

This requirement reflects the view, expressed in the quotation given above from the *Clark* case, and in other cases referred to below, that neither the Constitution nor Title VI is satisfied by extending students a "free" choice between a school with a segregated Negro faculty and a school with a segregated white faculty. Beyond this, however, there is no other requirement respecting student assignments. There does remain the expectation under a free choice plan that as the choice is made increasingly free, by steps toward the desegregation of faculty and other means, the choice procedures will result in significant increases in student desegregation. If such does not occur, a complete review of the operation of the plan may lead to a determination that the plan is not operating adequately to accomplish the purposes of the Act, and that further steps to make more adequate progress are called for.

A study of the guidelines, particularly of § 181.54, shows that the relative percentage examples of the order of progress in student desegregation that "would normally be expected" are provided to show the "criteria" by which the Commissioner "will, in general, be guided" in the process of "scheduling free choice plans for review." There are no fixed percentage requirements, but only some rough yardsticks for assessing the general extent of progress.

Moreover, the general requirement is not that assignments be made on the basis of race, but that the making of such assignments be ended, along with the racial identifiability of the schools. There are, of course, situations in which race must be taken into account in order to meet constitutional and statutory nondiscrimination requirements, such as when faculty assignments and reassignments are being planned to correct the effects of past discriminatory assignments. The Fourth Circuit has held

When school authorities, recognizing the historic fact that existing conditions are based on a design to segregate the races, act to undo these illegal conditions—especially conditions that have been judicially condemned—their effort is not to be frustrated on the ground that race is not a permissible consideration. This is not the "consideration of race" which the Constitution discountenances. *Wanner v. County School Board of Arlington County*, 357 F.2d 452, 454 (4th Cir. 1966).

Further in his discussion of the validity of the guidelines, Senator Stennis asks why the guidelines are not applied "uniformly throughout the country." He wonders what "unique problems would be encountered in requiring school districts beyond the South to submit the same reports and meet the same percentages of integration," and why a quoted portion of one of the provisions of the guidelines respecting transportation could not similarly be applied across the country.

To the extent that dual-structure districts are found throughout the country, the guidelines generally apply, although in the one case encountered thus far outside the South, much more rapid elimination of the dual system was agreed upon than that provided for by the guidelines. But within the 17 Southern and Border States the guidelines are now applicable to only about 1,750 districts of roughly 5000*. An attempt to apply the guidelines to the many bi-racial districts, in those same States, which have completely eliminated the dual school structure, and to the thousands of bi-racial districts in other States which never have had a dual structure, would raise serious problems indeed.

In almost all such districts, so far as is presently known, whatever segregation is now found in the schools usually results from housing patterns, population density and the natural or other topographic factors influencing the drawing of school attendance zones. While the guidelines do not require any fixed percentage of student desegregation, contrary to the Senator's understanding, if the Commissioner were to apply to a single-structure district, North or South, even the rough measures for gauging desegregation progress in dual-structure districts that the guidelines provide, this would not be consistent with the intent of Congress. The statements by Senator Humphrey referred to above and the provisions of section 407(a) of the Act combine to cast serious doubt as to the scope of the authority Congress intended the executive and judiciary branches to

*Some 200 of those districts filing voluntary plans in 1965-66 have since completed the transition to a single system of schools for all students, and are considered in compliance with § 80.3 of the Regulation. In Delaware and Kentucky, the dual school system has been virtually eliminated this year, and very substantial steps toward this goal were taken in Maryland, Tennessee and Oklahoma. A number of districts in other Southern States have taken such steps.