The judicial action prayed for is (1) in violation of the negative nature and terms of the Fourteenth Amendment, (2) would constitute an invasion by the federal judicial branch of administrative discretion lawfully vested in the School Board of Prince Edward County under the Constitution and laws of the Commonwealth of Virginia, and (3) would require a supervision of the details of administrative judgment beyond the practical reach of the process of a court of equity.

(6) The amended supplemental complaint Paragraph I (2) alleges that the state law requires the maintenance of a system of free public schools and that the failure to maintain such schools in Prince Edward County while a system of public schools are maintained in other counties and cities of the Commonwealth constitutes a violation of the due process and equal protection clauses of the Fourteenth Amendment. Such allegation does not support [fol. 101] prayer (a) of the amended supplemental complaint for the following reasons:

The Fourteenth Amendment does not deny to Virginia the right to grant to each county and city local control of the education of its children, nor does it deny to Virginia the right to grant to each county and city of Virginia the option to provide for the educational needs of its children either in (1) public schools owned, operated and controlled by said counties or cities, or, if it prefers (2) to provide for such education by the payment of a sum for educational expenses to the parent or other person immediately responsible for such education in reimbursement of expenses so incurred.

In connection with this allegation the court will take judicial notice of Section 141 of the Constitution of Virginia and the provision of Title 22 of the Code of Virginia enacted in pursuance thereof.

It is, therefore, not sufficient merely to allege, as does the amended supplemental complaint, that Prince Edward has exercised a lawful right and elected to provide for the education of its children under Section 141 of the Constitution of Virginia and laws enacted in pursuance thereof.

It is essential in order to raise a federal constitutional question under the Fourteenth Amendment to allege that the laws of Virginia give some benefit or privilege to or impose some burden or disadvantage upon the county or city of the state which is not given to or imposed upon all counties or cities of the state, or, it must be alleged that the laws of the State of Virginia and of Prince Edward County give some benefit to or impose some disadvantage upon one individual or class which is not given [fol. 102] to or imposed under such law to or upon all children of the said County.

It is, therefore, apparent that where the law gives every county and city within the Commonwealth of Virginia the privilege, if it so elects, to provide for the education of its children in the same manner in which the County of Prince Edward has elected to provide for its children, such law and arrangement does not deny equal protection as between the counties and cities of the Commonwealth of Virginia.

The county ordinances exhibited with the supplemental complaint show upon their face that they apply equally within the County to all individuals and classes and are, therefore, not in violation of the Constitution of the United States. The equal administration of said county ordinances is not brought into question by any allegation of the amended supplemental complaint.

It, therefore, follows that there is no sufficient allegation contained in the amended supplemental upon which to base a charge of a violation of equal protection or due process under the Fourteenth Amendment of the United States Constitution.

(7) Paragraph VI (17) alleges that acts otherwise lawful become unlawful if done for the purpose and in order to avoid placing the children of the County within schools which fall within terms of the court order of April 22, 1960. It is alleged that by doing such acts or by the failure to take affirmative acts a federal constitutional question is raised. Such an allegation is patently insufficient to raise any federal constitutional question and is patenty untenable. Neither the terms of the order of April 22, 1960,

[fol. 103] nor the language and judicial construction of the Fourteenth Amendment can be thus enlarged by the motive or purpose of a legislative body which enacts laws otherwise within its lawful constitutional power. The motives or purpose of the Board of Supervisors of Prince Edward County cannot change or alter or enlarge the express limits of the court order of April 22, 1960, nor change, alter or enlarge the language, nature and judicial construction of the Fourteenth Amendment of the Constitution of the United States. Unless the acts and laws referred to violate some right of the plaintiffs under the United States Constitution or are alleged to be administered in such a fashion as to deny the plaintiffs a right under the Constitution of the United States the motive and purpose of the legislative branch is utterly immaterial and irrelevant provided the legislative branch had the power to enact the laws referred to.

It is, therefore, respectfully submitted that the amended supplemental complaint should be dismissed and the plaintiff left to seek his remedies as he may be advised in the state courts.

Present: All the Justices

Record No. 5390.

Leslie Francis Griffin, Jr., an Infant, Suing by L. F. Griffin, Sr., his Father and Next Friend, and L. F. Griffin, Sr.,

v.

[fol. 104] Board of Supervisors of Prince Edward County

Opinion By Chief Justice John W. Eggleston
Richmond, Virginia, March 5, 1962

Original Petition for Writ of Mandamus

This is an original petition for a writ of mandamus filed by Leslie Francis Griffin, Jr., an infant, suing by L. F.

Griffin, Sr., his father and next friend, and L. F. Griffin, Sr., in his own right, hereinafter referred to as the petitioners, to compel the Board of Supervisors of Prince Edward county, sometimes hereinafter referred to as the respondent, to appropriate and make available to the School Board of that county sufficient funds for the operation and maintenance for the 1961-1962 school term, and subsequent terms, of such public free schools as in the judgment of the School Board the public welfare requires. The matter is before us on the petition, the answer and a stipulation, from which these facts appear:

Both petitioners are citizens of the Commonwealth of Virginia, residing in Prince Edward county. The infant petitioner is within the age limits of eligibility to attend public schools and possesses the qualifications necessary for admission thereto. His father, the adult petitioner, is a taxpayer of the Commonwealth and of Prince Edward county.

Beginning with the fiscal year 1959-1960, and thereafter for each succeeding fiscal year, the School Board has prepared and submitted to the Board of Supervisors an estimate of the amount of money deemed necessary for the [fol. 105] maintenance and operation of public schools in the county. For each of these fiscal years the Board of Supervisors has failed and refused to appropriate any money for such purpose. However, for the fiscal year 1961-1962, it appropriated the sum of $285,000 for "Educational Purposes in furtherance of the elementary and secondary education of children residing in Prince Edward county in private nonsectarian schools to be expended as may be provided by Ordinance and pursuant to Section 141 of the Constitution of Virginia," as amended.

The petition alleges that the respondent's failure and refusal to appropriate funds for the maintenance and operation of public free schools in the county was occasioned by the decision of the United States Court of Appeals for the Fourth Circuit on May 5, 1959, that white and colored children should be enrolled and taught together. *Allen* v. *County School Board of Prince Edward County,* 4 Cir., 266 F. 2d 507. However, in the petitioners' brief

it is "conceded" that the motives which prompted the inaction on the part of the Board of Supervisors are immaterial to the issues involved in the present litigation.

The petitioners further point out in their brief that "there are no Federal questions [involved] in this proceeding," and we perceive none.

The petition further alleges that "by reason of Article IX of the Constitution of Virginia, and particularly Sections 129 and 136 thereof, and the several statutes which have been enacted pursuant to said article, it is the duty of the respondent board of supervisors to appropriate money to be used by the County School Board of Prince Edward County for the maintenance and operation of such [fol. 106] public free schools as in the judgment of said school board the public welfare may require."

The respondent denies that these or any other provisions of the Constitution of Virginia, or of any statutes enacted by the General Assembly, "impose a duty upon the said Board of Supervisors to appropriate any revenue under its control for the operation of schools." It alleges that its failure to levy taxes and make appropriations for the maintenance and support of such schools are matters which "are wholly within the legislative discretion vested in said Board of Supervisors under the Constitution and laws of Virginia and are not subject to control by the judicial process of writ and mandamus as prayed for in the petition."

Thus the pleadings present to us these questions:

(1) What is the duty imposed by law on the Board of Supervisors of Prince Edward county with respect to appropriations for the maintenance and operation of public free schools? (2) Will a writ of mandamus lie to compel that Board to perform such duties as are imposed on it by law with respect to such appropriations?

The argument on behalf of the petitioners runs thus: Section 136 of the Constitution imposes on the Board of Supervisors the *mandatory duty* of levying and collecting local school taxes for establishing and maintaining such schools as in the judgment of the local school authorities the public welfare may require; the Board of Supervisors is a mere administrative agency with respect to such duties and is vested with no legislative discretion therein; hence,

mandamus will lie to require it to perform its duties in this respect.

[fol. 107] The substance of the argument of the Board of Supervisors is that it is the legislative department of the county; that in levying taxes and appropriating local funds it exercises a legislative function and is vested with a discretionary power as to what taxes, if any, will be levied and appropriated, and that such discretion is not subject to judicial control.

Section 136 of the Constitution reads thus:

> "Each county, city or town, if the same be a separate school district, and school district is *authorized* to raise additional sums by a tax on property, subject to local taxation, not to exceed in the aggregate in any one year a rate of levy to be fixed by law, to be apportioned and expended by the local school authorities of said counties, cities, towns and districts in establishing and maintaining such schools as in their judgment the public welfare may require; provided that such primary schools as may be established in any school year shall be maintained at least four months of that school year, before any part of the fund assessed and collected may be devoted to the establishment of schools of higher grade. The board of supervisors of the several counties, and the councils of the several cities and towns, if the same be separate school districts, shall provide for the levy and collection of such local school taxes." (Emphasis added)

Article IX of the Constitution, embracing the subjects of "Education and Public Instruction," contemplates that moneys for the establishment and maintenance of public free schools will be appropriated partly by the General [fol. 108] Assembly and partly by the local governing units. Section 136 provides for the raising by local taxation of "additional sums", that is, sums in addition to those which the General Assembly may appropriate pursuant to the preceding sections of the Constitution.

The provisions of Section 136 are implemented in Code, SS 22-126 and 22-127, as amended. Section 22-126, as amended, reads as follows:

> "Each county, city and town if the town be a separate school district, *is authorized* to raise sums of money by a tax on all property, subject to local taxation, at such rate as may be deemed sufficient, but in no event more than three dollars on the one hundred dollars of the assessed value of the property in any one year to be expended by the local school authorities in establishing, maintaining and operating such schools as in their judgment the public welfare requires and in payment of scholarships for the furtherance of elementary or secondary education and transportation costs as required or authorized by law; * * *" (Emphasis added.)

Section 22-127, as amended, reads:

> "The governing body of any county, city, or town, if the town be a separate school district, *may, in its discretion,* make a cash appropriation, either annually, semi-annually, quarterly, or monthly, from the funds derived from the general county, city or town levy and from any other funds available, of such sums as in its judgment may be necessary or expedient for the establishment, maintenance and operation of public schools, and/or for educational purposes." (Emphasis added.)

[fol. 109] We find in neither Section 136 of the Constitution nor in the statutes implementing it, any support for the petitioners' contention that the Board of Supervisors is under the mandatory duty to levy local taxes and appropriate moneys for the support of public free schools in the county.

By the first sentence of the Constitutional provision the local political unit "is authorized" to raise additional sums, to be apportioned and expended by the local school authorities. It will be noted that such political unit "is authorized," not "required," to raise the additional sums. The words "is authorized" denote a grant of power and discretion to act, but not a command or requirement to act. According to Webster's Third New International Diction-

ary, Unabridged, "authorized" means "endowed with authority," "sanctioned by authority." As we said in *Superior Steel Corp.* v. *Commonwealth,* 147 Va. 202, 205, 136 S.E. 666, 667, "one is 'authorized' when he possesses the authority to act."

Nor do we agree with the contention on behalf of the petitioners that the closing sentence of the constitutional provision, "The boards of supervisors of the several counties, and the councils of the several cities and towns, if the same be separate school district, shall provide for the levy and collection of such local school taxes," imposes a mandatory duty on the Board of Supervisors to levy and appropriate these moneys. This sentence merely designates the governing bodies of the respective political units which "shall provide for the levy and collection of *such* local school taxes" (emphasis added), that is, the local school taxes which are "authorized" to be levied by the first sentence in the section.

[fol. 110] This interpretation of the constitutional provision is quite in accord with our previous decisions. In *School Board of Carroll County* v. *Shockley,* 160 Va. 405, 168 S.E. 419, we had under consideration an act of the General Assembly requiring the board of supervisors of Carroll county to make a special levy, in addition to all other levies, and directing that the proceeds of such special levy be used solely for the purpose of erecting and equipping a high school building in the town of Hillsville in that county. We held that the act was in conflict with Section 136 of the Constitution which lodged in the local authorities the exclusive power to determine what additional sums, if any, should be raised by local taxation, and that that power could not be taken away by the General Assembly.

After reviewing the various provisions of Article IX of the Constitution relating to "Education and Public Instruction," and what funds must be appropriated by the General Assembly for that purpose, we thus defined the purpose and meaning of Section 136:

> "Considering these clear and unqualified provisions, as placed in the Constitution, and in connection with the related provisions thereof, it is obvious that it

> was the purpose of this section to vest in the local authorities of each county and school district of the State the *exclusive power* to determine *what additional sums, if any,* should be raised by local taxation to supplement the funds provided by the State for the support of the schools in the respective counties and school districts; and the *exclusive power* to levy the tax for school purposes on the property specified, *if any is imposed,* subject only to the limitation that *if any tax at all is levied* it shall not 'exceed in the ag-[fol. 111] gregate in any one year a rate of levy to be fixed by law'. (Emphasis added)
>
> "The local authorities of each county and school district being thus vested with the exclusive power to impose local taxes for school purposes under this section, the necessary implication is that the General Assembly is prohibited by the Constitution from exercising that power." 160 Va., at page 413.

This interpretation, which is quite applicable in the present case, was reaffirmed in *Almond* v. *Gilmer,* 188 Va. 1, 26, 49 S.E. 2d 413, 444.

This discretionary nature of the right, power, or authority of the board of supervisors to determine what sums, if any, should be raised by local taxation for the support of public schools was also reaffirmed in *Scott County School Board* v. *Board of Supervisors,* 169 Va. 213, 217, 193 S.E. 52, 54. In that case the county school board filed in this court an original petition for mandamus to compel the board of supervisors to impose a levy sufficient "to take care of the budget" prepared by the school board. The school board asserted that the board of supervisors had "no discretion in acting upon the school budget," but "must raise the necessary revenue to take care of "such budget as submitted. (169 Va. at page 215, 193 S.E., at page 53.) We denied the writ on the ground that mandamus did not lie "to control [the] discretion" to curtail the school budget which the statutes (Code of 1919, S 657)[1] had lodged in the board of supervisors. 169 Va., at page 217, 193 S.E. at page 54.

---

[1] Cf. Code of 1950, 1960 Cum. Supp., SS 22-120.3 and 22-120.4.

[fol. 112] See also, *Board of Supervisors of Chesterfield Co.* v. *County School Board,* 182 Va. 266, 280, 281, 28 S.E. 2d 698, 705 in which we affirmed the holding of the trial court that "the board of supervisors has the right, within the limits prescribed by law, *in their discretion,* to fix the amount of money to be raised by local taxation for school purposes at whatever amount they see fit." (Emphasis added.)

It is clear, then, that Section 136 of the Constitution and Code, SS 22-126 and 22-127, as amended, which implement the constitutional provision, vest in the Board of Supervisors of Prince Edward county the discretionary power and authority to determine "what additional sums, if any, should be raised by local taxation to supplement the funds provided by the State for the support of the schools" in the county. *School Board of Carroll County* v. *Shockley, supra,* 160 Va., at page 413.

Whatever may be the duty imposed under Section 129 of the Constitution, that section is plainly directed to the General Assembly and not to the local governing bodies. It says, "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State." Hence, we are not concerned in the present proceeding with the application of that provision. But it is important to compare the mandatory wording of that section with the discretionary language employed in Section 136.

We do not agree with the petitioners' contention that the concluding sentence of Section 136, which provides that "The board of supervisors of the several counties, and the councils of the several cities and towns, * * * shall [fol. 113] provide for the levy and collection of such local taxes," imposes on these local governing units merely ministerial duties. There is no constitutional mandate as to how these levies and collections shall be made, and as we have said, the concluding sentence of the section vests this function in these local governing units. This is in accord with the provision in Section 111 of the Constitution that boards of supervisors of a county "may * * * lay the county and district levies."

Since the early days of the Commonwealth, we have repeatedly pointed out that the exercise of the power of

taxation is a legislative function. See 18 Mich. Jur., Taxation, S 5, p. 127 *ff.,* where numerous cases are collected. The same is true when the power is exercised by a local governing unit. *Southern Railway Co.* v. *City of Danville,* 175 Va. 300, 305, 7 S.E. 2d 896, 898.

It is firmly settled in this State that mandamus is the proper remedy to compel the performance of a purely ministerial duty, but does not lie to compel the performance of discretionary duty. 12 Mich. Jur., Mandamus, S 6, p. 340 *ff.;* Burks Pleading and Practice, 4th Ed., S 199, p. 322; *Scott County School Board* v. *Board of Supervisors, supra,* 169 Va., at page 217, 193 S.E., at page 54; *State Board of Education* v. *Carwile,* 169 Va., 663, 673, 194 S.E. 855, 859; *Fleenor* v. *Dorton,* 187 Va., 659, 664, 47 S.E. 2d 329, 332.

Whether mandamus will lie to compel the levy and assessment of taxes depends upon whether the duty with respect to that matter is ministerial or discretionary. If ministerial, the writ will lie; if discretionary, as is the case here, mandamus will not lie. 34 Am. Jur., Mandamus, S. [fol. 114] 214, pp. 982, 983; 55 C.J.S. Mandamus, S 182-b (4), pp. 355, 356. Application of this distinction has been recognized and applied in prior decisions of this court.

In *Supervisors of Cumberland County* v. *Randolph,* 89 Va. 614, 16 S.E. 722, relied upon by the petitioners, we affirmed a judgment of the county court awarding a mandamus compelling the board of supervisors to levy a tax to pay certain coupons on bonds which had been issued by the county. This was because, we said, the particular statute there involved required the levy and made the duties of the board of supervisors with respect thereto "purely ministerial". 89 Va., at page 622.

On the other hand, in *Scott County School Board* v. *Board of Supervisors, supra,* we denied a writ to compel the board of supervisors to impose a levy sufficient to take care of the budget prepared by the school board, on the ground that mandamus did not lie to control the discretion which had been lodged in the board of supervisors with respect to the matter. 169 Va. at page 217, 193 S.E. at page 54.

It is not our function here to say whether the action of the Board of Supervisors of Prince Edward county in refusing to make these appropriations is proper, wise, or desirable. Our duty is merely to determine whether it may be compelled to do so by a writ of mandamus. In our view it may not be so compelled.

The Constitution of Virginia vests in the legislative department of the government the duty, power and authority to establish and maintain public free schools throughout the State. To grant the writ in this proceeding would [fol. 115] amount to an invasion by the judicial department of those functions of the legislative department. It would mean that this court may substitute its discretion for that vested by law in the local legislative body. Clearly, under the division of powers embodied in our Bill of Rights (Constitution, S 5), we may not do this.

For these reasons the writ prayed for is denied.

Writ denied.

---

* * * * * * *

SECTION I

How Such Application Made, What It Shall Contain

A. The parent, guardian or person in loco parentis to any child shall make application for such grants upon forms provided by the Board of Supervisors of Prince Edward County, shall sign the same and make oath to the facts therein stated and shall file the same on or before the 1st day of September, 1960 or any succeeding year with the Board of Supervisors of Prince Edward County or with such person as the Board may designate to receive and examine such application.

B. The parent, guardian or person in loco parentis to such child in order to be eligible to receive a grant of funds under this ordinance shall, as a part of such application, make oaths to the following facts:

(a) The name of the parent, guardian or person in loco parentis making the application and the name, age and

[fol. 116] residence of each child on whose behalf the application is made.

(b) That the person signing the application is legally responsible for the care of each child for whose benefit the application is made.

(c) That each child in whose behalf the application is made has attained six years of age and has not attained the age of twenty years.

(d) That the said child is an actual bona fide resident of Prince Edward County and is educable.

(e) That each child on whose behalf the application is filed will be enrolled in either a private nonsectarian elementary or secondary school within the County of Prince Edward or a public school within the State of Virginia wherein tuition is charged in a least the amount of the grant applied for.

(f) That said child is not detained or confined in any public institution.

(g) That said child is or will be enrolled during the school year for which the application is made in a course of systematic educational instruction or training of not less than one hundred eighty days duration or the substantial equivalent thereof, and shall give the name and location of said school, or the name of the person, or persons, offering such course of instruction or training and the place at which it will be offered.

(h) That said child has not graduated or completed the course of study offered at the high school level.

[fol. 117] (i) That the person making the application agrees to refund any grant made thereunder if said child for whom the grant is made fails to attend school at least one hundred fifty days per school year, unless the Board of Supervisors by resolution releases such obligation to refund on account of sickness of the child or other unavoidable or oppressive circumstances.

Section II

Minimum Amount of Grant: Discretion to Increase the Amount; How and to Whom Paid; Termination Thereof . . .

(1) The amount of each grant paid under this Ordinance shall be a sum not less than One Hundred Dollars ($100.00) per year for each child and the amount thereof may be increased in the discretion of the Board of Supervisors by resolution adopted on or before the end of any fiscal year.

(2) Upon approval by the Board of Supervisors of the application therefor it shall by resolution make appropriation for the payment of each grant and shall authorize the Treasurer to make payment thereof upon warrants of the Board of Supervisors, as provided by law, for the payment of other claims against the County.

(3) Upon denial of an application or inability to act thereon because of the absence of necessary information, the Board shall give notice to the applicant of its action within a reasonable time thereafter by mailing said notice to the post office address given in the application. Within 15 days after the mailing of said notice any applicant who feels aggrieved by the action of the Board shall file with [fol. 118] the Board or its designated agent a petition for a review of its action. Such petition shall state the reasons for his objection to the action of the Board and shall be heard by the Board at its next meeting provided the said meeting is at least 15 days after the filing date of the petition for such hearing. Such hearing shall be informally conducted and the aggrieved party shall have the right to offer evidence and to be represented by counsel.

Within 15 days after such hearing the Board shall notify such aggrieved party of its final action upon such application and any applicant feeling aggrieved thereby shall have the right of appeal to the Circuit Court of the County of Prince Edward as provided by law.

(4) The Board of Supervisors shall pay not more than half of any grant on or before the 15th day of October of the school year for which paid and the remainder at such intervals as it may deem proper, provided that the

total amount thereof shall be paid not later than the 31st day of May of the school year for which the grant is made, and provided further that upon the violation of any condition set forth in the application therefor or upon the ascertainment that any false representation has been made in procuring said grant, the Board shall terminate the same and any balance thereof shall not be paid.

SECTION III

Defining Unlawful Acts in Violation of This Ordinance and Prescribing Penalty Therefore . . .

A. Any person who shall wilfully make a false statement in any application for a grant under this Ordinance shall [fol. 119] be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed three hundred dollars ($300.00) or by confinement in jail not exceeding 30 days.

B. It shall be unlawful and constitute a misdemeanor for any person, firm, association or corporation receiving a grant for educational purposes under this Ordinance to use the sum so received for any purpose other than for educational purposes in a private nonsectarian school located within the County of Prince Edward or in public schools located within the State of Virginia. Any person violating this section shall be subject to a fine not exceeding three hundred dollars ($300.00) or confinement in jail not exceeding 30 days.

---

* * * * * * *

Be It Ordained by the Board of Supervisors of Prince Edward County, Virginia that:

(1) Contributions made by any person, association, firm, corporation or other taxpayer of the County of Prince Edward, Virginia to a nonprofit nonsectarian private school located within said County of Prince Edward, Virginia may be deducted from the real and personal property taxes due the County of Prince Edward, Virginia by the person, association, firm, corporation or other taxpayer making such contribution for the year during which

said contribution was made, subject to the limitations set forth in this ordinance.

(2) For the purpose of this Ordinance, the term "private school" shall mean only those nonprofit, nonsectarian private elementary and secondary schools either in opera- [fol. 120] tion during the year for which the tax deduction or credit is claimed or chartered to begin operation within the year succeeding that for which the tax deduction or credit is claimed, which schools are located in the County of Prince Edward, Virginia and which offer or will offer during the time herein set forth a course of systematic educational instruction of not less than one hundred eighty days duration per school year or the substantial equivalent thereof.

(3) No credit shall be allowed for any contribution made to any private school under the provisions of this ordinance unless the person, association, firm, corporation or other taxpayer seeking such credit files with the Treasurer of the County of Prince Edward, Virginia at the time his, her, or its taxes are due and payable, To wit: On or before December the fifth in the year in which the levy is made, a voucher, receipt or canceled check showing the amount and date of the contribution and to whom made and his, her, or its affidavit setting forth the name and address of the school to which the contribution was made, the date thereof, the name and address of the person, association, firm, corporation or other taxpayer of the County of Prince Edward, Virginia making such contribution, the amount thereof, and declaring that no scholarship, reduction in fees or charges, rebate or remission of charges or other benefit was granted such person, association, firm, corporation or other taxpayer or his or her children, or any child for which said person, association, firm, corporation or other taxpayer was the legal guardian or other person in loco parentis to such child directly or indirectly as a result of such contribution and declaring that no such refund, rebate, reduction in fees or charges or remission or charges or other benefit will be made to [fol. 121] such person, association, firm, corporation or taxpayer on account of such contribution.

Upon the presentation of such affidavit and supporting evidence of payment to the Treasurer of the County of Prince Edward he shall deduct from the amount of taxes due the County of Prince Edward by such person, firm, association, corporation or other taxpayer on account of real estate taxes or personal property taxes the amount of such contribution credit in no event to exceed 25 per centum of the total taxes due the County of Prince Edward on real estate and personal property by such taxpayer. When such person, firm, association, corporation or other taxpayer shall have paid the balance remaining of such taxes due by such person, firm, association, corporation or taxpayer to the County of Prince Edward, Virginia, he shall thereupon be discharged from any further liability for taxes assessed against his, her or its personal or real property by the County of Prince Edward, Virginia for the year in which such taxes were payable.

(4) Upon denial of an application for credit, the Treasurer shall give notice to the applicant of his action within a reasonable time thereafter by mailing said notice to the Post Office address given in the application. Within 15 days after the mailing of said notice any applicant who feels aggrieved by the action of the Treasurer shall file with the Board or its designated agent a petition for a review of his action. Such petition shall state the reasons for his objection to the action of the Treasurer and shall be heard by the Board of Supervisors at its next meeting provided the said meeting is at least 15 days after the filing date of the petition for such hearing. Such hearing [fol. 122] shall be informally conducted and the aggrieved party shall have the right to offer evidence and to be represented by counsel.

Within 15 days after such hearing the Board shall notify such aggrieved party of its final action upon such application and any applicant feeling aggrieved thereby shall have the right of appeal to the Circuit Court of the County of Prince Edward as provided by law.

(5) The Treasurer of Prince Edward County shall in no case be liable upon his bond or otherwise for any credit

granted any person, firm, corporation, association or other taxpayer under this Ordinance provided the voucher, receipt or cancelled check and the affidavit required by this Ordinance executed by the person, firm, association or other taxpayer are filed with the Treasurer as herein required.

(6) It shall be unlawful and constitute a misdemeanor for any person falsely to claim a credit or seek to falsely claim a credit against his taxes not in accordance with the provisions of this Ordinance. Any person violating this Ordinance shall be subject to a fine not exceeding $300.00 or confinement in jail not exceeding thirty days.

[fol. 123]

APPENDIX

To The Brief of The State Board of Education And Superintendent of Public Instruction of the Commonwealth of Virginia

---

[fol. 124]

In the United States District Court

For the Eastern District of Virginia

Richmond Division

Civil Action No. 1333

Eva Allen, et al., Plaintiffs

v.

County School Board of Prince Edward County, et al., Defendants

---

Notice of Appeal—Filed November 7, 1962

Notice is hereby given that the State Board of Education of the Commonwealth of Virginia and Woodrow W. Wilkerson, Superintendent of Public Instruction of the Commonwealth of Virginia, hereby appeal to the United States

Court of Appeals for the Fourth Circuit from the judgment entered by orders in the above-styled cause on October 10, 1962, and from so much thereof:

(1) As fails to grant and, in effect, denies the motion filed May 1, 1961, on behalf of the above-named appellants to dismiss the Amended Supplemental Complaint as to them for any of the grounds stated therein, said motion having been timely renewed in accordance with subsequent orders of the Court reserving decision thereon and permitting such renewals;

(2) As denies the motion of all defendants, including [fol. 125] above-named appellants, to dismiss, or in the alternative to abstain from determining the issues presented in, the Amended Supplemental Complaint;

(3) As restrains and enjoins the above-named defendants from processing or approving any applications for State scholarship grants from persons residing in Prince Edward County so long as the public schools of Prince Edward County remain closed; and

(4) As holds that the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers, if this portion of said judgment order has such finality as permits appeal.

Robert Y. Button, Of Counsel for the State Board of Education of the Commonwealth of Virginia and the Superintendent of Public Instruction of the Commonwealth of Virginia.

Robert Y. Button, Attorney General of Virginia;
R. D. McIlwaine, III, Assistant Attorney General;
Supreme Court—State Library Building, Richmond 19, Virginia;

Frederick T. Gray, Special Assistant, State-Planters Bank Building, Richmond 19, Virginia.

[fol. 126] Certificate of service (omitted in printing).

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed May 1, 1961

Now come Woodrow W. Wilkerson, Superintendent of Public Instruction, and Colgate W. Darden, Lewis F. Powell, Jr., Gladys V. V. Morton, William J. Story, Jr., Leonard G. Muse, Louise F. Galleher and Mosby Garland Perrow, Jr., individually and constituting the State Board of Education, and move the Court to dismiss the amended supplemental complaint herein upon the following grounds:

1. The amended supplemental complaint alleges a new and distinct cause of action different from that which formed the basis of the original complaint and seeks relief foreign to the purposes of the original complaint against persons not parties to the original suit.

2. The Court is without jurisdiction to entertain the amended supplemental complaint because the suit sought to be maintained thereby is, in its direct purpose and effect, a suit against the Commonwealth of Vir- [fol. 127] ginia, which has not consented to be sued, and the judicial power of the United States does not extend to such suit.

3. The amended supplemental complaint fails to state a claim upon which relief can be granted.

4. The amended supplemental complaint does not state a case of which this Court should entertain jurisdiction in that the various provisions of Virginia law to which reference is made in the amended supplemental complaint have not been finally construed by the Supreme Court of Appeals of Virginia. As the constitutional issues presented by the amended supplemental complaint may be modified or removed if the provisions of law in question are first construed by the courts of the Commonwealth of Virginia, the amended supplemental complaint does not state a case of which a federal court should assume jurisdiction.

5. The amended supplemental complaint seeks to enjoin the enforcement, operation and execution of various statutes of the Commonwealth of Virginia upon the ground of the unconstitutionality of such statutes, and the requested relief may not be granted unless the application therefor is heard and determined by a district court of three judges in accordance with 28 U.S.C.A. 2284.

[fol. 128] 6. No actual controversy exists between the parties to this suit, nor is there any present clash of contending legal interests between the parties.

Woodrow W. Wilkerson, Superintendent of Public Instruction;

Colgate W. Darden, Lewis F. Powell, Jr., Gladys V. V. Morton, William J. Story, Jr., Leonard G. Muse, Louise F. Galleher, Mosby Garland Perrow, Jr., Individually and Constituting the State Board of Education,

By: ...., Of Counsel.

Frederick T. Gray, Attorney General of Virginia;
R. D. McIlwaine, III, Assistant Attorney General, Supreme Court—State Library Building, Richmond 19, Virginia.

Certificate of service (omitted in printing).

[fol. 129]

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANTS TO DISMISS OR IN THE ALTERNATIVE TO ABSTAIN FROM DETERMINING THE ISSUES PRESENTED IN THE AMENDED SUPPLEMENTAL COMPLAINT AND TO DISMISS PLAINTIFFS' MOTION FOR FURTHER RELIEF—Filed May 1, 1962.

Now come all defendants herein, to-wit: County School Board of Prince Edward County, Virginia; T. J. McIlwaine, Division Superintendent of Public Schools; Board

of Supervisors of Prince Edward County; J. W. Wilson, Jr., Treasurer of said County; the individual members of the said State Board of Education; and Woodrow W. Wilkerson, Superintendent of Public Instruction, and without waiving their several motions heretofore filed which remain undetermined, but severally renewing and insisting upon the same, move the Court as follows:

1. To dismiss the Amended Supplemental Complaint and Motion of Plaintiffs for Further Relief, or in the alternative to abstain from exercising jurisdiction over the same until the Supreme Court of Appeals of Virginia has had submitted to it and has had opportunity to decide the question set forth in this Court's opinion of August 23, 1961, and in its order of November 16, 1961.

2. As their grounds for said motion, defendants recite the following sequence of events:

A. In recognition of the Federal doctrine of abstention, this Court, in its memorandum opinion of August 23, 1961, said that:

> "The question that must and should be judicially determined is: Can the public schools, heretofore maintained in Prince Edward County, be closed in order to avoid the racial discrimination prohibited by the Fourteenth Amendment?"

[fol. 130] It further said:

> "Counsel for all parties having indicated that an appropriate suit would be forthwith instituted in the Virginia state courts, this Court will defer its ruling on this question until the Supreme Court of Appeals of Virginia has rendered its decision, provided that said suit is filed within sixty days from this date."

B. Within two and one-half weeks thereafter, to-wit, on September 8, 1961, Leslie Francis Griffin, Jr., an infant by L. F. Griffin, Sr., his father and next friend, and L. F. Griffin, Sr., two of the persons who are party plaintiffs in the instant case, acting through counsel who represent the

plaintiffs in the instant case, filed a petition for mandamus in the Supreme Court of Appeals of Virginia against the Board of Supervisors of Prince Edward County. The proceeding thereby instituted is hereinafter referred to as "the mandamus proceeding." In the mandamus proceeding the petitioners alleged, among other things, that by reason of Article IX of the Constitution of Virginia, and particularly Sections 129 and 136 thereof, and the several statutes which have been enacted pursuant thereto, it was the duty of the Board of Supervisors to appropriate money to be used by the County School Board for the maintenance and operation of public free schools within the County; and they also alleged that the failure so to appropriate funds was due to reaction to the opinion of the United States Court of Appeals for the Fourth Circuit in the instant case of May 5, 1959, and for no reason other than a determination not to appropriate money for the operation and maintenance of public schools wherein the races are taught together and the fact that by virtue of the opinions, orders and decrees entered in the instant case the School Board of the County would be required to permit children of [fol. 131] both races to be taught together in the public schools of the County. The prayer of the petition was that the Board of Supervisors be directed to appropriate and make available to the County School Board sufficient funds with which to operate and maintain such public schools as in the judgment of the School Board might be required, all of which will more fully appear from a copy of said petition found on page 5 of the printed Record in the mandamus proceeding, a copy of which Record is filed herewith and marked Exhibit "A." A copy of the petitioners' opening brief in the mandamus proceeding is filed herewith and marked Exhibit "B."

C. The Board of Supervisors of said County answered said petition as is shown by their answer appearing on page 8 *et seq.*, of said Record filed herein as Exhibit "A." Amid other things, they alleged that their acts did no violence to the Constitution of Virginia or the Constitution of the United States.

D. The pleadings in the mandamus proceeding having been brought to the attention of this Court, this Court in its order of November 16, 1961, recited:

> "It appearing from statement of counsel and the copy of the suit papers that an appropriate suit has been timely instituted in the Supreme Court of Appeals of Virginia, seeking a determination of the legal question posed in this Court's opinion of August 23, 1961, namely: 'Can the public schools, heretofore maintained in Prince Edward County, be closed in order to avoid the racial discrimination prohibited by the 14th Amendment?' "

[fol. 132] And this Court then determined:

> "The Court reserves further consideration of this question until there has been a final determination by the Supreme Court of Appeals of Virginia of the pertinent provisions of the United States Constitution, the Virginia Constitution and statutes adopted pursuant thereto."

E. The brief filed on behalf of the Board of Supervisors of Prince Edward County in the mandamus proceeding dealt extensively not only with the questions of State law but also with the questions of Federal law and whether the actions of the Board of Supervisors violated the Federal Constitution. A copy of said brief is filed herewith as Exhibit "C", and particular reference is made to pages 64-124 thereof.

F. Despite the terms of this Court's abstention order entered on November 16, 1961, the plaintiffs in the mandamus proceeding filed a reply brief in the mandamus proceeding on December 24, 1961, a copy of which is filed herewith marked Exhibit "D", in which they disclaimed the existence of a Federal question in the mandamus proceeding. The said brief contains a Section VI, beginning on page 20 thereof, the caption of which is "The Pleadings in This Case Present No Federal Question," and in which they asserted that not only were there no Federal questions involved in the mandamus proceeding but that this Court had:

"... abstained from decision of that question [i.e., the Federal question] pending this Court's [i.e., the Virginia Court's] determination whether *the Constitution and laws of Virginia* permit the respondent here, by withholding funds, to require public schools to be and to remain closed." (Emphasis added).

[fol. 133] No mention is made of the fact that the Federal Court was also awaiting the Virginia Court's determination of the questions arising under the Federal Constitution.

G. The plaintiffs in said mandamus proceeding having thus affirmatively disclaimed the submission of any Federal question to the Supreme Court of Appeals of Virginia and having thus removed any Federal question from the consideration of said Court, the Supreme Court of Appeals of Virginia, in its opinion handed down March 5, 1962, a copy of which is filed herewith and marked Exhibit "E", said:

> "The petitioners further point out in their brief that 'there are no Federal questions [involved] in this proceeding,' and we perceive none."

H. Accordingly, the plaintiffs, with knowledge gained from this Court's order of November 16, 1961, that this Court was anticipating from the case then pending in the Supreme Court of Appeals of Virginia a "final determination by the Supreme Court of Appeals of Virginia of the pertinent provisions of the United States Constitution" and with knowledge, gained from the answer and brief of defendant filed in said case, that the defendant was seeking such determination, nevertheless by their subsequent action of December 24, 1961, frustrated and prevented such determination of the Supreme Court of Appeals of Virginia, thereby failing to comply with this Court's order of abstention. That the plaintiffs were aware of the full scope of the questions which this Court desired to have decided in the Supreme Court of Appeals of Virginia is made manifest by paragraph 3 of the "Motion For Further Relief."

For the foregoing reasons, the Amended Supplemental [fol. 134] Complaint and the Motion for Further Relief should be dismissed, or at least all further proceedings in this instant case should be stayed and the plaintiffs directed to submit to the Supreme Court of Appeals the question whether the actions of the Board of Supervisors as outlined in said petition for mandamus violates any provisions of the Constitution of the United States, and in the event of the failure of the plaintiffs so to submit said question within a reasonable time fixed by the Court, the said Amended Supplemental Complaint and Motion for Further Relief should be dismissed.

County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Public Schools,

By: ...., Of Counsel.

Board of Supervisors of Prince Edward County and J. W. Wilson, Jr., Treasurer of said County,

By: ...., Of Counsel.

Members of the State Board of Education and Woodrow W. Wilkerson, Superintendent of Public Instruction,

By: ...., Of Counsel.

[fol. 135] Collins Denny, Jr., John F. Kay, Jr., Denny Valentine & Davenport, 1300 Travelers Building, Richmond 19, Virginia;

C. F. Hicks, DeHardit, Martin & Hicks, Gloucester, Virginia, Counsel for County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Public Schools;

J. Segar Gravatt, Blackstone, Virginia;

Frank N. Watkins, Watkins and Brock, Farmville, Virginia, Counsel for Board of Supervisors of Prince Edward County, and J. W. Wilson, Jr., Treasurer of said County;

Robert Y. Button, Attorney General of Virginia;

R. D. McIlwaine, III, Assistant Attorney General, Supreme Court—State Library Building, Richmond 19, Virginia;

Frederick T. Gray, Special Assistant, State-Planters Bank Building, Richmond 19, Virginia, Counsel for Members of the State Board of Education and Woodrow W. Wilkerson, Superintendent of Public Instruction.

[fol. 136] Certificate of service (omitted in printing).

IN UNITED STATES DISTRICT COURT

MOTION FOR FURTHER RELIEF—Filed March 26, 1962

Now come the plaintiffs in the above-entitled cause and move this Court for further relief and for final disposition of this case and in support thereof show:

1. On November 16, 1961, this Court entered its order enjoining the defendants from processing or approving any application for state scholarship grants from persons residing in Prince Edward County, and from approving and paying out any county funds and allowing of tax credits authorized by the so-called Grant-in-Aid ordinance or the Tax credit ordinance of July 18, 1960, during such time as the public schools in Prince Edward County remain closed.

2. It was further ordered that defendant, the School Board of Prince Edward County, comply with the April 22, 1960, order of the Court requiring the aforesaid defendant to make plans for the admission of pupils of the elementary schools of Prince Edward County without regard to race or color.

3. The question as to whether the public schools could be closed in order to avoid compliance with the guarantees [fol. 137] of the Fourteenth Amendment prohibiting racial discrimination was reserved for further consideration until there had been a final determination by the Supreme Court of Appeals of Virginia of the "pertinent provisions of the United States Constitution, the Virginia Constitution and the statutes adopted pursuant thereto."

4. Prior to the above cited order of this Court, plaintiffs filed an original petition for writ of mandamus in the Supreme Court of Appeals requesting that Court to determine whether Article IX of the Constitution of Virginia, and particularly Sections 129 and 136 thereof, imposes a mandatory duty upon the defendant, the Board of Supervisors of Prince Edward County, to appropriate sufficient funds for the use of the County School Board to maintain and operate such free public schools in Prince Edward County as the public welfare may require.

5. On March 5, 1962, that court ruled that the Constitution and the laws of the Commonwealth of Virginia placed a discretionary, not mandatory, duty on the defendant, Board of Supervisors of Prince Edward County, to appropriate sufficient funds to maintain free public schools in the county. Since this duty was not mandatory, the failure of the Board to appropriate any funds to maintain the schools in Prince Edward County was declared not to be subject to judicial relief.

6. The injunctive decrees and order entered by this Court on November 16, 1961, by their terms are to become inoperative twenty (20) days from the date of the entry of the judgment and order of the Supreme Court of Appeals, which would leave defendants free to appropriate state scholarship grants, grants-in-aid and tax credit to support and provide funds for persons to attend the Prince [fol. 138] Edward School Foundation in the absence of public schools being maintained in the county and contrary to the intendment of this Court in both its memorandum opinion and judgment.

7. The state law questions as to the duties of the defendants having been determined by the Supreme Court of Appeals, this Court must now decide the federal constitutional issues in the light of that state law determination, to wit:

(a) Whether the failure of the Board of Supervisors of Prince Edward County to exercise its discretionary obligations under Article IX of the Constitution of Virginia

and to appropriate and provide funds sufficient to maintain an efficient free public school system in Prince Edward County constitutes a violation of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States?

(b) Whether such failure to appropriate funds to maintain a free public school system in order to avoid the maintenance and support of public schools free of racial discrimination as required by the federal Constitution and the decisions and mandate of this Court constitutes a denial of equal protection of the laws and due process of law as secured by the Fourteenth Amendment to the Constitution of the United States?

(c) In the light of the determination of the Supreme Court of Appeals that the Board of Supervisors is under a discretionary and judicially unenforceable duty to appropriate sufficient funds to maintain a free public school system in Prince Edward County, does the failure of the Commonwealth of Virginia to provide out of state funds whatever monies are necessary for the maintenance of an efficient free public school system in Prince Edward County constitute a denial of equal protection and due process of [fol. 139] law as secured by the Fourteenth Amendment to the Constitution of the United States?

(d) The Commonwealth of Virginia, pursuant to Article IX of the Constitution of Virginia and Title 22, Code of Virginia, 1950, as amended, has established a procedure and formula for a state wide operation and maintenance of free public schools in Virginia. Only in Prince Edward County is this formula and procedure not being effectuated. Does the failure, therefore, to effectuate and to implement the formula and procedure for maintenance of an efficient public school system in Prince Edward County, as provided in Article IX of the Constitution of Virginia, and Title 22, Code of Virginia, 1950, as amended, constitute a denial of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States?

(e) Does the failure effectuate the procedure and formula aforesaid for the maintenance and operation of free

public schools in Prince Edward County, in the light of the notorious and well-known fact that this formula and procedure are not being followed in Prince Edward County for the sole reason that local authorities are seeking to avoid compliance with the Fourteenth Amendment guarantee against racial discrimination, constitute a denial of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States?

8. It is plaintiffs' contention that the facts and the law require that this Court answer each of the above-cited questions in the affirmative and hold that the failure of the defendant Board of Supervisors to appropriate funds sufficient for free public schools, and the failure of the Commonwealth to provide free public schools, and the failure of the Commonwealth to effectuate the formula and procedure for the operation of the free public schools in Prince [fol. 140] Edward County constitute denials of equal protection and due process as secured under the Fourteenth Amendment to the Constitution of the United States and, therefore, that this Court should, after hearing, grant further and final relief to the plaintiffs, to wit:

(a) Enjoin the defendant Board of Supervisors from refusing to appropriate sufficient funds to maintain and operate an efficient public school system in Prince Edward County on the grounds that such failure constitutes a denial of equal protection and due process; or

(b) Enjoin the Commonwealth of Virginia from refusing to provide sufficient funds for the operation of the free public school system in Prince Edward County, in the light of the Board of Supervisors' failure to do so on the grounds that the state's failure to maintain a free public school system in the County constitutes a denial of due process and equal protection guaranties of the Fourteenth Amendment.

(c) Enjoin the Commonwealth of Virginia; the State Board of Education; the County School Board of Prince Edward County; T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County; the Board of Super-

visors of Prince Edward County; J. W. Wilson, Jr., Treasurer of Prince Edward County; Woodrow W. Wilkerson, Superintendent of Public Instruction; Garland Gray, Lewis F. Powell, Jr., Anne Dobie Peebles, C. Stuart Wheatley, Jr., Leonard G. Muse, Louise F. Galleher and Mosby Garland Perrow, Jr., individually and as constituting the State Board of Education; and all other persons who may be concerned, as well as their assigns, successors in office and persons in concert with them from failing and refusing to implement and effectuate in Prince Edward County the provisions of Article IX of the Constitution of Virginia and [fol. 141] Title 22, Code of Virginia, 1950, as amended, establishing the state-wide procedure and formula for the maintenance and operation of free public schools in Virginia, on the ground that the failure to implement and effectuate these provisions as aforesaid constitutes a denial of equal protection and due process as secured by the Fourteenth Amendment to the Constitution of the United States.

(d) Make final and permanent the injunctive decrees heretofore entered against the defendants in the November 16, 1961, order of this Court.

9. Plaintiffs request a speedy hearing and early determination of the questions and issues herein raised.

Respectfully submitted,

S. W. Tucker, Of Counsel for Plaintiffs.

Robert L. Carter, 20 West 40th Street, New York 18, New York;

S. W. Tucker, Henry L. Marsh, III, 214 East Clay Street, Richmond 19, Virginia;

Otto L. Tucker, 901 Princess Street, Alexandria, Virginia, Attorneys for Plaintiffs.

Certificate of service (omitted in printing).

[fol. 143] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

PRINCE EDWARD COUNTY SCHOOL BOARD, et al., Defendants.

UNITED STATES, Applicant for Intervention.

MOTION TO INTERVENE AS A PLAINTIFF
AND TO ADD DEFENDANTS—Filed April 26, 1961

The United States, by Robert F. Kennedy, Attorney General, and Joseph S. Bambacus, United States Attorney for the Eastern District of Virginia, moves for leave to intervene as a plaintiff in this action and to file the complaint in intervention, a copy of which is attached hereto, and to add as parties defendant the persons and corporations named as additional defendants in the complaint in intervention.

As appears from the complaint in intervention, intervention by the United States, and the adding of the persons and corporations named in the complaint in intervention as parties defendant, is necessary in order to prevent the circumvention and nullification of the prior orders of this Court and to safeguard the due administration of justice and the integrity of the judicial processes of the United States.

[fol. 144] The claim of the United States, as set forth in the complaint in intervention, involves questions of both law and fact in common with those raised by the amended supplemental complaint filed by the plaintiffs herein.

This motion is made under and pursuant to Sections 309 and 316 of Title 5 of the United States Code and Rule 24 of the Rules of Civil Procedure.

Robert F. Kennedy, Attorney General;

Burke Marshall, Assistant Attorney General;

Joseph S. Bambacus, United States Attorney.

[fol. 145] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

PRINCE EDWARD COUNTY SCHOOL BOARD, et al., Defendants.

UNITED STATES, Applicant for Intervention.

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION OF THE UNITED STATES OF AMERICA
TO INTERVENE AND TO ADD PARTIES DEFENDANT
—Filed April 26, 1961

I.

The District Courts of the United States have jurisdiction to enjoin interference with and obstruction to the implementation of their orders requiring operation of public schools on a racially non-discriminatory basis.

Faubus v. *United States,* 254 F. 2d 797 (C.A. 8, 1958), cert. den. 358 U.S. 829;

Kasper v. *Brittain,* 245 F. 2d 92 (C.A. 6, 1957), cert. den. 355 U.S. 834;

Bullock v. *United States,* 265 F. 2d 683 (C.A. 6, 1959), cert. den. 360 U.S. 932;

Kelley v. *Board of Education of the City of Nashville,* 2 R.R.L.R. 976-983 (D.C. M.D. Tenn., 1957).

[fol. 146]

II.

Obstruction to and circumvention of school desegregation decrees violate the interests of the United States in the due administration of justice as well as the interest of the original plaintiffs in the desegregation suit.

Faubus v. *United States, supra;*

Bush v. *Orleans Parish School Board,* 190 F. Supp. 861 (D.C. E.D. La., Nov. 30, 1960);

Bush v. *Orleans Parish School Board,* —— F. Supp. —— (D.D. E.D. La., Mar. 3, 1961).

III.

The United States, in its sovereign capacity, may seek relief in its courts against the violation of such interest.

In re Debs, 158 U.S. 564, 584;

United States v. *California,* 322 U.S. 19;

Sanitary District of Chicago v. *United States,* 266 U.S. 405, 425-6;

Kern River Company v. *United States,* 257 U.S. 147, 154-5;

United States v. *San Jacinto Tin Company,* 125 U.S. 273, 278-80, 248-51;

United States v. *Louisiana, sub nom. Bush* v. *Orleans Parish School Board,* 188 F. Supp. 916 (D.C. E.D. La., Nov. 30, 1960);

Faubus v. *United States, supra;*

Bush v. *Orleans Parish School Board* (Mar. 3, 1961), *supra.*

IV.

The closing of public schools to avoid compliance with a desegregation decree while schools elsewhere in the state remain open is an unlawful obstruction to the carrying out of such decree, and the diversion of state funds from the [fol. 147] closed schools to privately operated segregated schools is an unlawful circumvention of such decree.

James v. *Almond,* 170 F. Supp. 331 (D.C. E.D. Va., 1959), appeal dismissed 359 U.S. 1006;

James v. *Duckworth,* 170 F. Supp. 342 (D.C. E.D. Va., 1959);

Aaron v. *McKinley,* 173 F. Supp. 944 (D.C. E.D. Ark., 1959), aff'd. *sub nom. Faubus* v. *Aaron,* 361 U.S. 197;

And see *Brown* v. *Board of Education,* 347 U.S. 483 (1954) at p. 493;

Bush v. *Orleans Parish School Board,* 188 F. Supp. 916, 928 (D.C. E.D. La., 1960).

V.

The United States having a claim for relief against unlawful obstruction and circumvention of this Court's prior decrees, and the claim having questions of law and fact in common with those raised by the plaintiffs' amended supplemental complaint, the motion to intervene should be granted.

5 U. S. C. 309;

5 U. S. C. 316;

Rule 24, Rules of Civil Procedure;

And see *Securities & Exchange Commission* v. *United States Realty & Improvement Co.,* 310 U.S. 434.

Burke Marshall, Assistant Attorney General;

Joseph S. Bambacus, United States Attorney;

St. John Barrett, Department of Justice.

[fol. 148]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

UNITED STATES OF AMERICA, Intervenor,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY; T. J. MCILWAINE, Division Superintendent of Schools of Prince Edward County; BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY; J. W. WILSON, JR., Treasurer of Prince Edward County; PRINCE EDWARD SCHOOL FOUNDATION, a Corporation; THE COMMONWEALTH OF VIRGINIA; WOODROW W. WILKERSON, State Superintendent of Public Instruction of Virginia; COLGATE W. DARDEN, LEWIS F. POWELL, JR., GLADYS V. V. MARTIN, WILLIAM F. STORY, JR., LEONARD G. MUSE, LOUISE F. GALLEHER and MOSBY GARLAND PERROW, JR., members of the State Board of Education of Virginia, and SYDNEY C. DAY, Comptroller of Virginia, Defendants.

COMPLAINT IN INTERVENTION

The United States, as a claim against the defendants, alleges that:

1. This proceeding is brought against the County School Board of Prince Edward County (hereafter referred to [fol. 149] as the County School Board; T. J. McIlwaine, Division Superintendent of Schools of Prince Edward

County; the Board of Supervisors of Prince Edward County (hereafter referred to as the Board of Supervisors); J. W. Wilson, Jr., Treasurer of Prince Edward County; Colgate W. Darden, Lewis F. Powell, Jr., Gladys V. V. Martin, William F. Story, Jr., Leonard G. Muse, Louise F. Galleher and Mosby Garland Perrow, Jr., members of the State Board of Education of Virginia, and Woodrow W. Wilkerson, Superintendent of Public Instruction of Virginia, each of whom has been previously named and served as a defendant in this case.

2. This proceeding is also brought against the Commonwealth of Virginia (hereafter referred to as the State), the Prince Edward School Foundation, a corporation (hereafter referred to as the Foundation), and Sydney C. Day, Jr., Comptroller of Virginia.

3. The Commonwealth of Virginia is a state of the United States. Its principal executive and legislative offices are located in Richmond, Virginia.

4. Sydney C. Day, Jr., is Comptroller of Virginia, and as such is authorized under the laws of Virginia to draw warrants upon the state treasury for the disbursement of state funds for school and educational purposes. He resides in Richmond, Virginia.

5. The Prince Edward School Foundation is a corporation organized and existing under the laws of Virginia. Its office and principal place of business is in Prince Edward County, Virginia.

6. Section 129 of the constitution of Virginia requires that the General Assembly establish and maintain a system of public free schools throughout the state. In dis-[fol. 150] charge of this responsibility the General Assembly has enacted legislation, appearing in Title 22 of the Code of Virginia, providing for such a system.

7. At all times herein mentioned prior to June 1959, the County School Board, the Division Superintendent, the Board of Supervisors, the State, the State Board of Education and the State Superintendent of Public Instruction maintained a system of public free schools in Prince Ed-

ward County. This system of schools provided public education at the elementary and high school levels for approximately 3100 pupils, of whom approximately 1700 were Negro and 1400 white. Separate schools were maintained for the white and Negro races.

8. On May 17, 1954, the Supreme Court of the United States reversed the judgment of this Court entered in this case on March 7, 1952, and held that state operation of racially segregated schools in Prince Edward County was a denial of the equal protection of the laws secured by the Fourteenth Amendment to the Constitution.

9. In July 1954 the Board of Supervisors of Prince Edward County adopted a resolution expressing opposition to the operation of racially non-segregated public schools.

10. On July 18, 1955, this Court, having received the mandate of the Supreme Court in this case, entered its order requiring that the public schools of Prince Edward County be racially desegregated with all deliberate speed.

11. On May 3, 1956, the Board of Supervisors held a public meeting in which they received and directed to be filed with the records of the Board a petition signed by [fol. 151] approximately 4000 white citizens of Prince Edward County stating that they preferred to abandon public schools rather than to have the children of the county educated on a racially non-segregated basis. At the meeting the Board of Supervisors adopted a resolution declaring it to be the policy of the Board that no county tax levy should be made for the operation of public schools on a racially non-segregated basis. At the meeting those in attendance adopted a "declaration of conviction" asking the Board of Supervisors to enact ordinances and regulations to prohibit the levying of any tax or the appropriation of any funds for the operation of "racially-mixed schools within Prince Edward County to the end that all public schools of the county may be closed upon the entry of a court order requiring the mixing of the races in any school of this county." This declaration was

received by the Board of Supervisors and filed with the records of the Board. Copies of the affirmation, resolutions and declaration of convictions are attached hereto as Appendix A.

12. On May 5, 1959, the Court of Appeals for the Fourth Circuit reversed an order entered by this Court on August 4, 1958, and directed the entry of an order requiring that the public high schools of Prince Edward County be operated on a racially non-discriminatory basis commencing with the fall semester, 1959.

13. On May 26, 1959, William F. Watkins, Jr., W. J. Gills, Jr., and J. Barrye Wall, Jr., each a resident of Prince Edward County, executed articles of incorporation for the Prince Edward School Foundation for the purpose of operating, through the instrumentality of the Foundation, elementary and high schools in Prince Ed- [fol. 152] ward County for the education of children of the white race, exclusively.

14. On May 29, 1959, the State Corporation Commission of Virginia issued a certificate of incorporation to the Prince Edward School Foundation to operate non-profit private schools in Prince Edward County, Virginia.

15. On June 2, 1959, the Board of Supervisors adopted a resolution that the Board would levy no taxes for the operation of public schools in Prince Edward County for the 1959-60 school year. In connection with this resolution the Board of Supervisors, through its chairman, issued a formal statement that it was not possible to operate the public schools of Prince Edward County within the terms of the order of this Court.

16. On June 3, 1959, the Board of Supervisors voted its approval of a county budget making no provision for operation of public schools. The Board fixed the tax levy for the fiscal year 1959-60 at $1.60 per one hundred dollars of assessed valuation on all taxable property located outside of Farmville, at $1.50 for all property located in Farmville other than personal property classified as merchants' capital invested in the county, and $0.30 upon all

such merchants' capital. The corresponding levies upon these categories of property had been, in both 1957 and 1958, $3.40, $3.30, and $0.80, respectively.

17. Public schools in Prince Edward County were not opened for the fall semester 1959 and have not been open since that time.

18. In September 1959 the Prince Edward School Foundation employed teachers and offered courses of [fol. 153] instruction for white children residing in Prince Edward County. Approximately 1400 white children, comprising virtually the entire white population of school age in Prince Edward County, were enrolled by the Foundation. No tuition or other fees were exacted for the instruction of these students.

19. The Prince Edward School Foundation employed for the school year 1959-1960, and is now employing, approximately fifty-nine of the seventy white teachers who had been employed by the County School Board the preceding year and who had taught in the public schools.

20. The Prince Edward School Foundation financed the operation of schools for white children during the 1959-60 school year through contributions. In soliciting contributions the Foundation urged property owners to donate sums saved by them on account of the reduction in tax levies for the fiscal year 1959-60 as described in paragraph 16.

21. On April 22, 1960, this Court, on remand from the decision of the Court of Appeals of May 5, 1959, entered an order enjoining the County School Board and the Division Superintendent from any action that regulates or affects on the basis of race or color the admission, enrollment or education of Negro children to the public high schools of the county and requiring the County School Board and the Division Superintendent to make plans for the admission of pupils in the elementary schools of the county without regard to race or color, and to receive and consider applications to that end at the earliest practical day.

22. In June 1960 the Board of Supervisors adopted a county budget for fiscal 1960-61 providing approximately [fol. 154] $270,000 for educational purposes, but without providing funds to permit operation of the public schools. On the basis of this budget the Board of Supervisors fixed the tax levy for the fiscal year 1960-61 at $4.00 per one hundred dollars of assessed valuation on all taxable property outside Farmville, at $3.90 for all property located in Farmville other than personal property classified as merchants' capital invested in the county, and $0.80 upon all such merchants' capital.

23. On July 18, 1960, the Board of Supervisors, acting under authority of Sec. 19.1 of Title 58 of the Code of Virginia, adopted an ordinance requiring the County Treasurer to allow as a credit against real and personal property taxes due the county any contributions, not in excess of 25 per cent of the amount of the taxes due, made by a taxpayer to any non-profit, non-sectarian private school located within Prince Edward County. The text of this ordinance is attached hereto as Appendix B.

24. On July 18, 1960, the Board of Supervisors, acting under authority of Chapter 7.3 of Title 22 of the Code of Virginia, adopted an ordinance providing for grants of county funds to parents of children between the ages of six and twenty years, residing in Prince Edward County, who enrolled in private non-sectarian elementary or secondary schools within the county, or in public schools within the State of Virginia. The ordinance provides that each grant shall be not less than $100 per year for each child. The text of this ordinance is attached hereto as Appendix C.

25. The only private, non-sectarian elementary or sec- [fol. 155] ondary schools operating in Prince Edward County on July 18, 1960, or which have been established and operating since that time, attendance at which qualifies a student to a tuition grant under the Board of Supervisors ordinance referred to in the preceding paragraph, are the schools of the Prince Edward School Foundation.

26. Taxpayers of Prince Edward County have, since the adoption of the ordinance referred to in paragraph 23, claimed $58,866 in tax credits on account of contributions to the Prince Edward School Foundation.

27. The Foundation has 1376 white children enrolled for the 1960-1961 school year.

28. The Foundation has financed and is financing its educational program for the 1960-1961 school year by charging tuition in the amount of $240 for each child enrolled in elementary schools and $265 for each child enrolled in high school, as well as by contributions.

29. Of the $240 in tuition paid to the Foundation for each elementary school student, $100 has been or is being reimbursed to the parent or guardian by Prince Edward County pursuant to the ordinance of the Board of Supervisors described in paragraph 24, and $125 has been or is being reimbursed by the State pursuant to the provisions of the Code of Virginia, Title 22, Chapter 7.3, Article 1. Of the $265 in tuition paid to the Foundation for each high school student, $100 has been or is being reimbursed by Prince Edward County pursuant to the ordinance of the Board of Supervisors described in paragraph 24, and $150 has been or is being reimbursed by the State pursuant to the provisions of the Code of Virginia, Title 22, Chapter 7.3, Article 1.

[fol. 156] 30. The County School Board has been and is receiving and processing applications for reimbursement of tuition as described in the preceding paragraph. For the 1960-61 school year, the County School Board has received and approved 1,325 applications by white children attending the schools of the Prince Edward School Foundation. It has approved no other applications for tuition grants for attendance in "non-sectarian private" schools.

31. On December 6, 1960, a number of Negro residents of Prince Edward County presented a signed petition to the Board of Supervisors asking that the public schools of the county be reopened. This request was rejected by the Board of Supervisors.

32. Since June 1959 the County School Board, the Division Superintendent, the Board of Supervisors, the State, the State Board of Education and the State Superintendent of Public Instruction have failed and refused to maintain a system of public free schools in Prince Edward County. The purpose and effect of this failure and refusal has been and is to prevent the operation of public schools in Prince Edward County in compliance with the orders of this Court requiring their operation on a racially nondiscriminatory basis.

33. Since June 1959 the County School Board, the Board of Supervisors, the State, the State Board of Education and the State Superintendent of Public Instruction have maintained the schools of the Prince Edward School Foundation for the education of white children residing in Prince Edward County.

34. Since June 1959 no schools have been maintained and operated in Prince Edward County for the education [fol. 157] of Negro children residing in the county.

35. A system of public free schools is being maintained by the State, the State Board of Education and the State Superintendent of Public Instruction in all counties and cities of the State other than Prince Edward County, and warrants for payment of state funds in connection with the maintenance of such system have been and are being drawn upon the state treasury by the Comptroller.

36. The maintenance and operation of the schools of the Prince Edward School Foundation on a racially discriminatory basis, with the financial assistance of the county and State, circumvents this Court's order requiring the public schools of Prince Edward County to be operated without racial discrimination.

37. The failure and refusal of the County School Board, the Division Superintendent, the Board of Supervisors, the State, the State Board of Education and the State Superintendent of Public Instruction to maintain and operate a system of public free schools in Prince Edward County, while such a system is being maintained and operated

throughout the rest of the state, denies to Negro residents and taxpayers of the county rights secured by the Fourteenth Amendment to the Constitution.

38. Plaintiff, having the duty to represent the public interest in the administration of justice and the preservation of the integrity of the processes of this Court, has no remedy against the unconstitutional and illegal acts of the defendants herein named, other than this action for an injunction, and unless such injunction issue the plaintiff will [fol. 158] suffer immediate and irreparable injury consisting of the impairment of the integrity of the judicial process, the obstruction of the due administration of justice, and the deprivation of rights under the Constitution and laws of the United States.

Wherefore, Plaintiff respectfully prays that this Court enter an order:

(a) enjoining the County School Board, the Division Superintendent, the Board of Supervisors, the State, the State Board of Education, and the State Superintendent of Public Instruction from failing or refusing to maintain in Prince Edward County a system of public free schools;

(b) enjoining the County School Board, the Board of Supervisors, the State, the State Board of Education, the State Superintendent of Public Instruction, and the State Comptroller from approving, paying, or issuing warrants for the payment of tuition grants for students attending the Prince Edward School Foundation, for so long and during such period as the public schools of Prince Edward County are closed and a system of public free education is not maintained in Prince Edward County;

(c) enjoining the Board of Supervisors and the County Treasurer from allowing any credit to taxpayers on account of contributions to the Prince Edward School Foundation for so long and during such period as the public schools of Prince Edward County [fol. 159] are closed and a system of public free education is not maintained within the county;

(d) enjoining the State, the State Board of Education, the State Superintendent of Public Instruction, and the State Comptroller from approving, paying, or issuing warrants for the payment of any funds of the State for the maintenance or operation of public schools anywhere in Virginia for so long and during such period as the public schools of Prince Edward County are closed and a system of public free schools is not maintained within the County, and

(e) enjoining all of the defendants from otherwise interfering with, obstructing, or circumventing the orders of this Court requiring operation of the public schools of Prince Edward County on a racially non-discriminatory basis.

Plaintiff further prays that the Court grant such additional relief as the interests of justice may require.

Robert F. Kennedy, Attorney General; Burke Marshall, Assistant Attorney General; Joseph S. Bambacus, United States Attorney.

[fol. 160]

Appendix A to Complaint in Intervention

Affirmation

We, the undersigned citizens of Prince Edward County, Va., hereby affirm our conviction that the separation of the races in the public schools of this county is absolutely necessary and do affirm that we prefer to abandon public schools and educate our children in some other way if that be necessary to preserve separation of the races in the schools of this county.

We pledge our support of the Board of Supervisors of Prince Edward County in their firm maintenance of this policy.

Note.—This affirmation has been signed by 4,216 citizens over 21 years of age in the county which is 1,000 more than the total qualified registered voters.

Resolutions

At a regular meeting of the Board of Supervisors of Prince Edward County held at the courthouse thereof, on the 3rd day of May 1956, at which meeting all members of the board were present, the following resolutions were adopted unanimously:

I

Be it resolved by the board of supervisors, That we do hereby express to the people of Prince Edward County our gratitude that they have made known to this board so clearly their views upon the grave problems with which we are confronted with respect to our schools. The support of our people makes the burden of our responsibilities lighter and the course of our future action clearer. We trust the people of the county will continue to make known to us their views as we go forward to meet our problems together.

II

Be it resolved, That the Board of Supervisors of Prince Edward County as the elected representatives of the people of Prince Edward County, do hereby declare it to be the policy and intention of said board in accordance with the will of the people of said county that no tax levy shall be made upon the said people nor public revenue derived from local taxes shall be appropriated for the operation and maintenance of public schools in said county wherein white and colored children are taught together under any plan or arrangement whatsoever.

III

Be it resolved by the Board of Supervisors of Prince Edward County, That the Governor of Virginia, the superintendent of public instruction, and the State Board of Education are hereby requested to pay any State revenue to the School Board of Prince Edward County in support of public schools in accordance with the policy adopted by

the board of supervisors of said county for the payment of local revenue to said school board.

[fol. 161] IV

Be it further resolved by the Board of Supervisors of Prince Edward County, That the "Affirmation" signed by citizens and school patrons of the county is hereby received and directed to be filed with records of the Board and it is further resolved that the "Statement of Convictions and Purposes" adopted by the citizens of this county present at this meeting (being approximately 250 in number) be received by the board and it is directed that the same be filed with the records of the board.

And the clerk of this board is directed to prepare copies of the affirmation with a statement attached thereto showing the number of the citizens whose names are signed thereto together with copies of the "Statement of Convictions and Purposes" and that one copy of each be transmitted to the School Board of Prince Edward County, the Governor of Virginia, the superintendent of public instruction, the attorney general of Virginia, the State Board of Education, Representative J. H. Daniel and Senator J. D. Hagood, together with a copy of this resolution, and of the resolution this day adopted stating the policy and intention of this board with respect to the levy of taxes and appropriation of local revenue for school purposes.

V

Be it resolved by the Board of Supervisors of Prince Edward County, That the Governor be and he is hereby respectfully requested not to call a special session of the Legislature of Virginia for the purpose of presenting any legislative plan which would require, permit, or authorize under the laws of Virginia the teaching of white and Negro children together in the public schools of Prince Edward County.

Horace Adams, Clerk of the Board.

Declaration of Convictions

(Adopted May 3, 1956, by citizens of
Prince Edward County, Va.)

The power of the Federal courts being once again invoked against the administrative officers of our public schools for the purpose of causing children of the white and Negro race to be taught together therein, we the people of Prince Edward County, Va., deem it appropriate that we should make known to all men our convictions and our purposes.

We first affirm our deep and abiding loyalty and devotion to our country and its institutions. We acknowledge the Constitution to be the supreme law of the land and the bulwark of our liberties, ever subject to the sovereign powers reserved by it to the States and to the people. We know that the liberties of all Americans of all races rests upon the Constitution and the division of powers ordained therein. We deem it the obligation of free men to preserve the powers reserved under the Constitution [fol. 162] to the States and to the people and to preserve the constitutional separation of the powers of government in the legislative, executive, and judicial branches separately.

We believe that the educational, social, and cultural welfare and growth of both the white and Negro races is best served by separation of the races in the public schools.

We believe the tranquility, harmony, progress, and advancement of the Negro and the white races, who must live together in Virginia and in Prince Edward County, is absolutely dependent upon the mutual good will and mutual respect of each race for the other.

We believe that a policy which undertakes to force the association of one race with the other against the will of either, by court decree under threat of fine or imprisonment, is destructive of mutual good will and respect, breeds resentment and animosities, and is injurious to the true interests of both races.

Education Parents' Duty

We believe that the molding of the minds and characters of our children is the sacred duty and the priceless natural right and obligation of parents.

Freedom of decision with respect to these considerations touching as they do the most intimate relations of the people of our community and the most cherished natural rights and duties of parenthood is absolutely essential to the maintenance, operation, management, and control of our public schools. We conceive this freedom to be among the sacred rights "retained by the people" under the ninth amendment of the Federal Constitution.

Among the reserved rights and powers of the States guaranteed to the State of Virginia under the 10th Amendment, is the power to maintain racially separate public schools. We do not perceive that the exercise of this power has ever been prohibited to the States by any provision of the Federal Constitution. We believe that this power can be prohibited to the States only by the States themselves. To concede the right of a Federal court to withdraw this power from the individual States is to concede that all rights and powers of the States and of the people are enjoyed at the sufferance of the judiciary and that the guaranties of the liberties of the people are no longer fixed in the Constitution itself.

We do not intend to speak disrespectfully. The gravity of the issues requires that we speak plainly. By its decision of May 17, 1954, and subsequent decisions the Supreme Court of the United States has flagrantly exceeded its lawful and intended authority, trespassed upon the rights of the people and dangerously encroached upon the reserved rights of the States.

Holding these convictions, it is not possible for us to submit the children of Prince Edward County to conditions which we most deeply and conscientiously believe to be pernicious. Nor can we as the heirs of liberty, pur- [fol. 163] chased at so great a sacrifice by those who have gone before, submit to this judicial breaking of the constitutional chains forged to restrain tyranny for all generations of Americans. We, therefore, pledge ourselves

firmly to use every honorable, legal and constitutional means at our command to oppose this assault upon the Constitution and upon the liberties of our people.

Prohibit Funds

Therefore, if courts refuse to recognize these most fundamental, intimate, and sacred rights and the profound necessity that they be respected, then we proclaim our resort to that first American tenet of liberty—that men should not be taxed against their will and without their consent for a purpose to which they are deeply and conscientiously opposed. We ask our board of supervisors as our legislative representatives to proceed at the appropriate time to enact and adopt whatever ordinances and resolutions may be required to prohibit the levying of any tax or the appropriation of any funds for the operation of racially mixed schools within Prince Edward County to the end that all public schools of the county may be closed upon the entry of a court order requiring the mixing of the races in any school of this county.

We further call upon our school board to make known to the district court the determination of the people of Prince Edward County here expressed. The issues are too profound and the consequences to our people too grave to leave any doubt of the impossibility of our compliance or of the resolute mind of our people. An order to mix the races in our schools can only result in the destruction of the opportunity for a public education for all children of this county.

Month-to-Month Basis

We also call upon the Governor of Virginia and all officials of the Commonwealth in control thereof to pay State revenue to Prince Edward County for school purposes in accordance with the policy adopted by the board of supervisors for the payment of local funds for school purposes, thus and thereby giving effect to the interposition resolution of the General Assembly of Virginia, adopted on February 1, 1956, fixing the policy of this Com-

monwealth, "to take all appropriate measures, honorably, legally, and constitutionally available to us, to resist this illegal encroachment upon our sovereign power."

It is with the most profound regret that we have been forced to set this course. The history of the people of Prince Edward County demonstrates their love and appreciation of the value of educational opportunity. We act with no animus toward any man or body of men. We do not act in oppression of the Negro people of this county. We propose, in every way that we can, to preserve every proper constitutional right of all the people of Prince Edward County. However deeply convinced as we are of the wrongness and imprudence of intimate racial integration, we cannot and will not place merely supposed rights, newly created by judicial mandate, above the conscience of our people and above rights and powers, which for [fol. 164] generations have been exercised honorably and constitutionally by the people of our county.

It is our earnest hope that other counties and the Commonwealth of Virginia will repudiate the spurious allurements of expediency and stratagem in order that Virginia may stand as she has always stood, dedicated to the protection of the rights of a free people against tyranny from any quarter. If we fail in this solemn obligation now our rights will be extinguished one by one.

[fol. 165]

Appendix B to Complaint in Intervention

Be It Ordained by the Board of Supervisors of Prince Edward County, Virginia that:

(1) Contributions made by any person, association, firm, corporation or other taxpayer of the County of Prince Edward, Virginia to a nonprofit, nonsectarian private school located within said County of Prince Edward, Virginia may be deducted from the real and personal property taxes due the County of Prince Edward, Virginia by the person, association, firm, corporation or other taxpayer making such contribution for the year during which said contribution was made, subject to the limitations set forth in this ordinance.

(2) For the purpose of this Ordinance, the term "private school" shall mean only those nonprofit, nonsectarian private elementary and secondary schools either in operation during the year for which the tax deduction or credit is claimed or chartered to begin operation within the year succeeding that for which the tax deduction or credit is claimed, which schools are located in the County of Prince Edward, Virginia and which offer or will offer during the time herein set forth a course of systematic educational instruction of not less than one hundred eighty days duration per school year or the substantial equivalent thereof.

(3) No credit shall be allowed for any contribution made to any private school under the provisions of this ordinance unless the person, association, firm, corporation or other taxpayer seeking such credit files with the Treasurer of the County of Prince Edward, Virginia at the time his, her, or its taxes are due and payable. To wit: On or before December the fifth in the year in which the levy is made, a voucher, receipt or cancelled check showing the amount and date of the contribution and to whom made and his, her, or its affidavit setting forth the name and address of the school to which the contribution was made, the date thereof, the name and address of the person, association, firm, corporation or other taxpayer of the County of Prince Edward, Virginia making such contribution, the amount thereof, and declaring that no scholarship, reduction in fees or charges, rebate or remission of charges or other benefit was granted such person, association, firm, corporation or other taxpayer or his or her children, or any child for which said person, association, firm, corporation or other taxpayer was the legal guardian or other person in loco parentis to such child directly or indirectly as a result of such contribution and declaring that no such refund, rebate, reduction in fees or charges or remission of charges or other benefit will be made to such person, association, firm, corporation or taxpayer on account of such contribution.

Upon the presentation of such affidavit and supporting evidence of payment to the Treasurer of the County of Prince Edward he shall deduct from the amount of taxes

due the County of Prince Edward by such person, firm, association, corporation or other taxpayer on account of real estate taxes or personal property taxes the amount of such contribution, in no event to exceed 25 per centum of the total taxes due the County of Prince Edward on real estate and personal property by such taxpayer. When such person, firm, association, corporation or other taxpayer shall have paid the balance remaining of such taxes due by such person, firm, association, corporation or taxpayer to the County of Prince Edward, Virginia he shall thereupon be discharged from any further liability for taxes assessed against his, her or its personal or real property by the County of Prince Edward, Virginia for the year in which such taxes were payable.

[fol. 166] (4) Upon denial of an application for refund, the Treasurer shall give notice to the applicant of his action within a reasonable time thereafter by mailing said notice to the Post Office address given in the application. Within 15 days after the mailing of said notice any applicant who feels aggrieved by the action of the Treasurer shall file with the Board or its designated agent a petition for a review of this action. Such petition shall state the reasons for his objection to the action of the Treasurer and shall be heard by the Board at its next meeting provided the said meeting is at least 15 days after the filing date of the petition for such hearing. Such hearing shall be informally conducted and the aggrieved party shall have the right to offer evidence and to be represented by counsel.

Within 15 days after such hearing the Board shall notify such aggrieved party of its final action upon such application and any applicant feeling aggrieved thereby shall have the right of appeal to the Circuit Court of the County of Prince Edward as provided by law.

(5) The Treasurer of Prince Edward County shall in no case be liable upon his bond or otherwise for any credit granted any person, firm, corporation, association or other taxpayer under this Ordinance provided the voucher, receipt or cancelled check and the affidavit required by this Ordinance executed by the person, firm, association or other taxpayer are filed with the Treasurer as herein required.

(6) It shall be unlawful and constitute a misdemeanor for any person falsely to claim a credit or seek to falsely claim a credit for a contribution as a credit against his taxes not in accordance with the provisions of this Ordinance. Any person violating this Ordinance shall be subject to a fine not exceeding $300.00 or confinement in jail not exceeding thirty days.

(7) If any part, section, portion or provision of this Ordinance or the application thereof to any person or circumstance be held invalid by a court of final resort, such holding shall not affect any part, section, portion, provision or application of this Ordinance which can be given effect without the part, section, portion, provision or application so held invalid; and to this end, the parts, sections, portions, provisions and applications hereof are declared severable.

(8) This Ordinance is passed pursuant to Chapter 191 of Acts of General Assembly of 1960, Section 58-19.1 of the Code of Virginia and Section 141 of the Constitution of Virginia as amended.

This Ordinance shall be full force and effective after its passage by the Board of Supervisors of Prince Edward County and the publication thereof as provided by law on the 6th day of August, 1960 and each and every year thereafter.

[fol. 167]

Appendix C to Complaint in Intervention

Be It Ordained that any parent, guardian or person in loco parentis to any child between six and twenty years of age, which child is a resident of Prince Edward County as hereinafter provided, is authorized to make application as hereinafter provided for a grant of funds to be used in furtherance of the elementary and secondary education of such child in private nonsectarian schools located within the County of Prince Edward, and in public schools located within the State of Virginia.

Section I

How Such Application Made, What it Shall Contain

A. The parent, guardian or person in loco parentis to any child shall make application for such grants upon forms provided by the Board of Supervisors of Prince Edward County, shall sign the same and make oath to the facts therein stated and shall file the same on or before the 1st day of September, 1960 or any succeeding year with the Board of Supervisors of Prince Edward County or with such person as the Board may designate to receive and examine such application.

B. The parent, guardian or person in loco parentis to such child in order to be eligible to receive a grant of funds under this ordinance shall, as a part of such application, make oaths to the following facts:

(a) The name of the parent, guardian or person in loco parentis making the application and the name, age and residence of each child on whose behalf the application is made.

(b) That the person signing the application is legally responsible for the care of each child for whose benefit the application is made.

(c) That each child in whose behalf the application is made has attained six years of age and has not attained the age of twenty years.

(d) That the said child is an actual bona fide resident of Prince Edward County and is educable.

(e) That each child on whose behalf the application is filed will be enrolled in either a private nonsectarian elementary or secondary school within the County of Prince Edward or in a public school within the State of Virginia wherein tuition is charged in at least the amount of the grant applied for.

(f) That said child is not detained or confined in any public institution.

(g) That said child is or will be enrolled during the school year for which the application is made in a course of systematic educational instruction or training of not less than one hundred eighty days duration or the substantial equivalent thereof, and shall give the name and location of said school, or the name of the person, or persons, offering such course of instruction or training and the place at which it will be offered.

(h) That said child has not graduated or completed the course of study offered at the high school level.

[fol. 168] (i) That the person making the application agrees to refund any grant made thereunder if said child for whom the grant is made fails to attend school at least one hundred fifty days per school year, unless the Board of Supervisors by resolution releases such obligation to refund on account of sickness of the child or other unavoidable or oppressive circumstances.

SECTION II

Minimum Amount of Grant; Discretion to Increase the Amount; How and to Whom Paid; Termination Thereof . . .

(1) The amount of each grant paid under this Ordinance shall be for a sum not less than One Hundred Dollars ($100.00) per year for each child and the amount thereof may be increased in the discretion of the Board of Supervisors by resolution adopted on or before the end of any fiscal year.

(2) Upon approval by the Board of Supervisors of the application therefor it shall by resolution make appropriation for the payment of each grant and shall authorize the Treasurer to make payment thereof upon warrants of the Board of Supervisors, as provided by law, for the payment of other claims against the County.

(3) Upon denial of an application or inability to act thereon because of the absence of necessary information, the Board shall give notice to the applicant of its action within a reasonable time thereafter by mailing said notice to the post office address given in the application. Within

15 days after the mailing of said notice any applicant who feels aggrieved by the action of the Board shall file with the Board or its designated agent a petition for a review of its action. Such petition shall state the reasons for his objection to the action of the Board and shall be heard by the Board at its next meeting provided the said meeting is at least 15 days after the filing date of the petition for such hearing. Such hearing shall be informally conducted and the aggrieved party shall have the right to offer evidence and to be represented by counsel.

Within 15 days after such hearing the Board shall notify such aggrieved party of its final action upon such application and any applicant feeling aggrieved thereby shall have the right of appeal to the Circuit Court of the County of Prince Edward as provided by law.

(4) The Board of Supervisors shall pay not more than half of any grant on or before the 15th day of October of the school year for which paid and the remainder at such intervals as it may deem proper, provided that the total amount thereof shall be paid not later than the 31st day of May of the school year for which the grant is made, and provided further that upon the violation of any condition set forth in the application therefor or upon the ascertainment that any false representation has been made in procuring said grant, the Board shall terminate the same and any balance thereof shall not be paid.

Section III

Defining Unlawful Acts in Violation of This Ordinance and Prescribing Penalty Therefor . . .

A. Any person who shall willfully make a false statement in any application for a grant under this Ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed three hundred dollars ($300.00) or by confinement in jail not exceeding 30 days.

[fol. 169] B. It shall be unlawful and constitute a misdemeanor for any person, firm, association or corporation

receiving a grant for educational purposes under this Ordinance to use the sum so received for any purpose other than for educational purposes in a private nonsectarian school located within the County of Prince Edward or in public schools located within the State of Virginia. Any person violating this section shall be subject to a fine not exceeding three hundred dollars ($300.00) or confinement in jail not exceeding 30 days.

Section IV

If Part Declared Unconstitutional, Other Parts to Remain in Force . . .

If any part, section, portion or provision of this Ordinance or the application thereof to any person or circumstance be held invalid by a court of final resort, such holding shall not affect any part, section, portion, provision or application of this Ordinance which can be given effect without the part, section, portion, provision or application so held invalid; and to this end, the parts, sections, portions, provisions and applications hereof are declared severable.

This Ordinance, comprised of Section I through Section IV is passed pursuant to Chapter 461 of the Acts of the General Assembly approved March 31, 1960, Code Section 22-115.37 and other sections of the Code of Virginia granting the powers herein exercised to the Board of Supervisors and pursuant to Section 141 of the Constitution of Virginia as amended.

This Ordinance shall be in full force and effective after its passage by the Board of Supervisors of Prince Edward County and the publication thereof as provided by law on the 6th day of August, 1960 and each and every year thereafter.

[fol. 170] Certificate of Service (omitted in printing).

[fol. 171] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
Civil Action No. 1333

EVA ALLEN, et al.

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al.

MOTION OF SCHOOL BOARD OF PRINCE EDWARD COUNTY TO DISMISS THE AMENDED SUPPLEMENTAL COMPLAINT PERMITTED TO BE FILED BY ORDER OF APRIL 24, 1961, ETC.—Filed May 1, 1961

I.

The defendant School Board of Prince Edward County moves that the Amended Supplemental Complaint permitted to be filed by Order of April 24, 1961, be dismissed for the following reasons:

1. Said Amended Supplemental Complaint alleges new causes of action different from that alleged in the original Complaint; the relief sought is alien to that sought in the original Complaint and it is sought against persons not parties to the original suit and who were foreign to the relief sought therein.

The original Complaint alleged racial discrimination in the admission, enrollment and education of Negro children in the public schools of the County and sought an injunction against the County School Board and Division Superintendent of Schools, restraining such alleged discriminatory practices. The Amended Supplemental Complaint alleges that no public schools are being maintained in Prince Edward County. It alleges that the Board of

Supervisors of the County have not made and do not intend to make any levy or appropriation for the operation of public schools in the County; that it has by ordinance provided for a County tax credit to be given for contributions made to certain nonprofit and nonsectarian private schools; that by another ordinance it has provided for scholarship grants from County funds in aid of any child, resident in the County, desiring to attend a nonsectarian private school or desiring to attend a public school in another locality; and that all or most of said [fol. 172] grants in aid have been paid to or in reimbursement for sums paid to the Prince Edward School Foundation which was organized to provide educational opportunities for white children only and for the education of white children residing in the County.

Said Amended Supplemental Complaint further alleges that the State Board of Education and the Superintendent of Public Instruction have not acted to discharge an alleged obligation of Virginia to operate schools in Prince Edward County; that said State Board and Superintendent, from funds which would otherwise have been available for the operation of public schools in the County, have approved tuition grants to more than a thousand white children to attend the schools operated by said Foundation.

Said Amended Supplemental Complaint finally alleges that the School Board of Prince Edward County is considering and contemplating the conveyance, lease or transfer of public schools or public school properties of the County.

Upon these allegations said Amended Supplemental Complaint seeks by mandatory injunction to compel the operation of public schools in Prince Edward County; to enjoin all the defendants from expending any public funds in support of any private school which excludes Negroes or from expending any public funds in aid of the attendance of any child at any such school; to enjoin the giving of any tax credit for contributions to any such schools; and finally to enjoin the sale or lease of the public schools and facilities in said County.

2. On the face of said Amended Supplemental Complaint, when read with the Order of this Court of April 22, 1960, it appears that the alleged actions complained of do not and cannot render said Order ineffective or unenforceable or circumvent or frustrate the enforcement thereof.

[fol. 173] 3. The Amended Supplemental Complaint alleges no cause of action over which this Court should entertain jurisdiction because it calls for construction of provisions of the Constitution of Virginia, of her statutes, and of ordinances of the Board of Supervisors of the County of Prince Edward relating to matters of primary importance involving relations between Nation and State. The Supreme Court of Appeals of Virginia has not construed these constitutional provisions, statutes, and ordinances. Such construction will be binding on this Court and may eliminate alleged constitutional issues presented in the Amended Supplemental Complaint. A proper regard for our Federal system requires that complainants present these questions of State Constitution, laws and County ordinances to the proper State courts for determination.

4. The Amended Supplemental Complaint prays for reliefs which this Court has no jurisdiction to grant.

5. The Amended Supplemental Complaint does not allege that any statute or ordinance is unconstitutional or that any statute or ordinance is being administered in an unconstitutional manner. It attacks them because of the alleged motive or purpose of the individuals composing legislative bodies. A statute or ordinance otherwise constitutional which is administered in a constitutional manner does not become unconstitutional because of any motive or purpose of legislators.

II.

If the preceding motion be overruled, the defendant School Board of Prince Edward County moves that Section I, II, III, and IV of the Amended Supplemental Complaint and Paragraphs (a), (b), (c), and (d) of the prayers

thereof be dismissed as to it because this defendant has no authority or power to levy any taxes or to appropriate any funds or to provide for any tax credit or to give any scholarship grant in aid or any tuition grant. Indeed its [fol. 174] power in these regards is confined to the making of budgetary recommendations to the County Board of Supervisors, and said Amended Supplemental Complaint expressly admits it has performed its duty in connection with that power.

III.

If the foregoing motions be overruled, the defendant School Board of Prince Edward County moves that Paragraphs (b), (c), and (d) of the prayers of the Amended Supplemental Complaint be dismissed because the allegations of said Complaint are confined to Prince Edward County and these prayers seek injunctions not only in connection with schools in Prince Edward County but also concerning funds and schools entirely foreign to Prince Edward County.

IV.

Should the motion made in Section I hereof be overruled, the defendant School Board of Prince Edward County moves that Section V of the Amended Supplemental Complaint and Paragraph (e) of the prayers thereof be dismissed:

Because no sale of school property exceeding $500.00 in value may be made under § 22-161 of the Code of Virginia, as amended, without order approving and ratifying the same being obtained from the Circuit Court of Prince Edward County, Virginia, and any questions concerning any sale pursuant to that section must at the least be first raised before that Court.

Because §§ 22-164.1 and 22-164.2 of said Code do not relate to or affect the conveyance, lease, or transfer of the public schools and public school property of the County.

Because no conveyance, lease, or transfer of school property can be had pursuant to §§ 22-161.1 to 22-161.5, inclusive, of said Code unless 10 per centum of the voters voting in

the last preceding presidential election in the County shall petition the Circuit Court of Prince Edward County for [fol. 175] entry of an order for an election by the people of the County to determine whether the property or properties specified are or are not needed for public purposes and not until favorable outcome of that vote can sale be made. Said Amended Supplemental Complaint does not allege that any of these acts which are conditions precedent to sale have been taken or are contemplated.

County School Board of Prince Edward County, Virginia, By Collins Denny, Jr., Of Counsel.

Denny, Valentine & Davenport, Collins Denny, Jr., John F. Kay, Jr., 1300 Travelers Building, Richmond 19, Virginia.

C. F. Hicks, DeHardit, Martin & Hicks, Gloucester, Virginia, Counsel for said Board.

Certificate of Service (omitted in printing).

[fol. 176] [File endorsement omitted]

In the United States District Court
For the Eastern District of Virginia
Richmond Division
Civil Action No. 1333

Eva Allen, et al.

v.

County School Board of Prince Edward County, etc., et al.

Opinion Denying Without Prejudice Motions to Dismiss Amended Supplemental Complaint, etc.—June 14, 1961

This case came on to be heard upon the motions to dismiss the amended supplemental complaint, upon the written briefs and argument of counsel.

The principal contentions of the various defendants in support of their motions to dismiss are summarized as follows:

The amended supplemental complaint is a suit against the Commonwealth of Virginia in contravention of the Eleventh Amendment to the Constitution of the United States.

The Doctrine of Abstention should be invoked.

[fol. 177] The injunctive relief requested can not be granted except by a district court of three judges.

The amended supplemental complaint created a new cause of action.

The paramount question raised by the amended supplemental complaint is, whether or not the defendants, individually or in concert with each other, are deliberately circumventing or attempting to circumvent or frustrate the order of this Court.

On that question the plaintiffs are entitled to be heard.

Therefore, the motions to dismiss are herewith denied, without prejudice to the rights of the defendants or any of them to renew their motions upon the conclusion of the hearing if they are then so advised.

If during the course of the hearing the Court is of the opinion that it will be necessary to construe and/or interpret certain sections of the Constitution of Virginia or the [fol. 178] statutes made pursuant thereto, pertaining to the maintenance of a system of free public schools, not heretofore passed upon by the Supreme Court of Appeals of Virginia, further proceedings herein will be stayed for a reasonable period to permit the parties or any of them to institute appropriate action in the state courts.

Likewise, if a district court of three judges is deemed necessary pursuant to Title 28, Section 2284, United States Code, further proceedings herein will be stayed until such a court can be convened.

The defendants are granted twenty days from the date of this opinion to file their answer and/or other responsive pleadings to the amended supplemental complaint.

July 24, 1961, at 10:00 o'clock A.M., E.D.S.T., is fixed as the date for the hearing on the merits. A formal pre-trial of the issues to be heard will be scheduled for July 10, 1961, at 4:00 o'clock P.M., E.D.S.T., if requested by any of the parties, otherwise counsel for all parties shall ten days before the trial date exchange with each other copies of all [fol. 179] exhibits intended to be introduced as evidence. Formal proof of authenticity of such document will be deemed to be waived unless objected to in writing three days prior to trial, in which event the offering party must be prepared to offer the necessary formal proof. All other questions of admissibility such as relevancy, etc., will be ruled upon when and as the exhibit is offered in evidence.

Counsel for all parties shall also within the same time limits exchange lists showing the names and addresses of all witnesses they intend to call. The name and address of later discovered witnesses must be exchanged when and as discovered, otherwise witnesses presented on the date of the trial will not be permitted to testify except by leave of Court for good cause shown.

Counsel for the plaintiffs should prepare an order in accord with the foregoing, submit same to counsel for defendants for approval as to form, and it will be accordingly entered effective this date.

Oren R. Lewis, United States District Judge.

Richmond, Virginia, June 14, 1961.

[fol. 180] [File endorsement omitted]

In the United States District Court
For the Eastern District of Virginia
Richmond Division
Civil Action No. 1333

Eva Allen, et al.,

v.

County School Board of Prince Edward County,
etc., et al.

Memorandum Opinion—June 14, 1961

The United States seeks to intervene as a party plaintiff in the above captioned matter. A better understanding of the question now before the Court necessitates a brief history of the main action.

In compliance with the decision rendered in Brown v. Board of Education, 349 U.S. 294 (1955), an order was entered in this suit under date of November 26, 1958, providing, among other things, that the defendants proceed promptly with the formulation of a plan to comply with the order of this Court heretofore entered enjoining them from discriminating against the plaintiffs in admission to the public schools of the County solely on account of race. [fol. 181] Said defendants were further directed to report to the Court on or before January 1, 1959, the progress made in the formulation of such plan and were further directed to comply with the terms of the injunction heretofore entered commencing with the opening of the school year 1965.

The Court of Appeals for the Fourth Circuit under date of May 5, 1959, reversed this Court and remanded the case, with directions to issue an order in accordance with that opinion, which provided, among other things, that the de-

fendants be enjoined from any action that regulates or affects on the basis of color the enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County, and to take immediate steps in this regard to the end that the applications be considered so as to permit the entrance of qualified persons into the white schools in the school term beginning September 1959. No decree was entered pursuant to the mandate of the Court of Appeals until the petitioners presented an appropriate order for entry therein on April 22, 1960, pertinent portions [fol. 182] of said order being:

> "The defendants are restrained and enjoined from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County and that the defendants receive and consider the applications of such persons for admission to such high schools without regard to race or color.
>
> "That the defendants make plans for the admission of pupils in the elementary schools of the County without regard to race or color and to receive and consider applications to this end at the earliest practical day."

The Court and all counsel of record had knowledge of the fact that the public schools of Prince Edward County were closed prior to the entry of the said order.

Under date of July 8, 1960, counsel for the plaintiffs filed a motion to intervene additional plaintiffs; a motion for leave to file a supplemental complaint and to add additional defendants; to all of which motions the defendants objected. On September 16, 1960, the said motions were granted. By consent decree, the time for the filing of responsive pleadings to the supplemental complaint was extended to October 24, 1960.

[fol. 183] The defendants filed motions to dismiss the supplemental complaint. Prior to the hearing of said motions, the plaintiffs on January 13, 1961, filed a motion for leave to amend their supplemental complaint and to

add the Board of Supervisors of Prince Edward County and J. W. Wilson, Jr., Treasurer of Prince Edward County, as additional defendants.

Upon consideration of the said motions the Court under date of April 24, 1961, granted plaintiffs leave to amend their supplemental complaint and to add the Board of Supervisors of Prince Edward County and J. W. Wilson, Jr., Treasurer of Prince Edward County, as additional defendants. The order fixed May 1, 1961, as the last date for the plaintiffs to offer any further amendments to their pleadings and as the last date for the defendants to file any motions in response thereto. The hearing of the motions thus filed was set for May 8, 1961.

Under date of April 26, 1961, the United States, by Robert F. Kennedy, Attorney General, and Joseph S. Bambacus, United States Attorney for the Eastern District of Virginia, moved the Court for leave to intervene as a [fol. 184] plaintiff in this action and to file a complaint in intervention, and to add as parties defendant the Prince Edward School Foundation, a corporation, the Commonwealth of Virginia, and Sydney C. Day, Jr., Comptroller of Virginia.

The United States, in support of its motion to intervene, alleges that intervention

> "is necessary in order to prevent the circumvention and nullification of the prior orders of this Court and to safeguard the due administration of justice and the integrity of the judicial processes of the United States.
>
> "The claim of the United States, as set forth in the complaint in intervention, involves questions of both law and fact in common with those raised by the amended supplemental complaint filed by the plaintiffs herein."

The motion was made under and pursuant to Sections 309 and 316, Title 5, United States Code, and Rule 24 of the Rules of Civil Procedure. The United States requested a hearing, on its motion to intervene, on May 8, 1961. The motion was then heard.

All of the defendants to this suit and the additional parties sought to be made defendants objected to the in-

tervention of the United States as a party plaintiff. The plaintiffs supported the Government's position. The mat-[fol. 185] ter was fully and ably argued by counsel for all parties and the written briefs have been carefully considered by the Court.

Rule 24 of the Rules of Civil Procedure provides for intervention of right and permissive intervention.

> Rule 24. (a) "Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

It is therefore necessary to first determine whether or not the United States, as a matter of right, may intervene in this suit as a party plaintiff. If it has such a right, its application therefor must be "timely" filed; the rule specifically so provides. The able Assistant Attorney General of the United States, both in his oral argument and in his written brief, totally ignored this requirement of the rule. The Government offered no excuse or extenuating circum-[fol. 186] stances justifying a delay of more than a year in the filing of the Government's motion in intervention.[1]

In view of the necessity of scheduling an early hearing on the merits of the plaintiff's amended supplemental complaint and the unexplained delay on the part of the Government in filing its motion in intervention, there is a serious question in the Court's mind as to whether or not the motion was "timely" filed.

---

[1] The order of this Court which they allege as being circumvented, was entered April 22, 1960. The Government's motion in intervention was filed April 26, 1961.

The Government does not contend that it has a statutory right to intervene in this suit. However, the Court's attention has been called to the fact that several bills have been introduced in the Congress of the United States and some are now pending, specifically granting unto the Attorney General of the United States the right to intervene in suits of this type as a party plaintiff. None of these bills, however, have been enacted into law. Thus to grant intervention in this case, in the absence of statutory authority, [fol. 187] would appear to be contrary to the intent of Congress. This, however, the Court need not decide, because the Attorney General relies primarily on Section (2) of Rule 24 (a).

He contends:

> "The interest of the United States, which is unique, is not represented by any of the existing parties. The plaintiffs seek to secure their constitutional rights, but the United States seeks to preserve its judicial processes against impairment by obstruction or circumvention. These clearly are distinct interests. Moreover, the due administration of justice is a sovereign interest that cannot properly be entrusted for safeguarding to private parties. The representation of the interest of the United States by the plaintiffs is plainly inadequate."

The Attorney General further contends:

> "The United States, by its complaint in intervention, has joined the State of Virginia in order to secure complete relief in this action, in which the United States contends that the State is circumventing this Court's order by action which is unlawful in that it denies to the residents of Prince Edward County the equal protection of the laws. But the State of Virginia can be made a defendant only by the United States, [fol. 188] since the Eleventh Amendment of the United States Constitution bars the plaintiffs from suing a State without its consent."

In support of this contention, the Attorney General seeks to parallel the situation in Prince Edward County with the former situation in Little Rock and New Orleans. The facts in these cases do not justify such a comparison. In the latter cases, open defiance of Federal Court orders was obvious. In Virginia this complex problem has been and is being solved in a lawful and proper manner through the courts. There has been no known defiance of this Court's orders by either the State of Virginia or the County of Prince Edward. Even under the situation then existing in Little Rock and New Orleans, the Attorney General, insofar as this Court knows, did not move to intervene as a party plaintiff for any purpose. To the contrary, the Government's participation in those cases was at the Court's invitation as amicus curiae.[2]

[fol. 189] The precise question before this Court, in the case under consideration, is whether or not the defendants, or any of them, are violating or circumventing its orders. To find the defendants guilty of so doing without a hearing would be a clear violation of the defendants' constitutional rights. That, this Court will not do. The United States has no right to intervene as a party plaintiff in this case on that ground until this Court has first determined that its orders are in fact being violated or circumvented.

The Attorney General further argues, however, that the plaintiffs are unable to represent adequately the interest of the United States because the plaintiffs can not make the Commonwealth of Virginia a party defendant by virtue of the Eleventh Amendment to the United States Constitution.[3] Surely, that is not the "interest" referred to in the statute. If the United States has a cause of action against the Commonwealth of Virginia, in this or any other type

---

[2] A party plaintiff assumes the role of a party litigant. It is allowed to file pleadings, offer evidence, file briefs and seek relief. It has a right to reasonably control its side of the case; amicus curiae is technically "a friend of the Court", as distinguished from an advocate. It arises only via an ex parte order of the Court and fully advises the Court on the law in order that justice may be attained.

[3] See United States v. Texas, 143 U.S. 621; United States v. California, 332 U.S. 19.

of suit, the right to maintain that cause of action is not predicated upon the right to intervene as a party plaintiff [fol. 190] in a suit instituted by private plaintiffs seeking to secure their constitutional rights.

The Attorney General cites numerous cases in support of his contention that the United States by virtue of its national sovereignty has a sufficient general interest in this case to be permitted to intervene of right. Suffice it to say that none of the cited cases are sufficiently in point with the facts in this case to sustain his contention.

> "It is well settled that the only interest which will entitle a person to the right of intervention in a case is a legal interest as distinguished from interests of a general and indefinite character which do not give rise to definite legal rights." See Jewell Ridge Coal Corp. v. Local No. 6167, etc., 3 FRD 251. See also Radford Iron Co. Inc. v. Appalachian Electric Power Co., 62 F. 2d 940.

The Attorney General next contends Rule 24 must be considered in connection with Title 5, Sections 309 and 316,[4] U.S.C.A. With this we do not disagree. Clearly, [fol. 191] these statutes give very broad authority to the Attorney General to institute and conduct litigation in

---

[4] Section 309. "Conduct and argument of cases by Attorney General and Solicitor General. Except when the Attorney General in particular cases otherwise directs, the Attorney General and Solicitor General shall conduct and argue suits and writs of error and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested, and the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so."

Section 316. "Interest of United States in pending suits. The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States."

order to establish and safeguard Government rights and properties.

In our view of the matter, having reached the opinion that the United States does not have such an "interest" in the instant case as is required by Rule 24(a), these statutes are not applicable, for they likewise require the United States to have such an "interest".

Therefore this Court is of the opinion that the United States has no absolute right of intervention in this suit under Rule 24 (a).

The Attorney General further argues, however, that if the Court be of such opinion, the United States, in any [fol. 192] event, ought to be permitted to intervene under Rule 24 (b) Permissive Intervention, which reads as follows:

> "Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The granting of the motion under this section lies within the sound discretion of the Court and in so determining the Court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

In the judicial exercise of this discretion it is deemed proper that the allegations of the proposed complaint of intervention be carefully examined and compared with the allegations of the amended supplemental complaint now pending before this Court.

[fol. 193] The material allegations of the complaint in intervention are summarized as follows:

Section 129 of the Constitution of Virginia requires that the General Assembly establish and maintain a system of public free schools throughout the state; prior to June 1959, free public schools were being maintained in Prince Edward County, educating approximately 1700 Negro and 1400 white pupils; segregated schools were then being maintained; under date of May 17, 1954, the Supreme Court of the United States held that state operation of racially segregated schools in Prince Edward County was unconstitutional; in July 1954, the Supervisors of Prince Edward County expressed opposition to the operation of racially unsegregated public schools; in July 1955, this Court entered an order requiring that the public schools in Prince Edward County be racially desegregated with all deliberate speed; in May 1956, the Board of Supervisors of Prince Edward County, in response to a request of 4,000 white citizens, adopted a resolution declaring it to be the policy of the Board that no county tax levy should be made for operation of public schools on a non-segregated basis; [fol. 194] on May 5, 1959, the Court of Appeals for the Fourth Circuit directed the entry of an order requiring that the public schools of Prince Edward County be operated on a racially non-discriminatory basis, commencing in the fall of 1959; Articles of Incorporation were executed on May 26, 1959, for the creation of Prince Edward School Foundation for the purpose of operating elementary and high schools in Prince Edward County for the education of children of the white race exclusively; on June 2, 1959, the Board of Supervisors of Prince Edward County did not levy taxes for the operation of public schools for the school year 1959-60; public schools in Prince Edward County were not opened for the fall semester of 1959 and have not been opened since that date; the Prince Edward School Foundation began operating in September 1959; approximately 1400 white children attended; no tuition or fees were charged for educating these students; the Foundation obtained its funds through contributions for the school year 1959-60; on April 22, 1960, this Court entered an

order enjoining the defendants from any action that regulated or affected the enrollment or education of Negro children on the basis of race or color to the public high [fol. 195] school of Prince Edward County and further requiring the defendant to make plans for the admission of pupils to the elementary schools of the County without regard to race or color at the earliest practical date; in June 1960, the Board of Supervisors adopted a budget including funds for educational purposes, but without providing funds to permit operation of public schools; in July 1960, the Board of Supervisors adopted an ordinance requiring the County Treasurer to allow a certain credit against real estate and personal property taxes on account of any contributions made to a certain private school located in Prince Edward County; the Board of Supervisors on the same day adopted a tuition grant plan of not less than $100.00 per year per child who was enrolled in a private non-sectarian school within the County or in a public school within the state; that the only non-sectarian private school within the County was the Prince Edward School Foundation; $58,000.00 in tax credits have been granted on account of contributions to the Prince Edward School Foundation; the Foundation for the school year 1960-61 charged a $240.00 tuition for elementary schools and a $265.00 tuition for high schools; tuition grants from [fol. 196] the state and county amount of $225.00 for elementary students and $250.00 for high school students; in December 1960, a number of Negro residents petitioned the Board of Supervisors to reopen the public schools of the County; this request was denied; since June 1959, the defendants have failed and refused to maintain free public schools in Prince Edward County; the purpose and effect has been and is to prevent the operation of public schools in compliance with the orders of this Court on a racially non-discriminatory basis; since June 1959, the defendants have maintained the schools of the Prince Edward School Foundation for the education of white children residing in Prince Edward County; since that date no schools have been operated in Prince Edward County for Negro children; a system of free public schools is being maintained elsewhere in the State of Virginia; the failure and

refusal of all of the defendants, including the State, to maintain free public schools in Prince Edward County, while such a system is being maintained in the rest of the State, denies to the Negro residents of the County, rights secured under the Fourteenth Amendment to the Constitution.

[fol. 197] The complaint in intervention prays that this Court enter an order enjoining the defendants from failing or refusing to maintain free public schools in Prince Edward County; for an order enjoining the defendants from paying tuition grants to students attending Prince Edward School Foundation so long as public schools are closed; for an order enjoining certain defendants from allowing any credit to taxpayers on account of contributions to the Prince Edward School Foundation, during the time public schools are closed in Prince Edward County; for an order enjoining all the defendants, including the State of Virginia, from the payment of any funds of the State for the maintenance of public schools anywhere in Virginia during such period as public schools are closed in Prince Edward County.

The allegations of the amended supplemental complaint are substantially the same except that paragraph 16 of the amended supplemental complaint alleges that the County School Board of Prince Edward County is considering and contemplating the conveyance, lease or transfer of the public schools and public school property to some private corporation, etc.

[fol. 198] The amended supplemental complaint does not, however, seek to make Prince Edward School Foundation, the State of Virginia, or its Comptroller General parties defendant.

The prayers of the amended supplemental complaint request this Court to enter an order enjoining the present defendants (not the State of Virginia) from refusing to maintain free public schools in Prince Edward County; from expending public funds for the direct or indirect support of any private school which excludes the infant plaintiffs and others similarly situated by reason of race; from crediting any taxpayer with money paid or contributed to any private school which excludes the infant plaintiffs and

others similarly situated for the reason of race; from conveying, leasing or otherwise transferring title, possession or operation of public schools and facilities incidental thereto to any private corporation.

It is apparent from a comparison of the complaint in intervention with the amended supplemental complaint that the material difference therein is that the United States in its complaint in intervention seeks to make the Prince Edward School Foundation, the State of Virginia and its Comptroller General parties defendant and to have this Court enter an order enjoining the State of Virginia [fol. 199] from failing or refusing to maintain free public schools in Prince Edward County and enjoining the State from the expenditure of any of its funds for the maintenance of free public schools throughout the rest of Virginia so long as the free public schools of Prince Edward County remain closed. Such relief, if granted, would be unnecessarily punitive, in that it would require the closing of most, if not all, of the free public schools in Virginia. Whether the means, if legal, justifies the end is questionable, to say the least.

Although the Assistant Attorney General, in his argument before the Court, stated that "it was not the intent of the Government to force the closing of the public schools in Virginia; to the contrary, the purpose of the Government was to force the opening of the schools in Prince Edward County", he refused to delete this prayer from the complaint in intervention, stating "he did not have the authority to so do". Therefore this Court can only conclude, if the Government be permitted to intervene as a party plaintiff, it would urge this Court to enter an order that could jeopardize the education of several hundred thousand Virginia children who have no responsibility whatsoever for the closing of public schools in Prince Edward County.

[fol. 200] If this Court were to entertain the complaint in intervention in its present form, it would be necessary for the Court to construe and interpret certain sections of the Constitution of Virginia and laws adopted pursuant thereto pertaining to the maintenance of a system of free public schools in the State of Virginia. Abstinence in state affairs

when not in conflict with the United States Constitution[5] has long been the federal policy. "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments should at all times actuate the federal courts,' Matthews v. Rodgers, 284 U.S. 521, 525, as their 'contribution in furthering the harmonious relation between state and federal authority.' Railroad Comm'r v. Pullman Co., 312 U.S. 496." Harrison [fol. 201] v. NAACP, 360 U.S. 167.

Further, since the complaint in intervention seeks to make the Commonwealth of Virginia a party defendant, thereby making the suit a direct action against the State, it would be necessary, if an injunction were to issue against the State, to convene a three-judge District Court as provided for in Title 28, Section 2281 of the United States Code. These are not questions of law or fact in common with the main action. To the contrary, they are new and independent assertions, which admittedly are not alleged in the amended supplemental complaint. A determination of these questions, whether heard by a three-judge court or by the Supreme Court of Appeals of Virginia, by virtue of the Doctrine of Abstention, will materially delay the adjudication of the private constitutional rights asserted by the individual plaintiffs in the main action. Further delay would inevitably occur as a result of an appeal to the Supreme Court of the United States, during which interim the "status quo" would be maintained in Prince Edward County.

The Attorney General cites many of the same authorities and arguments in support of permissive intervention as [fol. 202] were asserted in support of intervention of right. It is unnecessary to comment further on most of them. However, the Attorney General insists that the Department

---

[5] This Court knows of no provision of the United States Constitution which provides that the states shall provide a system of free public education and none has been cited.

of Justice is better equipped than the private plaintiffs to represent and defend the national interest. He states:

> "It has an experienced legal staff which is conversant with the legal issues involved herein. It also has the investigative facilities of the Federal Bureau of Investigation and the services of the United States Attorney to attend upon the Court. Thus, the public interest in assuring that all the implications of the issues are brought to the attention of the Court warrants the Government's intervention here."

This is undoubtedly true, but whether or not the Department of Justice should use its vast resources as a party litigant in a suit it admits was instituted by private citizens to secure their constitutional rights, is a question this Court need not decide.

The Court being of the opinion the granting of intervention will unduly delay and prejudice the adjudication of the rights of the original parties, the motion of the United States to intervene as a party plaintiff and to add as parties defendant the Prince Edward School Foundation, the Commonwealth of Virginia, and Sydney C. Day, Jr., Comptroller of Virginia, is denied.

[fol. 203] Counsel for the defendants should prepare an appropriate order, in accord with this opinion, submit it to counsel for plaintiffs and counsel for the United States for approval as to form, and present the same for entry herein.

Oren R. Lewis, United States District Judge.

June 14, 1961

[fol. 204] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

MOTION OF COUNTY SCHOOL BOARD FOR LEAVE TO FILE REPORT—Filed June 15, 1961

Defendant, County School Board of Prince Edward County, Virginia, moves the Court for an order permitting the filing of the attached report.

While said defendant does not believe it is required by any order or provision of law to bring to the attention of the Court the matter set forth in said report, it does believe that it is proper for it so to do.

Collins Denny Jr., of Counsel for Defendant, County School Board of Prince Edward County, Virginia.

Denny, Valentine & Davenport, Collins Denny, Jr., John F. Kay, Jr., 1300 Travelers Building, Richmond 19, Virginia.

C. F. Hicks, DeHardit, Martin & Hicks, Gloucester, Virginia, Counsel for County School Board of Prince Edward County, Virginia.

NOTICE

To:

Robert L. Carter, Esquire, 20 West 40th Street, New York 18, New York.

[fol. 205] S. W. Tucker, Esquire, 111 East Atlantic Street, Emporia, Virginia, Counsel for Plaintiffs.

Honorable Frederick T. Gray, Attorney General of Virginia, State Library Building, Richmond, Virginia.

Honorable J. Segar Gravatt, Attorney at Law, Blackstone, Virginia, Counsel for other Defendants.

Please take notice that counsel for the County School Board of Prince Edward County, Virginia, will bring the foregoing motion on for hearing before this Court at its courtroom in the United States Post Office Building, Richmond, Virginia, on the 26th day of June, 1961, at 10:00 o'clock a.m. of that day or as soon thereafter as counsel can be heard.

Collins Denny, Jr., of Counsel for Defendant, County School Board of Prince Edward County, Virginia.

Certificate

I certify that copies of the foregoing Motion together with copies of report and letter thereto attached were served upon other parties hereto by mailing copy thereof on June 15th, 1961, to Robert L. Carter, Esquire and S. W. Tucker, Esquire, Counsel for Plaintiffs and to Honorable Frederick T. Gray, Attorney General of Virginia and Honorable J. Segar Gravatt, Counsel for other Defendants at their respective addresses listed above.

Collins Denny, Jr.

[fol. 206] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

REPORT FROM SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA—Filed July 24, 1961

To the Honorable Oren R. Lewis, Judge of said Court:

The defendant, School Board of Prince Edward County, Virginia, desires to make report to the Court of a certain action recently taken by it. It does so not because it believes the current order of Court so requires or that any provision of law so requires. It does so as a matter of courtesy.

The Board has been anxious to do anything it might properly do to aid the cause of education in the County. It learned a few weeks ago, with the greatest interest, of a suggestion that the Virginia Teachers Association conduct a "crash" program this summer for those children in the County who have not been attending school. It is probable that that Association will command the confidence of the parents of these children and those who have been influencing them and that it may thus succeed in bringing some educational opportunity to these children.

The buildings and equipment owned by this Board, erected with the intent that they would be used for the benefit of all the children of the County, have now for two years stood idle. The School Board believes it is proper

[fol. 207] and permissible that it offer those facilities to the Virginia Teachers Association to assist it in its purpose. It has accordingly, after first consulting with its counsel, addressed to Dr. J. Rupert Picott a letter, a copy of which is attached hereto.

Respectfully submitted,

School Board of Prince Edward County, Virginia,
By Collins Denny, Jr., of Counsel.

[fol. 208]

Prince Edward County Public Schools

Office of the Division Superintendent

Farmville, Virginia

June 14, 1961

Dr. J. Rupert Picott
Executive Secretary
Virginia Teachers Association
316 East Clay Street
Richmond 19, Virginia

Dear Dr. Picott:

The School Board of Prince Edward County, along with the public generally throughout the County, has been deeply distressed that a substantial segment of the children of the County have now for two years been without schools. The members of the School Board have noted with the keenest interest that the Virginia Teachers Association proposes this summer to attempt to operate a "crash remedial program" for so many of these children as will avail themselves of it. We trust this program will meet with great success. Supported as it will be by your organization, it should elicit the confidence of those whom it is designed to aid.

The School Board believes that it should do all it can to help. We have, as you know, the buildings formerly used as public schools. They stand idle. I am directed by the Board to offer such of them as may be helpful to your organ-

ization for the furtherance of this program without cost to your Association. The Board, of course, does not desire or seek in any way to influence your program; since it is responsible for the upkeep and repair of the physical properties, it would at the expense of the Board maintain custodial and janitorial supervision and provide all needed utility services and attempt to be of aid in any other respects you might desire. The Board still owns some school buses, and perhaps a plan for making them available could also be perfected.

If this proposal will be of assistance to you and you desire to avail yourself of it, representatives of the Board will be happy to meet with representatives of your Association to perfect the details. I would think that the sooner we get started the better. An early conference can be arranged by communicating either with me, Mr. T. J. McIlwaine, Division Superintendent of Schools, Farmville, Virginia, or our counsel, Mr. Collins Denny, Jr., Travelers Building, Richmond, Virginia.

Very truly yours,

W. Edward Smith, Chairman, Prince Edward County School Board.

[fol. 209] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT RICHMOND
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

ORDER DENYING MOTION OF UNITED STATES TO INTERVENE AS PARTY PLAINTIFF AND TO ADD PARTIES DEFENDANT—July 5, 1961

This cause came on to be heard upon the motion of the United States to intervene as a plaintiff and to add defendants, and upon the written briefs and argument of counsel; upon a consideration of all of which, for the reasons stated in an opinion of the Court filed in this case on June 14, 1961, it is

Ordered that the motion of the United States to intervene as a party plaintiff and to add as parties defendant the Prince Edward School Foundation, the Commonwealth of Virginia, and Sidney C. Day, Jr., Comptroller of Virginia, is denied.

Oren R. Lewis, United States District Judge, Richmond, Virginia, July 5, 1961.

We ask for this:

Collins Denny Jr., Of Counsel for the School Board and Division Superintendent of Schools of Prince Edward County.

[fol. 210] F. N. Watkins, Com. Atty. Prince Ed. County, Va.

J. Segar Gravatt, Of Counsel for the Board of Supervisors of Prince Edward County.

Frederick T. Gray, Of Counsel for the Superintendent of Public Instruction and the State Board of Education.

Seen:

S. W. Tucker, Of Counsel for Plaintiffs.

H. John Barrett, Of Counsel for the United States.

[fol. 211] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, et al., Defendants.

ORDER DENYING MOTIONS TO DISMISS SUPPLEMENTAL COMPLAINT, ETC.—July 7, 1961

This cause came on to be heard upon the motions to dismiss the amended supplemental complaint and upon the written briefs and argument of counsel; upon a consideration of all of which, for the reasons stated in an opinion of the Court filed in this case on June 14, 1961, it is

Ordered that the motions to dismiss are denied, without prejudice to the rights of the defendants or any of them to renew their motions upon the conclusion of the hearing if they are then so advised; and it is further

Ordered that the defendants shall file their answer and/or other responsive pleadings to the amended supplemental

complaint within twenty days from June 14, 1961, and that pre-trial procedures as provided and scheduled in said memorandum be observed by counsel for all parties, and that this cause be heard on its merits on July 24, 1961, at 10:00 o'clock A. M., E. D. S. T.

The Court, being requested to do so, notes the retirement of Oliver W. Hill, Esquire, Spottswood W. Robinson, III, Esquire, and Frank D. Reeves, Esquire, from this case as counsel for the plaintiffs.

Oren R. Lewis, United States District Judge, July 7, 1961.

[fol. 212] We ask for this:

S. W. Tucker, Of Counsel for Plaintiffs.

Seen and objected to:

Collins Denny Jr., Of Counsel for the County School Board of Prince Edward County and Division Superintendent of Schools.

Frank N. Watkins, Commonwealth Attorney.

J. Segar Gravatt, Of Counsel for the Board of Supervisors of Prince Edward County and J. W. Wilson, Treasurer.

Frederick T. Gray, Of Counsel for State Board of Education and Superintendent of Public Instruction.

[fol. 213]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 1333

EVA ALLEN, et al.

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al.

July 24-27, 1961

TRANSCRIPT OF TRIAL PROCEEDINGS

Before Honorable Oren R. Lewis, District Judge.

* * * * * * *

[fol. 213a] MARY R. CHEATHAM, called as a witness by the plaintiffs and being first duly sworn, testified as follows:

Direct examination.

By Mr. Carter:

Q. Is this Miss or Mrs. Cheatham?

A. Mrs.

Q. Mrs. Cheatham, where do you live?

A. In Farmville.

Q. What do you do?

A. I am the agent for the Board of Supervisors of Prince Edward County.

Q. As agent for the Board of Supervisors of Prince Edward County, what do you do?

A. I accept, process, and generally am in charge of the [fol. 213b] applications for educational grants for the children of Prince Edward County.

Q. That is, the applications for educational grants that are paid by the Board of Supervisors pursuant to the ordinance which has been introduced?

A. Yes, sir.

Q. Now, do all applications come through your office?

A. All county applications come through my office.

Q. All applications for funds of the Board of Supervisors come through your office?

A. Yes, sir.

Q. I will show you Plaintiff's Exhibit No. 18 and ask you if that is the application?

A. Yes, sir.

Q. Mrs. Cheatham, how many applications were received through your office during the year of '59-60?

A. I will have to make an estimate on that. I do not have the exact figure in my head. I will be able to give that to you tomorrow morning. My estimate is approximately 1,360-odd.

Q. I gave it to you for '59-60.

A. Oh, I'm sorry. There were none. The office did not [fol. 213c] exist.

Q. Your office was established—

A. In August.

Q. Of '60?

A. Yes.

Q. So that the 1,300-odd would be for the year 1960-61?

A. That is correct.

Q. Are these applications made once a year for the school year, or are they made for the semester?

A. They are made once a year for a school year.

Q. Is the application made for the amount of the tuition grant? Is the amount $50, or $100?

A. I do know that amount, yes, sir. The amount was put no less than $100 per child for the school year.

By the Court:

Q. You say the amount was put no less than $100?

A. Yes, sir, for the school year.

Q. If it was not put any less, what was the maximum of it?

A. There was no maximum listed. It was within the discretion of the Board of Supervisors.

Q. What was the amount granted for 1960-61?

A. It was $100 per year per child.

[fol. 213d] By Mr. Carter:

Q. This Exhibit No. 18 which I have shown you, are these applications kept on file in your office?

A. Yes.

Q. If I were a parent or guardian of a child desiring to qualify, I would come to your office and pick up one of these applications?

A. Yes, sir.

Q. I would fill it out?

A. Yes, sir.

Q. And I would leave it with you?

A. You would sign it in front of me or another notary, and then return it to me.

Q. After I fill it out pursuant to instructions, what do you do?

A. I take it, I check the name of the school listed to make sure that the child will be enrolled in a school or system of education; I satisfy myself through whatever channels are available that the child is properly enrolled, and pass it on to the board with my approval or disapproval.

Q. Let's take something specific. It is no secret that I am interested in these applications with respect to the Prince Edward School Foundation. I want to qualify. I [fol. 213e] have filled this out and under the name of the school I have listed "Prince Edward Foundation."

A. First, if the application has been filled out before school is open, I can do nothing. As soon as school is open, I check the names of those enrolled against the number in school. I check those against the applications made by the parents to make sure the child is enrolled in school. If they are, then they might be found to qualify.

Q. Do you have a list of children for whom educational grants were approved to attend the Prince Edward County Educational Foundation?

A. I have all of those that were approved by the County.

Q. Will you be able to have them tomorrow morning?

A. Yes, sir, I will have them tomorrow morning.

Q. Do you have any idea, with any accuracy, of these 1,300 or so applications, as to how many were for the Prince Edward School Foundation?

A. Yes, sir; all but five.

Mr. Carter: All but five. I think that is all.

[fol. 213f] Cross examination.

By Mr. Gravatt:

Q. Mrs. Cheatham, suppose a parent came to you and listed a child as being taught by a certain individual in a certain school run by the Prince Edward Christian Council. What would you do with that application?

A. I would accept it and recommend it for approval.

Q. What investigation, if any, would you make of the school and the enrollment?

A. The enrollment of the school?

Q. The enrollment of the child.

A. I would talk with the parent to see if the child were enrolled at that school.

Q. Would you recommend such an application?

A. Yes, sir.

Mr. Gravatt: That is all.

By the Court:

Q. Mrs. Cheatham, this Christian Foundation, or whatever the technical name of it is, did you receive any such applications for that institution?

A. No, sir, I did not.

Q. Is there such an institution in Prince Edward, to your knowledge?

[fol. 213g] A. To my knowledge, there is a school there run by the Prince Edward Christian Association.

Q. What kind of school is it?

A. I don't know. I never had occasion to take one for it, Judge.

Q. Well, is it one operating ten hours a day, or is it a summer school?

A. I know nothing about it.
Q. If you knew nothing about it—
A. I would inquire first and then make my recommendation.
Q. That is my point.
A. I'm sorry.
Q. I understood you to say you would recommend a grant to that institution.
A. Yes, sir. I would have to inquire into the institution first.
Q. If the school, after you had investigated it fully, did not meet the requirements set forth in the ordinance itself, what would you do?
A. I would have no choice but to disapprove the application if it did not meet the requirements.
Q. Well, have you made any investigation privately or as a representative of the County Board to determine [fol. 213h] whether or not, in fact, there are any other educational facilities in Prince Edward that have complied with the requirements of the County Board ordinance, other than the Prince Edward Foundation?
A. No, sir, I have not.

The Court: Thank you. Stand down.

The Court: Call your next witness.

* * * * * * *

[fol. 214] Mrs. Mary Cheatham, recalled by the plaintiffs, further testified as follows:

Direct examination.

By Mr. Carter:

Q. Mrs. Cheatham, you recall that on yesterday you were asked about the number of applications for educational grants?
A. Yes, sir.

Q. And you gave me an approximation and indicated that you would give it exactly. Are you able to give us that exact figure?

A. Yes, sir. The exact figure is 1,363.

Q. Am I correct that of that 1,363 all but 5 were for education at the Prince Edward School Foundation?

A. Yes, sir.

Q. And that all of them received from the county the $100 educational fund?

A. There were a few exceptions to all of them receiving it because of the length of time in which they were enrolled in school, but they were given a proportionate sum of it.

By the Court:

Q. They received $100 per year if they went right in?

[fol. 215] A. If they went right in, yes, sir.

Mr. Carter: Thank you. That is all.

Mr. Gravatt: Mr. Carter, you asked for certain records that this lady keeps.

Mr. Carter: Yes, sir.

Mr. Gravatt: We have those records here if you want to look at them.

Mr. Carter: I think Mrs. Cheatham supplied the figures.

Mr. Gravatt: And you don't want the records?

Mr. Carter: No.

Cross examination.

By Mr. Gravatt:

Q. Mrs. Cheatham, do you have a copy of the application blank for a tuition grant?

A. No, sir, not with me.

Q. Is there one here?

Mr. Carter: It is an exhibit.

The Court: It is an exhibit in evidence.

By Mr. Gravatt:

Q. You are an employee of the Board of Supervisors of Prince Edward County; is that correct?

A. Yes, sir.
[fol. 215a] Q. In your capacity as agent of the Board of Supervisors—that is what you have been designated, I believe?

A. Yes, sir.

Q. In that capacity, what responsibility do you have in the administration of the educational payment ordinance?

A. As the agent for the Board, I am responsible for the administration of all the grants. They are made out sometimes by the parents; sometimes they are made out in my presence. I am authorized to help them if it is necessary. I am also a notary, which is necessary in the application.

Q. In filling out this form and in administering this act, if a parent comes to your office, you present one of these form to the parent and, if they ask your assistance, you assist in filling it out; is that correct?

A. Yes, sir.

Q. Among the questions on here, number one is the name of the child, birth date, residence, and things of that nature; number two, name and address of the parent, guardian, or person *in loco parentis;* number 2-A, if applicant is not a parent, give name and address of parent; 3, name and [fol. 216] address of school last attended or place of instruction; 4, name of school in which child is to be enrolled or person offering such course of instruction or training within Prince Edward County.

Now, when you got down to this No. 4, was it necessary that No. 4 be filled in that it be any system of schools or any system of instruction where a child would be going to school from the first grade, say, to high school, or was it simply necessary that there be some person who was giving instruction to a child or children?

The Court: Well, doesn't the ordinance answer that question? Doesn't the ordinance itself specify when and under what conditions the grant would be approved?

Mr. Gravatt: No, sir, I don't think it specifies all of that. It is broad, but I think there are certain areas in the administration of the ordinance that should be developed from this witness, and that is what I am trying to do.

The Court: You can ask her what she has been doing and we will consider that—I mean, how she has been interpreting it.

By Mr. Gravatt:

Q. Is it necessary that anything more be stated than [fol. 217] a responsible teacher for a child or children, teaching them, in order to make this application?

A. No, sir. My instructions from the Board of Supervisors were to investigate and to assure and satisfy myself that it was an honest effort to train and educate the children or a child. It could be four or five children, as long as it was an honest effort. That was my instructions from the Board of Supervisors.

By the Court:

Q. Whom did you get those instructions from?

A. I received those instructions fom the Board of Supervisors when I was hired.

Q. Are they in writing?

A. No, sir, they are oral.

Q. You didn't copy them down?

A. I may have a notation of my own, but they were not formal written instructions.

By Mr. Gravatt:

Q. Now, the next question: "If this is a public school located outside of Prince Edward County, state name and address and the amount of tuition to be charged."

The next question on here is No. 5. And this application has to be sworn to; is that correct?

A. Yes, sir, it must be signed and sworn to.

[fol. 218] Q. No. 5: "The undersigned is legally responsible for the care of the child for whose benefit the application is made; that said child has attained the age of six years and has not attained the age of twenty years; that the said child is a bona fide resident of Prince Edward County, Virginia and is educable; that the said child on whose behalf the application is filed will be enrolled in

either a private non-sectarian elementary or secondary school within the County of Prince Edward, Virginia, or in a public school located within the State of Virginia wherein tuition is charged in at least the amount of the grant applied for; that the child is not detained or confined in any public institution; that the said child is or will be enrolled during the school year for which the application is made; that the child has not graduated or completed the course of study offered at the high school level."

Was this application entertained if the child or the child's parents stated that the child would be enrolled for instruction by some person, firm, or corporation giving instruction within the county?

A. I didn't get that, I'm sorry.

Q. Was the application entertained—

A. Yes, sir.

[fol. 219] Q. —if the parent simply certified—

A. Yes, sir.

Q. —that the child would be enrolled—

A. Yes, sir.

Q. —with a person, firm or corporation offering some kind of educational training?

A. Yes, sir.

Q. In accordance with question No. 5 of the application?

A. Yes, sir.

Q. Now, No. 6: "The undersigned agrees to refund any grants made under the ordinance to provide funds for educational purposes adopted on 18th day of July, 1960, as provided therein if such child fails to attend school for 150 days unless excused by the Board of Supervisors, of said county."

Now, the point has been made here that certain schools may not have been eligible for these grants because they did not teach for 180 days. My question to you is, This application does not require a parent to certify that the school teaches for 180 days, does it?

A. No, sir.

Q. And all you required was that the child be enrolled and that you satisfy yourself in an honest, bona fide effort [fol. 220] was being made for a responsible person to educate the child?

A. Yes, sir.

Q. And the only additional thing that was required was that they certify that they would refund, subject to an excuse from doing so by the Board of Supervisors, if they did not attend school for 150 days?

A. Yes, sir.

Q. Now, upon your investigation, after receiving that blank filled in that way, what investigation would you make, if any, of the applicant in order to make your recommendation on the application?

A. Well, on the back there is a place where it has to be signed by me before being turned over to the Board of Supervisors, to be approved or disapproved. It was my responsibility to investigate the schools, the course of instruction, the teacher, whatever association or organization was handling the education or training of the children. If in my opinion after examining it as closely as I could I felt that it was an honest effort to train these children, no matter what type of school it was, I then handed it to the Board of Supervisors with my recommendation for approval for the first half of the payment of the grant. It was my under- [fol. 221] standing that I was to be as lenient as possible, because in our county now we are most anxious to get as many children educated as possible, and I was to regard this as leniently as possible until the first payment, and if I felt after the first payment that it was an effort to defraud, an effort to gain money without using it, then I put my disapproval on the application; but that was not final. I had to take it to the Board to explain the circumstances—what I had found out about the courses of training, and the teachers and the parents. I give them all the information I can. At that time they take it under consideration. They either go along with my approval, or rather my disapproval, and then they disapprove that application. If they disapproved, the applicant then, the parent or guardian, had a chance to appeal before the Board and also before the Court, if they felt that they were being treated unfairly. Of course, my disapproval was very properly overruled—had it ever occurred, it could have been very properly overruled. It could have been felt there were

mitigating circumstances that I could not see. It was their decision as far as I was concerned.

Q. So that in the administration of this ordinance the policy of the Board of Supervisors as applied by you was to make this money available to any person, guardian, or [fol. 222] parent who had his child in a course of instructional training in a good-faith, honest effort to try to do something to help that child educationally?

A. That is correct.

Q. And this money was available and it was the policy of the Board to make it available to people in that situation regardless of whether they had a formal school, or formal building, or formal grades, or that the teachers were accredited by the State Department, or that their surroundings were safe and sanitary—it was an effort to help people who in good faith were undertaking to serve the need of the county to educate children of any race?

A. That is right.

Mr. Gravatt: That is all.

By Mr. Denny:

Q. Mrs. Cheatham, is there any difference in the procedures when an application comes from the parent or guardian of a Negro child than the procedures adopted when it comes from the parent or guardian of a white child?

A. No, sir.

Q. You have had applications made by parents or guardians of Negro children?

A. Yes, sir.

Q. Have they been granted?

[fol. 223] A. Yes, sir; all of the applications for Negro children that my office has received have been granted.

Mr. Denny: Thank you.

Redirect examination.

By Mr. Carter:

Q. Mrs. Cheatham, the applications that were approved were 1,358, I believe?

A. 1,363.

Q. I am leaving out the five that did not go to the Prince Edward School Foundation. Those 1,358 were credited to a full-time, 180-day school?

A. Yes, sir.

Q. What about the five?

A. The five that went to public schools located within the State of Virginia.

Q. So there has not been across your desk or approved by you any educational grants for anybody to go to anything but an authorized and formal school?

A. I cannot approve what I do not receive.

Mr. Carter: That is all.

Mr. McIlwaine: No further questions.

By the Court:

Q. Do I understand, Mrs. Cheatham, that any person in [fol. 224] Prince Edward County, colored or white, who came in and told you that they were sending their child to be tutored or taught by an individual in Prince Edward County would get the $100?

A. Sir, if they came to me and told me they were sending their child to a person to be tutored, if it was an honest effort, I would naturally have some investigation to make.

Q. What kind of investigation would you make?

A. I make sure that the person doing the training is honestly trying to help educate the child.

Q. Well, a mother undertakes to educate a child, and it is a very successful effort, is it not?

A. Yes, sir.

Q. Is she eligible to get $100 if she is conscientiously trying to get the child to read and write and do a lot of other things? If she were highly conscientious and desirous of having her child learn to read and write, would she get the $100?

A. Well, my decision, of course, would not be final. I would say—

Q. Well, what would your recommendation be?

A. My recommendation would be that if a mother was trying to teach her child, there would be no expense in-[fol. 225] volved and there would be no need for it, for an educational grant, but there would probably be an expense—

Q. What do you mean by "expense"?

A. There are certain expenses that a mother has in the process of educating a child. There are the costs of books, the costs of materials—a mother would have the cost of books if she were trying to teach her child to read, Judge. Then, if it were an honest effort to educate her child or her children, I would assume it would be an honest effort and I would give my approval, at least.

Q. Well, obviously, regardless of how conscientious the mother was, I doubt if she could equal the efforts of an accredited school in teaching the child, particularly in high school classes; regardless of how competent she was, I doubt that she could do it, but she would still be conscientious. This money, or this act was never created, was it, to give a substitute of that type for an educational system?

A. No, sir. The understanding would be that a person or association or organization would be offering this course of training or school to a group. Now, the group could be small.

Q. I am not talking about the size, but would the teachers have to have any minimum standards, any minimum [fol. 226] qualifications, to be a person whom you might consider to be competent to teach children?

A. My instructions were that there did not have to be accredited, qualified teachers.

Q. And these children would get $100 by applying for it, regardless of their ability to teach?

A. That would be a part of my responsibility, to investigate to see if they were actually being taught, and being taught in a manner that was educational. I would have to examine that more closely.

Q. Well, let us assume they were being taught. Do you have any standards to apply to this applicant or this teacher that is going to try to teach ten people?