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Article 8

Attempted Elimination of School Segregation Through Zoning Held Invalid

Recent Decision: Attempted Elimination of School Segregation Through Zoning Held Invalid

In the recent New York case of *Balaban v. Rubin*,[1] the petitioners sought to annul a determination made by the Board of Education of the City of New York, which created a district for a new junior high school. The zone was planned primarily to create a racially balanced student body at the school. Petitioner's children would normally have attended a primarily "white" neighborhood school, but were scheduled to attend the new school to constitute part of its white population. Petitioners contended that the exclusion of their children from the neighborhood school violated the state Education Law[2] proscribing discrimination in public education. In annulling the zoning proposal, the New York Supreme Court *held* that the plan, based to a material extent upon racial factors, violated the spirit and intent of the statute.

Since the historic opinions of the United States Supreme Court in *Brown v. Board of Educ.*,[3] declaring separate educational facilities for Negro and white children to be "inherently unequal"[4] and ordering their dissolution with "all deliberate speed,"[5] federal and state courts have had difficulty interpreting and implementing the decisions. While clearly prohibiting government-created or enforced segregation (*de jure* segregation) the Court did not deal with the problem of whether segregated education resulting from fortuitous residential patterns (*de facto* segregation) is within the purview of the fourteenth amendment.[6]

Federal courts in their interpretation of the *Brown* cases have agreed that there is a constitutional duty on the part of state authorities to end segregated education when imposed by state action. However, they have differed as to whether there is an affirmative duty to integrate public schools when *de facto* segregation exists. A majority of federal courts have indicated in *dicta* that no affirmative duty to integrate schools exists.[7] These courts have restricted the *Brown* cases' application exclusively to those situations where *de jure* segregation exists. On the other hand, federal courts in the Second Circuit have said that an affirmative duty to integrate may exist where there is *de facto* segregation. The courts reasoned that segregation in public education, whether it be government-enforced, or merely the result of unintended circumstances, is irreparably harmful to the psyche of the segregated child.[8] These cases view

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[1] 40 Misc. 2d 249, 242 N.Y.S.2d 973 (Sup. Ct. 1963).

[2] N.Y. EDUC. LAW § 3201. "No person shall be refused admission into or be excluded from any public school in the state of New York on account of race, creed, color or national origin." *Ibid.*

[3] 347 U.S. 483 (1954); 349 U.S. 294 (1955).

[4] Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

[5] Brown v. Board of Educ., 349 U.S. 294, 301 (1955).

[6] U.S. CONST. amend. XIV, § 1 provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[7] *E.g.*, Allen v. County School Bd., 249 F.2d 462, 465 (4th Cir. 1957); Boarders v. Rippy, 247 F.2d 268, 271 (5th Cir. 1957); Bell v. School City of Gary, Indiana, 213 F. Supp. 819, 829 (N.D. Ind. 1963).

[8] Branche v. Board of Educ., 204 F. Supp. 150, 153 (E.D.N.Y. 1962); Taylor v. Board of Educ., 191 F. Supp. 181, 192 (S.D.N.Y. 1961) (dictum), *aff'd*, 294 F.2d 36 (2d Cir. 1961), *cert. denied*, 368 U.S. 940 (1961).

the *Brown* rationale as standing for the proposition that it is the inherent inferiority of the segregated education itself that is per se violative of the fourteenth amendment, not merely the physical separation of individuals because of their race. In *Branche v. Board of Educ.*, the court said:

> The central constitutional fact is the inadequacy of segregated education. That it is not coerced by direct action of an arm of the state cannot, alone, be decisive of the issue of deprivation of constitutional right .... The educational system that is thus compulsory and publicly afforded must deal with the inadequacy arising from adventitious segregation; it cannot accept and indurate segregation on the ground that it is not coerced or planned but accepted.[9]

This position was again forcefully advanced in *Blocker v. Board of Educ.* The court held unconstitutional a school zone established in 1929. At that time no problem of racial imbalance existed. Since that time, however, rigid adherence to the same zoning determination, coupled with changing residential patterns in the district, has resulted in an almost complete separation of races in the district's schools. The court called the resulting situation "segregation by law—the law of the School Board."[10] Although there was no evidence of an official policy seeking to maintain segregation, the court held that the existing racial imbalance in the district was tantamount to segregation.

Federal courts have not often had the opportunity of meeting the problem of *de facto* segregation directly in that they have interpreted various state actions as evidence of an official segregation policy warranting a desegregation order. In *Taylor v. Board of Educ.*,[11] evidence that a school district was gerrymandered to segregate Negroes was considered sufficient grounds for a decree. Racially segregated residential areas created by state authorities which result in a ghetto-like neighborhood school,[12] manipulation of pupil transfer policies[13] and school board pronouncements sanctioning segregation[14] have also moved courts to issue desegregation decrees. These decisions seem consonant with the United States Supreme Court's statement in *Cooper v. Aaron*[15] that "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws."[16]

The rationale expounded in the *Brown* cases has been adopted in a number of states as an important element in school zoning policy. Dr. James E. Allen, Jr., Commissioner of Education of the State of New York, has been a leading proponent for the establishment of racially integrated schools. On June 19, 1963, Commissioner Allen ordered the school boards throughout the state to submit plans showing the steps they intended to take to eliminate racial imbalance in their districts.[17] Commissioner Allen recognized that in some areas of the state it would be difficult to achieve racial balance, but he said: "This does not relieve

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[9] Branche v. Board of Educ., *supra* note 8, at 153.
[10] Blocker v. Board of Educ., No. 62-C-285, E.D.N.Y., p. 48, Jan. 24, 1964.
[11] *Supra* note 8.
[12] Holland v. Board of Pub. Instruction, 258 F.2d 730 (5th Cir. 1958).
[13] Evans v. Buchanan, 172 F. Supp. 508 (D. Del. 1959).
[14] Gibson v. Board of Pub. Instruction, 246 F.2d 913 (5th Cir. 1957).
[15] 358 U.S. 1 (1958).
[16] *Id.* at 19.
[17] N.Y. Times, June 19, 1963, p. 21, col. 4.

school authorities of their responsibility for doing everything within their power, consistent with the principles of sound education, to achieve an equitable balance."[18]

In response to the Commissioner's mandate the New York City Board of Education has renewed its efforts to provide equality of educational opportunity for all.[19] To achieve this, it has sought to provide the new school districts with racially balanced student populations. This is accomplished by carefully drawing the school zone lines so as to include both white and nonwhite neighborhoods within the same zone. This in essence was the plan proposed by the Board of Education in the instant case.[20] This plan, of necessity, considered the racial factor in arriving at the zone finally proposed. It should be emphasized that the Board of Education has not abandoned the consideration of other factors in formulating its zoning policy. Among these are safety, minimization of travel distance, continuity of instruction, maximum utilization of school space and accessibility of public transportation.[21] However, the Board has now added the desirability of achieving racial balance in the schools to these zoning considerations.

Commissioner Allen's order to the school boards throughout the state did not sound the death knell to the neighborhood school concept as many people believed it would. Recognizing the advantages of having children attend local schools, the Commissioner has stated his desire to preserve the neighborhood school method of zoning whenever possible, but not when it creates a segregated school.[22]

In the instant case, the Court, in striking down the proposed school zone, reasoned that the consideration of race as a material zoning factor was inconsonant with the mandate of the Education Law. In his opinion, the judge stated that "they [petitioner's children] did, however, along with all other children, of whatever race or color, have the moral and statutory right not to be excluded from any public school in the State by reason of their race or color. That is the plain command of the law."[23] In the Court's view, any plan creating a racial quota in the new school would of necessity exclude some children from attendance if their presence would upset the proposed balance for that school. Their exclusion, based primarily on

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[18] *Id.* at col. 3.

[19] "The Supreme Court of the United States [in *Brown v. Board of Education*, 347 U.S. 483] reminds us that modern psychological knowledge indicates clearly that segregated, racially homogeneous schools damage the personality of minority group children. These schools decrease their motivation and thus impair their ability to learn. White children are also damaged. Public education in a racially homogeneous setting is socially unrealistic and blocks the attainment of the goals of democratic education, whether this segregation occurs by law or fact." Board of Education statement as quoted in In the Matter of Skipwith, 14 Misc. 2d 325, 336-37, 180 N.Y.S.2d 852, 864 (Dom. Rel. Ct. 1958).

[20] Balaban v. Rubin, 40 Misc. 2d 249, 250, 242 N.Y.S.2d 973, 975 (Sup. Ct. 1963).

[21] Jansen, *Zoning Plan of Superintendent of Schools, City of New York, July 1957*, 2 RACE REL. L. REP. 1037, 1037-40 (1957). The New York State Commissioner of Education, James E. Allen, Jr., has also said: "The [physical] safety of the children, both white and Negro, is certainly a greater consideration than the claim made by these appellants that because there is a substantial predominance of Negroes in the Northeast School, that will mitigate against their educational program." In the Matter of Bell, 77 N.Y. Dep't R. 37, 38 (N.Y. State Educ. Dep't 1956).

[22] N.Y. Times, June 23, 1963, § IV, p. 7, col. 1.

[23] Balaban v. Rubin, *supra* note 20, at 252, 242 N.Y.S.2d at 976. The same position was taken recently in another supreme court case. In the Matter of Vetere, Co. Clerk's No. 5217-63, Sup. Ct. Albany Co., Dec. 31, 1963.

their race, was discrimination in violation of the Education Law. Thus, respondent's contention that the Board of Education may consider racial and ethnic make-up in school zoning, unless that policy results in the establishment of a segregated school, was considered untenable by the Court. The respondent argued that the legislature intended Section 3201 of the Education Law to be an anti-discrimination statute designed to prohibit the segregation of minority groups in the public schools. The Court, in rejecting this view stated: "whatever may have been the factors which impelled its enactment, the statute, by its very terms proscribes exclusion from public schools by reason of race, creed, color or national origin."[24]

Although materials indicative of the intent of the legislature in enacting section 3201 are scarce, respondent's contention seems well founded. The act which contained section 3201 was entitled "An act to tional facilities for Negro children in the state of New York. . . ."[25] The second section of the same act repealed an earlier statute allowing separate but equal educational facilities for Negro children in the State of New York.[26]

The Court's determination will seriously affect the Board of Education in its attempts[27] to achieve racial balance in the city's schools. In completely disregarding the rationale of the *Brown* decision concerning the shortcomings of segregated education, and in literally interpreting the Education Law the Court seems to have rendered an unfortunate decision. Consequently, the Board of Education is deprived of one of its most effective methods of achieving a racially integrated school system. The Board has not attempted to deprive any child of his right to receive an education, nor has it inconvenienced any child by its zoning proposal. It has pledged that no child would have to walk further to the new school than he would have had to in order to get to his neighborhood school.[28] Now the Board of Education will have to resort to costly and less effective methods such as its Open Enrollment Program.[29] This plan allows children to transfer from schools which are segregated because of residential patterns to schools outside of their district which are not segregated, if such schools are utilized at less than ninety per cent of capacity.[30]

Thus, if the Board is forced to zone without considering the desirability of racial balance, it cannot help but maintain the status quo of segregated education in a large portion of the city.[31] Even more important

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[24] *Ibid.*

[25] LAWS OF N.Y. 1900, ch. 492, §§ 1-2.

[26] The separate but equal provision was enacted again in 1909 as § 981 of the Education Law. LAWS OF N.Y. 1909, ch. 16. It was finally repealed in 1938, LAWS OF N.Y. 1938, ch. 134.

[27] The Board's recently proposed joint zoning program (the so-called Princeton Plan) may also be open to objection as a result of the holding in the instant case. This plan seeks to promote integration by pairing elementary schools having dissimilar ethnic compositions which are located in the same area. All pupils in the area would attend one school for three years, then the other for the remaining three years of the elementary school curriculum. N.Y. Times, Jan. 20, 1964, p. 1, col. 8.

[28] N.Y. Times, June 15, 1963, p. 9, col. 6.

[29] *Joint Statement by Mr. Charles H. Silver, President of the Board of Education, and Dr. John J. Theobald, Superintendent of Schools (Aug. 31, 1960),* 5 RACE REL. L. REP. 911 (1960).

[30] The Board has recently said that such transfers may be made mandatory to relieve overcrowding and to insure that each child receives a full day of classes. N.Y. Times, Jan. 30, 1964, p. 17, col. 1.

[31] N.Y. Times June 19, 1963, p. 21, col. 3. Sixty-four of 588 elementary schools in New York City have more than seventy per cent Negro and Puerto Rican students. Thirty-one more have Negro and Puerto Rican populations of between fifty and sixty-nine per cent. *Ibid.*

is that it may be unable to avoid segregation in new schools still in the planning stage.

The United States Supreme Court can do much to clarify exactly what rights and duties are involved in the area of *de facto* segregation. As in all cases where a standard of reasonableness is employed, no hard and fast rules can be drawn. The educational authorities and the courts should be flexible in their approach to this problem. They must always weigh the slight disadvantages to a particular group against the greater benefits to society that may be gained by any new proposal. Even if the Supreme Court finds that there is no affirmative duty to integrate *de facto* segregated schools, it should permit school authorities to voluntarily integrate their schools through rezoning. This is especially so when, as in the instant case, such integration does not impinge upon the rights of white children by causing them more than minimal inconvenience. When educational authorities believe that they can work out an equitable solution, the courts should not impede them in their efforts.