students who were in fact transferred from segregated schools. The percentage of transfers expected would vary as outlined in the Statement of Policies, dependent upon the rate of transfers in previous years.

"Where there is substantial deviation from these expectations, and the Commissioner concludes, on the basis of the choices actually made and other available evidence, that the plan is not operating fairly, or is not effective to meet constitutional and statutory requirements, he will require the school system to take additional steps to further desegregation.

"Such additional steps may include, for example, reopening of the choice period, additional meetings with parents and civic groups, further arrangements with State or local officials to limit opportunities for intimidation, and other further community preparation. Where schools are still identifiable on the basis of staff composition as intended for students of a particular race, color, or national origin, *such steps must in any such case include substantial further changes in staffing patterns to eliminate such identifiability.*

"If the Commissioner concludes that such steps would be ineffective, or if they fail to remedy the defects in the operation of any free choice plan, he may require the school system to adopt a different type of desegregation plan." [Italic added.]

The Commissioner's authority in this area stems from the HEW Regulation to effectuate title VI of the Civil Rights Act of 1964 (45 CFR Part 80). Under section 80.4(a) of that Regulation and pursuant to requirements under section 80.4(b), an assurance of compliance, which has been standardized within the Department as HEW Form 441, is required of each local school system as a condition to the extension of Federal financial assistance.

Section 80.4(c), however, provides an alternative to the provision of such an assurance if the school system submit a final desegregation order of a Federal Court or "a plan for the desegregation of such school or school system which the Commissioner of Education determines is adequate to accomplish the purposes of the Act and this Regulation, and [if the school system] provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the Commissioner may reserve the right to redetermine, after such period as may be specified by him, the adequacy of the plan to accomplish the purposes of the Act and this regulation."

Three questions are presented as discussed below.

1. *May the Commissioner determine the adequacy of a plan solely on the basis of results achieved as measured by the percentage of students who transfer from segregated schools and without regard to whether the school system acted to prevent transfer?*

In the years immediately following the second *Brown* decision[1] there were many assertions that so long as a school system with racially segregated schools did not prevent Negro students from transferring to other schools, the students were not deprived of their Constitutional rights. In short, it was not the maintenance of a dual school system, but the prohibition against the Negro students' attending the schools attended by whites which constituted discrimination.[2]

Whether this was ever generally considered good law is immaterial for our purposes here, because clearly it is not the rule followed by the courts today. It now is well recognized that the discriminatory effects of almost a century of compulsory segregation and the many years of involuntary servitude which preceded that, are not overcome by allowing Negro students to attend the formerly all white schools while the school system continues to maintain schools intended for students of a particular race, color, or national origin. In *Singleton* v. *Jackson Municipal Separate School District* 348 F.2d 729, 730, note 5 (C.A. 5, 1965) the Court stated:

"In retrospect, the second Brown opinion clearly imposes on public school authorities the duty to provide an integrated school system. Judge Parker's well know dictum ('The Constitution, in other words, does not require integration. It merely forbids discrimination.') in *Briggs* v. *Elliott*, E.D.S.C. 1955, 132 F. Supp. 766, 777, should be laid to rest. It is inconsistent with Brown and the latter development of decisional and statutory law in the area of civil rights."

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[1] *Brown* v. *Board of Education*, 349 U.S. 294 (1955).

[2] See *Briggs* v. *Elliott*, 132 F. Supp. 776, 777 (E.D., S.C., 1955); *Avery* v. *Wichita Falls Ind. School Dist.*, 241 F. 2d 230 (C.A. 5th, 1957); *cert. den.* 353 U.S. 938 (1957); *Boston* v. *Rippy*, 285 F. 2d 43 (C.A. 5th, 1960).