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BUSING STUDENTS TO OVERCOME RACIAL SEGREGATION IN THE PUBLIC SCHOOLS

This will refer to your request for information on the busing of students to overcome racial segregation in the public schools.

The mainspring of the subject of school desegregation, of course, is the Supreme Court's ruling in 1954 that compulsory segregation of the races in the public schools is inherently unequal and a denial of the 14th Amendment's equal protection of the law guaranty. Brown v. Board of Education (frequently called Brown I) 347 U.S. 483. In Brown I, the Court effectively repudiated the "separate but equal" doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896), and held that regardless of the similarity of the physical facilities, separation by race was per se inequality condemned by equal protection of the laws. The following year, in Brown II, the Court set out the compliance formula of "all deliberate speed," Brown v. Board of Education, 349 U.S. 294 (1955), thus deferring full realization of the present right announced in Brown I in order to give "dual school" jurisdictions time to make the difficult transition to a desegregated system. The Court stated that the lower Federal Courts exercising equitable jurisdiction would continue to supervise these efforts.

When dealing with this whole subject of school desegregation, a number of important points must be kept in mind: first, the distinction between de jure and de facto segregation; and, second, the difference between federal action to desegregate the schools in conformity with Brown and its progeny and the Office of Education efforts to implement and administer school assistance programs in conformity with title VI of the 1964 Civil Rights Act, P.L. 88-352; 42 U.S.C. 200 (d). De jure segregation ordinarily describes the situation where separation of the races is compelled by law or actions taken under the color of law. De facto segregation describes those cases where racial separation is arrived at adventitiously or by chance, that is to say, by factors other than law. The former was condemned in Brown v. Board of Education, supra, while the Supreme Court has refused, to date, to review any case raising the issue of the duty imposed by the 14th Amendment to correct the effects of de facto segregation.

In the middle sixties, the Court began to manifest impatience with school desegregation efforts characterized by some commentators as "all deliberation and no speed." In 1965, the Court ruled that the delay implicit in the phrase "all deliberate speed" was no longer "tolerable." Bradley v. School Board of City of Richmond, 382 U.S. 103 (1965); Rogers v. Paul, 382 U.S. 198 (1965). More recently, in Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969), a unanimous Supreme Court decreed immediate compliance to be the governing formula for meeting the requirement of Brown I. "[C]ontinued

operation of segregated schools under a standard of allowing "all deliberate speed" for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools," p. 20. Court orders involving various Southern school districts established February 1, 1970, to be the target date. Some school district officials and some courts ordered busing as the quickest way of meeting this objective. Busing has frequently proven to be the least expensive as well as the most immediate method of desegregating public schools.

It should be noted that the issue of busing does not appear in the cases as an issue separate and distinct in itself. That is, in the usual instance, the court has ordered busing where necessary to the implementation of a proposed plan of desegregation subsequent to a specific finding of the existence of proscribed de jure segregation. Indicative of the scope and effect of the typical judicially ordered busing provision is that contained in the court's decree in United States v. Jefferson County Board of Education, 380 F. 2d 385, 392 (C.A. 5th, 1967) wherein the order read:

> (n) Transportation. Where transportation is generally provided, buses must be routed to the maximum extent feasible in light of the geographic distribution of students, so as to serve each student choosing any school in the system. Every student choosing either the formerly white or formerly Negro school nearest his residence must be transported to the school

> to which he is assigned under these provisions, whether or not it is his first choice, if that school is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules.

In other words, if transportation is necessary to carry children to the schools to which they are assigned pursuant to a court ordered plan of desegregation, school districts are under an obligation to provide it. As a further example, the court in Ellis v. Board of Public Instruction of Orange County, Florida, 423 F. 2d 203 (C.A. 5th, 1970), held that where vestiges of state imposed segregation were reflected in the uniracial composition of certain schools maintained by the district, the school district must provide transportation for all eligible students under a court-ordered neighborhood student assignment plan.

In Swann v. Charlotte-Mecklenberg Board of Education, 403 U.S. 72, decided on April 20, 1971, the Supreme Court decided that the achievement of a "unitary school system" required the school board to assign pupils to schools so that the white-black pupil ratio in each school approximated the ratio in the entire system, roughly 79% to 21%. Most of the black children were concentrated in the inner city while the majority of white children resided in the suburbs. Thus, the effectuation of the desegregation order required the board to assign black children to the outer city and suburban schools and the white children to the inner city schools, requiring transfers of several miles.

In addressing the need for transportation of students, the Court stated that "Desegregation plans cannot be limited to the walk-in school." Approximately 39% of the pupils in the United States, the opinion continues, are transported by bus to school every day. The plan ordered by the district judge in Swann provided for shorter trips than the trips regularly scheduled by the board. And "the District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record."

Nevertheless, cautioned the Chief Justice, the lower courts should consider all the factors in weighing an order involving busing. The health and age of the children must be taken into account and the trips should not be so long as to impinge on the educational process. But busing is within the remedial powers of the district courts. These were some of the factors to be used as guidelines by the lower courts, the Chief Justice concluded, but words were inadequate to define clearly the powers and the ways of exercising them which the courts possessed. "Substance, not semantics, must govern ..."

During the proceedings in the Charlotte-Mecklenburg litigation, the North Carolina legislature passed an anti-busing law and actions were brought in state court to enjoin school board compliance with any court-ordered busing. The plaintiffs in the desegregation action therein sued to void the state law and a three-judge federal court held it unconstitutional. 312 F. Supp. 502 (D.C.W.D.N.C. 1970). In North Carolina State Board of Education v.

Swann, No. 498, the Court, again in an opinion by the Chief Justice, affirmed.

> If a state-imposed limitation on a school's authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder federal constitutional guarantees.

The law would obstruct operation of desegregation plans by its limitation on busing, and by its prohibition of taking race into account by the school board it would impose a false standard of "neutrality" which would reduce the effectiveness of any remedial plan.

The foregoing is reflective of the judicial evolution of the Supreme Court mandate in the Brown decision (supra) as the same relates to the issue of busing. Further consideration of the subject as affected by pertinent federal legislation may now be helpful.

Concern with the pace of school desegregation, inter alia, led Congress to enact the "Civil Rights Act of 1964," supra. Two titles in that act have significant impact on the subject. Title IV provides a public remedy by authorizing the Attorney General to bring school desegregation suits in the name of the United States if certain jurisdictional requisites are met. (See our paper on Title IV annexed to this report). Congress also wrote into that title a number of limitations which were intended to preclude Federal corrective efforts to redress racially segregated conditions in the Nation's public schools and colleges. Thus, it defined "desegregation" to mean,

> The assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance. 42 U.S.C. 2000 c (b). (Emphasis supplied).

In another section of Title IV, which authorizes the noted actions by the Attorney General to achieve desegregated schools, Congress included a proviso "that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance ..." 42 U.S.C. 2000 c-6. Finally, in the last section of Title IV (§410), Congress approved the following language:

> Nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.

The aforementioned limitations in Title IV with regards to transportation (busing) must be examined with reference to the other provisions of the Civil Rights Act. First, the principal limitation expressly on busing students arises in the context of the Attorney General's school desegregation authority. In brief, giving that section a literal reading, this limitation on the courts appears to pertain when and only when the suit is filed by the Attorney General. Further, it will be observed that the limitation in both 42 U.S.C. 200 c (b) and 2000 c-6 apply to corrective efforts to redress "racial imbalance." This phrase, both in ordinary parlance and in the floor debate on

Title IV generally has reference to, if not synonymous with, de facto or adventitiously caused segregation, not de jure segregation.

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." In order to implement the provisions of Title VI, every federal department or agency dispensing federal aid to any program or activity is authorized to develop and issue, after presidential approval, rules and regulations consonant with objectives of the statute under which the assistance is granted. Pursuant to this requirement, HEW's Office of Education established minimum desegregation standards for schools seeking federal aid. 30 Fed. Reg. 9981 (1965); superseded by 31 Fed. Reg. 5623 (1966). Under the guidelines each de jure segregated school district is required to submit either a final Court order requiring desegregation or a voluntary plan for desegregation acceptable to the Commissioner of Education. The voluntary plans--generally, geographic attendance zones and freedom of choice--had to conform to standards established for the desegregation of a school system. The 1966 Guidelines which included a test of effectiveness for the freedom of choice plans did not create new desegregation plans but formalized plans utilized since Brown. Nor do they impose busing. Busing, however, may be used to effectuate a desegregation plan for a former dual school system. Failure to meet the requirements

of Title VI lays the groundwork for eventual fund-assistance cutoff. This does not mean that the school district is free to discriminate, however, since this is condemned by Brown. The sole choice in this connection is whether a school district desegregates with or without federal assistance.

To sum up: (1) school districts in areas that had compulsory school segregation by race in 1954 must take steps "to convert to a unitary system in which racial discrimination would be eliminated root and branch," Green v. School Board of New Kent County, 390 U.S. 430, 438 (1968); (2) school districts in some instances have adopted busing or have been ordered to bus by the courts, and such remedial measures have been expressly sanctioned by a recent Supreme Court decision. Swann (supra); (3) presently, there is no Supreme Court pronouncement respecting the constitutional need, if any, to correct de facto segregation or busing efforts directed thereto.

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