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Constitutional Law—Racial Factor May Be Considered by School Board in Correcting Imbalance in New School District

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RECENT CASES

CONSTITUTIONAL LAW

RACIAL FACTOR MAY BE CONSIDERED BY SCHOOL BOARD IN CORRECTING IMBALANCE IN NEW SCHOOL DISTRICT

In 1960, the Board of Education of New York City was authorized to build a new junior high school to relieve overcrowding in the Brooklyn area. The school was deliberately located in a fringe area with the intention of including children from three racial or ethnic groups. Rejecting an earlier plan,[1] the head of the Central Zoning Unit developed the present plan considering the element of racial imbalance among other relevant factors. This second plan, as adopted by the Board, achieved an attendance ratio of approximately one third each of the three racial or ethnic groups.[2] The children for whom this action was brought were starting their first year in junior high school and, but for the rezoning, would have attended a different neighborhood school. Petitioners[3] brought this action for review of the Board's plan,[4] and argued that exclusion of their children from the old neighborhood school because of race contravened the state education and antidiscrimination laws.[5] They also alleged that the Board's consideration of race in formulating the new zone violated the equal protection clause of the federal and state constitutions.[6] The Supreme Court, Special Term, confined its holding to the first issue and annulled the Board's plan because it violated the Education Law.[7] The Appellate Division, considering both the statutory and constitutional arguments, found no violation and reversed the lower court.[8] Affirming the Appellate Division's decision, the Court of Appeals *held*, that consideration of the factor of racial imbalance by a board of education in adopting a zoning plan was not arbitrary or unconstitutional. *Balaban v. Rubin*, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 85 S.Ct 148 (1964).

The action of the Board of Education in the instant case involved a consideration of race in zoning a school district with the intent to provide an

1. The initial plan was rejected by the Board of Education because the new school would not have been centrally located and because the plan failed to accord adequate consideration to the factor of racial imbalance. The ratio of attendance under the initial plan would have been 52% Negro, 34% Puerto Rican, and 14% White.

2. Specifically, the attendance ratio is 35.2% Negro, 33.6% Puerto Rican, and 31.2% White.

3. Petitioners are the parents of two children of junior high school age who live in the disputed district. The action was brought for these two white children and others similarly situated.

4. N.Y. CPLR § 7801.

5. N.Y. Educ. Law § 3201, provides, "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." N.Y. Civil Rights Law, §§ 40 and 41, proscribe discrimination in public accommodations on the basis of race.

6. U.S. Const. amend. XIV, § 1; N.Y. Const. art. I, §§ 6 and 11.

7. Balaban v. Rubin, 40 Misc. 2d 249, 242 N.Y.S.2d 973 (Sup. Ct. 1963).

8. 20 A.D.2d 438, 248 N.Y.S.2d 574 (2d Dep't 1964).

equal educational opportunity to all children concerned. Analysis of this case should include both the Board's consideration of race and the requirement of an equal opportunity to state education. The guarantee of an equal opportunity to state provided education was enunciated in *Brown v. Board of Education.*[9] In that case, the Supreme Court declared that separate educational facilities could never be equal. It concluded that if a state provided educational opportunities, they must be made available to all on equal terms. The Court held that state action denying such an opportunity because of race violated the equal protection clause of the fourteenth amendment.[10] The *Brown* decision focused on state imposed separation of school children because of race. When confronting *de facto* segregation, *i.e.*, separation of children caused by existing racial imbalance in residential patterns and not by requirement of the state, federal and state courts have varied in their interpretation of *Brown.* The federal courts have held that absent any official state action causing the segregation, no constitutional duty compels a board of education to attempt to remedy the condition.[11] However, on a showing of some state action causing or maintaining segregation, some federal courts require affirmative corrective action.[12] According to these courts, a board of education must use its authority to locate school zones in accordance with constitutional principles.[13] State courts have generally held that corrective action would be required if there was any state action imposing segregation.[14] However a California court has declared that, ". . . even in the

9. 347 U.S. 483 (1954).

10. *Id.* at 495. See Bolling v. Sharpe, 347 U.S. 497 (1954); Cooper v. Aaron, 358 U.S. 1 (1958); Goss v. Board of Education, 373 U.S. 683 (1963); Griffin v. County School Board, 377 U.S. 218 (1964).

11. See, *e.g.*, Bradley v. School Board, 317 F.2d 429 (4th Cir. 1963); Boson v. Rippy, 285 F.2d 43 (5th Cir. 1960) (by implication); Kelley v. Board of Education, 270 F.2d 209 (6th Cir. 1959), *cert. denied,* 361 U.S. 924 (by implication); Bell v. School City of Gary, 213 F. Supp. 819 (N.D. Ind.), *aff'd,* 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964); Lynch v. Kenston School Dist. Board of Education, 229 F. Supp. 740 (N.D. Ohio 1964); Webb v. Board of Education, 223 F. Supp. 466 (N.D. Ill. 1963); Evans v. Buchanan 207 F. Supp. 820 (D. Del. 1962). *Compare* Taylor v. Board of Education, 191 F. Supp. 181 (S.D.N.Y.), *aff'd,* 294 F.2d 36 (2d Cir. 1961) *with* Fuller v. Volk, 230 F. Supp. 25 (D.N.J. 1964). In the *Gary* case, the court suggests that, ". . . requiring certain students to leave their neighborhood . . . and be transferred to another school . . . simply for the purpose of balancing the races in the various schools would . . . be a violation of the equal protection clause. . . ." Bell v. School City of Gary, *supra* at 831.

12. Taylor v. Board of Education, *supra* note 11 (creating or maintaining); Blocker v. Board of Education, 226 F. Supp. 208 (E.D.N.Y. 1964) (maintaining or perpetuating). See Branche v. Board of Education, 204 F. Supp. 150 (E.D.N.Y. 1962). The court in *Blocker* said that "in a publicly supported, mandatory state educational system, the plaintiff's have the *civil right* . . . not to be compelled to attend a school in which all of the Negro children are educated separately . . . from over 99% of their white contemporaries." Blocker v. Board of Education, *supra* at 227 (emphasis added). For a discussion of federal court decisions in school segregation cases, see generally Bickel, *The Decade of School Desegregation: Progress and Prospects,* 64 Colum. L. Rev. 193, 203-12 (1964); Hyman & Newhouse, *Desegregation of the Schools: The Present Situation,* see this issue; Note, 50 Va. L. Rev. 465, 474-84 (1964).

13. Taylor v. Board of Education, 191 F. Supp. 181, 195 (S.D.N.Y. 1961). See Blocker v. Board of Education, *supra* note 12; Branche v. Board of Education, *supra* note 12.

14. Morean v. Board of Education, 42 N.J. 237, 200 A.2d 97 (1964) (per curiam); Jackson v. Pasadena City School System, 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963). See generally Note, 50 Va. L. Rev. 465, 502-24 (1964).

absence of gerrymandering or other affirmative discriminatory conduct by a school board, a student . . . would be entitled to relief where by reason of residential segregation, substantial racial imbalance exists in his school."[15]

New York law relating to school segregation has been developed both by the decisions of the courts and by rulings of the state Commissioner of Education. Action by a local board of education is subject to review by the Commissioner of Education.[16] Early decisions of the Commissioner on cases of alleged discriminatory zoning indicate that a board of education has authority to zone school attendance areas.[17] However, it must zone reasonably,[18] within the limits of the Constitution and of its statutory power,[19] and without an intent to segregate.[20] The fact that all the children of a neighborhood are of one race, religion, or nationality does not require that a board gerrymander its zones to achieve proportionate distribution.[21] On review, the Commissioner has considered the regularity of district lines,[22] the equality of facilities in various schools,[23] traffic and health hazards,[24] transportation problems,[25] transfer and optional attendance policies,[26] and the value of the neighborhood school plan for elementary schools.[27] Upon a finding of an intent to segregate or other abuse of authority, the Commissioner may readjust zone boundaries.[28] However, in a more recent case,[29] the Commissioner declared a change of policy. In this case, it was alleged that the pupil transfer system instituted by a school board was inadequate to correct the serious racial imbalance existing in the school. In passing on the claim, the Commissioner found that the local board's action was not arbitrary and that the plan was sound. Nevertheless, he declared that racial imbalance *per se* does constitute a deprivation of equal educational opportunity.[30] Hence he ordered the local board to reconsider its plan in light of the

15. Jackson v. Pasadena, *supra* note 14, at 878, 382 P.2d at 881, 31 Cal. Rptr. at 609.
16. N.Y. Educ. Law § 310.
17. *E.g.*, In the Matter of Bell, 77 State Dep't Rep. 37 (Educ. Dep't 1956); In the Matter of Hempstead, 70 State Dep't Rep. 108 (Educ. Dep't 1949); In the Matter of Ramapo, 65 State Dep't Rep. 106 (Educ. Dep't 1943).
18. In the Matter of Hempstead, *supra* note 17; In the Matter of Ramapo, *supra* note 17.
19. In the Matter of Hempstead, *supra* note 17.
20. In the Matter of Bell, 77 State Dep't Rep. 37 (Educ. Dep't 1956).
21. *Id.* at 38.
22. In the Matter of Ramapo, 65 State Dep't Rep. 106 (Educ. Dep't 1943).
23. In the Matter of Taylor, 1 Educ. Dep't Rep. 501 (Comm'r of Educ. 1960).
24. In the Matter of Bell, 77 State Dep't Rep. 37 (Educ. Dep't 1956); In the Matter of Taylor, *supra* note 23.
25. In the Matter of Danker, 2 Educ. Dep't Rep. 513 (Comm'r of Educ. 1963).
26. In the Matter of Mitchell, 2 Educ. Dep't Rep. 501 (Comm'r of Educ. 1963); In the Matter of Danker, *supra* note 25.
27. In the Matter of Bell, 77 State Dep't Rep. 37 (Educ. Dep't 1956).
28. *Ibid.*; In the Matter of Ramapo, 65 State Dep't Rep. 106 (Educ. Dep't 1943). *Cf.* In the Matter of Miller, 78 State Dep't Rep. 60 (Educ. Dep't 1957). See N.Y. Education Law § 311.
29. In the Matter of Mitchell, 2 Educ. Dep't Rep. 501 (Comm'r of Educ. 1963).
30. On the same day that this case was decided, the Commissioner issued a directive to local school administrators. In it he quoted from a statement of policy issued by the State Board of Regents,

'The State of New York has long held the principle that equal opportunity for

change in policy. The Appellate Division, in upholding this decision,[31] declared that a board can consider race in correcting imbalance.[32] Thus it has been clearly expressed that equality of educational opportunity is a matter of state concern,[33] that this equality of opportunity is essential to our democratic society,[34] and, therefore, that corrective action must be taken.[35]

Discrimination also involves classifying or distinguishing a group of people on the basis of some difference. The fourteenth amendment has traditionally prohibited a state from using invidious,[36] or palpably arbitrary classifications.[37] An explanation of this prohibition is that such a classification not only distinguishes one group but also significantly disadvantages it for no legitimate purpose.[38] However, a state may use classifications that are based on differences which are related to the object of legislation.[39] In correcting or assisting one group which suffers from a distinct condition, a state may set that group apart.[40] New York courts have held that the law allows a wide discretion to the state in classifying persons as long as it serves a legitimate public purpose.[41] There is some indication that a classification based solely on race may not be permitted,[42]

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all children . . . is a manifestation of the vitality of our American democratic society. . . .' The position of the Department, . . . is that the racial imbalance existing in a school in which the enrollment is wholly or predominantly Negro interferes with the achievement of equality of educational opportunity and must therefor be eliminated. . . . If this is to be accomplished, there must be corrective action in each community where such imbalance exists.

Special Message From the Commissioner of Education of New York to Local School Administrators, June 14, 1963, as reported in 8 Race Rel. L. Rep. 738-40 (1963).

31. In upholding the Commissioner's order, the Appellate Division reversed the decision of a lower court. That court set aside the Commissioner's order because it violated section 3201 of the Education Law. Matter of Vetere, 41 Misc. 2d 200, 245 N.Y.S.2d 682 (Sup. Ct. 1963).

32. In the Matter of Vetere v. Mitchell, 21 A.D.2d 561, 251 N.Y.S.2d 480 (3d Dep't 1964), *reversing* Matter of Vetere, 41 Misc. 2d 200, 245 N.Y.S.2d. 682 (Sup. Ct. 1963). *Compare* Matter of Strippoli v. Bickal, 21 A.D.2d 364, 250 N.Y.S.2d 969 (4th Dep't 1964) *with* Di Sano v. Storandt, 250 N.Y.S.2d 701 (Sup. Ct. 1964).

33. N.Y. Executive Law § 290. N.Y. Civ. Rights Law, §§ 40 and 41.

34. Statement of the New York Board of Regents quoted in Special Message of the Commissioner of Education of New York to Local Administrators, June 14, 1963, as reported in 8 Race Rel. L. Rep. 738-40 (1963).

35. *Ibid.*

36. Ferguson v. Skrupa, 372 U.S. 726 (1963); Morey v. Doud, 354 U.S. 457 (1957).

37. Allied Stores v. Bowers, 358 U.S. 522 (1959). See generally, Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341 (1949).

38. "It is of the essence of classification that upon the class are cast burdens different from those resting upon the general public. . . ." Atchison, Topeka & S.F.R.R. v. Matthews, 174 U.S. 96, 106 (1899). See Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1960). In this article, Professor Black discusses this explanation in light of the segregation decisions. He concludes that the principle to be derived from these cases is that the equal protection clause prohibits significantly disadvantaging any group of people. Since this is the effect of large scale segregation, such segregation is unconstitutional.

39. Royster Guano Company v. Virginia, 253 U.S. 412 (1920). *But cf.* Griffin v. Illinois, 351 U.S. 12 (1957).

40. See Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) (dictum); Morey v. Doud, 354 U.S. 457, 464-65 (1957); West Coast Hotel Company v. Parrish, 300 U.S. 379 (1939). *Cf.* Griffin v. Illinois, *supra* note 39.

41. Bucho Holding Company v. Temporary State Housing Commission, 11 N.Y.2d 469, 182 N.E.2d 569, 230 N.Y.S.2d 977 (1960) (by implication); Schaeffer v. Montes, 37 Misc. 2d 722, 233 N.Y.S.2d 444 (Civ. Ct. N.Y. 1962).

42. See Hughes v. Superior Court, 339 U.S. 460, 463-64 (1950) (dictum); Cassel v.

or will be scrutinized carefully.[43] In reviewing classifications, the Supreme Court has applied the presumption of reasonableness or constitutionality to the determinations of state agencies as well as to state legislatures.[44] The burden of rebutting that presumption falls to the party challenging the classification. It must be shown that the agency's action was arbitrary or unreasonable and that the claimant was significantly disadvantaged.[45]

In the instant case, the Court of Appeals limited review to a consideration of the exercise of authority by the Board of Education. Petitioners argued that the Board's action violated section 3201 of the Education Law by excluding their children from a neighborhood school because of race. The court found that no child was excluded from any school and that therefore no violation occurred. The court evidently based this conclusion on the fact that a board of education has specific statutory authority to determine school districts,[46] and interpreted this statute as a limitation upon a child's absolute right to attend a specific school within his district.[47] The Board's power to determine attendance zones is limited only by the requirement that it act reasonably and within the limits of the Constitution. Finding that no child would have to travel farther to the new school than he would have had to travel to the old neighborhood school, the court concluded that there were no oppressive results. Since there was no oppressive result, the Board's action was reasonable and could not be annulled.

Texas, 339 U.S. 282, 295 (1950) (concurring opinion) (dictum); Yick Wo v. Hopkins, 118 U.S. 356 (1885); Boson v. Rippy, 285 F.2d 43 (5th Cir. 1960); Progress Development Corp. v. Mitchell, 182 F. Supp. 681 (N.D. Ill. 1960), *rev'd on other grounds*, 286 F.2d 222 (7th Cir. 1961) (racial quota). *But see* Dove v. Parham, 282 F.2d 256, 262 (8th Cir. 1960); Kelley v. Nashville, 361 U.S. 924 (1959) (memorandum decision denying cert.). In the *Kelley* case the Supreme Court denied review of a pupil-transfer plan which explicitly recognized race as a criteria for transfer. Chief Justice Warren and Justices Douglas and Brennan dissented, and would have granted review because of the race question. *But cf.* Hirabayushi v. United States, 320 U.S. 81 (1943). See generally, Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 355-61 (1949).

43. Bolling v. Sharpe, 347 U.S. 497 (1954). See Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32 (1928).

44. Thompson v. Consolidated Gas Utilities, 300 U.S. 55 (1937); Pacific States Box Co. v. White, 296 U.S. 176 (1935). See McGowan v. Maryland, 366 U.S. 420 (1961).

45. Williamson v. Lee Optical, 348 U.S. 483 (1955) (by implication) (proof of arbitrariness); Blocker v. Board of Education, 226 F. Supp. 208 (E.D.N.Y. 1964) (proof of harm); Taylor v. Board of Education, 294 F.2d 36, 44 (2d Cir. 1961) (Moore J., dissenting). *Accord*, McGowan v. Maryland, 366 U.S. 420 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911). See James v. School Board, 228 F.2d 72, 77 (4th Cir. 1960); Henry v. Godsell, 165 F. Supp. 87, 90 (E.D. Mich. 1958). In *Evans v. Buchanan*, 207 F. Supp. 820 (D. Del. 1962), the court indicated that the fact of an all Negro student body might give rise to a presumption which a school board would have to rebut. *Cf.* In the Matter of Skipwith, 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct. 1958), where the court allowed a showing that a public school was inferior because of *de facto* segregation as a defense in an action to require that Negro parents send their children to school. See Kaplan, *Segregation Litigation and the Schools—Part III: The Gary Litigation*, 59 Nw. U.L. Rev. 121, 133-55 (1964).

46. A board of education, "Shall authorize and determine . . . the school where each pupil shall attend." N.Y. Educ. Law § 2503 subd. 4(d). A board is also given authority to select a site for new schools, N.Y. Educ. Law § 2556.

47. "A person over five and under twenty-one years of age is entitled to attend the public schools maintained in the district or city in which such person resides. . . ." N.Y. Educ. Law § 3202 subd. 1.

In considering the charge that the Board discriminated and segregated petitioners' children in violation of the equal protection clause, the court found that the plan did not foster or produce segregation. This finding indicates that the court would require more than a mere consideration of race to sustain an actionable claim of discrimination, for there were racial considerations in the plan. And furthermore, the court's specific attention to the problem of whether or not the plan produced oppressive results, indicates that a further requirement for an actionable claim of discrimination is a showing of harm or oppression. Generally the court considered that in view of the broad power to assign pupils to specific schools, the Board of Education *may* choose to disregard such imbalance or may attempt to correct it. If it chooses to remedy the situation, the Board is limited by the requirement that it cannot cause harmful or oppressive results. The court emphatically noted that it was not considering whether a board *must* remedy imbalance. Judge Van Voorhis, dissenting, indicated that racial classification is inherently unconstitutional and always causes harm. Given this principle, an administrative act classifying individuals is unsupportable no matter how desirable its effect. Citing a recent federal court case,[48] the dissent noted that relief was denied because no state action caused the imbalance in the schools. He reasoned that the converse must be true, that where state action does cause segregation or discrimination, relief should be granted. Judge Van Voorhis concluded that in the instant case, official state action does segregate petitioners' children and therefor relief should be granted. For further support, the dissent interprets *Brown* as prohibiting state action excluding a child because of race and not as involving any broader principle requiring racial balance.[49]

A comparison of the majority opinions of both the Appellate Division and the Court of Appeals reveals the restrictions which the latter imposes. In noting the Appellate Division's opinion, the Court of Appeals decision only mentions that portion concerning the alleged statutory violations. The Appellate Division found that there was no right to attend a *specific* school within a child's district, that the Board has authority to delimit school districts, that section 3201 of the Education Law was intended as a desegregation measure and could not be used to foster segregation, and that therefore there was no statutory violation. This opinion also stated that the plan is not discriminatory since within the district each child will attend the new school regardless of race. Judge Desmond's opinion adopted much of this analysis for the Court of Appeals, at least implicitly. In the remainder of the Appellate Division's opinion, there is a broad interpretation of *Brown* as proscribing any use of governmental power to enforce segregation. It indicated that the Supreme Court in *Brown* was address-

48. Bell v. School City of Gary, 213 F. Supp. 819 (N.D. Ind. 1963), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

49. See Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 Nw. U.L. Rev. 157, 206-07 (1963). *Contra* Sedler, *School Segregation in the North and West: Legal Aspects*, 7 St. Louis U.L.J. 228, 266-67 (1963).

ing itself to *all* kinds of school segregation, especially in its statement on the extent of judicial review of a board's action.[50] This reading of *Brown* is disputed by some commentators and was not used by the Court of Appeals.[51] Judge Desmond's opinion limited comment on *Brown* to a statement that it proscribes state imposed segregation. However, there is an implication that the principle regarding the educational value of an integrated education—which was recognized by the Supreme Court—was also considered in *Balaban*. In reaching its determination, the Court of Appeals weighed the effects of the disputed action. The Board's consideration of race as one factor in determining the school district's boundaries did not, demonstrably, disadvantage the white children. But it did promote, in a positive sense, the objective of equal, integrated education for *all* children.[52] It is suggested that the Court of Appeals implicitly indicated the limits on future corrective action by a board and the possible means of challeging such action. Boards cannot cause oppression, and anyone challenging a plan must show the plan to be arbitrary and oppressive.[53] Continued use of this analysis would permit corrective action by a board and still allow sufficient judicial supervision. Considering the recent denial of certiorari by the Supreme Court, such *ad hoc* solutions may lead to ultimate approval of corrective action.

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CONTRACTS

THE EFFECT OF THE STATUTE OF FRAUDS ON AN IMPLIED CONTRACT

In November 1957, plaintiff and defendant entered into an oral agreement by which plaintiff was to act as exclusive export manager for products used with photographic and sound recording equipment manufactured by the defendant. The contract was to run for one year: from January 1, 1958 until December 31, 1958. For his services plaintiff was allowed a discount on prices of the items to be handled. Both parties performed under the contract that year. Without any further express agreement the parties also carried on this arrangement from January 1, 1959 to December 31, 1959 and during the early part of 1960. In April 1960, the defendant refused to accept plaintiff's services any longer. Plaintiff brought an action in the New York Supreme Court, for

50. On reargument of *Brown*, the Supreme Court said, "School authorities have the primary responsibility for elucidating, assessing, and solving [local] problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the . . . principles." 349 U.S. 296, 299 (1955). The Appellate Division also emphasized that boards of education were to use rezoning as one technique in effectuating the equal educational opportunity principle. Brown v. Board of Education, *supra* at 300-01.

51. *Compare* Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, *supra* note 49 *with* Maslow, *De Facto Public School Segregation*, 6 Vill. L. Rev. 353 (1961).

52. Brief for N.A.A.C.P. as Amicus Curiae, p. 12.

53. See Comment, 39 N.Y.U.L. Rev. 539, 545-48 (1964).