

inantly or exclusively white schools. The court held that such a provision was contrary to the Constitution, but it indicated that if the transfers were made available to all without regard to race, and not limited by the racial composition of the schools transferred to or from, then the Constitution would be satisfied.

This case is authority for that type of desegregation plan which establishes a single set of nonracial attendance zones for each school, on the basis of which all students are assigned subject to a right of free transfer at the student's option. The *Goss* decision did not consider at all the adequacy of a free choice plan, with student assignments utterly dependent on choice, under which little or no student desegregation is achieved.

The *Singleton*, *Kemp*, *Bradley* and *Goss* cases, then, when reviewed in the light of the circumstances, are such that the provisions of the guidelines respecting the effectiveness of free choice plans are not contrary to these authorities, as the Senator suggests is the case. Moreover, the provisions of § 181.54 of the guidelines quoted on page 9 of this letter, concerning progress under free choice plans, and even the percentage examples themselves, are clearly reflected in the rulings of the Fifth and Eighth Circuits in the *Davis* and *Clark* cases. In *Davis*, less than one percent desegregation of Negro students led to a revised plan. In *Clark*, a plan was upheld under which the desegregation of Negro students had doubled to reach 19 percent.

Moreover, the further provisions of the guidelines quoted by the Senator, authorizing a majority to minority transfer preference, are not contrary to the *Goss* case. In that case the court struck down a plan provision which inhibited desegregation, the minority to majority transfer preference. The quoted provisions of the guidelines, from § 181.33(b) and 181.49, authorize school districts in their discretion to enhance the process of desegregation by the opposite type of preference. If it be objected that such policies would improperly involve consideration of race, as the Senator suggests, then the holding of the Fourth Circuit in the *Wanner* case quoted earlier in this memorandum is appropriate. A majority to minority transfer preference is not the type of consideration of race which the Constitution precludes, because the purpose of considering race in such cases would be to help correct the effects of past unconstitutional racial discrimination. See *Dowell v. School Board of Oklahoma City*, 219 F. Supp. 427 (W.D. Okla. 1963), 244 F. Supp. 971 (W.D. Okla. 1965), which was recently affirmed by the Tenth Circuit in its decision in Civil Action No. 8523, January 23, 1967. In this leading case, the school system was ordered to provide a majority to minority transfer preference.

Senator Stennis concludes his letter with a series of further questions concerning the validity of the policies of the Office of Education for faculty desegregation under the Act, stemming from his review of the May 20th memorandum, the cases cited therein, and other decisions cited by the Senator.

The Senator first states that the Supreme Court has itself not yet ordered faculty desegregation implemented, but only held that plaintiffs in school desegregation cases are "entitled to a hearing on the question of the relation between faculty assignments and the adequacy of the desegregation plans." It is true that in reversing the refusal of the Fourth Circuit to consider faculty assignments in the *Bradley* case, the Supreme Court stated that:

There is no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the adequacy of desegregation plans is entirely speculative. 382 U.S. 103, 105 (1965).

But in *Rogers v. Paul*, 382 U.S. 198 (1965), the other case cited by the Senator in this connection, the court was more direct in a decision handed down the same day as *Bradley*:

Two theories would give students not yet in desegregated grades sufficient interest to challenge racial allocation of faculty: (1) that racial allocation of faculty denies them equality of educational opportunity without regard to segregation of pupils; and (2) that it renders inadequate an otherwise constitutional pupil desegregation plan soon to be applied to their grades. (382 U.S. at page 200).

The court then referred to the *Bradley* case and held that the plaintiffs here (who were students in grades not yet reached by the plan) had standing to challenge racial allocation of faculty under the first theory, and that they were improperly denied a hearing on this issue.

These cases have been widely cited as authority for requiring prompt steps toward the desegregation of faculty. *Wheeler v. Durham City Board of Edu-*