

court should consider the possible effect of "assignment of teachers by race not as seeking to protect rights of such teachers, but as a claim that continued assigning of teaching personnel on a racial basis impairs the students' rights to an education free from any consideration of race." *Mapp v. Board of Education, City of Chattanooga, Tenn.*, 319 F. 2d 571, 576 (C.A., 6th 1963); *Northcross v. Board of Education, City of Memphis, Tenn.*, 333 F. 2d 661 (C.A. 6th, 1964); *Jackson v. School Board, City of Lynchburg, Va.*, 321 F. 2d 230 (C.A. 4th, 1964); *Augustus v. Board of Public Instruction, Escambia County, Fla.*, 306 F. 2d 862, (C.A. 5th 1962); *Board of Public Instruction of Duval County, Fla. v. Braxton*, 326 F. 2d 616, 620 (C.A. 5th, 1964); *Christmas v. Board of Education of Hartford County, Maryland*, 231 F. Supp. 331 (D.C., D.Md., 1964); *Dowell v. School Board of Oklahoma City, Okla.*, *supra*; *Bell v. School Board of City of Staunton, Va.*, *supra*; and *Kier v. School Board of County of Augusta*, *supra*. In the Oklahoma City case the court said (at 978):

"... where the cessation of assignment and transfer policies based solely on race is insufficient to bring about more than token change in the segregated system, the Board must devise affirmative action reasonably purposed to effectuate the desegregation goal. This is not new law."

Recently the Court of Appeals for the Fifth Circuit stated that it is "essential that the plan provide an adequate start toward elimination of race as a basis for the employment and allocation of teachers, administrators and other personnel." *Singleton v. Jackson Municipal Separate School District* (Jan. 26, 1966), *supra*, note 3.

In *Bradley v. School Board, City of Richmond*, *supra*, note 4, the United States Supreme Court vacated a lower court's order, saying, "There is no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans is entirely speculative."

The fact that schools remain identifiable as intended for Negro students because of the staffing pattern and the further fact that there is not effective desegregation in the actual operation of the free choice plan, provide a reasonable justification for the Commissioner to hold that the objectives of title VI and the Regulation cannot be achieved unless the racial identification of the schools is removed.

The importance of prompt steps to wipe out such identification is underscored by the difficulty of having a choice period or of otherwise reassigning children after the school year has commenced. The relatively short period which intervenes between the choice period and the time when final plans should be made for the operation of schools for the coming year, argues for more prompt action than complicated factual evaluations permit. Staff reassignment to remove the identifiability of schools on a racial basis should not be foreclosed even if the school system should assert that other steps might secure results. In fact, if the school system knew of actions which could have been taken to secure better results, it should already have taken them.

It should be recognized that changes required in a plan including those addressed to the removal of the identifiability of schools on a racial basis, would not always substantially affect assignments for the school year for which the poor performance is indicated. The objective of a desegregation plan is the total elimination of the dual school system, however, and the test of performance is significant, not only as measuring what will happen in 1966-7, but also as a gauge of progress toward the final objective. If less than the expected showing is made for the coming school year, there is every reason to insist on steps calculated to speed up the process thereafter, and to set the stage for freer choices for the succeeding school year.

In expressing the foregoing views, I am cognizant that section 604 of the Civil Rights Act of 1964, provides that nothing in title VI "shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer. . . ." That section, in my opinion, does not preclude the action referred to above.

Even if we assume that the assignment of teachers by the public school system is an "employment practice", section 604 does not preclude action based upon the need to prevent discrimination against students as beneficiaries of the Federal aid as distinguished from actions taken for the sole purpose of protecting em-