IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

UNIFIED SCHOOL DISTRICT NO. 501,
SHAWNEE COUNTY, STATE OF KANSAS,
Plaintiff,

vs.

CASPAR WEINBERGER, Individually, and as Secretary of the Department of Health, Education and Welfare; THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; TAYLOR D. AUGUST, Individually, and as Director, Office for Civil Rights, Department of Health, Education and Welfare, Region VII; PETER E. HOLMES, Individually, and as Director, Office for Civil Rights, Department of Health, Education and Welfare; NATIONAL SCIENCE FOUNDATION,
Defendants.

No. 74-160-C5

FILED
AUG 23 1974
ARTHUR G. JOHNSON, Clerk
By [signature]

MEMORANDUM OF DECISION
and
FINDINGS OF FACT AND CONCLUSIONS OF LAW

This proceeding involves legal and equitable principles announced and implemented in the historical case of Brown v. Board of Education, 347 U.S. 483, which had its origin in this District Court now called upon to further consider the application of guidelines announced in that famous decision of the United States Supreme Court and the subsequent orders and judgment of this Court made in its effort to carry out the Supreme Court mandate.

This Court is aware of the fact that schools in Unified School District No. 501 (Topeka schools), will open for the 1974-75 term within the next few days and all parties to this controversy ought to have as a prime objective the functioning of the school system with as little disturbance, disruption and frustration as is reasonably possible. At the same time, the Court has a responsibility of determining whether constitutional and legislative mandates are being met by those charged with administering the public schools.

of the City of Topeka.

As Chief Judge Brown so succinctly put it in <u>Linker v. Unified School District No. 259</u> (Wichita), W-4681 and 4585, 6-22-72, unreported:

> "We are involved with equality of opportunity, and the efforts of the people of this nation through their Government, to afford to all the opportunity to develop and use their talents for their intelligent self-interest and the national interest.
>
> "This Court not only has, but must take jurisdiction to carry out such Federal Constitutional and legislative mandates."

This action was brought by plaintiff to challenge the right of the Department of Health, Education and Welfare and The National Science Foundation, and their representatives, to hold an administrative hearing to determine whether or not the plaintiff is in compliance with Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000, et seq.) and the administrative rules and regulations implementing that Act, and to defer final approval of all applications filed by the plaintiff for Federal funds for new programs and activities in elementary and secondary education until the conclusion of the administrative proceeding, and to terminate or discontinue Federal assistance to, and withhold Federal funds from the plaintiff school district.

Plaintiff seeks a Declaratory Judgment determining that defendants, their attorneys, agents, servants and employees have no right or jurisdiction to initiate and continue the administrative proceedings they have commenced to determine plaintiff's noncompliance with the requirements of the Civil Rights Act of 1964 and regulations adopted thereunder, and that they have no right or jurisdiction to defer final approval of plaintiff's applications for Federal funds for new programs or activities in elementary or secondary education pending such administrative hearing, or to terminate or discontinue Federal assistance thereto, or to withhold Federal funds from the

plaintiff school district.

Plaintiffs, on August 7, 1974, filed a Motion for the preliminary injunction supported by affidavit of Merle R. Bolton, Superintendent of plaintiff school, and by the verified Complaint.

The Motion was set for hearing on August 19, 1974, but by agreement of the parties was reassigned for hearing at Topeka on August 15, 1974.

An evidentiary hearing was conducted following which the Court requested the parties to submit requested findings and conclusions and any citation of authorities the parties cared to supply that might be helpful to the Court in making a proper determination of the issue.

Two principal contentions appear. The first involves an interpretation of 42 U.S.C. §2000(d)-5, enacted by Congress as a part of the Civil Rights Act of 1964, as it relates to the jurisdiction of this Court, and, second, to the question of whether plaintiff is likely to suffer irreparable injury if the temporary injunction is not granted.

It seems apparent that the first includes the last because if this Court has jurisdiction of the matter involved under the statute referred to then the defendants are acting beyond the scope of their authority and jurisdiction, and the question of irreparable damages would not require consideration.

Though the issue of sovereign immunity has not been alluded to in the briefs or requests for findings submitted by the parties, counsel for defendants raised this point in oral argument. This doctrine does not apply in actions brought against Government officials who are undertaking to act beyond their powers and contrary to the provisions of law. Lee v. Gardner, 263 F.Supp. 26; Dermott v. Gardner, 278 F.Supp. 687.

The statute to be applied in determining the question of jurisdiction is 42 U.S.C. §2000(d)-5. It reads as follows:

> "The Commissioner of Education shall not defer action or order action deferred on any application by a local educational agency for funds authorized to be appropriated by this Act, by the Elementary and Secondary Education Act of 1965, by the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), by the Act of September 23, 1950 (Public Law 815, Eighty-first Congress) or by the Cooperative Research Act, on the basis of alleged noncompliance with the provisions of this subchapter for more than sixty days after notice is given to such local agency of such deferral unless such local agency is given the opportunity for a hearing as provided in section 2000d-1 of this title, such hearing to be held within sixty days of such notice, unless the time for such hearing is extended by mutual consent of such local agency and the Commissioner, and such deferral shall not continue for more than thirty days after the close of any such hearing unless there has been an express finding on the record of such hearing that such local educational agency has failed to comply with the provisions of this subchapter: Provided, That, for the purpose of determining whether a local educational agency is in compliance with this subchapter, compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be in compliance with this subchapter, insofar as the matters covered in the order or judgment are concerned."

The meaning of the proviso is the basis of the dispute in this case. Particular attention is directed at the phrase "compliance by such agency with a final order <u>or</u> judgment of a Federal court" for desegregation . . . shall be deemed compliance, etc.

Defendants' counsel, in their brief, have failed to note the disjunctive <u>or</u> in the statute. The statute does not read "a final order of judgment." Herein lies the crux of the problem.

The original opinion of <u>Brown v. Board of Education</u>, supra, held that in the field of public education the doctrine of "separate but equal" has no place since separate facilities are inherently unequal and separation of physical facilities on account of race constitutes a violation of constitutional rights. That opinion reversed the decision and judgment of this Court, <u>Brown v. Board of Education</u>, 98 F.Supp. 797.

The Supreme Court thereafter directed in Brown v. Board of Education (No. II), 349 U.S. 294, that the case be remanded to this Court and for this Court to take such proceedings and enter such orders and decrees consistent with the Supreme Court's opinion as are necessary and proper to admit students to public schools on a racially nondiscriminatory basis with all deliberate speed.

Following remand, this Court conducted a full hearing and after receiving evidence and the arguments of counsel undertook to carry out the mandate of the Supreme Court. The actions taken by this Court are reported in 139 F.Supp. 468. A plan was submitted by the Board of Education and the judgment entered by this Court reads as follows:

> "It is the conclusion of the Court that while complete desegregation has not been accomplished in the Topeka School System, a good faith effort toward that end has been made and that, therefore, the plan adopted by the Board of Education of the City of Topeka be approved as a good faith beginning to bring about complete desegregation. Jurisdiction of the cause for the purpose of entering the final decree is retained until such time as the Court feels there has been full compliance with the mandate of the Supreme Court."

The opinion and order of this Court constituted a judgment. The fact that jurisdiction was retained for the purpose of giving the matter further consideration did not make the opinion and order any less a judgment. Many judgments are entered by this Court with the provision that jurisdiction be reserved for the purpose of seeing to it that the Court's judgment is carried out correctly. 10 Wright & Miller, Federal Practice & Procedure, § 2651, p. 14; Rodriguez v. San Antonio School District, 337 F.Supp. 280. There can be little doubt that the opinion and order constituted a final appealable judgment of the Court. It was immediately applicable and operable. It involved a claim pressed and resisted by adversaries in this Court, a hearing and an adjudication. No more could be required to make it a judgment.

Defendants undertake to ignore the word "judgment" in the statute and support their arguments based on the words "final order." But the statute does not say "final order of judgment," as quoted by defendants, it reads in the disjunctive, "final order or judgment."

The proviso under consideration was added by Congress in 1968. Limitations of time prevents this Court from fully reviewing the congressional history of the amendment but its import is so clear, research is scarcely necessary and could not change the plain directions of a clearly written enactment. Board of Pub. Inst. v. Cohen, 413 F.2d 1201, 1203.

Under F.R.Civ.P. 54(a), the term "judgment" is defined to include a decree and any order from which an appeal lies.

Defendants urge that the failure of the docket entries in Brown, 139 F.Supp. 468, to show a final judgment, demonstrates that no judgment was entered. The defendants add the adjective "final" in their argument but the statute refers only to a judgment without qualification. As Judge Phillips is quoted in the case of United States v. Eliopoulos, 158 F.2d 206, "the judgment was duly rendered when it was ordered or pronounced by the court and that entry in the journal is but formal evidence thereof." Judge Abruzzo's oral pronouncement in open court was the rendition of "his decision or judgment" and started the running of the time within which an appeal must be taken. In the case at bar a written opinion containing the Court's judgment was filed and as further evidence that it was considered by this Court to be its judgment, the opinion appears in Federal Supplement which includes cases "argued and determined" by the United States District Courts. This Court did, by its opinion and order of October 28, 1955, intend that a determination by judgment be made. It is not conceivable that a case before it could be determined in any other way than by judgment.

Under the circumstances, this Court is bound to hold that indeed a judgment was rendered and that it remains in full force and effect. The Court must further determine that the proviso in 42 U.S.C. 2000(d)-5 applies here and that the Court has retained jurisdiction authorizing it to make a further determination as to whether there has been full compliance with the mandate of the Supreme Court. This Court has always been open and available to any party having an interest to demonstrate that the mandate of the Supreme Court has or has not been fully complied with. Until now, no party has submitted any facts or evidence one way or the other.

Defendants call attention to an action pending in the Court, that of Johnson v. Whittier, et al., No. T-5430, in which it is alleged in substance that black children systematically are discriminated against by Unified School District No. 501, the plaintiff in the case at bar. The Court has announced that it will take judicial notice of the files in all cases having any relevance to the pending matter. The Court observes that judicial time might be conserved by consolidation of Case No. T-5430 with this action so that the issues presented might be determined in one proceeding.

This Court invites and requests all defendants to present and submit to this Court any facts or evidence they have which should be considered in now determining whether the mandate of the Supreme Court and all other obligations and requirements of law have been complied with. This Court is open and available to hear any charges or claims that legal requirements have not been met by the School District as it relates to racial discrimination condemned in Brown v. School Board.

IRREPARABLE INJURY

While this Court is of the opinion that defendants are undertaking to wrest from this jurisdiction that which is clearly reserved to the Court by its judgment, and in violation of clear statutory provision, the evidence before the Court sustains plaintiff's contention that irreparable injury has already resulted from the actions of the defendants and it is equally clear that defendants are pursuing their unauthorized procedure with the view and for the purpose of interfering with the flow of funds and other benefits, some of which have already been denied, e.g., the denial of funds for Topeka participation in the Title VI Institute of Intergroup Relations, the loss of financial assistance through a general assistance center, loss of eligibility to acquire Federal surplus property, the loss of the privilege to acquire property at Forbes Air Force Base at Topeka for important school purposes. All these deprivations have resulted in acts of the defendants and the record discloses that unless restrained, defendants contemplate further deprivations of rights and privileges to which plaintiffs are at this time entitled and from which they continue to be denied.

This Court must find defendants will continue to carry on the coercive actions against the interests of plaintiffs unless restrained and that the plaintiff's Motion for a Temporary Injunction should be sustained.

From the evidence, the files and records considered in the record, and from all the matters of which the Court takes judicial notice, after hearing the arguments and statements of counsel and upon being fully advised in the premises, the Court makes the following:

FINDINGS OF FACT

1. The defendants herein on June 10, 1974, commenced an administrative proceeding against plaintiff school district and the State Department of Education, State of Kansas, Respondents, to determine whether or not plaintiff is in compliance with Title VI of the Civil Rights Act of 1964 and administrative regulations implementing said Act, by serving on plaintiff a Notice of Opportunity For Hearing containing allegations of noncompliance by plaintiff, and praying for an order terminating and refusing to grant or continue Federal financial assistance which is administered by the Department of Health, Education, and Welfare and by the agencies named in the caption of said Notice directly to the Respondent School District or through the Respondent State Agency and which supports Respondent School District's system of elementary and secondary education. (Plaintiff's Exhibit 10.)

Defendants have also deferred approval of plaintiff school district's applications for Federal funds for new programs and activities in elementary and secondary education during the pendency of said administrative hearing, and have notified the state educational agency for Kansas that commitments of Federal financial assistance for all new activities are likewise to be deferred, and have notified each Federal agency extending assistance to schools of the defendants' action. (Plaintiff's Exhibit 9.)

2. The plaintiff, Unified School District No. 501, Shawnee County, State of Kansas, is the successor to the Topeka School District No. 23, Shawnee County, Kansas, also designated as the Board of Education of Topeka of the State of Kansas, as provided by law.

3. The plaintiff school district as successor to the Board of Education of Topeka operates the same public school system, and is subject to final orders or judgments for the

desegregation of its school system entered in the case of Brown v. Board of Education of Topeka, 347 U.S. 483, and 349 U.S. 294, as implemented by the United States District Court for the District of Kansas in the same case, Brown v. Board of Education of Topeka, 139 F.Supp. 468 (October 28, 1955).

4. The Board of Education of Topeka submitted a plan for desegregation of its school system to the United States District Court for the District of Kansas (Plaintiff's Exhibit 1) and is summarized by the Court as follows:

> "The central principle of the plan is that hereafter, except in exceptional circumstances, school children irrespective of race or color shall be required to attend the school in the district in which they reside and that color or race is no element from this basic principle." (139 F.Supp. 468, 469.)

Recognizing that achieving full compliance with the plan for desegregation of the school system might require some time, the District Court approved the plan as a good faith beginning to bring about complete desegregation. The Court retained jurisdiction until such time as the Court should determine that there has been full compliance with the mandate of the Supreme Court. No appeal was taken from the judgment of October 28, 1955.

5. The Board's plan provided for desegregation consisting of four steps taken over a period of several years. Steps I, II and III (Plaintiff's Exhibit 1) were taken prior to the United States District Court's approval of the plan on October 28, 1955. Step IV (Plaintiff's Exhibit 2) was taken January 18, 1956.

6. Since the October 28, 1955 judgment of this Court was announced there has been no showing to the Court that there has or has not been full compliance with its judgment or any modification thereof required by law.

7. The plaintiff school district, on August 14, 1974, served on the Department of Health, Education, and Welfare and on Peter E. Holmes, Director, Office for Civil Rights, Department of Health, Education, and Welfare, and on the U. S. Office of Education, Application Control Center, Washington, D. C., its Assurances of Compliance with the final orders or judgments of the Supreme Court of the United States for the desegregation of the Topeka, Kansas, school system as implemented by order or judgment of the United States District Court for the District of Kansas approving a plan for the desegregation of said school system including any future modification of said orders. (Plaintiff's Exhibit 11.)

8. On June 10, 1974, the Superintendent of plaintiff school district was notified by Peter E. Holmes, Director, Office for Civil Rights, Department of Health, Education, and Welfare, that by reason of a finding of evidence of noncompliance by the plaintiff school district with Title VI of the Civil Rights Act of 1964, and regulations promulgated thereunder, he had requested that the Office of the General Counsel of the Department initiate administrative enforcement proceedings against plaintiff school district; and he further gave notice to plaintiff school district that final approval of any application filed with the Department of Health, Education, and Welfare by plaintiff school district for Federal funds for new programs and activities for elementary and secondary education was ordered deferred; and that the Kansas State Educational Agency was also notified that commitments of Federal financial assistance for all new activities were likewise being deferred; that "each Federal agency extending assistance to schools will be notified of this action"; and that "we shall notify these (Federal) agencies that efforts

to secure compliance by voluntary means have failed, and they will be given the opportunity to join enforcement proceedings." (Plaintiff's Exhibit 9.)

9. On June 24, 1974, the Superintendent of plaintiff school district was notified by Andrew G. Larsen, Program Officer, Equal Educational Opportunities, Office of Education, Department of Health Education, and Welfare, Region VII, that the school district was ineligible to receive any financial aid, services of institutes, or assistance through a General Assistance Center, by reason of its having received a citation from the Office of Civil Rights, Department of Health, Education, and Welfare. (Plaintiff's Exhibit 3.)

10. On June 26, 1974, Dr. James Boyer, Director, College of Education, Kansas State University, was notified by Robert E. Farning, Senior Program Officer, Equal Educational Opportunities, Office of Education, Department of Health, Education, and Welfare, Region VII, that as long as the present status of the plaintiff school district remains the same, no Topeka staff member of the plaintiff school district may be compensated for transportation or attendance stipend in connection with the Kansas State University Title IV Institute. (Plaintiff's Exhibit 4.)

11. On June 28, 1974, the Superintendent of plaintiff school district received a copy of the letter dated June 27, 1974, addressed to "Topeka Participant" in the Title IV Institute on Intergroup Relations at Kansas State University informing the Topeka participants from plaintiff school district that the Institute would be unable to underwrite the costs of any Topeka participant in the Institute because of a citation by the Office of Civil Rights against Topeka Public Schools. (Plaintiff's Exhibit 5.)

12. Request by the plaintiff school district for participation of sixteen (16) Topeka school teachers from plaintiff school district in the summer 1974 Title IV Institute on

Intergroup Relations at Kansas State University was denied as a result of the actions of officers of the Department of Health, Education, and Welfare as stated above. Nine (9) of the Topeka teachers attended the Institute without reimbursement or transportation or stipend which they otherwise would have received from Federal funds. Seven (7) of the original sixteen (16) teachers did not attend the Institute as a result of the discontinuance of Federal assistance to Topeka teachers for said program. This action decreased the number of teachers who would have been trained in intergroup relations and who would thereafter have been qualified to train other teachers in the Topeka school system.

13. On July 15, 1974, Mr. Wayne Warner, Director, Business Affairs, of plaintiff school district, was notified by Robert H. Arnold, Director, Surplus Property Section, Division of Administrative Services, Department of Administration of the State of Kansas, that the plaintiff school district had been temporarily suspended from acquiring Federal surplus property through that agency as a result of notification by the Department of H.E.W. that said school district was in non-compliance with the Civil Rights Act of 1964 (Plaintiff's Exhibit 6); and from and after on or about July 15, 1974, the plaintiff school district has been denied the acquisition of any such surplus property.

14. The school district's suspension or denial from acquiring Federal surplus property from the Department of Administration of the State of Kansas, which property is needed for the operations of the plaintiff school district, will result in plaintiff school district's having to purchase comparable property on the open market at an additional cost of an estimated $26,000.00 to $32,000.00 per year for so long as such denial or suspension is effective, based upon experience in prior years. Participants, including plaintiff school

district, in the Federal surplus property program must be able to obtain such property as is needed when it is available. Even if plaintiff school district's participation is only temporarily suspended, surplus property needed by plaintiff school district may be distributed to other eligible recipients before the suspension is lifted and therefore will be lost by plaintiff school district.

15. on July 8, 1974, the Superintendent of the plaintiff school district was notified by Fredric N. Borkaw, Director, Surplus Property Utilization, Office of Regional Director, Department of Health, Education, and Welfare, Region VII, that final determination on plaintiff school district's application for Building No. 282 together with five (5) acres of land and related personal property at Forbes Air Force Base must be deferred pending completion of compliance action undertaken by the Department of Health, Education, and Welfare against plaintiff school district. And also, the compliance action affects the 39.66 acres of land, formerly a portion of the Veterans Administration Hospital Reservation, which had been conveyed to the plaintiff school district by quitclaim deed dated July 26, 1971, pointing out that Condition No. 4 in the deed calls for compliance with Title VI of the Civil Rights Act of 1964. (Plaintiff's Exhibit 7.)

Condition No. 4 in the quitclaim deed provided for reverter of title to the land to the Federal Government upon noncompliance with Title VI of the Civil Rights Act of 1964.

16. Building No. 282 at Forbes Air Force Base is a fully equipped dental clinic with twelve examination stations and laboratory rooms. The plaintiff school district's purpose in acquiring this building is to provide vocational training for dental assistants and dental technicians, there being a proven need for such a training program within the State of Kansas, including the Topeka community. The plaintiff school district presently occupies and operates a dental program in said Building No. 282 under a one year lease or

license from the Federal government, which expires September 10, 1974. As the result of defendants' compliance action, the plaintiff school district does not know and has been unable to determine whether the facility, Building No. 282, will be available for such continued vocational training program after September 10, 1974. In the event the building is not available to plaintiff school district after September 10, 1974, the entire vocational dental program will be lost, as it would require at least two years and several hundred thousand dollars to acquire and equip another dental facility; and further that the dental training program would necessarily need to be discontinued by plaintiff school district, thereby depriving the Topeka community and the area vocational students who are enrolled or may enroll therein, of this educational program.

17. The 39.66 acres, formerly a portion of the Veterans Administration Hospital Reservation, conveyed to the plaintiff school district by quitclaim deed from the Federal Government is presently used by the plaintiff school district for various outdoor educational activities including biological sciences, civil technology, mathematical and topographical studies, wildlife studies and nature trails for the community. Located in the heart of the plaintiff school district and retained in its natural state, this tract is of beneficial use to the plaintiff school district and its students. Loss of the tract by reverter would necessitate either the termination of the educational programs or the rental or acquisition of another site outside the plaintiff school district as no other suitable sites are available within the school district and other sites outside the district would require additional expense for such rental or acquisition and the transportation to and from that site.

18. The Federal assistance to be obtained by plaintiff school district from Federal programs administered by the Department of Health, Education, and Welfare for the 1974-1975 school year is estimated at over $1.3 million. This estimate does not include Federal assistance for vocational training programs for which the plaintiff school district is eligible.

The effect of terminating Federal assistance for programs administered by the Department of Health, Education, and Welfare would be to end those programs as the expense of these programs could not be financed by the plaintiff school district from other available sources due to budgetary and financing restrictions as provided by state law. Those programs which would be affected by termination of Federal assistance include the Head Start and Title I reading and mathematics programs which are directed to benefiting economically deprived children.

By reason of the defendants' compliance action, the deferral and termination of other Federal agencies' funds or assistance may be involved, other than derived from the Department of Health, Education, and Welfare. The plaintiff school district is also obtaining Federal assistance from the Department of Agriculture for the school hot lunch program valued at greater than $100,000 per school year. Loss of this Federal assistance on the part of the Department of Agriculture would necessitate the curtailing or ending the hot lunch program in that a substantial number of the students would not be financially able to purchase their meals, nor would the plaintiff school district be able to budget and fund the program from other sources.

19. When the Notice of Opportunity for Hearing containing allegations of noncompliance against the plaintiff school district was served by the Department of Health, Education, and Welfare on June 10, 1974, such event was publicized by the news media. The result was that because of concern over their employment security as to the potential deferment or termination of Federal assistance administrative personnel,

teachers and other personnel in such programs, including Head Start and Title I Reading and Mathematics programs became difficult to employ and retain.

If Federal assistance to plaintiff school district is terminated during the 1974-1975 school year, the plaintiff school district will still be obliged to pay teachers salaries for the entire school year for which provision has not been made in the general fund budget, thus imposing an additional financial burden on the school system.

20. The immediate and irreparable damage suffered by plaintiff exceeds $10,000 and plaintiff will continue to suffer many thousands of dollars in damages for the reason set forth above, and plaintiff has no adequate remedy at law and the granting of a preliminary injunction is necessary until the merits of this case can be heard and determined.

21. Plaintiff school district consists of the geographic territory of the former Board of Education of the City of Topeka of the State of Kansas, as it was constituted on October 28, 1955, and that of a number of other districts which were consolidated with that territory over the intervening years.

The school district currently operates three high schools, twelve junior high schools, thirty-four elementary schools and one area vocational-technical school.

22. Approximately one-half of the elementary schools currently operated by the school district are the schools dealt with in the plan approved by this Court on October 28, 1955 (or successor schools subsequently constructed on the same or a nearby site).

The remaining elementary schools were either constructed subsequent to October 28, 1955, or were schools in districts consolidated with the original territory of the Board of Education of Topeka.

23. No further order has been entered in <u>Brown v. Board of Education</u>, 139 F.Supp. 468, since October 28, 1955, nor has any request or application ever been made of the Court for such an order. The Court has been open at all times to hear any such request or application but none have been presented.

24. This Court is now ready and available to hear any evidence and/or complaint which may properly be considered in determining whether plaintiff is in full compliance with the mandate of the Supreme Court which jurisdiction it reserved in its judgment of October 28, 1955. The Court requests defendants to come forward with any evidence it has from which this Court may determine whether there has been full compliance. The Court will modify the order contained in its judgment as may be necessary to fully comply with the law.

25. Each Finding of Fact set forth in the foregoing Findings of Fact deemed to be a Conclusion of Law is hereby found to be a Conclusion.

From the foregoing facts, the Court reaches the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action under ~~42~~ 28 U.S.C.A. §1331(a) and 28 U.S.C.A. §2201.

2. The judgments and orders of the United States Supreme Court in <u>Brown v. Board of Education of Topeka</u>, 347 U.S. 483, and 349 U.S. 294, as implemented by the judgment and order of the United States District Court for the District of Kansas in the same case, <u>Brown v. Board of Education of Topeka</u>, 139 F.Supp. 468 (October 28, 1955) constitute a judgment requiring the desegregation of the Topeka Public School system.

3. Under the provisions of 42 U.S.C.A. §200d-5, a school district's compliance with a (final order or) judgment of a Federal Court for the desegregation of its school system is deemed to be compliance with Title VI of the Civil Rights Act of 1964, to the extent such judgment so provides.

4. Under 45 C.F.R. 80.4(c) if a school district is subject to a final order of a court of the United States for desegregation of its school system and gives assurance of compliance with said court order, including any future modifications of such order, then the requirement of section 45 C.F.R. 80.4(a) and (b) for giving assurances of compliance with the Civil Rights Act of 1964 shall be deemed satisfied. The plaintiff school district has given the Department of Health, Education, and Welfare such assurance of compliance with the final order and judgment of the Supreme Court of the United States for desegregation of its school system, as implemented or supplemented by the order and judgment of the United States District Court for the District of Kansas, including any future modifications of said orders.

5. The actions of the defendants, particularly, in respect to the denial of the acquisition of surplus property and the denial of the benefits under the Title IV Institute on Intergroup Relations, as hereinbefore stated in the Findings of Fact, paragraphs 9 through 14, inclusive, constitute the termination or discontinuance, in whole or in part, of Federal assistance to, or withholding of Federal funds from, the plaintiff school district, notwithstanding the limitations and restrictions imposed upon the authority of the defendants under 42 U.S.C.A. §2000d-5 and 45 C.F.R. 80.4(c).

6. The Department of Health, Education, and Welfare has the power and duty to monitor a school district which is under a judgment of a Federal Court for desegregation, but it also has the duty to bring its findings to the attention of the Federal Court rendering such judgment before deferring or terminating Federal assistance to such a school district. The responsibility for compliance by a school district under court order rests upon the court issuing the order which in the circumstances of this case is the United States District Court for the District of Kansas. The Department of Health, Education, and Welfare may neither defer final approval of the school

district's applications for Federal funds nor may it defer, terminate or withhold Federal assistance for the school district under court order before bringing the matter of the school district's noncompliance to the attention of the court and securing judicial approval of deferment or termination of Federal financial assistance to the school district.

7. The Department of Health, Education, and Welfare had the authority and duty to ascertain compliance with the requirements of Title VI of the Civil Rights Act of 1964 (42 U.S.C.A. §2000d, et seq., and its implementing regulations 45 C.F.R. §80, et seq.) by school districts receiving Federal financial assistance.

8. The Department of Health, Education, and Welfare has the authority and duty to ascertain compliance with Title VI of the Civil Rights Act of 1964 for all school districts receiving Federal financial assistance, whether or not they are subject to an order of a Federal court to desegregate.

9. Compliance by a school district with a final order or judgment of a Federal court for the desegregation of the schools operated by the school district is compliance with Title VI of the Civil Rights Act of 1964, insofar as the matters covered in the order or judgment are concerned. 42 U.S.C.A. §2000d-5 (proviso).

10. Plaintiff seeks a preliminary injunction pending resolution of the merits of the case. Plaintiff has demonstrated probability of success on the merits and the irreparable injury which it will be caused if defendants are not enjoined. Defendants are requested to promptly bring before the Court the evidence they have for the Court's consideration in determining whether plaintiff is complying with the requirements of the law so that the judgment heretofore entered by the Court may be modified to the extent, if any, that may be necessary for full compliance.

12. Plaintiff school district is entitled to a preliminary injunction enjoining the defendants, Caspar Weinberger, as Secretary of Health, Education, and Welfare of the United States; The Department of Health, Education, and Welfare of the United States; Peter E. Holmes, as Director, Office for Civil Rights, Department of Health, Education, and Welfare of the United States; Taylor D. August, Director, Office for Civil Rights, Department of Health, Education, and Welfare, Region VII; and the National Science Foundation; their officers, attorneys, agents, servants and employees, and all others acting in concert with them, from continuing the administrative proceeding which they have heretofore commenced to determine whether or not plaintiff school district is in compliance with Title VI of the Civil Rights Act of 1964 and administrative rules and regulations implementing said Act, and is further enjoined from deferring final approval of plaintiff school district's applications for Federal funds for new programs and activities in elementary and secondary education, and from deferring, terminating or discontinuing Federal assistance to, and from withholding Federal funds from, the plaintiff school district, until further order of this Court.

13. Each Conclusion of Law set forth in the foregoing Conclusions of Law deemed to be a Finding of Fact is hereby found to be a Finding of Fact.

Plaintiff's counsel will prepare, circulate and submit a formal order consistent with the findings and conclusions of the Court herein as required by Rule 65(d). The findings and conclusions herein announced are deemed notice to the parties to the action, their officers, agents, servants, employees and attorneys.

Upon filing of answers by defendants, the cause will be assigned for pretrial. Any discovery necessary shall be promptly undertaken and completed. Consolidation with the

the Johnson case, T-5430, shall be considered.

It is the purpose of the Court to arrange for an early disposition of this case on its merits and the cooperation of all concerned parties is requested to that end.

Dated at Topeka, Kansas, this 23rd day of August, 1974.

United States District Judge

ADMINISTRATIVE PROCEEDING
IN THE
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
NATIONAL SCIENCE FOUNDATION

RECEIVED
SEP 13 1976
SUPERINTENDENT'S OFFICE
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IN THE MATTER OF UNIFIED SCHOOL

DISTRICT NUMBER 501, SHAWNEE COUNTY
KANSAS

and

STATE DEPARTMENT OF EDUCATION,
STATE OF KANSAS
RESPONDENTS
Respondents

****

DOCKET NO. S-79
MOTION FOR DISMISSAL

The Department of Health, Education, and Welfare, petitioners herein, by its General Counsel, respectfully moves the Administrative Law Judge, to dismiss the above entitled matter, without prejudice.

As grounds therefore, the General Counsel states:

> That the Respondent School District adopted a plan to remedy the violations of Title VI of the Civil Rights of Act of 1964 alleged in the Notice of Oportunity for hearing in this matter.

RESPECTFULLY SUBMITTED,
FOR THE GENERAL COUNSEL,
Department of Health,
Education, and Welfare

DATED: September 9, 1976

David H. Leeman, Attorney

CERTIFICATE OF SERVICE

I hereby certify that I cause one copy of the attached document to be mailed this date to the following persons at the addresses given:

Honorable Benson Tomlinson
Administrative Law Judge
Bureau of Hearings and Appeals
Social Security Administration
Room 1427
210 North 12th Street
St. Louis, Missouri 63101

Dr. Merle R. Bolton
Superintendent of Schools
Topeka Public Schools
U.S.D. No. 501
415 West 8th Street
Topeka, Kansas 66603

Honorable C. Taylor Whittier
Comm[illegible]ioner of Education
St[illegible]epartment of Education
Topeka, Kansas 66612

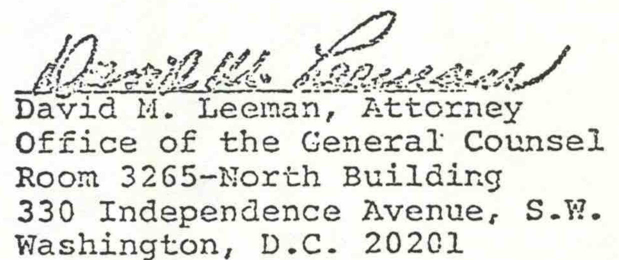
James W. Porter, Esquire
Eidson, Lewis, Porter and Haynes
1300 Merchants National Bank Building
Topeka, Kansas 66612

Paul P. Cacioppo
Regional Attorney
DHEW
601 East 12th Street
Room 414
Kansas City, Missouri 64106

Taylor August
Regional Director
Region VII
Office for Civil Rights
DHEW
12-Grand Building
12th and Grand
Kansas City, Missouri 64106

Director
National Science Foundation
1800 G Street, N.W.
Washington, D.C.
Attn: Arthur J. Kusinski

Reviewing Authority
(Civil Rights)
South Portal Building
Room 530G
Washington, D.C. 20201



David M. Leeman, Attorney
Office of the General Counsel
Room 3265-North Building
330 Independence Avenue, S.W.
Washington, D.C. 20201

DATED: September 10, 1976

ADMINISTRATIVE PROCEEDING
IN THE
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
NATIONAL SCIENCE FOUNDATION

IN THE MATTER OF UNIFIED SCHOOL DISTRICT NUMBER 501, SHAWNEE COUNTY KANSAS and STATE DEPARTMENT OF EDUCATION, STATE OF KANSAS RESPONDENTS Respondents	DOCKET NO. S-79 ORDER OF DISMISSAL

It appearing to the undersigned that the Respondent School District adopted a plan to remedy the violations of Title VI of the Civil Rights Act of 1964 alleged in the Notice of Opportunity for hearing in this matter, it is therefore ordered that the above entitled matter be dismissed without prejudice.

Dated: October 18, 1976

Benson C. Tomlinson
Administrative Law Judge
Bureau of Hearings and Appeals
Social Security Administration
8706 Manchester Road
Brentwood, Missouri 63144

RECEIVED
OCT 20 1976
Office for Civil Rights
Region VII

EDUCATION BRANCH
OCR/KC

CERTIFICATE OF SERVICE

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Superintendent of Schools
Topeka Public Schools
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Topeka, Kansas 66603

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Commissioner of Education
State Department of Education
Topeka, Kansas 66612

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Dated: October 18,1976

Benson C Tomlinson

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Administrative Law Judge
Bureau of Hearings and Appeal
Social Security Administratic
8706 Manchester Road
Brentwood, Missouri 63144

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

OLIVER BROWN, et al., Plaintiffs,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL., Defendants.

Civil Action No. T-316

Messrs. John Scott, Charles Scott, Robert L. Carter, Jack Greenberg, Charles E. Bledsoe and Thurgood Marshall for Plaintiffs;

Messrs. George Brewster, Lester Goodell, James Porter, and Harold R. Fatzer, Attorney General, for Defendants.

Before HUXMAN, United States Circuit Judge, MELLOTT, Chief District Judge, and HILL, District Judge.

OPINION and ORDER

On August 2, 1955, the plaintiffs in the above entitled cause filed a motion for a hearing on the formulation of a decree and judgment in this cause. The matter was set down for hearing on August 24, 1955, at Topeka, Kansas. At that time, the parties appeared in person and by their attorneys. A hearing was held, the subject of which was whether the Board of Education had fully complied with the order of the Supreme Court in this cause dated May 31, 1955.

A full hearing was accorded the parties. Evidence was received and arguments were heard by the respective attorneys. The Board of Education submitted the plan put in force for the current school year to bring about desegregation. No useful purpose would be accomplished by setting out the plan in detail. The Superintendent of the Public School System of Topeka, with commendable candor, gave it as his opinion that the plan adopted for the current school year did not fully accomplish desegregation. The central principle of the plan is that hereafter, except in exceptional circumstances, school children irrespective of race or color shall be required to attend the school in the district in which they reside and that color or race is no element of exceptional circumstances warranting a deviation from this basic principle.

There are a number of respects in which we feel that the plan does not constitute full compliance with the mandate of the Supreme Court, but that mandate implies that some time will be required to bring that about. The elements that we feel do not constitute full compliance are mostly of a minor nature but since this is not a final decree no useful purpose would be served by setting them out herein.

The most serious objection to the present plan relates to the rule adopted, permitting children reaching kindergarten age for the first time

to elect whether they will go to the school in the district in which they reside or to a school in another district. It is, of course, obvious that a child of kindergarten school age has no discretion to make an independent or intelligent election as to where it desires to go to school and that the election in such cases is in fact the election of the parents of the child.

The Court does not look with favor upon such a rule, but since it was stated that the rule was a temporary one having application only to the present school year and forming no part of the permanent school plan, we do not feel that it requires a present condemnation of an overall plan which shows a good faith effort to bring about full desegregation in the Topeka Schools in full compliance with the mandate of the Supreme Court.

It was stressed at the hearing that such schools as Buchanan are all-colored schools and that in them there is no intermingling of colored and white children. Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.

If it is a fact, as we understand it is, with respect to Buchanan School that the district is inhabited entirely by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live.

It is the conclusion of the court that while complete desegregation has not been accomplished in the Topeka School System, a good faith effort toward that end has been made and that, therefore, the plan adopted by the Board of Education of the City of Topeka be approved as a good faith beginning to bring about complete desegregation. Jurisdiction of the cause for the purpose of entering the final decree is retained until such time as the Court feels there has been full compliance with the mandate of the Supreme Court.

It is so ORDERED.

Signed this 28 day of Oct., 1955.

/s/ Walter A. Huxman

/s/ Arthur J. Mellott

/s/ Delmas C. Hill

Entered Oct. 28, 1955
Harry M. Washington, Clerk
By Elizabeth C. [illegible], Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNIFIED SCHOOL DISTRICT NO. 501,
Shawnee County, State of Kansas,

Plaintiff,

vs. No. 74-160-C5

DAVID MATHEWS, individually, and
as Secretary of the Department of
Health, Education and Welfare, et al.,

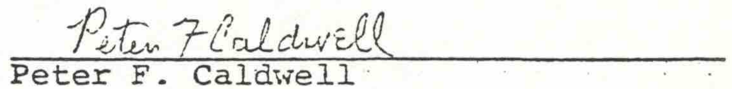
Defendants.

STIPULATION OF DISMISSAL

It is hereby stipulated and agreed by the plaintiff and defendants, acting by and through their counsel, that the above-entitled action be dismissed, without prejudice.

This stipulation and agreement is conditioned upon the further stipulation and agreement of defendants that the administrative enforcement proceedings against plaintiff begun on or about June 10, 1974, entitled, "Consolidated Compliance Proceeding Pursuant to Section 602 of the Civil Rights Act of 1964 and Implementing Regulations Thereunder," the notice of which is Exhibit "C" of plaintiff's Complaint filed herein, shall be withdrawn and terminated.

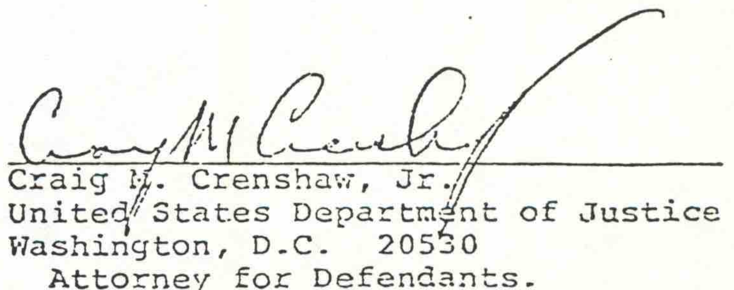
Charles N. Henson



Peter F. Caldwell

1300 Merchants National Bank Building
Topeka, Kansas 66612
(913) 233-2332
Attorneys for Plaintiff.

FILED



Craig M. Crenshaw, Jr.
United States Department of Justice
Washington, D.C. 20530
Attorney for Defendants.