent and Staff had worked in good faith to meet the requirements for a unitary school system as it was then understood. The plans called for an educationally sound desegregation schedule that began in the early 1960's, and was given impetus by the passage of a 108.6 million dollar bond issue in 1968. This bond issue provided facilities for an orderly change from a partially segregated system to a unitary system. All grades 6–12 were to be desegregated by a plan commensurate with sound educational research. Elementary schools were to remain as neighborhood schools.

As judicial interpretations of the 1954 decision changed, the school system worked with various agencies as necessary, always in good faith, to make the changes necessary to implement the ever new and changing guidelines that developed, seemingly on the whim of the hour. At various times they worked with representatives of the Department of Health, Education, and Welfare both at Washington and Atlanta as well as the Desegregation Consulting Center at the University of Miami.

The plans called for a desegregation schedule beginning in 1968 for completion by 1973. All secondary schools were to have been desegregated, with elementary schools remaining as neighborhood schools.

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The school system has always believed in the educational soundness of the neighborhood school concept especially at the elementary level, although agencies and courts seem continually to attack the plans predicated on this concept. This order effectively destroys the neighborhood school for certain groups of students.

On March, 16, 1970, Judge Cabot ordered the School Board of Broward County to establish a unitary school system by April 9, 1970. Since that date, school boundaries have been altered to comply with the order, parents have been notified and 24,000 students have been reassigned.

A new organizational pattern was implemented to change elementary schools from grades one through six to Kindergarten through five; junior high schools from grades seven through nine to middle schools with grades six through eight; and senior high schools from grades ten through twelve to nine through twelve. Additionally, two new high schools were organized for grades nine through twelve.

A plan for teacher reassignment was devised by a group selected by the Superintendent and under this plan 1127 teachers have been reassigned to new school centers. Principals cooperated with the Personnel Division in the selection of those persons to be reassigned so they would best fit the educational needs of the schools. For example, combinations were established so that teachers would not leave a flexible school but were reassigned to another flexible school. Teachers in self-contained type school centers were reassigned, insofar as possible, to other self-contained type centers.

Teachers with experience in individualized instructional programs were assigned to schools with similar programs

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wherever possible. As a part of this plan, an inservice training program was prepared and has been carried out. The program was begun with a county-wide television program conducted by the Superintendent and his staff. It was telecast into all schools. All members of the profession were given the opportunity to phone in their questions so that each person would understand the impact of the integration order on his particular situation.

Additionally, inservice programs in the form of workshops were held for teachers who were transferred from familiar programs into others with which they had no familiarity, e.g., a teacher with self-contained classroom experience transferred to an individualized program was given the opportunity to learn some of the techniques to be expected of him in 1970–71.

Human relations specialists have addressed education groups to prepare personnel for some of the problems of integration which they might encounter. There have been a total of 515 participants in a series of inservice programs.

Other human relations workshops were conducted for principals, assistant administrators, and guidance personnel to prepare them for the special problems they will have to deal with in the desegregation process. For these workshops consultants were obtained from other school systems in Florida which have experienced this change.

Special workshops were held during the week of August 10 to August 17 for teachers newly assigned to flexible school programs as a result of plans for desegregation. The number of participants was 136.

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Also there has been a program of school intervisitation based on system of faculty exchange which has allowed teachers with little experience in integrated school settings to see first hand the operation of fully integrated schools.

In the current plan the percentage of teachers to be relocated reflects directly the number of students of each race at the elementary, junior, and senior high school level. This is in compliance with Judge Cabot's order for a unitary school system.

Special efforts to obtain the textbooks appropriate for the changed student body in newly integrated schools were made by the Textbook Department and the supervisory staff working with school building principals.

The Supervisor of Instructional Materials has conducted an analysis of school libraries to make sure that adequate and appropriate materials were available for students in newly integrated schools.

Budgets for the current year, which are prepared for schools on a per pupil cost basis, have already been computed on the basis of enrollments expected as a result of implementing Judge Cabot's order.

Principals have received these budgets, assigned the funds to supplies and materials categories appropriate to their instructional program for the new year, and have returned those budgets to the county for processing. A tremendous amount of supplies and materials have already been bought to support the instructional program anticipated in each school for the 1970–71 school year.

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Bus routes in Broward County which cover a total of 16,000 miles per day have had to be substantially changed to accommodate new school boundaries resulting from Judge Cabot's order. Additional miles of travel required amount to an increase of 5500 miles per day, one million miles per year, at a cost of approximately $370,000. An additional 4,000 students will have to be transported; special authorization for transporting 159 students has been given because of hazardous conditions on new access routes.

The driver's day has been increased from 7½ hours to 8½ hours per day which places most of the drivers into the overtime pay category. Ten drivers have resigned because of this increase in length of working day and because of problems inherent in the integration process—real and imagined. At this point, the System needs 40 additional drivers. These drivers have to go through a minimum training program of 40 hours which requires a minimum of two weeks until that driver is hired and assigned to a permanent route.

Buildings and programs originally designed to accommodate one age group of students have been to a great extent redesigned to accommodate new groupings of students. Furniture, equipment, library books and textbooks, materials and supplies have been shifted from school to school in order to accommodate these new grade groupings and ages of students.

Broward County has a totally accredited school system in grades 1–12. This accreditation is based on adequate program and building design, adequate equipment and materials, and the training of teachers. Implementation of Judge Cabot's order required that standards be kept in mind at all times in order not to jeopardize the accreditation of the Broward County School System. Large student enrollments in the senior high

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schools and the result of double sessioning of these schools has required the addition of 30 school administrators to absorb the administrative load with this size program. This cost $360,000.

The tremendous number of students shifted and the tracking problem involved in order to insure their records followed them, and followed them in a up-to-date condition, required that administrators, guidance personnel, and secretaries be employed for an additional 19 days; 53 people worked during the summer at an estimated cost of $37,000.

A primary concern of school and community leaders alike, as they planned to implement District Court orders, was the health and safety of the thousands of children who would be required to travel greater distances or over new routes to get to school. Many special provisions have been made to guarantee their welfare:

new streets and sidewalks have been built

many walk ways have been extended

new signal lights have been installed

adults have been hired as crossing guards

needed school zones and markings have been made

traffic control devices have been obtained

security officers have been assigned to some schools

Civic leaders and school personnel have worked diligently for the past four months to build healthy attitudes within the

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school communities to be most severely affected by the new school attendance regulations. These efforts have been aimed at several specific goals:

allaying the fears of parents whose children will have to move from a familiar school to a new one

studying access routes to all schools to assure safety for children

building positive relationships between parents and new school faculty members

familiarizing students with the new schools they would be attending

Because Judge Cabot had wisely permitted a period of adjustment for implementing his decision, school and community leaders have been able successfully to overcome the initial, strong emotional reaction which followed the order in some communities. The importance of the factor of time cannot be over emphasized, for although buildings can be altered and furniture moved on schedule, the attitudes and feelings of people, especially on a matter so vital as the education of their children, need time to adjust.

CONCERNS OF IMPLEMENTATION

The Educational Problems

It is especially alarming to the School Board of Broward County, Florida, to contemplate that a judicial decision made in New Orleans might have the effect of subverting recent massive efforts of the whole school system to reorganize its

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instructional program in a way to provide a continuous and effective learning experience for all students. Tremendous amounts of money, time, and effort have been invested in teacher training, materials development and experimentation with innovative uses of space and time within the school day.

These massive efforts have resulted in a break-through in education organization which promises to effect great strides in educational achievement countywide. Careful planning has guaranteed that no disruption of this progress will occur in the implementation of Judge Cabot's decision; however, if school pairing is to be forced on our school communities to meet the demands of one definition of a unitary school system time and effort have been wasted and the promises to our children will remain unfulfilled.

The essential cindition of school pairing by grade levels will work in direct opposition to the reorganization of our school program which is already under way. All of these plans have been formulated seeking only to provide the best possible and most appropriate education for each child considering him only as an individual and not as a racial statistic. An essential part of a continuous individualized program is the gradual reduction of grade level barriers which can hinder student progress.

A court decision which requires segregation of students into fixed grade levels without concern for their individual needs is the result of an impaired vision which cannot discriminate the needs of an individual as an individual.

Clustering or pairing under all the court-ordered plans presented, causes a conflict in the educational continuum for the student, e.g., adjusting to a traditional program in one school, the student is then required to adjust to a flexible type program the next year.

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The possible loss of the kindergartens in the affected schools because of grade assignments would be another educational loss.

Facility Problems

Relocating portable building to effect the changes.

Relocate the furniture to accomodate the size of the students.

Renovation of facility to accomodate the new age group housed in the facility, i.e., chalk boards, washrooms, and drinking fountains.

Relocate the instructional materials to correspond to the program.

People Problems

Reorientation program for the community, parents, teachers to gain reacceptance and renewed cooperation in implementing the plan.

Family adjustment to children in as many as three elementary schools with a variation in opening and closing times for each. The family readjusts to the loss of the services of the older children in supervising the younger ones in going to and from school, only to find that they must now belong to threee P.T.A.'s.

Program variation between paired schools minimizes the effectiveness of family involvement in assisting each other with school work.

Many teachers will require additional inservice training in order to utilize effectively the new instructional environment into what they have been reassigned. This disruptive effect on

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the teachers will carry over to their interaction with students.

Already successfully integrated situations are destroyed, and may never be rebuilt, and the new ones required take at last as long to build as the old ones did.

Safety Problems

The clustering has not considered the time, effort, and money expended by the various communities and agencies in providing sidewalks, traffic control, crossing guards, and the marking of safety lanes required for the safe movement of students to their presently assigned schools. In addition, nine student crossings will have to be constructed over Interstate I-95, and two crossings over the Sunshine State Parkway. Construction work on I-95 presents additional problems.

Transportation Problems

Lack of trained drivers and substitute drivers.

Bus routing is circuitous, causing riding times to be unnecessarily long for the younger students.

New transportation equipment cannot be obtained, thus adjustments must be made in timing routes and school opening and closing.

DISCRIMINATORY ASPECTS AND CONCLUSIONS

Discrimination

A careful study of the Court's plans reveals it to be discriminatory in several ways. In the first place, the schools being di-

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rected to pair are located within the central and more densely populated areas of the county. Residential areas near the ocean and in the growing western section of the county where a predominance of upper-middle class white families live remain relatively unaffected. It would be difficult not to interpret this most recent court order as discriminatory in favor of these more affluent areas of the county.

In addition, any court order directing a specific reorganization of schools is discriminatory against a local community which has a unique history and characteristics of which a remote panel of judges can be only statistically aware. It is presumptuous to think that the judiciary can protect the rights of all communities before the law if it presumes to prescribe particular procedures for desegregation in the wide diversity of communities that constitute America. When judges assume the prerogatives of locally appointed school administrators, they misconstrue their proper role as impartial interpreters of the law.

In the present instance, the decision of the judges of the Fifth District Court of Appeals not only confuses the role of the judiciary and is, in effect, discriminatory against a segment of the community of Broward County—but even more alarmingly it destroys the concept of the elementary school which is not a local institution, but a national one. Should the pairing problems which have been ordered in Broward County be equally required throughout the United States, it would have the effect of subjecting the public school system to the judiciary and thus destroying it as a free American institution.

Review

The administrative and educational problems have been enumerated in detail, but demand repetition here to provide

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concise reviewing of the problems. Referring to any one of the clusters, they contain people, young people, one-sixth of whom are going to school for the first time this fall. They contain the teaching staffs which have been assigned for almost four months.

It is unthinkable; it is amazing, that anyone could interpret this as a situation that could be completely redirected as suddenly as the court demands. The more information one gets from those who are familiar with the schools, streets, highways, and the people the more the impracticability of a headlong rush into implementation becomes apparent. The implementation of decision on student and teacher reassignment is overwhelming. The preparation of the facility for different students and the accumulating of instructional materials for the grades assigned presents an ardous logistics problem. All of these compounded with problems of transportation, safety, and community relation makes unreasonable the implementation of the order in the manner prescribed.

The additional financial burden of accomplishing these changes would put a strain on the already strained financial condition of the system. Implementation as required would demand the expenditures of resources which could otherwise be directed towards the implementation of a desegregation which the community, parents, students, and educators had planned in good faith, worked for in good faith, and were going to implement in good faith.

The conclusion can be only that cluster/pairing using only statistics is educationally, logistically, and economically unsound.

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CERTIFICATE OF SERVICE

This is to certify that copies of Brief of Amicus Curiae were served upon each of the attorneys named below by depositing the same in the United States mail, postage prepaid on this 4 day of September, 1970.

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