

It is true that in the *Clark* case the court denied the plaintiffs' request that continuation of the free choice plan be ruled unconstitutional on the ground of inadequate progress in student desegregation. The court noted that the free choice method "has been tentatively accepted by this and other courts as well as the Department of Health, Education, and Welfare . . ." but added that this is not to say free choice "may not be cast aside by the courts" if it does not result in meeting constitutional requirements (slip opinion, p. 5). The court indicated it would not rely conclusively on statistics showing the degree of student desegregation, for "the mere presence of statistics indicating absence of total integration does not render an otherwise proper plan unconstitutional" (slip opinion, p. 8). The court found that the number of Negro students in formerly all-white schools had more than doubled, from 621 in 1965 to 1,360 in 1966, or 19% of the total, and ruled that this constituted adequate progress as far as student desegregation was concerned.

The advice given the Tate County district as to the inadequacy of its plan seems entirely consistent with the reasoning and holding in the *Davis* and *Clark* cases. Tate was not asked to abandon free choice or reach any fixed degree of student desegregation, but only advised that further steps must be worked out to make more adequate progress. In the meantime, there remains virtually unaffected the racial discrimination inherent in the dual school structure.

3. THE RELEVANCE OF FACULTY ASSIGNMENTS IN DETERMINING COMPLIANCE WITH TITLE VI

Senator Stennis next discusses § 604 of the Act, which prohibits action under Title VI "with respect to any employment practice . . . except where the primary objective of the Federal financial assistance is to provide employment." He also refers to a provision of Title VII of the Act. In the administration of that Title, under § 703(j), no preferential treatment may be required of any employer because of any racial "imbalance" in the makeup of his staff as compared with the racial makeup of the population in his community or its available work force. The Senator concludes that under these provisions the racial composition of a school system's faculty has no bearing on its compliance with Title VI, and asks what other legal authority there can be for considering the assignment of teachers and staff.

By the terms of Title VII itself (§ 701(b)), the employees of a school system are excluded from the reach of the requirements of Title VII for nondiscriminatory employment practices. Accordingly, no provision of Title VII respecting racial discrimination or racial imbalance in employment, whether permissive or prohibitive, can have any application to a school district's faculty members.

If it were possible to maintain segregated faculties without a racially discriminatory impact on students, § 604 might be held to preclude any consideration of faculty assignments under Title VI. Providing for the employment of teachers is not the primary objective of any class of Federal financial assistance extended to school districts, and so the exception within § 604 does not apply. The primary objective of all assistance to schools is to benefit the students in the system, not the teachers. Therefore § 604, if it could be taken by itself, might be construed to preclude consideration of the faculty assignment practices of school districts.

But § 604 cannot be read apart from the general nondiscrimination policy enunciated in § 601. When read as part of Title VI, § 604 can only have the very restrictive meaning considered above if it is assumed that maintaining segregated faculties has no discriminatory impact on students. But the students, as the primary beneficiaries of Federal assistance to school districts, must be protected from racial discrimination if the basic purpose of Title VI, as expressed in § 601, is to be carried out. And the courts have repeatedly held that the racial allocation of staff must be considered in determining whether pupils are subjected to discrimination in the schools.

Several of the key court decisions to this effect are mentioned on pages 9 and 10 of the Senator's letter. These and other cases on faculty desegregation are referred to below in commenting on additional points in this connection raised by the Senator on those pages. It should be sufficient here for the purpose of clarification of the present question to state that the problem of reallocating staff was one of the reasons mentioned twelve years ago by the Supreme Court for permitting the desegregation process to take place over a period of time. *Brown v. Board of Education*, 349 U.S. 294, 301 (1955).