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De Facto Public School Segregation

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DE FACTO PUBLIC SCHOOL SEGREGATION*

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THE EPOCHAL DECISION of the United States Supreme Court in the public school segregation cases[1] invalidated statutes in 17 states[2] (all below the Mason and Dixon line) that compelled segregation and those in four other states and the District of Columbia that permitted it.[3] The decisions by necessary implication also outlaw segregation practices in northern states stemming from deliberate action of public educational authorities.[4] The decisions, of course, were aimed only at segregation resulting from "the sanction of law."[5] Segregation not imposed by law was not involved in the five cases before the court. The court was under no necessity, therefore, to pass upon or even refer to the segregation that results when a homogeneous racial population, concentrated in a particular neighborhood, attends an all-white or all-Negro public school in that neighborhood. This *de facto* segregation arising from neighborhood patterns not created by law is primarily, but not exclusively, a Northern problem.[6]

Understandably, the problem of Northern *de facto* segregation has been obscured by the spectacular events in the South in the last six

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1. Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Educ., 347 U.S. 483 (1954).

2. These are the 11 listed in note 7 *infra* and the border states of Delaware, Kentucky, Maryland, Missouri, Oklahoma and West Virginia. Prior to *Brown v. Board of Educ.* many Northern states by statute or court decision had outlawed public school segregation. For the list of such states, see GREENBERG, RACE RELATIONS AND AMERICAN LAW 245 (1959).

3. Arizona, Kansas, New Mexico and Wyoming. UNITED STATES COMMISSION ON CIVIL RIGHTS, REPORT, 158 (1959).

4. Segregated public schools were soon thereafter eliminated in El Centro, California; Brookport and Cairo, Illinois; Benton Harbor, Michigan; Hillsboro, Ohio; Ambler, Chester and Willow Grove, Pennsylvania and some fifty different communities in Southern New Jersey. LOTH & FLEMING, INTEGRATION NORTH AND SOUTH 7-11 (Fund for the Republic 1956). See also WILLIAMS & RYAN, SCHOOLS IN TRANSITION, COMMUNITY EXPERIENCES IN DESEGREGATION (1954); Culver, *Racial Desegregation in Education in Indiana,* 23 J. NEGRO ED. 296 (1954); Valien, *Racial Desegregation of the Public Schools in Southern Illinois,* 23 J. NEGRO ED. 303 (1954); Wright, *Racial Integration in the Public Schools of New Jersey,* 23 J. NEGRO ED. 282 (1954).

5. Brown v. Board of Educ., 347 U.S. 483, 494 (1954).

6. MCENTIRE, RESIDENCE AND RACE 32-67 (1960); Grodzins, Metropolitan Segregation, Scientific American, October. 1957.

years. The federal troops at Little Rock, the closing of schools in Virginia, the riots in New Orleans — in a word — the massive resistance of the South to the Supreme Court's mandates have preempted the nation's concern. But Northern segregation though less clamorous also deserves our attention. Almost half of the 18,000,000 Negroes in this country now live outside the 11 states of the Confederacy.[7] More than a million Negroes reside in New York City, constituting the largest Negro urban bloc in the world. Chicago, Philadelphia, Detroit or Los Angeles each contain larger Negro populations than Atlanta, Birmingham, Houston or New Orleans.[8] New York City's Puerto Rican population was recently estimated at 720,000, two-thirds of whom were born in Puerto Rico.[9]

The black ghettos[10] in northern metropolitan areas create school populations that for all practical purposes are almost completely segregated. In New York City, for example, there are 75 public elementary schools (out of a total of 570) with Negro or Puerto Rican enrollments of 90% or more.[11] In Chicago, 102,000 Negro children, 87% of the city's Negro elementary students, are said to be attending practically all-Negro public schools in the black belt.[12] A 1957 study[13] revealed that of the 107,000 Negro children in Detroit's public elementary schools about 45% were registered in schools in which Negroes constituted more than 80% of the school population. According to this study, five elementary public schools in San Francisco had a Negro enrollment and two an Asian enrollment

7. These states are Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia.

8. The 1960 census ranked the nation's largest cities according to their Negro population as follows (figures rounded off); New York, 1,087,000; Chicago, 812,000; Philadelphia, 529,000; Detroit, 482,000; Washington, D.C., 411,000; Los Angeles, 334,000; Baltimore 326,000; Cleveland, 250,000; New Orleans, 233,000; Houston, 215,000; St. Louis, 214,000; Atlanta, 186,000; Memphis, 184,000; Dallas, 129,000; Cincinnati, 108,000; and Pittsburgh, 100,000. N.Y. Times, March 15, 1961.

9. N.Y. Times, Feb. 22, 1961, p. 27.

10. Deliberate segregation of Latin-American school children has also been practiced in California, Texas and the Southwest. See Westminster School Dist. v. Mendez, 161 F.2d 774 (9th Cir. 1947); Independent School Dist. v. Salvatierra, 33 S.W.2d 790 (Tex. Civ. App. 1930); WILLIAMS & RYAN, *op. cit. supra* note 4, at 14.

11. New York City Board of Education, Towards Greater Opportunity, A Progress Report from the Superintendent of Schools to the Board of Education Dealing with Implementation of Recommendations of the Commission on Integration, June 1960, p. 155, hereinafter cited as THEOBALD REPORT. Puerto Ricans are of course, not a race but an ethnic group. About one-fourth of the population of Puerto Rico is classified as Negro. HANDLIN, THE NEWCOMERS 59 (1959).

12. De Facto Segregation in the Chicago Public Schools, The Crisis, Feb. 1958, p. 89. For an early account of public school segregation in Illinois, see Valien, *Racial Desegregation in the Public Schools of Southern Illinois,* 23 J. NEGRO ED. 303 (1954).

13. American Jewish Committee, Excerpts from a Survey on School Desegregation in Northern Cities, Oct. 1957.

of more than 80%; in Cleveland, where about 30% of the city's 130,000 public school children were Negroes, 27 of the city's 127 elementary schools were "predominantly Negro."

In Philadelphia, according to an official 1960 study, 47% of the students in the public schools are Negroes. In each of 38 public schools, 14% of the total number, the Negro enrollment is 99+%.[14]

About half of the 100,000 Negroes of Massachusetts live in the Roxbury section of Boston. According to an unofficial estimate, 13 elementary schools and one junior high school in Roxbury have a Negro enrollment of 90% or higher.

In Los Angeles, expert estimates indicate that in 43 of the city's 404 elementary schools the percentage of Negroes and in 34 the percentage of Mexican-Americans is 85 or higher.[15]

In Indianapolis, seven of the city's 89 elementary schools are "all Negro," although 56 are "mixed."[16] Of the 76,000 pupils in its public schools, Negroes constitute 23.7%[17]

In Youngstown, Ohio, in 1958 three of the city's 31 elementary public schools had a Negro enrollment exceeding 90% and the number of white students in each of these schools had declined since 1953.[18]

Does such *de facto* segregation have a "detrimental effect"[19] upon Negro children? The conclusion in *Brown v. Board of Education*

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14. Philadelphia Board of Education, For Every Child, The Story of Integration in Philadelphia Public Schools, Oct. 1960, pp. 1-2.

15. Education Committee of the Community Conference of Southern California, REPORT 21, presented to the United States Civil Rights Commission, Jan. 25-26, 1960.

16. Indianapolis Human Relations Council, REPORT 2, June 20, 1959.

17. The National Conference and the Reports of the State Advisory Committees to the United States Commission on Civil Rights, 1959 (1960), p. 118.

18. Mayor's Committee on Human Relations, Report on Human Relations in Youngstown, 1959, pp. 1-2. Similar *de facto* segregation exists in Toledo, Ohio, where there are 25 elementary schools without a single Negro student, although Negroes constitute 17.6% of a total school population of 46,719. Letter, dated Jan. 7, 1960 from the Board of Community Relations of Toledo. In Berkeley, California, although 28.7% of the school population of 15,375 are Negroes, in six of the city's 14 elementary schools less than 1% of the children are Negroes and in two schools the total non-Caucasian children constitute more than 94% of the school population. Inter-racial Problems and Their Effect on Education in the Public Schools of Berkeley, California, Report to the Board of Education by an Advisory Committee of Citizens, Oct. 19, 1959, p. 9 and Appendix H. In Pasadena, California, three of the city's 26 elementary schools had in 1957 Negro, Latin-American and Asian enrollments of 97%, 84.1% and 86.2%, respectively. REPORT, *supra* note 15, at p. 17. In Compton, a city bordering on Los Angeles, six of the city's 19 elementary schools had Negro populations of 85% or more. In Enterprise, California and Willowbrook, California, which are predominantly Negro areas, all three of the former's elementary schools and all six of the latter's have Negro enrollments of 85% or more. REPORT, *supra* note 15, at pp. 22, 21. On the other hand, according to the Bridgeport, Connecticut, Intergroup Council, Negroes are enrolled in 40 of the city's 42 public schools although the 2000 Negro children in that city constitute less than 8% of the total school population. Letter dated Jan. 21, 1960 to the present writer from the Council.

19. In *Brown v. Board of Educ.*, the Court cited with approval a finding by the U.S. District Court of Kansas that "segregation of white and colored children in

that racial segregation of children in public schools "has a tendency to retard the educational and mental development of Negro children" was not limited to segregation imposed by law. The same conclusion was reached four years later by the New York City Commission on Integration whose final report declared that "segregated education is inferior education" whose "defects are inherent and incurable."[20]

That the educational level of children in segregated schools is markedly below that of their white peers is a matter of common knowledge verified by many studies. An investigation by the Public Education Association at the request, and with the cooperation, of the New York City Board of Education revealed that the average reading test scores of Negro and Puerto Rican eighth grade children in the city's predominantly Negro and Puerto Rican elementary schools were two years and four months below those of a sample of eighth grade children in predominantly white schools. The comparable average arithmetic test scores showed a differential of two years and seven months.[21] School segregation in and of itself is obviously not the only factor responsible for this educational retardation[22] but that it plays an important role seems clear.

Does the Constitution require an effort to eliminate such *de facto* segregation? Dicta abound declaring that the equal protection clause of the fourteenth amendment does not "affirmatively command integration"[23] and forbids only the use of governmental powers to enforce segregation.[24] But a closer analysis is required before an opinion can be ventured.

It is hardly open to doubt that in violation of the Constitution a school may be segregated in other ways than by a state statute or

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the public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law." Brown v. Board of Educ., 347 U.S. 483, 487 n.1 (1954), Transcript of Record, Findings of Fact, No. VIII, 241-42.

20. Toward the Integration of Our Schools, Final Report of the [New York City] Commission on Integration, June 13, 1958, p. 7. Other testimony in support of this conclusion is summarized in In the Matter of Skipwith, 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct. 1958).

21. Public Education Association, The Status of the Public School Education of Negro and Puerto Rican Children in New York City, Oct. 1955, p. 24, hereinafter cited as PEA REPORT. The PEA was assisted by the New York University Research Center for Human Relations, staffed with such distinguished social psychologists as Stuart W. Cook, Marie Jahoda and Isidor Chein.

22. See DEUTSCH, MINORITY GROUP AND CLASS STATUS AS RELATED TO SOCIAL AND PERSONALITY FACTORS IN SCHOLASTIC ACHIEVEMENT (Society for Applied Anthropology, New York State School of Industrial and Labor Relations, Cornell University, 1960).

23. Borders v. Rippy, 247 F.2d 268, 271 (5th Cir. 1957).

24. See, *e.g.*, *Allen v. County School Bd.*, 249 F.2d 462, 465 (4th Cir. 1957); Avery v. Wichita Falls Independent School Dist., 241 F.2d 230, 233 (5th Cir. 1957); Shuttlesworth v. Alabama, 162 F. Supp. 372 (N.D. Ala. 1958), *aff'd on limited grounds*, 358 U.S. 101 (1958); Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

school board resolution barring admission to non-white children. Illegal segregation may be effectuated by gerrymandering a school district, by arbitrary site selection, by manipulating transfer policies, by under-utilization of certain schools, if such practices are designed to establish or maintain a homogeneous racial school population. It is immaterial that the word "race" or "Negro" is scrupulously avoided in official declarations. The crucial tests are motivation and effect. Nor must this constitutional right to attend non-segregated schools necessarily have only a judicial remedy. The right may be affirmed and protected by administrative action of school authorities or legislative action of city councils. Indeed, some constitutional rights lack a judicial remedy.[25]

In some circumstances, "a culpable official's inaction may also constitute a denial of equal protection."[26] The recent case of *Taylor v. Board of Education*[27] is instructive. There the court found that beginning in 1930 the New Rochelle school Board had so gerrymandered school district lines as to confine Negro pupils within one school, the Lincoln School, and to assign white pupils to other schools. This plan was strengthened up to 1949 by allowing white children in the Lincoln School district to transfer to other elementary schools.[28] In that year, when Lincoln School had almost a 100% Negro population, the school board imposed "a freeze on the artificially created boundaries" of the Lincoln district and refused all requests by Negro children for

25. Under the First Amendment, the federal government may not grant federal funds to religious bodies but there seems to be no legal method by which an ordinary citizen or taxpayer can challenge such payments, since under current constitutional doctrine, he lacks status to sue. See PFEFFER, CHURCH, STATE AND FREEDOM 165-69 (1953).

26. Lynch v. United States, 189 F.2d 476, 479 (5th Cir. 1951); there state police officials allowed a mob to seize and beat Negroes whom they had arrested. *Accord,* Catalette v. United States, 132 F.2d 902, 907 (4th Cir. 1943) which upheld the conviction of an officer who passively allowed a mob to assault certain Jehovah's Witnesses. *Cf.* Public Utilities Comm's v. Pollack, 343 U.S. 451, 462 (1952). For a different view of the obligations of school boards, see Meador, *The Constitution and the Assignment of Pupils to Public School,* 45 VA. L. REV. 517 (1959), who relies on Covington v. Edwards, 264 F.2d 780 (4th Cir. 1959) and Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956), *Cert. denied,* 353 U.S. 910 (1957). In Borders v. Rippy, 250 F.2d 690, 692 (5th Cir. 1958), the court modified a lower court injunction restraining the Dallas, Texas, school board "from requiring or permitting segregation of the races in any school" by striking the phrase "or permitting" on the ground that it "might indicate a serious misconception of the law." For a detailed analysis of different types of state action, see *State Action, A Study of Requirements under the Fourteenth Amendment,* 1 RACE REL. L. REP. 613 (1956). See also the materials cited in GREENBERG, RACE RELATIONS AND AMERICAN LAW 48 n.61 (1959).

27. Civil No. 60-4098, S.D.N.Y., Jan. 24, 1961.

28. Public school segregation has been illegal in New York by statute since 1938 when the then existing section 921 of the Education Law was repealed. N.Y. Laws, 1938, ch. 134. Section 3201 of the Education Law, which has been law since at least 1910, explicitly forbids the exclusion of pupils from public schools because of their race or color.

transfers to other schools in the community. From 1949 to 1960, despite many requests and recommendations that the racial imbalance at Lincoln School be corrected, the school board refused to take any corrective action. Federal District Judge Kaufman in a 48 page opinion found that the New Rochelle School Board had been motivated since 1949 by a desire to maintain the Lincoln School as a "racially segregated" school. Declaring that the 94% Negro population of the school was not "an unfortunate fortuity," he held that the board had not since *Brown v. Board of Education* "acted in good faith to implement desegregation as required by the fourteenth amendment." He declared in a footnote, however, that the term "de facto should be limited to segregation resulting from fortuitous residential patterns. This decision does not purport to determine whether 'de facto' segregation, in this sense, is violative of the Constitution."

Judge Kaufman thereupon directed the New Rochelle School Board to submit within 80 days a "plan for desegregation" to begin no later than the 1961-1962 school year.[29] This is the first time a northern school board has been ordered to submit a desegregation plan to a court.[30]

The "expanding concept of state action"[31] continues therefore to develop. Failure to correct *de facto* segregation may in some circumstances violate the Constitution. A school board does not immunize itself against judicial challenge merely by adopting a "neighborhood school policy" for, as Judge Kaufman held, such a policy is not "sacrosanct" and is "valid only insofar as it is operated within the confines established by the Constitution. It cannot be used as an instrument to confine Negroes within an area artificially delineated in the first instance by official acts."

Judge Kaufman cited in support of this proposition *Evans v. Buchanan,*[32] in which a United States District Court rejected a desegregation plan submitted in Delaware under which a pupil was required to attend the "nearest school within the district in which he resides" or the school he attended prior to the institution of the desegregation plan. The Court pointed out that this plan would have

29. According to the State Commissioner of Education, of the other ten elementary schools in the New Rochelle district, four had less than 10% of Negro pupils, five from 15 to 27% and one had 51%. Matter of Taylor, No. 6775, N.Y. State Educ. Dept., May 20, 1960.

30. For a contrary view of the underlying facts in this case, see Elfin, Why Pick on New Rochelle?, Reporter, Dec. 8, 1960.

31. Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 536, 87 N.E.2d 541, 551 (1949), *cert. denied* 339 U.S. 981 (1950).

32. 172 F. Supp. 508, 516, *aff'd on rehearing,* 173 F. Supp. 891 (D.C. Del. 1959), *rev'd on other grounds sub nom.* Evans v. Ennis, 281 F.2d 385 (3d Cir. 1960).

prevented Negro children living in a Negro district from attending a "white" school farther from his home than the hitherto segregated Negro school.

Boards of education may not therefore put the sole responsibility for segregated schools on residential patterns if they reinforce such patterns by their own actions or "culpable inaction." *Taylor v. New Rochelle* is a warning, as Judge Kaufman put it, that "compliance with the supreme court's edict was not to be less forthright in the north than in the south. . . ."

School boards in northern cities had two alternatives after *Brown v. Board of Education.* They could hide behind the striking phrase used by Justice Harlan in 1896 and be "color-blind,"[33] refusing to assume any responsibility for school segregation arising from no policy or action of their own. Almost all northern school boards have tacitly adopted this position.[34] Or they could be "color-conscious,"[35] recognizing that if *de facto* segregation means inferior education, school authorities have at least an educational and moral responsibility to take affirmative steps to reduce or limit, if not eliminate, such segregation.

One of the few school boards in the country to adopt the latter position is the New York City Board of Education which in a bold and challenging resolution issued December 23, 1954 declared that "racially homogeneous public schools are educationally undesirable" and that it intended to devise and put into operation a plan to "prevent the further development of such schools . . . and to integrate them as quickly as practicable." Simultaneously the Board created a Commission on Integration and directed it to address itself to the problem of desegregation and "the closely related and crucial problems of raising the educational and vocational aspirations of talented students from economically and socially deprived groups."[36]

A similar declaration was adopted by the New York State Board of Regents who supervise all education in the state. Declaring that "schools enrolling students largely of homogeneous ethnic origin may damage the personality of minority group children" and "impair the

33. Plessy v. Ferguson, 163 U.S. 537, 599 (1896) (dissenting opinion).

34. For the position of the Chicago school authorities, see De Facto Segregation in the Chicago Public Schools, *supra* note 12, at pp. 87-88. This study cites evidence, however, tending to show that the Chicago Board of Education is deliberately maintaining a policy of segregation.

35. See LEVINE & MASLOW, FROM COLOR BLIND TO COLOR CONSCIOUS (1959).

36. The complete text of the resolution appears in Toward the Integration of Our Schools, *supra* note 20, at pp. 24-26. The Commission consisted of all nine members of the Board of Education, the Superintendent of Schools and four other officers of the school system and 23 civic and educational leaders, including Kenneth B. Clark, Richard L. Plaut and Robert C. Weaver.

ability to learn," it described such public education as "socially unrealistic, block[ing] the attainment of the goals of democratic education." After referring to "residential segregation which leads to schools predominantly of one race," it charged the State Education Department to assist in seeking solutions of the problem.[37]

A forthright declaration of policy is only the first step toward a solution. A desegregation plan must be devised and put into operation. What are the essentials of such a plan?

One basic component is a realistic definition of segregation and integration. The prevailing Southern view is that the admission of a handful of Negroes or even a single one to an all-white school desegregates it. When the barrier to an open admissions policy is a state law or school board policy in which race is a crucial or limiting factor, such a view is untenable, as long as other applicants are barred by their race. It is equally unrealistic and self-defeating when segregation arises from concentrations of Negro or Puerto Rican population that, left unchecked, will automatically produce Jim Crow schools. The New York Board of Education classifies an elementary school as segregated if its Negro or Puerto Rican population is either 90% or higher or 10% or lower. The comparable figures for junior high schools are 85% and 15%.[38] These precise figures have no independent legal or even psychological authority. They merely represent the Board's conclusion that to achieve integration, school boards must seek not the token admission in "white" schools of a few carefully screened Negro children[39] but creation of heterogeneous school populations in which substantial numbers of white and Negro children are mixed.[40] Desegregation cannot be viewed solely in terms of arbitrary Negro-white ratios but must be related to the racial composition of the area.

Devices to perpetuate segregation are numerous and often difficult to uncover. Most important is a deliberate drawing of school district line to lump Negroes in certain schools and white students in others. These zoning lines may result in gerrymandered districts whose irregular shapes on a zoning map reveal their hidden, illegal purpose. Gerry-

37. Statement of the Board of Regents on Intercultural Relations in Education, January 28, 1960. The State Education Department has not yet announced a program to correct school segregation.

38. THEOBALD REPORT 174-75.

39. In Evans v. Buchanan, 173 F. Supp. 891, 893 (D.C. Del. 1959), the court stated that it would not "permit the school authorities to confine integration to a bare token . . . ."

40. In Taylor v. Board of Educ., Civil No. 60-4098, S.D.N.Y., Jan. 24, 1961, the court found that a school with a white population of 6% was illegally segregated.

mandering to promote or retain segregation is obviously illegal.[41] Indeed, any zoning line which prevents children from attending the school nearest their homes, if they so desire, at once arouses suspicion.[42]

The customary criteria in zoning a school district are:

1. Minimizing distance from home to school.
2. Avoiding traffic hazards and topographical barriers such as steep hills.
3. Convenience and accessibility of public transportation when it is necessary to use public transportation.
4. Maximum utilization of school space to avoid under-utilized schools.
5. Avoidance of multiple shifting of pupils to ensure continuity of instruction.[43]

It is not sufficient that school lines are drawn without considering the ethnic composition of schools. The color-blindness simply allows the *status quo* to continue. Color-conscious New York City had made achievement of desegregation a "cardinal" principal in zoning.[44] That does not mean that other criteria may be disregarded.[45] It does mean that integration should not be deemed inferior to any other criterion, except perhaps the physical safety of the children. Indeed, considerations of learning, the prime function of schools, must be paramount to such matters of convenience as ease of access. Therefore lines must be

41. Clemens v. Board of Educ., 228 F.2d 853 (6th Cir. 1956), *cert. denied*, 350 U.S. 1006 (1956); Webb v. School Dist. No. 90, 167 Kan. 395, 206 P.2d 1066 (1949); Taylor v. Board of Educ., *supra* note 40; Matter of School Dist. No. 1, 70 State Dept. Rep. 108 (N.Y. State Educ. Dept. 1949); Matter of Central School Dist. No. 1, 65 State Dept. Rep. 106 (N.Y. State Educ. Dept. 1943); Walker v. Board of Educ. 1 RACE REL. L. REP. 255 (1956). In the second *Brown v. Board of Educ.* opinion, 349 U.S. 294 (1955), the Court referred to the need for "revision of school district and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis."

42. In Matter of Taylor, No. 6775, N.Y. State Educ. Dept. May 20, 1960, the New York State Commissioner of Education stated: "Every child is entitled to attend the school nearest his residence, unless there are just and compelling reasons to send him elsewhere." *Accord,* Pierce v. Union Dist. School Trustees, 46 N.J.L. 76 (1884).

43. PEA REPORT 8.

44. THEOBALD REPORT 152; Report of the Sub-Commission on Zoning, 2 RACE REL. L. REF. 231 (1957). During the 1958-1959 school year, 13 rezonings took place in New York City. In each instance, the percentage of white students in the rezoned school was decreased by small amounts. THEOBALD REPORT 176-77.

45. In Matter of Bell, 77 State Dept. Rep. 37 (N.Y. State Educ. Dept. 1956), the New York State Commissioner of Education held: "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 this will mitigate against their educational program."

placed that will foster, not hinder, desegregation.[46] (School district maps should also be public so that those interested may scrutinize these essays in "geometry and geography.")[47]

The "Princeton Plan" offers a relatively simple method of achieving integration in small towns, or even in larger areas, where a school serving a Negro area is relatively close to a school serving a white one. School authorities in Princeton, New Jersey, assigned all children in the first three grades to one school in a Negro area and the other grades to a second school outside the area, thus achieving integration.[48] The Public Education Association disclosed in 1955 that there were 258 pairs of elementary and junior high schools within the same school districts in New York City which differed in the percentage of continental white children by 30% or more.[49] Adoption of the Princeton Plan of rezoning or variations thereof would therefore lead to better ethnic balance in such schools.

We must distinguish, however, between a school board's right to use zoning lines to reduce segregation and its legal duty to do so. In the New Rochelle case, the New York State Commissioner of Education held that a school board was under no compulsion to "gerrymander" school district lines to achieve integration.[50] In three prior rulings, the Commissioner rejected attempts by parents of Negro children to *compel* school boards to reduce *de facto* segregation by rezoning school district lines.[51]

If integration is to be achieved, school authorities must have up-to-date information about the racial and ethnic composition of their schools and the neighborhoods they serve. This does not entail keeping records of each school child's race or ancestry. It is not necessary for the school board to know the race or ethnic origin of any

46. This view was strongly defended by the New Jersey Attorney General in Walker v. Board of Educ., 1 RACE REL. L. REV. 255 (1956); GREENBERG, RACE RELATIONS AND AMERICAN LAW 251-52 (1959).

47. Gomillion v. Lightfoot, 362 U.S. 916 (1960).

48. This plan is also used in Benton Harbor, Michigan; Willow Grove, Pennsylvania and other communities. GREENBERG, RACE RELATIONS AND AMERICAN LAW 248 (1959).

49. PEA REPORT 18.

50. Matter of Taylor, No. 6775, N.Y. State Educ. Dept., May 20, 1960. The United States District Court found that on the contrary, school district lines in New Rochelle had been drawn to maintain segregation.

51. Matter of Bell, 77 State Dept. Rep. 37 (N.Y. State Educ. Dept. 1956); Matter of School Dist. No. 1, 70 State Dept. Rep. 108 (N.Y. State Educ. Dept. 1949); Matter of Central School Dist. No. 1, 65 State Dept. Rep. 106 (N.Y. State Educ. Dept. 1943). In the first and second cases cited, questions of the physical safety of the children because of traffic hazards were involved. See also People v. McFall, 26 Ill. App. 319 (1887) (all-colored schools held the "natural result" of the neighborhood); State *ex rel.* Lewis v. Board of Educ., 137 Ohio St. 145, 28 N.E.2d 496 (1940) (Negroes denied admission to school nearest them); Smith v. Lower Gwynedd Twp., 72 Montg. Co. L. Rep. 266 (C.P. Pa. 1954) (children attend the all-Negro school because of the "geography of the situation").

particular child. Indeed any effort to question an individual child about his race or ancestry or record such data may not only be an affront or a humiliation but may be illegal as well. A school board needs only *statistical* data about the ethnic composition of groupings of the school population. That data can be obtained (as is done in New York City) by teacher counts based on their observation of the children and without questioning them.[52] Complete or scientific accuracy is not necessary and border-line or doubtful cases can be placed in one category or another. But without such information, school authorities must rely on guesing, an unreliable procedure when large numbers are involved.

Should school zoning lines once drawn be rigidly maintained? Educators are divided. Some feel that, if children in a particular school district are given permission to attend schools outside their district, white children will avail themselves of this privilege merely to escape attendance at predominantly non-white schools. The Indianapolis school board while adopting the neighborhood school concept has established certain "optional zoning districts" in which pupils have a choice of school. According to the Indianapolis Human Relations Council, these options "limit the extent of integration."[53]

On the other hand, Philadelphia has always had and still maintains the policy of allowing a child to attend any school in the city, provided that such school after enrolling the children of the neighborhood has room for others. School authorities in that city contend that an optional enrollment policy fosters rather than hinders integration.[54]

One important advantage of an optional policy is that it may discourage flight to the suburbs by white parents. Nathan Glazer points out the marked variations among ethnic groups in what they expect from education for their children and the importance they ascribe to education in general. He argues that allowing middle-class or

52. Board of Education, Ethnic Distribution of Pupils in Regular Elementary and Junior High Schools, September 1957 (1958) p. 1.

53. See REPORT, *supra* note 16, at 2.

54. For Every Child, *supra* note 14, at p. 3. Only 5,000 children, the majority of whom are Negroes, out of 243,000 in that city, are attending schools "outside their home boundaries." After *Brown v. Board of Educ.*, Baltimore likewise allowed its school children to enroll in any school of their choice not officially declared overcrowded. In September, 1954, only 4000 Negro children or 6.9% of the total Negro enrollment elected to attend what were previously all-white schools. Some 46,000 white students or 53.6% of the total white population were then enrolled in these mixed schools. Baltimore had not zoned its schools even before *Brown v. Board of Educ.* United States Commission on Civil Rights, REPORT 178 (1959). By the fall of 1957, however, there were 14,826 Negro children or about 20% of the Negro enrollment attending former all-white schools. Southern School News, Feb. 1958, p. 13.

upper-class parents to send their children to what they regard as the best schools in the city, even though such schools are not in their neighborhood, is a powerful deterrent against fleeing to suburbia or other areas in an effort to obtain better schooling for their children.[55] The Chicago branch of the National Association for the Advancement of Colored People complained that the inferior school in a mixed neighborhood "becomes an important contributing factor to the flight of whites from a transition neighborhood. Dissatisfied with their own mixed school, the whites look a few blocks farther to the Negro ghetto nearest them and picture their children on double shift until high school. They move."[56]

New York City until recently maintained a strict policy that compelled children to attend their neighborhood school. A similar position is taken by the Pasadena, California, Board of Education which has taken a firm stand against evasion of school zoning and has declared that it will not allow "practices by parents which alter the faithful racial representation of the geographical area served by each school."[57] The lengths to which some parents go to circumvent zoning lines were described by the Public Education Association in 1955 as including the falsification of home addresses and the use of "political pressure."[58]

May a school board constitutionally consider the race of an individual seeking a transfer from one school to another? The Supreme Court has held that "classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."[59] But in *Kelley v. Nashville Board of Education*,[60] the Court throws doubt on this proposition. There the United States Supreme Court was requested to review a desegregation plan in Nashville that had been approved by the lower courts. The plan, among other features, permitted pupils to transfer out of mixed or desegregated schools if the schools had been established previously for children of another race or where children of another race were in the majority. Thus white children were given a judicially-sanctioned option of avoiding attendance at a desegregated school. Consistent with its present policy of allowing the lower federal courts to determine the procedures of school desegregation

55. Glazer, *The School As an Instrument in Planning*, 25 J. AM. INSTITUTE OF PLANNERS 191 (1959).

56. De Facto Segregation in the Chicago Public Schools, *supra* note 12 at p. 89.

57. Superintendent's Bulletin No. 8, Pasadena City Schools, July 22, 1958.

58. PEA REPORT 16.

59. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

60. 361 U.S. 924 (1959) (mem. dec. denying cert.)

plans, the Supreme Court declined to review the plan. Chief Justice Warren and Justices Douglas and Brennan noted their dissent from the denial of certiorari, declaring that they favored a review of the transfer provision of the Nashville plan because it "explicitly recognized race as an absolute ground for the transfer of students between schools, thereby perpetuating rather than limiting racial segregation."[61] If optional transfers that perpetuate segregation can withstand judicial scrutiny, optional transfers designed to effectuate desegregation should clearly be upheld.

Allowing such optional transfers removes any element of coercion that may be present in a desegregation plan and thus removes the pressure of its most vociferous opponents. Simultaneously it would allow unlimited and unrestricted transfers of Negro children who desire to escape from inferior all-Negro schools in ghetto areas.

The difficult policy question that must be determined is whether such unlimited transfers will foster or hinder desegregation. Local factors, including distances to available schools, will probably affect the final determination more than any *a priori* logical judgment.

New York City's integration program first contemplated a continuance of its long-established policy of rigid school zoning lines with no privilege of permissive transfers, except for intellectually gifted or retarded children seeking to attend special classes not given in the schools within their zoning district. In 1959, however, it experimented with a device called permissive bussing. Under this plan, it transported daily by bus some 919 children from over-crowded schools in the Bedford-Stuyvesant district, a Brooklyn Harlem, to under-utilized schools just across the borough borderline in Queens. During the ensuing public controversy and in the litigation commenced to en-

61. *Id.* In Boson v. Ripley, 285 F.2d 43, 47 (5th Cir. 1960) (supplemental opinion), the fifth circuit after citing the denial of certiorari in the *Kelley* case invalidated a provision in the segregation plan submitted by the Dallas, Texas, school board which recognized as a "valid condition" to support an application for transfer for the fact that a "white student would otherwise be required to attend a school previously serving colored students only" and that a student would otherwise be required to attend a school "where the majority of students in that school or in his or her grade are of a different race." The court stated that "classification according to race for purposes of transfer is hardly less constitutional than such classification for purposes of original assignment to a public school." Similarly in Dove v. Parham, 282 F.2d 256 (8th Cir. 1960) the circuit court disagreed with the statement of the lower court that "the race of a particular student who may desire to be assigned to a particular school may be considered to a limited extent as one of a number of factors going into the total equation." 183 F. Supp. 389 (E.D. Ark. 1960). The circuit court stated at page 262: "Where a board has adopted a definite plan of effecting desegregation by reasonable transitional steps, the racial question necessarily is geared to the scope of those steps. But only in that sense and within that need, we think, is there basis to say that consideration in assigning students may be given to race."

join the transfer, school authorities defended it as designed solely for the better utilization of schools.[62]

Goaded by protests from Negro parents, civic groups and the New York Commission on Intergroup Relations and by threats of student strikes,[63] the school authorities in August 1960 adopted a new policy on transfers designed to obtain "better ethnic distribution" in the schools. Under this "open enrollment" program, all pupils from 21 designated junior or senior high schools with a "heavy concentration of Negro and Puerto Rican students" were given the opportunity to transfer to 28 other schools, which were utilized at less than 90% of capacity. Students in the boroughs of Brooklyn or Queens could choose any designated school in their borough and students in Manhattan or Bronx could transfer to any appropriate school in either borough. Parents, however, were required to provide their own transportation. The Negro and Puerto Rican enrollment in the "sending" junior high schools was from 80 to 100% and in the "receiving" schools from .4 to 23.8%. About 12,000 students were eligible to transfer.[64]

The plan, winning wide public acceptance,[65] was soon extended to about 50,000 children in the second, third and fourth grades of 93 predominantly Negro and Puerto Rican schools in four boroughs of the city. Free bus transportation is to be provided when the new school is more than a mile from the transferee's home. The transfers are scheduled to take place in the fall of 1961. Some 3,080 children have requested transfers under the plan or 6.1% of those eligible; they will occupy about one-fifth of the 15,000 empty places in the 124 designated receiving schools.[66] Subsequently 3,097 sixth graders out of some 15,000 eligible applied for transfer to 27 desegregated receiving junior high schools. A first preference was given to pupils who would normally attend junior high schools having a Negro and Puerto Rican enrollment of 85% or more. A second preference was

62. Matter of Anderson v. Board of Educ., Queens County, L.J., (N.Y. Sup. Ct. 1960). The injunction suit was never brought to trial. In other instances, after the ground had been prepared by community relations workers of the Board and the New York Commission on Intergroup Relations, a frictionless transfer of 794 children from East Harlem to all-white Yorkville took place. THEOBALD REPORT 161-63; N.Y. Times, Dec. 21, 1959.

63. See editorial, N.Y. Amsterdam News, Aug. 20, 1960; N.Y. Times, Aug. 30, 1960.

64. N.Y. Times, Sept. 1, 1960; 5 RACE REL. L. REP. 911-13 (1960).

65. See editorial and news item, N.Y. Times, Sept. 2, 1960.

66. N.Y. Herald Tribune, Jan. 30, 1961. The Board of Education was able to assign 91% of those requesting transfers; 181 Manhattan elementary school pupils were turned down because all available seats at the receiving school had been taken. N.Y. Times, Feb. 22, 1961, p. 19.

given to pupils who were scheduled to attend junior high schools with Negro and Puerto Rican enrollments of 75 to 85%.[67]

It will be noted that the privilege to transfer is not given on a racial or ethnic basis; a white student in a predominantly Negro or Puerto Rican school may also exercise the option. Nevertheless, the designation of predominantly Negro and Puerto Rican schools as "sending" schools will mean in practice that almost all the children exercising the option will in fact be Negro or Puerto Rican.

The open enrollment program is therefore almost a complete break with the concept of the *mandatory* neighborhood school and should improve the ethnic balance of New York City's schools. Since the program does not rest on a racial or ethnic base and can also be defended as a device to prevent over-crowding, it should withstand legal attack.[68] It means in the last analysis that any child in the eligible grades in a designated school may, if he wishes, avoid the disadvantages of segregated public education by exercising a privilege freely available to him. (Children in kindergarten or the first two grades, who are too young to travel alone by bus, will continue, however, to attend segregated schools.)

Some boards of education are willing to transport Negro children to white schools even for the sole purpose of relieving overcrowding. According to a study by the Chicago branch of the NAACP, the Chicago Board of Education has refused to transport Negro school children from predominantly Negro schools operating on double shift to predominantly white schools operating on single shift, in some of which there were vacant classrooms. The refusal was purportedly based on a state law prohibiting the transportation of children who live within walking distance of their schools.[69] But obviously if the schools are redistricted and the Negro children assigned to distant less crowded "white" schools, they will not be within walking distance of such schools and therefore entitled to transportation.

On the other hand, the Detroit Board of Education began in October, 1960, to transport by bus 314 Negro third and fourth grade children from two overcrowded schools in Negro areas to three nearby

67. N.Y. Herald Tribune, March 3, 1961. The Board was faced, however, because of the unexpectedly large number of applications, with a shortage of some 1000 available places in the receiving schools.

68. Taylor v. Board of Educ., Civil No. 60-4098, S.D.N.Y., Jan. 24, 1961, at n.13. *Cf.* Railway Mail Ass'n v. Corsi, 236 U.S. 88, 89 (1945) (concurring opinion of Frankfurter, J.) "Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a state to extend the area of non-discrimination beyond that which the Constitution itself exacts."

69. De Facto Segregation in the Chicago Public Schools, *supra* note 12 at p. 90.

schools in white areas.[70] The program was defended as simply an effort to prevent overcrowding, "not for the sake of integration or to avoid it."[71] Despite a three day strike of some 1,200 students[72] at the receiving schools, the Board has maintained this policy.[73]

Another device to reduce segregation is to locate new schools on the fringes of areas of Negro concentration. These schools will then draw their population from Negro and white neighborhoods and thus avoid becoming Jim-crow or lily-white. However, a sharp dilemma sometimes faces metropolitan school boards that would locate new schools exclusively in fringe areas. The policy, if rigorously applied, would mean a refusal to replace obsolete and dilapidated schools in the heart of black belts. But what of the children in these schools? Shall their constitutional right to immediate equal educational opportunity, which at the very least requires that they shall not be relegated to inferior physical facilities, be denied or delayed? Faced with the problem of achieving a better ethnic balance but only at the expense of perpetuating unequal schools, New York City compromised. Of the 54 new elementary and junior high schools opened from 1957 through 1959, 13 were placed in predominantly Negro or Puerto Rican areas, 17 in predominantly white areas and the remaining 24 in mixed areas.[74]

We must again distinguish, however, between the right of a school board to locate a new school so as to prevent segregation and its duty to do so. A United States circuit court of appeals refused to enjoin school authorities in Darby Township, Pennsylvania, from locating a new public junior high school in a predominantly white area after finding that the selection of the site was not "motivated by any racial discrimination whatsoever."[75] In Pontiac, Michigan, a federal district court upheld a school board's selection of a school site which, though perpetuating *de facto* segregation, was chosen because of relevant and reasonable factors.[76] In New York, the State Commissioner of Education allowed the New Rochelle School Board to

70. Detroit Free Press, October 30, 1960.

71. Detroit News, October 26, 1960.

72. Detroit News, October 30, 1960.

73. Detroit News, Feb. 1, 1961. Similarly in St. Louis, Missouri, 6125 elementary school children, the "great majority" of whom are Negroes, are being bussed from over-crowded schools to six formerly all-white schools. Southern School News, Nov. 1960, p. 10.

74. THEOBALD REPORT 176.

75. Sealy v. Department of Public Instruction, 252 F.2d 898 (3d Cir. 1958), *cert. denied*, 356 U.S. 975 (1958); 3 RACE REL. L. REP. 460 (1958). The lower court, however, reserved for later consideration a claim that a proposed administrative reshuffling of school districts would conjoin non-contiguous Negro populations, 159 F. Supp. 561 (1957); 3 RACE REL. L. REP. 455 (1958).

76. Henry v. Godsell, 165 F. Supp. 87 (E.D. Mich. 1958); 3 RACE REL. L. REP. 914 (1958).

locate a new school on the site of an outmoded one in a Negro area, despite protests that the school segregation would thereby be aggravated.[77]

Can a large city like New York, with its Harlems and its Bedford-Stuyvesant areas, achieve any real desegregation in the all-Negro schools within such racial concentrations?[78] New York City's problem is extraordinarily complex because three-quarters of the public elementary school children in Manhattan are either Negro or Puerto Rican; in the city as a whole, two-fifths are.[79] The Board's 1954 resolution spoke confidently of "a plan which will prevent the further development of such [segregated] schools and would integrate the existing ones as quickly as practicable." The 1958 final report of the Commission on Integration was much less hopeful. It concluded: "Given the present residential patterns, no very marked changes in the populations of more segregated schools can be expected in the near future." The 1960 progress report of the Superintendent of Schools bears out this pessimistic conclusion. It revealed that from 1957 to 1959, the number of segregated Negro or Puerto Rican elementary schools had actually risen from 64 to 75.[80] Not a single one of such schools has been desegregated, *i.e.*, in not one has the white population risen to 10% or higher. On the other hand, the number of elementary schools in which Negro and Puerto Rican children constituted less than 10% of the school enrollment has declined from 290 to 248. The net result was that in 43.3% of the system's elementary schools a measure of integration had been achieved in that the percentage of Negro and Puerto Ricans on the one hand and of continental whites on the other was each over 10%. In 1957, 33.2% of the city's elementary schools were integrated, according to this classification.[81] A further increase in such mixed schools is likely to result from the open enrollment policy.

Open enrollment policies and permissive bussing are devices to allow Negro and Puerto Rican children to avoid segregated schools.

77. Matter of Taylor, No. 6775, N.Y. State Educ. Dept., May 20, 1960; N.Y. Times, May 21, 1960. The State Commissioner of Education found that 93% of the Lincoln School's pupils were Negroes but stressed that 62% of the town's Negro elementary students attended integrated schools and that from the seventh grade on all students attended "completely integrated" schools. The question of the location of the Lincoln School is now under judicial scrutiny. Taylor v. Board of Educ., Civil No. 60-4098, S.D.N.Y., January 24, 1961.

78. For a pessimistic view, see Glazer, *Is "Integration" Possible In New York Schools?*, 30 COMMENTARY 185 (1960).

79. THEOBALD REPORT 6.

80. *Id.* at 155.

81. *Id.* For some reason the report does not give the ethnic composition of the city's junior high schools.

They cannot bring white children into non-white schools.[82] Only by massive reshuffling of school populations could the Board have coped with the problem of increasing the percentage of white students in the 75 segregated Negro and Puerto Rican schools. Voluntary techniques for transferring students are not sufficient to overcome the inexorable facts of population and geography in a hugh metropolis.

In small towns, the task of desegregation is much simpler. Schools may be classified according to use under the Princeton Plan and school districts either abolished or modified accordingly. Sometimes where a Negro concentration is at one end of a town, zoning lines may be drawn to run north and south instead of east and west, thus cutting through the Negro concentration instead of encircling it. Because distances are much smaller than in metropolitan areas, children may be bussed for short distances. In Westbury, Long Island, to prevent a new school in a predominantly Negro area from becoming segregated, school authorities are transporting *white* pupils to it by bus. By means of this redistricting, the new school's Negro population will be about 50%.[83]

Desegregation is only one part of a school board's task. Indeed, were it to stop at desegregation, it would not perform its constitutional duty of equalizing educational opportunity for all its pupils. Negro and Puerto Rican children, living in slums, with little or no parental supervision, moving frequently in the middle of school terms,[84] with poor motivation and low educational aspirations and occasionally speaking English poorly,[85] will require more than attendance at a theoretically integrated school to overcome such handicaps.[86] Physical facilities, expenditures per pupil, size of classes, overcrowding, caliber and experience of teachers and curriculum must also be equalized.[87]

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82. One significant zoning change did have the effect of moving 166 white children from a well-to-do residential area just South of 96th Street on Manhattan's East Side to a predominantly Negro and Puerto Rican School in East Harlem. N.Y. Times, June 10, 1960; Goldman & Goldman, School Segregation: Park Avenue Style, Look, Jan. 31, 1961.

83. N.Y. Times, Jan. 21, 1960.

84. In an elementary school in Manhattan, there were 669 admissions and 456 discharges in one school year out of a total school population of 1550; in a Brooklyn junior high school, 610 admissions and discharges in a school population of 1335; in a Bronx school 1077 admissions and discharges in a student body of 1450. Public Education Association, How Difficult are the Difficult Schools? 13 (1959). See also THEOBALD REPORT 43.

85. In 1958, about 10% of the 558,741 children in New York City's elementary schools lacked sufficient ability to speak or understand English. They were of Puerto Rican ancenstry. THEOBALD REPORT 16.

86. These factors are also mentioned in GREENBERG, RACE RELATIONS AND AMERICAN LAW 211 (1959).

87. PEA REPORT 7-11. For an extensive list of court cases in which inequality in physical facilities or educational opportunities in public schools was considered, see Leflar & Davis, *Segregation in the Public Schools, 1953,* 67 HARV. L. REV. 377, 430-32 (1954).

A deliberate provision of inferior facilities for minority group children is obviously a violation of the fourteenth amendment even where the school board is not responsible for segregation. But where one group in a school system is markedly handicapped in comparison with others, the provision of equal facilities for each may be inequitable. "Equal protection of the law," the Supreme Court has told us, "is not achieved through indiscriminate imposition of inequalities."[88] Neither is it achieved through the mechanical provision of equal facilities when only disproportions will redress prior inequalities and cultural deprivations. "There are instances where it is not only justified, but necessary, to provide for such allegedly 'unequal treatment' in order to achieve the equality guaranteed by the Constitution."[89] Or, as the New York City Superintendent of Schools put it in explaining the special services required by "difficult" or "special service" schools, "the nature of the educational opportunities available ought to be consistent with the needs of the children."[90]

The New York City Commission on Integration found that "the schools in the colored neighborhoods of Greater New York have tended to be older, less well equipped and more crowded than the schools in the white neighborhoods; the quality of the teaching provided in these predominantly colored schools has also suffered." The Board of Education therefore properly announced that it intended to replace 22% of the predominantly Negro and Puerto Rican schools, as compared with 1% of the predominantly white schools.

Considering the "proportionate needs of the school populations involved," the Commission on Integration urged a "quantitative and qualitative reassignment" of teachers to overcome the handicaps of the minority group.[91] It is not sufficient to ensure that the size of classes in the segregated inferior schools is no larger than in other schools; they must be smaller to compensate for racial and ethnic handicaps. Similarly, a disproportionate number of remedial reading and arithmetic teachers, guidance counselors and auxiliary personnel must be detailed to backward areas and finally, the best, not the worst, teachers in the system must be assigned to the difficult schools. As the Sub-Commission on Teachers Assignment and Personnel put it: "Emphasis should be on the needs of the schools rather than on preference of teachers and principals."[92]

88. Shelley v. Kraemer, 334 U.S. 1, 22 (1948).
89. Taylor v. Board of Educ., Civil N. 60-4098, S.D.N.Y., Jan. 24, 1961.
90. THEOBALD REPORT 10-11.
91. Toward the Integration of Our Schools, *supra* note 20, at pp. 5, 13, 9.
92. Report of the Sub-Commission on Teachers Assignment and Personnel, Dec. 7, 1956, p. 12.

This recommedation has evoked considerable controversy. The 1955 PEA report asked this question: "Are teachers in segregated Negro and Puerto Rican schools 'as competent' as those in other schools?" It answered: "If tenure, probationary and substitute status are measures of competency," teachers in the above described segregated schools are not as competent because "fewer of them are on tenure and most have probationary or substitute status."[93] It found that in the segregated Negro and Puerto Rican schools only 50.3% of the faculty in the elementary school and only 47.1% in the segregated junior high schools were "on tenure," *i.e.,* fully, licensed. The corresponding percentages for a sample of "white" schools, according to the PEA, were 78.2% and 62.0%, a gap in percentage of 27.9% for elementary schools and 14.9% for junior high schools.

One reason for this large differential is that incredibly the Board of Education has not exercised its power to assign teachers in accordance with some plan or policy but allows them to make their own arrangements with principals.[94] The Sub-Commission on Teachers Assignments and Personnel of the Commission on Integration reported that "in difficult schools where the most effective teaching is urgently needed, we find the lowest percentage of regularly licensed teachers, new appointees declining assignments. . . ." Since there is a city-wide shortage of licensed teachers, the Sub-Commission urged that a city-wide ratio of regular to substitute teachers be calculated and that regular or licensed teachers in any school in excess of the city-wide ratio be transferred to schools whose precentage of licensed teachers was below the city-wide average.

After protests from almost all teachers' unions and associations, the Board retreated. While in principle it accepted the policy of transferring teachers in excess of the city-wide ratio, it announced that it would first attempt to make teaching more attractive in the Negro-Puerto Rican schools and would then rely on "volunteers" to request transfer to the segregated schools.[95]

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93. In a subsequent study, however, the Public Education Association warned that "the labels, 'licensed,' 'substitute,' 'probationary' are not foolproof guides to quality . . ." and contrasted some alert, understanding, resilient probationers with "weary, routine and inflexible" licensed teachers "marking time to retirement." It urged that any assignment policy take individual personalties into account. How Difficult are the Difficult Schools? *supra* note 84, at pp. 23-24.

94. THEOBALD REPORT 100-12; In the Matter of Skipwith, 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct. 1958).

95. Toward the Integration of Our Schools, *supra* note 19, at pp. 15-16. The call for volunteers has been a ghastly failure as only 30 elementary and junior high school teachers out of a potential of some 18,000 in the entire school system have volunteered for transfer to such schools. THEOBALD REPORT 110.

The Board contented itself with giving the segregated Negro and Puerto Rican schools priority in the assignment of newly-appointed teachers and requiring candidates for the assistant to the principal license to serve at least two years in such schools. The Board did succeed in reducing the gap in the level of licensed teachers but only by decreasing the number of such teachers in predominantly white schools. The percentage of licensed teachers in predominantly Negro and Puerto Rican schools has not improved significantly.[96]

The Board's inaction has received judicial censure. Justice Justine Wise Polier of the New York Domestic Relations Court held that, by not exercising control over teacher assignments and thus allowing the teachers themselves to establish discriminatory patterns, the Board itself was responsible for the discrimination.[97] A similar situation exists in Chicago where Negro schools have been assigned disproportionate numbers of inexperienced teachers, although the Chicago General Superintendent of Schools has admitted that "it is desirable to have beginning teachers with limited experience assigned to schools throughout the city, rather than concentrated in a few."[98]

The inequality between segregated and all-white schools is sometimes flagrant. According to a 1958 NAACP study, 81% of the Chicago elementary school children were on "double shift," although they constituted little more than one-third of the total elementary school population. Nineteen percent of the city's "mixed" schools were on double shift and only 2% of the "white" schools. The average pupil population of Chicago's predominantly white schools was 669, of the mixed schools, 947, and of the predominantly Negro schools, 1275.[99] Nevertheless, the Chicago Board of Education has steadfastly refused to take any steps to relieve this crude discrimination by permissive bussing or transfer policies or rezoning.

Special and massive efforts are required to bridge the gap between the achievement levels of the Negro or Puerto Rican slum dwelling child and more fortunate students. Can a board of education

96. THEOBALD REPORT 104.

97. In the Matter of Skipwith, 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct. 1958). The issue arose in a domestic relations court proceeding brought by the Board of Education to declare Negro parents guilty of neglect because in protest against allegedly inferior schools, they had withdrawn their children from the school system. The court not only refused to find the parents guilty of neglect but said that they had a constitutional right to refuse to obey the New York compulsory education law because the schools to which they had been assigned were constitutionally inferior. The reverse situation arose in Cincinnati when the father of two white boys was charged with criminal neglect in juvenile court because he refused to send them to a "predominently colored" school. The charge was dropped when the boys were sent to a parochial school. Cincinnati Enquirer, May 21, 1960.

98. De Facto Segregation in the Chicago Public Schools, *supra* note 12, at p. 90.

99. *Id.* at pp. 89-90.

reduce this differential by educational methods alone without waiting for the community to end the slums, the low incomes, the social disorganization and the racial discrimination that create it? A unique educational experiment conducted by New York City provides a hopeful affirmative answer.

In 1956, the New York City Board of Education began a "Demonstration Guidance Project" in Junior High School 43, located in Harlem. The school had a student body of 1400, of whom 48% were Negro, 38% Puerto Rican and 14% continental white. (By New York City standards therefore the school was classified as segregated.)[100] The initial purpose of the project was "the early identification and stimulation of able students" in a school in a culturally deprived area. This significant experiment was aimed at raising levels of aspiration and achievement by compensating for cultural deprivation and by motivating children to attain their full potential.

In Board of Education allotted $51,000 to the project during its first year, $98,500 the second, and $120,000 the third. (Additional smaller sums were contributed by the College Entrance Examination Board and the National Scholarship Service for Negro Students.)

About 700 students, the top half of the student body, as measured by I.Q. and achievement tests, were selected for the experiment. The next step was to assign special personnel to the school. Three full-time "counselors," two teachers of remedial mathematics, one half-time teacher for educational and cultural enrichment, one school secretary, one assistant to the principal and the part-time services of a psychiatrist, a psychologist and a social worker were provided. In addition, special personnel already assigned to the school were detailed to the project, including two teachers of remedial reading, a Puerto Rican "co-ordinator," an attendance and behavior counselor and a part-time speech improvement counselor.

The 700 students in the sample were grouped on the basis of test data in special project classes, reduced in size. A double period of English was given daily and remedial teachers worked with retarded students. In addition, the special personnel assisted in training regular teachers and in giving parents an understanding of the project. Individual counseling was given, as well as weekly guidance sessions for the entire group. Finally, "cultural enrichment" excursions were made to West Point, Hyde Park, various colleges and to theatres, concerts and ballets in the city.

100. In the 1959-1960 school year, the percentage of Negroes and Puerto Ricans had risen to 89.2%. 5 RACE REL. L. REP. 913 (1960).

The results were striking. The project demonstrated, in the School Superintendent's words, that "aspirational and educational levels of under-privileged children can be raised, if people are willing to plan for it, work for it, and spend for it."[101] An I.Q. test (the Pintner Test of General Ability, verbal) showed an average increase in verbal I.Q. of 7.7 points (from 95 to 102.7) and a median increase of 9.3 points for the 700 project students. (I.Q. figures usually get progressively lower as culturally deprived children advance in elementary schools.) The median project student was 1.4 years retarded in reading in October, 1956, and three months above grade level in April, 1959. In mathematics ability, the average student in the sample showed a gain of 15 percentile points, raising his level from below average to average.

Finally, there was "a tremendous difference in achievement" between the graduates of J.H.S. 43 who entered a nearby high school before the project began and those who entered afterwards. In 1953, only five of the 105 J.H.S. 43 graduates had passed all their academic high school subjects. In the 1958 project group, 43 or 38% passed all their subjects at the end of the freshman year and 16 had averages of more than 80%. As a by-product of the experiment, school attendance improved and delinquency and misbehavior declined in the junior high school.[102]

The experimental findings were so spectacular that the Board of Education has decided to extend the program throughout the school system. As a first step, 12 more junior high schools and 16 elementary schools that channel students to them were chosen. Guidance counselors, remedial teachers and special teams of consultants and demonstrators were assigned to these schools. This new experiment, called "Higher Horizons," differed in two respects from the Demonstration Guidance project. The latter had as its main goal the stimulation of culturally deprived children to seek admission to college. The former seeks to improve the potential of all children, slow and average, as well as bright. Moreover, the High Horizons project is generally concentrated in Grade 3 in elementary schools and in Grade 7 in

101. THEOBALD REPORT 84.

102. *Id.* at 103-12. This program has served as a model for similar efforts in Chicago, Detroit, Philadelphia, Washington, D.C., and Wilmington. N.Y. Times, Jan. 11, 1961. See also Wrightstone, *Demonstration Guidance Project in New York City*, 30 HARV. EDUC. REV. 237 (1960); Rowan, A Road Out of the Slums, Saturday Evening Post, Feb. 4, 1961. As a result of the project, 39% more JHS 43 pupils graduated from George Washington High School, 2½ times as many completed the academic course of study and 3½ times as many went on to college. N.Y. Times, February 9, 1961.

junior high schools, whereas the Demonstration Guidance project encompassed all grades.[103]

Overcoming the deprivations of under-privileged Negro or Puerto Rican children can be accomplished if a school system is willing to finance such efforts. When budgets are not able to carry this extra load, boards of education must mobilize community support for increased financing.[104] If choice must be made between new school buildings and overcoming educational retardation, the choice, to the present writer, should not be masonry but improved instruction.

Equalizing objective educational factors in all-Negro and all-white schools will not wipe out the enormous disability of living in a slum and in a society that, despite a whole barrage of constitutional amendments and anti-discrimination statutes, still subjects the Negro to inferior status, as inferiority that he often accepts as his lot.[105] But such efforts help considerably to fulfill the constitutional and moral mandate imposed on boards of education.

De facto segregation is not an inevitable by-product of metropolitan life. It can be attacked and if not altogether eliminated at least be considerably reduced. Segregated education is educationally undesirable. School authorities have therefore at least an educational, a moral and in some situations a legal obligation to do all within their power to achieve integration and to equalize educational opportunity for all the children entrusted to their care.

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103. Board of Education, The Higher Horizons Program, First Annual Progress Report 1959-1960.

104. The New York City Board of Education has proposed an operating budget for 1961-1962 of $512,938,523. N.Y. Times, Jan. 18, 1961. Capital expenditures for new construction are financed by a capital expense budget which for the year 1960-1961 amounted to $68,353,668; the Board had requested an appropriation from the city of $115,431,725. THEOBALD REPORT 188.

105. Deutsch, SOCIAL AND PERSONALITY FACTORS IN SCHOLASTIC ACHIEVEMENT (Society for Applied Anthropology, New York School of Industrial and Labor Relations, Cornell University, 1960).