

ation, 363 F.2d 738 (4th Cir. 1966), is typical of such cases. In *Wheeler*, the Fourth Circuit, after noting that the evidentiary hearing called for by *Bradley* had been held in the district court, had this to say about the *Bradley* decision:

We read the decision as authority for the proposition that removal of race considerations from faculty selection and allocation is, *as a matter of law, an inseparable and indispensable command, within the abolition of pupil segregation* in public schools as pronounced in *Brown v. Board of Education* [italic added] (363 F.2d at 740).

In no case, it appears, has an evidentiary hearing been held under *Bradley* which resulted in a finding that the racial allocation of faculty does not subject students to discrimination. In fact, in many cases the courts, seemingly seeing the conclusion of discrimination as inescapable, have apparently not found hearings on the question necessary in order to require steps implemented to desegregate faculty, but consider this required "as a matter of law." If this is so, it must be that defendant school boards have not demanded such hearings in order to fight or delay faculty desegregation orders.

From the decisions in *Singleton*, *Kemp*, *Wright*, and *Kier* cases, for example, the cases next referred to by Senator Stennis, which are all cited above, it is not clear that such hearings were held. But the Senator refers to these cases, which were among those cited in the May 20 memorandum, primarily to point out that they are all cases in which the courts "exercised their inherent powers of equity" in enforcing constitutional provisions. The Senator's position is that a Federal administrator, such as the Commissioner of Education, has no inherent powers of equity, and "must find the authority for all his acts and orders in the statute which he administers."

This position is generally sound. But the Commissioner does find authority in Title VI for his acts in formulating faculty desegregation policies to be applied in determining eligibility for Federal financial assistance. In reviewing progress in faculty desegregation, and finding that some districts are making adequate progress and others are not, the Commissioner may be acting somewhat akin to a district court exercising equity powers in applying constitutional standards to determine faculty desegregation requirements in particular cases. To the extent that this is so, it is because the Commissioner must exercise this kind of discretion under § 80.4(c) (2) of the Presidentially-approved Regulation issued by the Department as required by § 602 of the Act.

If the Commissioner lacked discretion somewhat analogous to that of the courts in such cases, then he could not consider any desegregation plan to constitute a basis for extending Federal financial assistance under § 601. He would be obliged to move to terminate assistance to all dual-structure districts that did not succeed in eliminating the dual-structure indicia virtually overnight. Only the requirements of § 80.3 could be applied, and no gradualism would be available under § 80.4(c) (2). It is clear that if there is to be any gradualism, then some appropriate officer must have the power to evaluate the gradual progress it produces.

Otherwise the intent of the Congress would be defeated. Senator Humphrey stated as follows:

The Commissioner of Education would be warranted in relying on any existing plans of desegregation *which appeared adequate and effective . . .* It is not expected that funds would be cut off *so long as reasonable steps were being taken in good faith to end unconstitutional segregation.* [Italic added] 110 Cong. Rec. 6545 (1964).

Later in the same speech he said, "Depending on the circumstances, Federal courts have approved plans of progressive desegregation . . ." *id.* at 6546. The inference is plain that he would expect the Commissioner's actions under Title VI to depend on the circumstances in each case, to determine whether a district had a "plan of progressive desegregation" which was "adequate and effective," and whether "reasonable steps were being taken" under it "to end unconstitutional segregation."

Like all administrative actions, the Commissioner's must be reasonable and not capricious. In the context both of the practical situation and of Senator Humphrey's statements, it would have been unreasonable for the Commissioner to disregard the evolving body of judicial opinion in this area. That this body of opinion is in fact faithfully reflected in the policies of the guidelines, and in the actions taken under their provisions, is supported, it is believed, by the cases cited and analysis provided in this memorandum.