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Massachusetts school law and de facto segregation.

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MASSACHUSETTS SCHOOL LAW AND

DE FACTO SEGREGATION

by

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INTRODUCTION AND PURPOSE

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Although interest in this problem was originally stimulated by the fact that this writer presently teaches in an urban junior high school that has a Negro population estimated to be at 70 per cent, the problem at hand is not a personal one. It is the problem of every American citizen. It is unavoidable. It has come to America with heightened speed North, South, East and West in the last twelve years. Further, it has to be answered and solved, as there is no subtle way to side-step the issues at hand. In general terms the problem here, in the Commonwealth of Massachusetts, is that of alleged de facto segregation in our city schools where Negroes are heavily concentrated. As the Commission on School Integration phrased it:

> This concentration of the Negro population in restricted areas of large Northern cities, coupled with prevailing zoning practices, laid the foundation for what has come to be known as de facto segregation, completely or predominantly Negro schools not prescribed by law or avowed public policy.[1]

De facto segregation is the shell of this problem.

The heart of the problem is the question of the

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[1]Commission on School Integration, "Public School Segregation and Integration in the North." (National Association of Intergroup Relations, November 1963), p. 7.

position of the school administrator in this social crisis. More specifically, this writer became interested in the problem by speculating as to the results of several current avenues of protest that organized minority groups use to proclaim their dissatisfaction and to seek certain results. The means of protest used are the demonstration, usually near a specific school with a high concentration of Negroes, or in and near a school department headquarters housing administrative personnel, and the school boycott which prescribes the withdrawal, for a particular period of time, of large numbers of Negro children to protest the high concentration of their race in schools they attend. A third avenue of protest is the lawsuit against a school committee and administrative personnel to get a change in the distribution of pupils so that Negroes will not predominate in any one school. The law suit protest does not upset the status quo of the schools; that is, the learning process, but rather is a quiet legal means of seeking change. Therefore, it does not represent any threat to the process of learning or the business of education at any immediate time because nothing can be done until the courts so rule. The demonstration and the boycott have immediate results that interfere with learning. A demonstration, including the use of sign carriers, and a myriad of other functions, such as sitting down or lying down to impede the entrance of students, faculty and administration into a school, are distracting to all, but especially for the children in attendance. The boycott, the withdrawal of large

numbers of students from schools with high racial concentrations to protest same, is even more detrimental to school children because it takes them out of the classroom and out of the learning situation. The problem then is to determine what an administrator can do to assure education for all, to see that it continues, to see that children are not distracted, and to see that they are not removed from classrooms wherein they should be learning.

To clarify the problem, it is important to understand that the purpose of this writer is an objective one. It is the job of the school administrator to see that education goes on and to see that an adequate environment for learning is present so that teachers can do their job. The schools of the Commonwealth are set up by law, and they are administered by law if they are administered right. Principals and teachers are hired by law and have to function by the laws related to education as they presently exist. They cannot legislate sociological change within the framework of their positions. They have a clear mandate of the people in the statutes and citations of the Commonwealth of Massachusetts. School administrators and faculty who deviate from the letter of these statutes that are the framework of our schools are not doing their jobs as they should. Personal convictions may be voiced prudently outside of schools and school hours, and acted upon in discreet political activity or in polling booths, but not in schools.

It is the belief of this writer that the laws of the

Commonwealth are equitable and generous, and that they depict a pattern of education that is for all children regardless of race or religion or national origin. Further, the statutes and citations are designed to see that local school systems are run smoothly, and that the children of the Commonwealth are obliged to attend school, and that their parents are obliged by law to see that they attend with few exceptions. Also, the statutes provide the teachers and administrators with jurisdiction over the school-age children of the state during school hours. As pointed out by author Warren Gauerke in a recent text on the legal responsibilities of school personnel:

> The education of youth has been declared by the courts as a matter of vital importance to the maintenance of the democratic state and to the public wealth. The state may do a great deal, however, in the matter of limiting the control over education of the child. A parent may choose not to send his child to the public school if he so elects, and still obey state laws. The state may not prohibit the parent from enrolling his children in private schools. However, the law provides teachers with considerable authority over the control and education of the child once the parent sends his child to the public school. Again, the authority of the teacher is not delegated by the parent. It is granted to the teacher by the state as an essential part of his teaching responsibility. The legal term for this relationship of the teacher and the pupil is in loco parentis. The teacher, in other words, stands "in place of the parent" when the child is under his supervision and care.[2]

Thus teachers and administrators have to follow the design of the statutes of the state as do parents, and they are responsible for their children during school hours. It is a large responsibility; it is not taken lightly. Consequently, the

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[2]Warren Gauerke, Legal and Ethical Responsibilities of School Personnel (Prentice-Hall, Inc., 1959), pp. 227-228.

questions arise. How do we maintain order in the face of these threats to the learning situation? The answers are not ambiguous. They are found in the statutes and citations of the Commonwealth and in the opinion of the Attorney General of Massachusetts.

There are related questions that arise, and an attempt will be made to answer them in this problem. First, how did we come to face the problem of de facto segregation in Massachusetts today? Second, who is responsible for the distribution of pupils in Massachusetts schools? Third, has there been an apparent effort to segregate children or has the law been followed? Fourth, who are these groups who claim that children are purposefully segregated in Massachusetts schools, and what is their intent? Fifth, are the schools the proper vehicle for the changes sought in sociological make-up?

The interest in this problem stems in large part from the challenge of answering these questions and more so in seeking answers. But interest was also generated from the Massachusetts School Law course, and the possibility that questions involving personal circumstances might be answered. It is, then, a combination of personal and public interests that culminated in the writing of this problem. Speculation as to what could happen in the school this writer teaches in, and actual observance of what happened in Boston, Massachusetts, in February of this year when a massive boycott occurred acted as further stimulants of interest. It is hoped that in combining this information in an objective and

well-constructed manner a useful survey of those laws, court decisions, legal opinions and the background of same will be brought together, and might possibly serve as a guide to teachers and administrators faced with the same problems, and also that it might be of interest to any citizen of the Commonwealth.

Method of Procedure and Resources. The method of procedure is rooted in a research that consists of a thorough survey of several categories of literature having some relevance to the problem. First, the writer's interest in school law led him to investigate the statutes and citations of Massachusetts to determine what legal recourse an administrator has to preserve the learning situation in his school in the event of such distractions as the demonstration and the boycott. Useful in this area were the law course background and notes and the latest editions of the General Laws Relating to Education in Massachusetts. In seeking out the pertinent court cases, the district court library in Springfield proved useful. Local and university libraries were used for general background reading. There are not many books in the area of school law, and fewer still give both sides of the de facto segregation issue. Nearly all related aspects of the problem were considered in an attempt to focus on the problem objectively. Factors such as the number of Communists in the civil rights movement to the emotional aspects of school integration were read, weighed, and considered. The background, then, includes all pertinent information written on

and related to the problem.

Besides legal and general literature, this writer had the helpful cooperation of the Attorney General of Massachusetts in that, having corresponded with his office, legal opinions were received which had been previously sent from the Attorney General to the Commissioner of Education of Massachusetts. These legal opinions concerned the legality of the boycott of Boston, Massachusetts, public schools held on February 26, 1964, and proved helpful in allowing support for the contentions of this writer in the chapter dealing with statutes related to the problem. These legal opinions are included in the Appendix.

A survey to determine previous related problems turned up two problems written in the area of law, but not related to the problem of this writer. No others were found at the library of the University of Massachusetts. A survey of Masters' theses written throughout the country in recent years revealed some that were related to de facto segregation, but none that was relevant to the problem of this writer as it is written in the area of the school law of Massachusetts with concern for the problems of Massachusetts.

Limitations of the Problem. This problem will be limited to the civil rights attack on the schools. It will be limited legally to a survey of those laws of Massachusetts dealing with education that define and support the methods and practices which the legislature decreed were to be used in administering the schools, but some general legal

information will be included to further clarify the problem. The background of citations pertinent to the problem will include only those of Massachusetts with one exception. In explaining the legal-social background to the de facto segregation issue, some very relevant federal citations will be discussed to add scope to the problem. This problem is designed only to give the administrator an explanation of what de facto segregation is, where it came from, and what his duty is under the laws of the Commonwealth in facing its related aspects. In essence, it is an effort to draw together important information on a problem that faces urban administrators today so that they might understand it more fully and react to it correctly.

The Incompleteness of the Picture. Many administrators and teachers have a vague notion of what de facto segregation offers in the form of problems. Many would like to know more, including this writer. This problem is an attempt to clarify all of the most important related aspects of de facto segregation in Massachusetts today. It is an effort to show the school administrator that he must rely on the law, and further, to indicate to school committees which create local school policy within the framework of the law that they have a legal guidepost to follow in their creation of policy for the schools. This is an effort to trace the legal-social history of what is known as de facto segregation today in Massachusetts so that it can be dealt with in light of the history behind it, so that administrators can clearly see

what is being sought by minority groups claiming this alleged misfortune in the schools, and so that administrators can use the laws and the policy of their school committees to govern their decisions. Further, it is an effort to prove that Massachusetts school law is equitable and fair, and that it clearly points out the road that all of the schools of Massachusetts must follow.

CHAPTER II

BACKGROUND OF THE PROBLEM

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The Legal History of the American Negro

When protest groups such as the National Association for the Advancement of Colored People or the Congress of Racial Equality or the Urban League use phrases such as *de jure* or *de facto* segregation, they are referring to terminology involved in the greatest social revolution the United States has been involved in since the fast and frivolous 1920's. *De facto* means "in fact" or "in reality" and strung together with other words of protest it means that there is, in fact, segregation in the North. Its sister phrase, *de jure* segregation, is the prominent phrase used in reference to the South, and it means, in civil rights terminology, that there is, by law, segregation in the South. In the last twelve years these Latin phrases have entered the vocabulary of every American by way of the press, radio, and television. They are two of the most important phrases in education today. The question is what do they mean to the administrator and to the school committee member? To fully understand the phrases, to be truly honest in evaluating them, it is necessary to search out the social-legal history of the American Negro.

From Slave Ship to Dred Scott. The American Negro arrived here long before the invention of the cotton gin, but the gin tied the Negro to the land and to an owner who needed his services. Some years after the gin was invented in 1793, the largest group of Negro slaves was owned by 1,733 families.[1] In 1850 each one of these families held over one hundred slaves. These families represented the top of Southern society and the wealth and power of these families dealt a serious blow to public education in the South because their children were sent to private schools. This dominance by a concentrated group tended to widen the gap between rich and poor. The poorest of the poor was the Negro, tied to the land and slave to cotton.

There was no impetus to unchain the Negro in the South. Immigration, a factor that might have brought other minority groups to join hands with the Negro to break the static lock of a closed society, was at a low 4.4 per cent of foreign born in 1860, whereas the true melting pot of the country brewed in the North where 18.7 per cent of the population was foreign born. Besides the 1,733 families who owned over one hundred slaves each in 1850, there were 68,820 families who owned at least one slave.[2] Thus, the history of the American Negro up until the Civil War is a history of bondage in the South.

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[1]Thomas Bailey, The American Pageant (D. C. Heath and Company, 1956), p. 357.

[2]Ibid., p. 359.

In the North "slavery was common in New England and along the Atlantic seaboard" prior to the Revolutionary War.[3] After the war slavery was largely abolished in the North as well as in the Northwest Territory. Also, schools were set up for Negroes by abolitionist groups and by churches. A sprinkling of schools had whites and Negroes attending together, but on a larger scale Negroes were excluded from white schools. Between 1820 and 1840 New England and the Middle Atlantic states went through a slow process which began with no public schools for Negroes, then on to separate but equal facilities, and hence to integrated schools. The argument for integrated schools went on from 1840 to 1860 in the North, and in the meantime separate but equal facilities were maintained with one exception--Massachusetts. Here, proudly, citizens of Massachusetts can point to the legal history of the state in the field of education, because in 1855, six years prior to the Civil War, the legislature voted to outlaw separate but equal facilities. Here, then, is Massachusetts taking the lead in human rights before the infamous war between the states even began.

The move got its beginning with the landmark case in point of Roberts v. City of Boston argued in 1849. The case was argued by a Northern lawyer who contended that his client had "to walk 2100 feet to attend her classes, while a white school was only 800 feet from her door."[4] The lawyer was

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[3]Commission on School Integration, op. cit., p. 1.

[4]Harry S. Ashmore, The Negro and the Schools (The University of North Carolina Press, 1954), p. 4.

Charles Sumner, the abolitionist. Although the court found against his client, a Negro girl, the legislature repudiated the court in 1855, and separate but equal schools were prohibited by statute in Massachusetts. Thus, the Commonwealth moved on its own before the Civil War, before the Fourteenth Amendment, and while "New York, Philadelphia, Cincinnati, Providence and New Haven held firmly to school segregation."[5]

In March, 1857, the American Negro suffered a further setback. Dred Scott, a Negro slave, had lived with his master for five years in the Free Soil states of Illinois and Wisconsin, and he went to the courts to sue for his freedom because of his lengthy residence in free territory. The court ruled that Dred Scott was not a citizen, and also that he was private property, and so his status remained the same even in states where slavery was prohibited. They went one step further and ruled that the Missouri Compromise which had outlawed slavery above the line of thirty-six degrees, thirty minutes, was and had always been unconstitutional. Thus, as the North made progress through the leadership of states like Massachusetts, the South was still holding the Negro down, and "at the bottom of the social pyramid in the South of 1860 were nearly 4,000,000 black human chattels."[6] In the North, Maine, New Hampshire and Vermont never had legal segregation, and Massachusetts abolished segregation in 1855. Rhode Island and Connecticut abolished segregation in the 1860's; still

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[5]Commission on School Integration, op. cit., p. 4.

[6]Bailey, op. cit., p. 361.

some states in the Middle Atlantic region and the Midwest had legal segregation as the country went to war to resolve its problems.

Reconstruction. After the Civil War steps were taken toward integration in New England and some sister states of Massachusetts such as New York, but it was the leadership of Massachusetts which started things going early in 1855, and the "period following the Civil War witnessed real achievements in Negro education in the North. Negroes won admission to public schools in all states, along with the legal right to equality of educational opportunity."[7]

The postwar South had little or nothing in the way of universal, free public education despite the efforts of many Southern leaders who saw the need for it. "In 1866 there was no effective state system of public education anywhere in the region, and only a few of the larger cities maintained 'free schools.' There was no schooling at all for Negroes; indeed, in several of the Southern states teaching slaves to read and write was officially a crime."[8] There were efforts made at integrating newly created Southern public schools under the Reconstruction governments of the states, but a system that espoused separate facilities for whites and Negroes emerged, and the inferior pattern of Negro education in the South became the reality that has lasted until now, mainly because many states put property tax money paid by Negroes

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[7]Commission on School Integration, op. cit., p. 4.

[8]Ashmore, op. cit., pp. 6-7.

into Negro schools. Since few Negroes owned property, the investment in their schools was sadly short of being equal. While the North was following the road to better human rights, the South was fortifying its position. This pattern was reinforced in the South in a monumental legal decision in Negro history handed down in 1896. In this year the progress of the Reconstruction Era came to an end; for even though Negro leaders such as Booker T. Washington had carried the battle for human rights after the last federal troops had pulled out of the military districts of the South in 1877, this was the year of the Plessy Case, a landmark in the rights struggle of the Negro.

From Homer Plessy to Martha Lum. A man by the name of Homer Plessy, who was one-eighth Negro and seven-eighths white, was arrested for refusing to ride in a "colored" coach of a Louisiana railroad train which was segregated under Louisiana statute. Homer Plessy instituted action to restrain the use of these segregated statutes, claiming they were in violation of the Thirteenth and Fourteenth Amendments. Plessy attempted to stop Judge Ferguson of Louisiana from hearing his case. Plessy lost his plea to stop Ferguson, and Ferguson was backed up by the Supreme Court. The Supreme Court ruled that the statutes of Louisiana were "reasonable" and, therefore, constitutional. Part of the text of the decision of the Court in the Plessy v. Ferguson case is as follows:

> Laws permitting, and even requiring (separation of the races) in places where they are liable to be brought into contact do not necessarily imply the inferiority of

> either race to the other, and have been generally if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.[9]

The Plessy case acted as a precedent for the courts for fifty-eight years, and it upheld the separate but equal school doctrine. One case that came up to the Supreme Court in 1899 was judged with Plessy v. Ferguson as a precedent. Cummings v. Board of Education was a suit brought by Negro parents in Richmond County, Georgia, seeking to have all the white schools closed because the county provided no Negro schools. The separate but equal doctrine was not really tested, but signs of its being implicated were evident. The Court ruled that closing all the white schools would be wrong even though the county provided no Negro schools and dismissed the case. A more direct confrontation with the separate but equal doctrine made precedent in the Plessy case was the Gong Lum v. Rice case of 1927. A Chinese girl, Martha Lum, who lived in Mississippi, did not want to attend a Negro school, so her family brought suit after she was refused admission to a white school. The Supreme Court supported the findings of the Mississippi courts and found that all those who were not white were colored, and thus Martha Lum had to attend a Negro school. The Plessy, Cummings and Lum cases were the major ones to reach the Supreme Court that upheld

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[9]Ibid., p. 11.

the separate but equal doctrine that was embedded in Southern states. In all cases the idea of "substantial" equality was believed legitimate because completely equal facilities seemed impossible. The South, then, was given precedent to maintain a system that had been just about destroyed in the North during the first thirty years of the twentieth century.

The Immediate Background of the Brown Decision.

There are many reasons for the Supreme Court decision of 1954 which came fifty-eight years after the Plessy case. Some of these reasons are legal and can be discerned in two cases that occurred in the 1930's.

In 1935 Donald Murray, a Negro graduate of Amherst College, was denied the right to attend the University of Maryland Law School because of his race. He was represented by Thurgood Marshall, who was then a lawyer for two years, now chief counsel for the NAACP. Although the University of Maryland offered Murray a scholarship to another law school out of state, he refused, contending he wanted to learn Maryland law so that he could pass the Maryland bar examination and practice in Maryland. Also, he could not afford to live out of state even if his tuition was paid. The Maryland Court of Appeals ruled that the separate but equal doctrine would not hold because Maryland had no separate law school for Negroes. Murray was allowed to enter the University of Maryland Law School so that he might be able to get an equal education.

A similar case occurred in 1938 when the United States

Supreme Court ruled that Lloyd Gaines could attend the University of Missouri Law School because there was no separate but equal facility. Gaines had previously been denied admission, and when the Court reached the decision Gaines was missing and could not be found anywhere. These two cases represented a step toward desegregation under the separate but equal doctrine only because there were no law schools for the students to attend, but they represent an inroad toward the ultimate repudiation of the Plessy doctrine.

In 1950 a different set of circumstances arose. Herman Sweatt was denied admission to the University of Texas Law School because of race, but Texas had a separate law school for Negroes. The Supreme Court ruled that faculty size, the number of volumes in the library, the size of the physical plant and location were criteria to judge in comparing the two schools. The Negro school was ruled inferior.

Thus, from 1896 to 1927 the Plessy doctrine was upheld, but due to special circumstances some cases of forced desegregation were occurring without actually upsetting the precedent of the Plessy v. Ferguson case. The Murray, Gaines and Sweatt cases paved the legal road to 1954, and the historic Brown decision.

The Brown Decision. The Brown decision, Brown v. Board of Education, 347 U.S. 483, 495, 1954, and a later Brown decision, 349 U.S. 294, 301, 1955, were based on psychological and sociological intangibles and a new legal structure. The Court had two choices. It could have followed the

precedent of the 1896 Plessy v. Ferguson case which supported the separate but equal doctrine, or it could follow the precedent of the Sweatt case where the Negro Texas law school was declared inferior. It chose to follow the Sweatt precedent because, as Chief Justice Earl Warren put it, "the clock could not be turned back to 1896,"[10] and "in these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state is able to provide it, is a right which must be made available to all on equal terms."[11] It must be remembered that the Plessy v. Ferguson case never concluded that Negroes were in any way inferior. It stated that they must be treated equally but separately. In 1954 Chief Justice Warren said, "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[12]

As action proceeded the Court asked for briefs from both sides in response to the following questions:

> 1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
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> 2. If neither the Congress in submitting nor the

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[10] Albert Blaustein and C. C. Ferguson, Desegregation and the Law (Rutgers University Press, 1957), p. 118.

[11] Ibid., p. 11.

[12] Ibid., p. 13.

> States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment:
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> a. that future Congresses might, in the exercise of their power under section 5 of the Amendment abolish such segregation, or
> b. that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?
>
> 3. On the assumption that the answers to questions 2a and 2b do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?[13]

There were five questions in all. The first three had to do with the question of the abolition of segregation under the Fourteenth Amendment, and the last two, not quoted here, had to do with implementation if the first three were answered in the affirmative. The last two were used in the second Brown decision in May of 1955. Answering the questions were Thurgood Marshall of the NAACP and J. Lee Rankin who was an Assistant Attorney General of the United States. They represented the Negro plaintiff. The Southern position was defended by John W. Davis and T. Justin Moore. The words of the Constitution that were in question are contained in Section 1 of the Fourteenth Amendment:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[14]

By a factor of alphabetization and chronological order

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[13] Ibid., p. 52.

[14] Ibid., p. 55.

the case of Oliver Brown came up first on the Supreme Court docket in the segregation cases. Brown and twelve other Negro parents brought suit against the Board of Education of Topeka, Kansas, and against the State of Kansas. The Brown case was used as a vehicle by the NAACP lawyers to fight segregation. The first concern of Brown was his daughter Linda, who had to cross railroad tracks and take a bus twenty-one blocks to school rather than attend the nearest white school which was five blocks away. Brown had lost in a Kansas district court and came to the Supreme Court. Having received briefs on the previously mentioned questions and having considered all testimony including the sources listed below:

1. Psychological data submitted by Professor Kenneth Clark of City College of New York pointing out the emotional destruction of segregation in schools.

2. Sociological data submitted by sociologist E. F. Frazier from the faculty of Howard University.

3. A report by M. Deutscher and I. Chein conducted by the American Jewish Congress, 1947.

4. An American Dilemma, a book written by Gunnar Myrdal in 1944 pertaining to the plight of the Negro in America.

the Court ruled as follows:

1. Brown v. Board of Education, 347 U.S. 483, 495, 1954, "in the field of public education the doctrine of separate but equal has no place."

2. Brown v. Board of Education, 349 U.S. 294, 301, 1955 (one year later), schools should be desegregated "with all deliberate speed."[15]

In the first Brown decision the Supreme Court had

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[15]William W. Brickman and Stanley Lehrer, The Countdown on Segregated Education (Society for the Advancement of Education, 1960), pp. 84-85.

invoked the "equal Protection" clause of the Fourteenth Amendment to prohibit the states from maintaining segregated schools. The Brown decision of 1955 had to do with implementation of the 1954 decision. The Court wished desegregation to occur "with all deliberate speed." Approximately one week after the first Brown decision of 1954, the Supreme Court extended its decision into the area of public parks, golf courses and swimming pools, and remanded all such cases back to the lower courts so that the lower courts might have the opportunity to review them in light of the Supreme Court decision of May 17, 1954, and its new precedent. Thus, the gates were opened, and the Negro was on the road to becoming an equal citizen in the South.

The Problem of the Administrator in Urban Massachusetts

It is important to know and understand the background of the Brown decision and its impact because it was the lever that has brought the public school administrator face to face with de facto segregation and its complex related aspects here in Massachusetts. The Brown decision has given the civil rights movement impetus, and the direction of its attack has swept from South to North. Civil rights organizations such as NAACP, CORE and the Urban League claim that there is de facto segregation here in Massachusetts, and, more specifically, in Boston and Springfield. The Black Muslims and the Black Nationalist Movement which desire separation of the races have no charges to make. Civil rights organizations and civil rights literature blame the schools

for de facto segregation. Here are some of the charges concerning the North:

> 1. In the first place the laws of several states authorize maintenance of separate schools for Negroes.[16]
>
> 2. . . . minority group social status in the North and West has long carried with it a pattern of exclusion from or segregation in the system of public schools.[17]
>
> 3. It is known that rejection of children as indicated in their segregation in special schools for those of "their kind" frustrates a basic personality need and gives rise to unpleasant emotions. It contributes generally to disorganization of personality. This frequently results in strong anti-social behavior or withdrawal from participation in the many constructive social activities of the community.[18]
>
> 4. . . . the boundaries of the "neighborhood" to be served by a school are not "given"; they are determined by school authorities who exercise considerable discretion in reaching such decisions.[19]

It is evident that school authorities are being blamed for deliberately gerrymandering school district lines for the inclusion of Negro students so that de facto segregation is allowed to persist and be perpetuated. Further, that school authorities, school committees more so than school administrators, are allowing this alleged evil to persist to the detriment of these Negro children. Also, it is claimed that states in the North, including Massachusetts, have been following the principle of stare decisis, which is that courts should follow previous decisions of other courts, and hence have been

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[16]Commission on School Integration, op. cit., p. 9.

[17]Ibid., p. 11.

[18]Tanner Duckrey, "Looking at Integration," Educational Leadership, XIII (November, 1955), 75-88.

[19]Commission on School Integration, op. cit., p. 23.

following the precedent of the Plessy decision. School committees and school administrators have been the targets for these charges.

The Charges. Civil rights organizations are responsible for the following charges made against administrators and school committees because of their alleged creation and perpetuation of de facto segregation:

1. The continuation of de facto segregation will perpetuate the problem itself.

2. There is considerable personality damage done to minority group children under this system.

3. It increases the probability of early school dropouts.

4. It advocates a low standard of academic achievement.

5. It constitutes a large area of underdeveloped human potential, and it also creates community strife.

6. Teachers in schools with high racial concentrations are charged with being apathetic and even hostile toward the children.

7. Books and materials are allegedly inferior to other white schools.

8. Facilities are deemed inferior to those of other predominantly white schools.

9. Testing services are prejudiced towards these children because standardized tests are designed to encompass the vocabulary of middle-class children.

The Eradication of De Facto Segregation. Civil rights organizations claim that to eliminate the evils of de facto segregation integration must take place, and to arrive at integration, desegregation must occur. The end result in terms of numbers is not quite clear. Some say that a fifty-fifty ratio of Negro and white children will eliminate all

of the previously mentioned problems. Others feel that the Negro should be in the minority rather than the white, but do not give specific percentages. No one says anything about the white minority in Negro schools, and in the same vein little is said about the Japanese, Chinese, Mexican and the Puerto Rican American in terms of where they stand in integration. The plans to eliminate de facto segregation, as indicated in the diagram on the following page, are clearly spelled out for school committees and administrators, and they give a basic structure of six plans. They are as follows:

1. Redistricting--involves the redrawing of school district lines to correct racial imbalance.

2. Open enrollment--Negroes are allowed to enroll in formerly white schools.

3. Open enrollment in reverse--assignment of white pupils to Negro schools.

4. Princeton Plan--calls for specified schools to handle both white and Negro pupils in specified grades.

5. School recombination--convert the Negro school into some special school, perhaps for the retarded, and transfer Negro pupils to other schools.

6. New school spotting--involves planning to build new schools in areas where housing is already integrated.[21]

Whether all or any one of these plans are significant is a matter of opinion. Some large cities in the North are using them to eliminate de facto segregation but are encountering much resistance.

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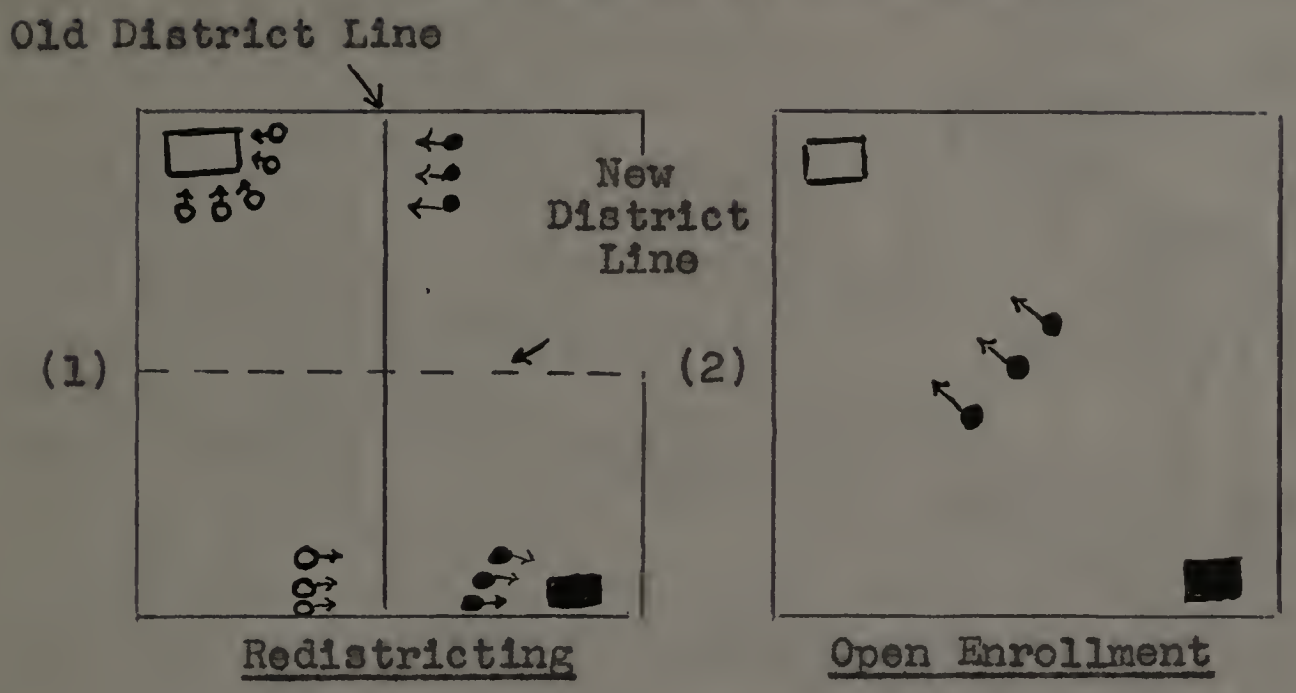
[21]"Integration North and South," Scholastic Teacher XX, September 20, 1963, 1-2.

SIX METHODS OF DESEGREGATION



Source: "Integration North and South," Scholastic Teacher, XX, September 20, 1963, 1-2.

As D. Dodson put it in Educational Leadership, "there is not a school administration in the world that can stand up against those parents, of an elite neighborhood, who are protesting sending their children into the Negro neighborhood to high school."[22] Despite the charges, the plans and the opinions, there is much evidence to prove that school authorities have had nothing to do with the creation or perpetuation of de facto segregation.

Evidence to the Contrary

Thus far, we have heard claims that school authorities have created and maintained the Northern form of segregation, de facto, and that school authorities have gone to great pains to maintain the status quo with all its alleged evil aspects. There is, however, important evidence to show that school authorities do not gerrymander school district lines to enclose minority group children, and that they have never done this in the Commonwealth. The first factor involved is migration.

Migration. After World War I millions of Southern Negroes came North for employment opportunities. Job opportunities were good in the 1920's, and the migration from Europe was curtailed so there was less competition for the jobs that required unskilled labor. After World War II there was an even greater industrial boom, and so the migrations occurred on a larger scale. The Negroes who came North were

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[22]Dan Dodson, "The North, Too, Has Segregation Problems," Educational Leadership, XIII (November, 1955), 108.

largely uneducated, unskilled, and had little in the way of capital. To find homes they had to go to the large cities where proximity to factories would be good and where relatively cheap housing could be found. The housing they could afford was, in most cases, in the zones of transition of large cities where old apartment blocks were located near the business district. Usually these neighborhoods were once in good condition, but as years went by the people who once inhabited them had moved out of the downtown area of these cities to housing that was further away from the business district. The lack of money on the part of the newly arrived Negro forced him into these neighborhoods and the ghetto was created when the Negro came in unprecedented numbers.

> As a result of these migrations, together with natural growth, there was an increase of more than 1,300,000 in the Negro population of the North between 1920 and 1940, and a further increase of more than 4,400,000 during the following two decades, bringing the 1960 total to 7,157,677. Moreover, the proportion which Northern Negroes constitute of all Negroes in the United States increased from 13 per cent in 1920 to 22 per cent in 1940, to 31 per cent in 1950, to 39 per cent in 1960. Thus, there were more than five times as many Negroes living in the North in 1960 as there were in 1920; and they represented three times as large a proportion of all Negroes in the country as was the case in 1920.
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> Most of the newcomers settled in the big cities. In 1960, for example, only about 5 per cent of Northern Negroes lived in rural areas. Whereas 45 per cent of them lived in only five large cities--New York, Chicago, Philadelphia, Detroit and Los Angeles.[23]

There was no other place for the Negro to go as he arrived in the North but to cheap housing on the fringes of the business districts of large cities. Since they came in such

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[23]Commission on School Integration, op. cit., p. 5.

unprecedented numbers, these districts became overcrowded. As automation makes it increasingly difficult for the unskilled and the uneducated to get jobs, the evil aftermath of unemployment began to arise--a growing crime rate, a rise in juvenile delinquency, social strife and perpetuation of the problem. As youngsters dropped out of school they, too, joined the ranks of the unemployed and the cycle continued. It is claimed that de facto segregation is at the root of these problems and that school authorities are to blame for it, but it is more than apparent that migration is partly to blame for de facto segregation because the Negro population increased so quickly and because the lack of education and lack of skill that they brought with them forced them into a neighborhood with older buildings and older schools. It forced them into areas where the white had long since departed. The few with housing that was adequate probably had the money to get it and probably had an education or a skill or both, but in any event the factor of migration is one of the most important in creating the ghetto:

> In his emigration from the South the Negro has become a city-dweller, and his dwelling place is most often in the decaying heart of a metropolis. Chicago provides a classic example. The great waves of immigration in the wake of the two World Wars have increased the city's Negro population from 30,150 in 1900 to 492,267 in 1950, when it accounted for 13.6 per cent of the total. More than 90 per cent of these Negroes are jammed into eleven square miles of the South Side of Chicago, and in their efforts to break out of their ghetto they have encountered resistance all the way up the scale to the recent race riots in the suburb of Cicero.[24]

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[24]Ashmore, op. cit., pp. 76-77.

In the ghetto the Negro has had the opportunity to attend school, but his poor home environment has not helped him to become academically inclined. Also, it is probable that the curriculum of the Negro school has not facilitated matters. It is sometimes too alien and difficult to comprehend. Failure in school naturally feeds the cycle, and the ghetto probably has some more lifetime inmates. Another factor that has probably kept the Negro confined, but one which is hard to measure, is discrimination. Discrimination in jobs and housing is prevalent in the North, but it is difficult to determine where and to what extent. Migration created the ghetto originally, but it has more likely been maintained by the factor of discrimination. Discrimination in housing, in particular, is the prime reason for de facto segregation in the schools in the North. As long as parents who can afford housing elsewhere cannot get it, they must remain in the ghetto, and the children must attend the schools provided for them there. Even if the books, materials, curriculum, facilities, and teachers are equal to white schools in other parts of a city, minority group leaders claim that racial imbalance is evil. But what do school authorities have to do with real estate?

Residential Segregation. Migration brought the Negro to the zone of transition which later became known as the ghetto. Failure in school becomes failure in employment and the cycle goes on, but there has always been a percentage of Negroes who did well in school and who found jobs that paid

to get them out of the ghetto despite discrimination. It has been difficult because residential discrimination has kept them in the ghetto to a large degree. Residential segregation produces high racial concentrations in the schools. It is truly the greatest cause of de facto segregation:

> 1. It is inevitable that residential segregation should produce segregation in education. This properly can be described as a natural process; any child normally attends the school nearest his home, and if he lives in an all-Negro neighborhood he is likely to attend an all-Negro school. And, since residential segregation of Negroes is still the prevailing pattern in the non-South, it also follows that the great majority of Negro children still attend predominantly Negro schools. The exceptions are the children of the few Negroes who have settled in rural areas or small towns, and those who live in the sections of the great cities where Negro residential sections merge with white neighborhoods in a constantly shifting pattern.[25]
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> 2. Why and how does this condition exist? Because residential living is segregated. It is difficult for the schools to provide an interracial educational experience if the people live in segregated neighborhoods.[26]
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> 3. Unless and until our residential ghettoes are dissolved there is not much the schools can do about integration of pupils, except in changing neighborhoods.[27]

Some defenders of the schools go further than the authors just quoted because it is not only apparent that residential segregation is the true culprit in causing high racial concentrations in the schools, but further that some of the charges made against the school authorities are questionable. James B. Conant believes the issue is primarily political. Conant

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[25] Ashmore, op. cit., p. 76.

[26] Dodson, op. cit., p. 106.

[27] Ibid., p. 107.

also feels that it was the Brown decision that eventually led to the accusations of segregation in the North. Here are some comments from an author who not only says that school authorities had nothing to do with school segregation but who also feels that high racial concentrations in schools mean nothing in terms of getting an education:

> 1. . . . if one group of children is separated from another group because of the neighborhood in which they live, the fact of this separation is, of and by itself, no evidence of an inequality in education. Whether in fact the facilities and instruction are equal in a 100 per cent white school, a mixed school, and 100 per cent Negro school in a large city is to be determined by examining the schools, not by appeal to phrases such as *de facto* segregation with the implication that it is to be condemned by all right thinking people who condemn *de jure* segregation.[28]
>
> 2. In some cities, political leaders have attempted to put pressure on the school authorities to have Negro children attend essentially white schools. In my judgement the cities in which the authorities have yielded to this pressure are on the wrong track. Those which have not done so, like Chicago, are more likely to make progress in improving Negro education. It is my belief that satisfactory education can be provided in an all-Negro school through the expenditure of more money for needed staff and facilities. Moreover, I believe that any sense of inferiority among the pupils caused by the absence of white children can be largely if not wholly eliminated in two ways: First, in all cities there will be at least some schools that are in fact mixed because of the nature of the neighborhood they serve; second, throughout the city there ought to be an integrated staff of white and Negro teachers and administrators.
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> 3. I believe the evidence indicates that it is the socio-economic situation not the color of the children, which makes the Negro slum schools so difficult; the real issue is not racial integration but socio-economic integration.
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> 4. Antithetical to our free society as I believe *de jure* segregation to be, I think it would be far better

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[28] James B. Conant, *Slums and Suburbs* (McGraw-Hill Book Company, 1961), p. 28.

> for those who are agitating for the deliberate mixing of children to accept de facto segregated schools as a consequence of a present housing situation and to work for the improvement of all slum schools whether Negro or white.[29]

Clearly, Conant feels that if books, materials, facilities and teachers are equal it does not make much difference what the children may be or what color they are. Also, he lauds cities which have said "No" to efforts to have children transported so that racial equality might result in terms of numbers. Conant believes, as others do, that more money for the slum school could be the answer. This writer would assume that he means that all other schools would get the same amount of financial support, but the slum school would get more. More money to hire more teachers so that there will be a lower pupil-teacher ratio could well be a partial answer to the problem. Some of these children can take up much of the time of the teacher, and they need it. Conant feels that the root of the problem is a socio-economic one and that the housing factor is a very important one in keeping the Negro in the ghetto and, thus, in high numbers in any given school near which the Negro may live.

The White on the Move. Since the end of World War II there has been a spectacular out-migration as the middle-class white has moved from the city to the suburb. The middle class white Northerner has moved out of the city as fast as the Southern Negro has come North and moved into it. Better housing in suburbia has been part of the general picture

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[29] Ibid., pp. 30-31.

of a better standard of living in America, but it has helped to create de facto segregation in Northern cities:

> Nor is this the major problem which is being faced in the North. Another facet of it is the migration of the middle class white to the suburbs. There is scarcely a community in America but that has an enormous out-migration to the suburbs since the war. This out-migration has been almost solidly white people.[30]

As the white people have left and continue to leave, educators have been left with the job of solving a problem that was not created by them.

To the Law. As tension continues to build in the North, the teacher and the administrator as well as the school committee are being caught in the web. The question of what to do about the problem rings again and again in the urban areas of Massachusetts. The social-legal history of the American Negro in this chapter was an attempt to show the reader whence de facto segregation came, and where the blame is placed for it. Also, it was an attempt to indicate that there are opponents who feel that the schools have been done an injustice and that they should be defended, and thus there was evidence to the contrary. Now that it is somewhat clearer as to what minority groups want, and whom they blame, and how they intend to change the picture, it is necessary to revert to the original contention. School authorities have to operate within the framework of the law, and they must administer the schools according to the policy set up by the school committee within the law; so the next step is to look at the law.

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[30]Dodson, op. cit., p. 107.

CHAPTER III

STATUTES PERTAINING TO DE FACTO SEGREGATION

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"During one of the earlier arguments on the school cases before the Supreme Court, the late Justice Jackson remarked that he foresaw a generation of litigation if the court should ever attempt to invalidate segregation."[1] His words have apparently come true even in the North where alleged de facto segregation is the prime target of civil rights organizations. This chapter is a survey of the statutes of Massachusetts related to education to determine if the state has any laws pertaining to segregation, and to point out the laws that concern administrators who must deal with the problem. Those laws that might indirectly pertain to the problem of the administrator are included also, and a subsequent explanation of the possible use of some laws in preserving law and order are included. Those laws pertaining to the power of the school committee are included as well as statutes dealing with pupil transportation, school attendance and pupil absenteeism. The legal opinion of the Attorney General is interwoven with the laws chosen here as being pertinent. The nucleus of laws presented here should give a

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[1]James Paul, "The Litigious Future of Desegregation," Educational Leadership, XIII (November, 1955), pp. 110-111.

clearer picture of what a school committee and an administrator can and must do in dealing with the problem of de facto segregation.

As the problem comes more and more to the attention of administrators, it becomes more apparent than ever that a knowledge of school law is very valuable in dealing with it, but all school personnel should know and understand the basics of their school law as it is an excellent guide in decision-making.

> School litigation is increasing in state and federal courts as one result of the expanding services of the school to pupils and employees. School personnel need access to readable sources of information pertaining to school law. School employees should examine carefully the facts and implications of situations that produce school law cases. An impressive mass of evidence has accumulated from court decisions regarding what can and cannot be done legally in the dozens of predicaments that daily confront school personnel and parents. The courts have laid down fairly definite lines of authority governing some of the common situations facing school employees. These can be used as guides to conduct when an insistent parent or principal presses an issue or when some other person believes he has a just complaint and demands "immediate action" of someone.[2]

The following statutes, quoted in chronological order, are from the General Laws Relating to Education in Massachusetts, 1961:

> [Chapter 43] SECTION 33. Powers and duties. Except as otherwise provided in this chapter and subject to any laws which limit the amount of money that may be appropriated in any city for school purposes, the school committee, in addition to the powers and duties conferred and imposed by law on school committees, may provide, when necessary, temporary accommodations for school purposes, may make all repairs, the expenditures for which

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[2]Gauerke, op. cit., pp. 1-2.

are made from the regular appropriation for the school department, shall have control of all school buildings and grounds connected therewith and shall make all reasonable rules and regulations, consistent with law, for the management of the public schools of the city and for conducting the business of the committee.

Besides giving the school committee the right to provide temporary accommodations, make repairs, etc., this statute clearly states that the school committee has full charge of all buildings and grounds, and that a committee can make reasonable rules and regulations in regard to them. This gives strong support to home rule.

[Chapter 43] SECTION 34. Sites, plans, etc., school buildings. No site for a school building shall be acquired by the city unless the approval of the site by the school committee is first obtained. No plans for the construction of or alterations in a school building shall be accepted, and no work shall be begun on the construction or alteration of a school building, unless the approval of the school committee and the mayor is first obtained. This section shall not require such approval for the making of ordinary repairs.

The school committee has the right, under the law, to choose the site for new school construction, and to approve the plans for construction of a new building or alterations to an older building. Further, this law is or could be a roadblock to civil rights organizations seeking injunctions to prevent new school construction in minority group neighborhoods because, as maintained by civil rights organizations, new school construction in minority group neighborhoods serves only to perpetuate alleged de facto segregation.

[Chapter 71] SECTION 37. Duties of school committee. It shall have general charge of all the public schools, including the evening schools and evening high schools, and of vocational schools and departments when not otherwise provided for. It may determine, subject to this

> chapter, the number of weeks and the hours during which such schools shall be in session, and may make regulations as to attendance therein.

This lends strong support to home rule and the phrase, "and may make regulations as to attendance therein," clearly places the power to regulate attendance in the hands of the school committee. The Honorable Edward W. Brooke, Attorney General of the Commonwealth, in a legal opinion to the Honorable Owen B. Kiernan, Commissioner of Education of the Commonwealth, dated February 19, 1964, stated that "the school committees of the various cities and towns have broad discretionary powers under c.71, s.37 of the General Laws, to effectuate the purposes of the General Laws relating to public education." The Attorney General placed the possibility of limitations on the above-mentioned statute with regard to Chapter 76, Section 5, of the General Laws and the 1954 Supreme Court decision on segregation, Brown v. Board of Education, 347 U.S. 483, but went on to say, "It is my considered judgement that subject to these limitations, the School Committee of the City of Boston is responsible for the assignment and distribution of pupils throughout the Boston School System." This opinion given by the Attorney General was in response to the following question by Commissioner Kiernan: "Whose responsibility is it to assign and distribute pupils throughout the Boston school system?" The question was asked in reference to the proposed boycott of public schools in Boston on February 26, 1964.

[Chapter 71] SECTION 68. Towns to maintain schoolhouses. Duty of the committee to transport pupils, etc. Every town shall provide and maintain a sufficient number of schoolhouses, properly furnished and conveniently situated for the accommodation of all children therein entitled to attend the public schools. If the distance between a child's residence and the school he is entitled to attend exceeds two miles and the nearest school bus stop is more than one mile from such residence and the school committee declines to furnish transportation, the department, upon appeal of the parent or guardian of the child, may require the town to furnish the same for a part or for all of the distance between such residence and the school. If said distance exceeds three miles, and the distance between the child's residence and a school in an adjoining town giving substantially equivalent instruction is less than three miles, and the school committee declines to pay for tuition in such nearer school, and for transportation in case the distance thereto exceeds two miles, the department, upon like appeal, may require the town of residence to pay for tuition in, and if necessary provide for transportation for a part or for the whole of said distance to, such nearer school. No school committee shall be compelled to furnish transportation on a private way. The school committee, unless the town otherwise directs, shall have general charge and superintendence of the schoolhouses, shall keep them in good order, and shall, at the expense of the town, procure a suitable place for the schools, if there is no schoolhouse, and provide fuel and all other things necessary for the comfort of the pupils.

There are two important legal phrases in this statute. Both might lend support to the concept of the so-called neighborhood school as it is known today. The first phrase is "conveniently situated for the accommodation of all children therein entitled to attend the public schools" and the second is "procure a suitable place for the schools." Both are in reference to the provision and location of schoolhouses. Evidently the legislature never conceived of the idea that children should be transported many miles to school, and it seems the concept of the neighborhood school was established for the good of "all" the children, in that schools should be

"conveniently" located in a "suitable" place. This law obviously was written and implemented with sincerity and is not an attempt to segregate children because of race, creed, etc.

> [Chapter 72] SECTION 2. Registration of minors. The school committee of each town shall ascertain and record the names, ages and such other information as may be required by the department of education, of all minors residing therein between five and sixteen, and of all minors over sixteen who do not meet the requirements for the completion of the sixth grade of the public schools of the town where he resides. Whoever, in control of any such minor, withholds information sought by a school committee or its agents under this section or makes a false statement relative thereto, shall be punished by a fine of not more than fifty dollars. Supervisors of attendance, under the direction of the committee and superintendent of schools, shall have charge of the records required by this section, shall be responsible for their completeness and accuracy, and shall receive the co-operation of principals, teachers and supervisory officers in the discharge of their duties hereunder. A card, as prescribed by the department, shall be kept for every child whose name is recorded hereunder. Supervisors of attendance shall compare the names of children enrolled in the public and private schools with the names of those recorded as required herein, and examine carefully into all cases where children of school age are not enrolled in, and attending school, as required by section one of chapter seventy-six.

Close scrutiny is kept over the children of both private and public schools who are between the ages of five and sixteen in regard to their school attendance, as this law indicates. Also, persons who give false statements relative to school attendance can be fined up to fifty dollars. Further, supervisors of attendance can "examine carefully into all cases where children of school age are not enrolled in, and attending school, as required by section one of chapter seventy-six." This law could stand in the path of any attempted school boycott.

[Chapter 72] SECTION 8. School registers. The school committee shall cause the registers of daily attendance to be faithfully kept under the direction of the superintendent who shall make due return thereof to the school committee or to such person as it may designate. All registers shall be kept at the schools, and at all times during school hours shall be open to the inspection of the committee, the superintendent, the supervisors of attendance and the commissioner and agents of the department.

This law allows the right of inspection by local school committees, superintendents, and supervisors of attendance, as well as agents of the Office of the Commissioner, of daily registers of attendance. It is linked with 72:2, previously cited, and clearly indicates that school attendance is considered to be a very important matter by the legislature.

[Chapter 76] SECTION 1. School attendance regulated. Every child between seven and sixteen, except a child between fourteen and sixteen who meets the requirements for the completion of the sixth grade of the public schools of the town where he resides and who holds a permit for employment in private domestic service or service on a farm, under section eighty-six of chapter one hundred and forty-nine, and is regularly employed thereunder for at least six hours per day, or a child between fourteen and sixteen who meets said requirements in the town where he resides and has the written permission of the superintendent of the schools of said town to engage in non-wage earning employment at home, or a child over fourteen who holds a permit for employment in a co-operating employment, as provided in said section eighty-six, shall, subject to section fifteen, attend a public day school in said town, or some other day school approved by the school committee, during the entire time the public schools are in session, unless the child attends school in another town, during the entire time the same is in session, under sections six to twelve, inclusive; but such attendance shall not be required of a child whose physical or mental condition is such as to render attendance inexpedient or impracticable or of a child granted an employment permit by the superintendent of schools when such superintendent determines that the welfare of such child will be better served through the granting of such permit, or of a child who is being otherwise instructed in a manner approved in advance by the superintendent or the school committee. The

superintendent of schools may transfer to any specialized type of school on a full-time basis any child who possesses the educational qualifications enumerated in this section and in the opinion of the superintendent would be benefited by such a transfer. The superintendent, or teachers in so far as authorized by him or by the school committee, may excuse cases of necessary absence for other causes not exceeding seven day sessions or fourteen half day sessions in any period of six months. Absences may also be permitted for religious education at such times as the school committee may establish; provided that no public funds shall be appropriated or expended for such education or transportation incidental thereto; provided, further, that such time shall be no more than one hour each week. For the purposes of this section, school committees shall approve a private school only when the instruction in all the studies required by law is in English, and when satisfied that such instruction equals in thoroughness and efficiency, and in the progress made therein that in the public schools in the same town; but shall not withhold such approval on account of religious teaching, and, in order to protect children from the hazards of traffic and promote their safety, cities and towns may appropriate money for conveying pupils to and from any schools approved under this section.

Pupils who, in the fulfillment of the compulsory attendance requirements of this section, attend private schools of elementary and high school grades so approved shall be entitled to the same rights and privileges as to transportation to and from school as are provided by law for pupils of public schools and shall not be denied such transportation because their attendance is in a school which is conducted under religious auspices, or includes religious instruction in the curriculum.

The school committee of each town shall provide for and enforce the school attendance of all children actually residing therein in accordance herewith.

Part 2, Chapter 5, Section 2, of the Constitution of The Commonwealth contained in the legal opinion sent from Attorney General Brooke to Commissioner of Education, Owen B. Kiernan, clearly sets forth the desire of the legislature to establish universal education in this state, and cases such as Cushing v. Newburyport 10 Met 511 strengthen the original desires of our Massachusetts forefathers. To assure this, the Attorney General says, "Chapters 76 and 77 are designed

to assure that this aspiration be realized." Further, he states in his legal opinion of February 10, 1964, to Commissioner Kiernan:

> The basic policy which the section clearly and unequivocally sets forth is that all children must attend an approved school for a specified period of time. The Legislature was not content merely to make public educational facilities available to those who might desire to use them. Because of the inextricable relationship between the child's education and his whole social, cultural and intellectual development and of the importance of a sound development to the Commonwealth, then notwithstanding the intimate concern of the parent with the upbringing of his child . . . .

The Attorney General goes on to point out that parents cannot ignore the clear mandate of Section 1 of Chapter 76 for "conscientious religious objections to the public school curriculum." Also, a parent who attempts the guise of withholding his child from school because of religious objections to vaccination is subject to prosecution under this section. The only loophole set forth in 76:1 is if a child has a physical or mental impairment which cannot be corrected, then he can be kept from the public schools of the Commonwealth, but the parents must make a reasonable attempt to correct the physical or mental impairment. Control of all other absence is in the hands of local school committees, and thus in the hands of local school administrators.

1. The superintendent alone grants employment permits.

2. The superintendent or the local school committee must approve private schooling.

3. Released time for religious training is subject to approval by the school committee.

4. Absence for "necessary" reasons is subject to the approval of local administrators, and they must decide if it is "necessary."

The Attorney General makes a very important point when he says:

> The statute recognizes that if parents were given the discretion to remove their children from school for reasons deemed by them to be adequate, there could be no uniform policy governing absences. The administrators would lose a great deal of the control over the operations of the schools which they now possess. Ultimately such a system would seriously devitalize the basic statutory policy by which I have referred: that the education of youth does not depend upon the pleasure of the parent, but is required by command of the Commonwealth. Accordingly, the grant of total discretion in the public school officials was deliberately done in order to assure uniformity in policy and administration of the school attendance laws. (Italics supplied.)

The Attorney General was giving his legal opinion in answer to questions presented to him by Commissioner Kiernan. The full text is appended. To clarify the matter for administrators who might encounter a similar problem, here are the questions asked of the Attorney General by the Commissioner, as written in the communication of February 10, 1964:

> In connection with the proposed boycott of public schools in Massachusetts on February 26, 1964, or any other regularly scheduled school day, I would appreciate being advised on the following question:
>
> 1. Is it lawful for a child to be absent from public school on such a day?
> 2. If the answer is negative, what legal remedies are available to enforce compliance with the statutes?
> 3. Upon whom does the responsibility rest to enforce such legal remedies?

The answers of the Attorney General are paraphrased as follows:

> 1. It is unlawful.
> 2. Parent or guardian can be punished with a fine up to twenty dollars, and appropriate juvenile and

district courts can take jurisdiction of case.

3. The responsibility to enforce these laws rests with the local school committee.

Other school attendance laws that follow will clarify the problem even more.

[Chapter 76] SECTION 2. Duties of parents, etc., as to school attendance. Every person in control of a child described in the preceding section shall cause him to attend school as therein required, and, if he fails so to do for seven day sessions or fourteen half day sessions within any period of six months, he shall, on complaint by a supervisor of attendance, be punished by a fine of not more than twenty dollars. No physical or mental condition capable of correction, or rendering the child a fit subject for special instruction at public charge in institutions other than public day schools shall avail as a defense unless it appears that the defendant has employed all reasonable measures for the correction of the condition and the suitable instruction of the child. The Boston juvenile court shall have jurisdiction, concurrent with the municipal court of the city of Boston, of complaints hereunder. Complaints hereunder brought in other district courts shall be heard in the juvenile sessions thereof.

Taking into consideration the previously mentioned legitimate reasons for being absent from the public schools of the Commonwealth which were:

1. Employment--with a permit granted by the superintendent.

2. Private school--with the approval of the superintendent or the school committee.

3. Religious training--with released time approved by the school committee.

4. "Necessary" absence--with the local administrators deciding if it is truly "necessary."

and that the absence loophole of physical or mental impairment is legal only if the parent or guardian has "employed all

reasonable measures for the correction of the condition," it should be clear, as the Attorney General says, that "the supervision under the statute is vested in the local school administrators."

Since administrators have the right to decide just what "necessary" absence is under Sections 1 and 2 of Chapter 76 of the General Laws, they alone, under the jurisdiction of the school committee, can decide whether or not the attendance supervisor shall investigate absence which is less than the stipulated seven full days or fourteen half days set forth in the above statute. Absence exceeding the above figures is automatically punishable "by a fine of not more than twenty dollars" if a supervisor of attendance makes a complaint.

Thus, the legislature has chosen to make the parent liable if a child does not attend public school in the Commonwealth in compliance with the laws, and as the legal opinion of the Attorney General of February 19, 1964, put it:

> Under section 2 of Chapter 76, a person in control of a child is required affirmatively to insure the attendance of the child in school. Such a person must do more than merely refrain from encouraging truancy; he must "cause him [the child] to attend school" as required in section 1.

Further, the opinion states:

> The General Court determined that the parent ought not be held criminally liable for an isolated default in the requirements of section 2. Persistent failure to enforce such attendance, however, indicates a serious disregard by the parent of his legal responsibilities, justifying the imposition of criminal sanctions.

Chapter 76, Section 2, of the General Laws then, if you will, puts "teeth" in the school attendance laws, and it

allows the local school committee and local administrators an avenue of approach if all other administrative efforts fail to make parents and children comply with the law as set forth in Chapter 76, Section 1. School employees are hired by, and must comply with, laws set forth by the legislature, and it is their duty under the law to see that the wishes of the legislature are carried out.

It is not the duty of school administrators and teachers to make value judgements concerning the moral righteousness of protests by minority groups seeking specific goals within the framework of the schools. Teachers and school administrators are duty-bound to operate the schools within the framework of the laws of the Commonwealth.

> [Chapter 76] SECTION 4. Penalty for inducing absence of minors. Whoever induces or attempts to induce a minor to absent himself unlawfully from school, or unlawfully employs him or harbors a minor who, while school is in session, is absent unlawfully therefrom, shall be punished by a fine of not more than fifty dollars.

Evidently this law applies to those persons who do not have direct parental responsibility, the third person concept. This law is a direct effort to stop anyone who may wish to keep children from school, no matter what the reason. Further, it might well be assumed that this law might serve to prevent any organized effort to keep children from attending school by a third party, either singly or acting as a group. Certain minority group efforts in this direction might be unlawful, but the law itself has not been tested in the courts.

> [Chapter 76] SECTION 5. Where children may attend. Every child shall have a right to attend the public

> schools of the town where he actually resides, subject to the following section, and to such reasonable regulations as to numbers and qualifications of pupils to be admitted to the respective schools and as to other school matters as the school committee shall from time to time prescribe. No child shall be excluded from a public school of any town on account of race, color or religion. (Italics supplied.)

In Chapter 76, Section 5, we have a law of the Commonwealth that clearly indicates the fairness and the justice of the legislature in representing all of the people in the state. It states emphatically that "no child shall be excluded from a public school of any town on account of race, color or religion." This is not an effort to create or perpetuate de facto segregation. This is not an effort to inhibit minority groups, be they religious or racial. The only limitations set upon this law are the number and qualifications of the students. Obviously, limitations on number are reasonable. School facilities can absorb only a certain number of pupils. Also, regulations on qualifications are not discriminatory. Some children are more qualified for one particular school, whereas others are not. Further, qualifications are not applicable in the elementary grades because children attend the school that is conveniently located nearest to them in the lower grades, and this is the traditional concept of the neighborhood school as it was originally formulated, whereas qualifications would be applicable on the high school level, but certainly they are only academic qualifications, and no child is screened on the basis of his race or his religion. This raises an important question: How can the schools, which were founded within the framework of the law, be blamed for

high concentrations of one minority group in any given school or school district? There is nothing in the statutes of the Commonwealth which indicates that students have to go to a certain school because of race or religion. Why is it that school committees are sued for creating and perpetuating de facto segregation? Why is it that school committees are demonstrated against by organized minority groups? Why is it that large numbers of children are kept from schools in massive boycotts, declared illegal by the Attorney General, in efforts to put an end to alleged de facto segregation? Unlike many of her sister states to the South, the Commonwealth has only anti-discrimination laws on her books, and our schools are operated according to the laws of the Commonwealth. Who or what is to blame for high concentrations of one race in some of the schools in the Commonwealth? It is hoped that these questions can be answered within the confines of this problem.

> [Chapter 76] SECTION 16. Exclusion from school, action for. The parent, guardian or custodian of a child refused admission to or excluded from the public schools shall on application be furnished by the school committee with a written statement of the reasons therefor, and thereafter, if the refusal to admit or exclusion was unlawful, such child may recover from the town in tort, and may examine any member of the committee or any other officer of the town, upon interrogatories.

Although this statute does not specifically mention race or religion, it might well be used by a student who feels he has been discriminated against because of race or religion. This party can get a "written statement of the reasons therefor," and if the exclusion was unlawful the party can "recover

from the town in tort" and also may question the members of the school committee or the officers of a town as to the reasons why he was excluded. This law is pertinent because it is a legal vehicle that can be used by minority groups rather than choose the options of protest demonstrations, mass boycotts, and law suits against school committees. Also, it is much more palatable, at least to this writer, because it is a method of operating within the law. Since the schools are operating within the law, why should protest groups operate outside of school law?

> [Chapter 77] SECTION 1. Certain counties to maintain training schools; commitments, payments, etc. The county commissioners of each county, except Barnstable, Berkshire, Bristol, Franklin, Hampshire, Dukes, Nantucket, Norfolk, Plymouth and Suffolk, shall maintain either separately or jointly with the commissioners of other counties as hereinafter provided in a suitable place, remote from a penal institution, a school for the instruction and training of children committed thereto as habitual truants, absentees or school offenders . . . .

This law is designed to strengthen the laws pertaining to the regulation of school attendance found in Chapter 76 of the General Laws previously discussed. In the case of an organized boycott of the schools, this writer believes that this law would be a last resort to make children who might be classified as habitual truants or habitual absentees abide by the law. Such drastic measures should not be considered until all other avenues of solution are explored, but the administrator can use this law to force attendance legally if he has the sanction of his school committee, and if he wishes to do so.

> [Chapter 77] SECTION 4. Habitual absentees. A child between seven and sixteen found wandering about the streets or public places, having no lawful occupation, habitually absent from school and growing up in idleness and ignorance, shall be deemed an habitual absentee, and, unless placed on probation as provided in section seven, may, on complaint of a supervisor of attendance or any other person, be committed, until he reaches his sixteenth birthday, to the county wherein he resides or, if there is no such school, to the custody of the youth service board, or to a county training school; provided, that a girl committed under this section in the county of Middlesex may be committed to the custody of the youth service board.

Although this law was not designed to thwart the efforts of any group to boycott the schools on a massive basis and it appears as though it was designed for the individual habitual absentee, there is within it the power to have an individual committed to a county training school upon complaint of a supervisor of attendance if, of course, the child falls within the categories stipulated in the law. In February of this year, 1964, Boston, Massachusetts, was the scene of a massive boycott by organized minority groups. Children stayed out of school by the hundreds. Many did not report to the so-called "Freedom Schools" set up by their leaders. These schools were designed to occupy the children during school hours, but many children did not report to them and the only limitation to their being reprimanded or even prosecuted under this law was that they could not be considered habitual absentees under the law as it was only of a one-day duration. But there is a question: What would be the consequences of an extended school boycott? This law might well apply then. In any event, there could have been resort to Chapter 76, Sections 1 and 2, in the sense that local administrators could question

the validity of this being a "necessary" absence. It must be remembered, as previously mentioned, that there are very few legitimate reasons for being absent from the schools of the Commonwealth, and it should also be remembered that local school authorities have the legal right to approve of any absence.

> [Chapter 77] SECTION 11. Jurisdiction. District courts, except the municipal court of Boston, trial justices and the Boston juvenile court shall have jurisdiction of offences arising under section one of chapter seventy-six and under this chapter. A summons or warrant issued by such court or justice may be served, at the discretion of the court or justice, by a supervisor of attendance or by any officer qualified to serve criminal process. On complaint against a child for any such offence, his parents, guardian or custodian shall be notified as required by section fifty-five of chapter one hundred and nineteen. A child against whom complaint as an habitual absentee is brought by any other person than a supervisor of attendance shall not be committed until notice and an opportunity to be heard have been given to the youth service board.

This statute points out the legal agencies that will have jurisdiction over a child who is considered to be a habitual absentee. This statute lends direct support to the attendance laws, Chapter 76, Sections 1 and 2.

> [Chapter 77] SECTION 13. Same subject; duties. Supervisors of attendance shall . . . if the court so orders, have oversight of children placed on probation under section seven; of minors licensed by the school committee under section nineteen of chapter one hundred and one; and of children admitted to or attending shows or entertainments contrary to section one hundred and forty. They may apprehend and take to school without a warrant any truant or absentee found wandering in the streets or public places.

A child who absents himself from school without a legitimate reason, approved by the superintendent or the school committee, or without a "necessary" excuse approved by

school administrators can be apprehended and taken to school by a supervisor of attendance. As the Attorney General said in his legal opinion of February 10, 1964:

> To the extent that absenteeism is a problem involving the youth or his parents, it deserves to be handled by an agency with substantial flexibility and expertise, which can fashion and enforce a highly individualized remedy. The statute seeks to have these problems treated in the first instance by the school committee, which has the closest, continuing relationship with the problems and the pupils, and then by the juvenile court, and district courts, which have special competence in problems relating to juveniles. It is, therefore, my considered judgement that the statutes confer upon the school committee the primary power, responsibility, and means by which to formulate and enforce programs to effectuate the school attendance laws.

It should be noted that the child considered to be a habitual absentee is first taken to school--not court. This is equitable. As the Attorney General points out in his legal opinion of February 19, 1964, "resort to the courts against a child ought to be the last resort, after all available administrative remedies have failed." Almost all educators would agree with this. The child comes first, but it also is the job of local administrators to see that the children are in school so that the business of education and learning can take place. This statute, as well as the others mentioned, have as a primary purpose the education of the child. If a boycott for any purpose empties the schools, then it is the duty of the school committee, superintendents, administrators, and teachers to see that the classrooms are filled again so that learning can take place. School committees alone can make policy within the law, and administrators and teachers must carry it out to the letter.

[Chapter 272] SECTION 40. Disturbance of school or public meeting. Whoever wilfully interrupts or disturbs a school or other assembly of people met for a lawful purpose shall be punished by imprisonment for not more than one month or by a fine of not more than fifty dollars.

This statute is included because it is the only one that might provide a roadblock to a noisy demonstration or an interfering picket line in front of or around a school. It does not mention either, but it might well be applicable. Again, administrators and teachers have to maintain reasonable order in the schools so that learning can take place. If there is noise or commotion, this law might be utilized after all other efforts to maintain order have been exhausted.

CHAPTER IV

COURT DECISIONS STRENGTHEN SCHOOL LAW

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Court cases or citations serve to interpret the law as it is made by the legislature. Sometimes laws go many years without being tested in the courts. However, once a law is tested in a court case, that decision remains precedent unless overturned by a higher court. There are several court decisions in Massachusetts which give the law clear meaning. As these decisions are reached, the legal principle of *stare decisis* becomes relevant; that is, previous decisions are precedents to be followed by courts as time passes. Court cases lend strength to the statutes and they make their constitutionality clear.

Massachusetts has several key court decisions which add strength to particular areas in which statutes were originally passed. Some of these important areas are in the guarantee of free education, the school attendance laws, responsibilities and powers of school committees, distribution of pupils, and the right of school committees to make reasonable rules and regulations.

The cases cited in this chapter are those used by the Attorney General in his opinions related to the school boycott in February of this year in Boston, Massachusetts. In

his legal opinions, contained in the Appendix, they are not detailed but rather indicated to strengthen his opinions. They are the basic cases in the school law history of Massachusetts in that they lend support to the statutes. Each case taken from the legal opinions of the Attorney General is listed with an explanation of its importance in relation to the history of fairness inherent in the school law of Massachusetts.

The Guarantee of Free Education to Children of Every Town. 10 Met 511, Cushing v. Newburyport.

In this case there was a question as to whether or not a school for girls would be built in the town and supported by taxes. Chief Justice Shaw held that early colonists in Massachusetts wanted schools for everyone, and that these schools were to be supported by taxation.

In this case we get an indication of the progressive spirit of early settlers of Massachusetts. The desire for free education for all is more than evident in the state Constitution and statutes as interpreted by Justice Shaw. This precedent is an important one as it stresses education for all.

Massachusetts School Committees Have Broad Powers Related to Education. 334 Mass. 23, Henry Dowd and others v. Town of Dover and others. Suffolk, March 9, 1956 - March 30, 1956.

The school committee of Dover changed its policy several times concerning the sending of high school pupils to Needham High School. Prior to the decision it vacillated between sending pupils out on a paid tuition basis or

maintaining a school. A group of the town people brought suit, claiming that the town at large could decide for itself about having the high school, not the committee. The court held that, according to the law, a town of 500 or more (71:4) "householders" had to provide a school, but it was not clear what the population was at the time so this law did not hold. Further, it was maintained that the Department of Education could decide whether or not a town should maintain a high school, thus lending support to the school committee.

307 Mass 354, Hazel Davis v. School Committee of Somerville. Middlesex, February 13, 1939 - November 25, 1940.

Hazel Davis was dismissed from the Somerville schools for no apparent reason, and she brought suit seeking reinstatement. The court ruled against Hazel Davis, holding that the school committee can dismiss a teacher as long as the committee is acting in good faith (71:41, 42).

294 Mass 167, Clara Rinaldo v. School Committee of Revere. Suffolk, February 4, 1936 - March 31, 1936.

Clara Rinaldo got married and was subsequently discharged because the school committee had made a rule on the marriage of women teachers. The committee was upheld as acting in good faith because it had made a rational rule with a reasonable purpose in mind.

In the Dowd v. Dover case it is clear that the school committee has broad powers because it could decide whether or not it was going to have a school despite the town. In the Davis and Rinaldo cases it is clear that school committees can make rules and can exercise power in good faith. The

concept of the school committee being a body politic of the state is certain here, making it more apparent that the state controls the schools, not the towns.

School Committees Have the Right to Make Reasonable Rules and School Committees, Acting in Good Faith, Are Not Subject to Review by the Courts. 105 Mass 475, Henry Hodkins v. Inhabitants of Rockport, November, 1870.

In this case a pupil was excluded from school by two members of a school committee. The pupil brought suit, and the court ruled that the committee was right because the whole committee had approved the exclusion later.

157 Mass 561, John Watson v. City of Cambridge. Middlesex, November 30, 1892 - January 4, 1893.

A pupil was removed from school because he was too weak-minded to derive profit from instruction. The court sided with the committee and ruled that a school committee, acting in good faith, is not subject to review by the courts.

These laws are indicative of the right of the state to control education through the school committee. It is clearly a state function:

> One important feature of education as it has developed in the United States is the legal control of public schools by the several states through their constitutions and statutes. The courts have held education to be a state function. In legal theory, public education is considered not only one important function of state government, but to be of government itself. Where the issue of control over education has arisen, the courts have stated that authority over school personnel and school affairs is a central power residing in the Legislature of the state.[1]

With this power the legislature of Massachusetts has made the schools free and open to all. Also, it has spelled out the

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[1]Gauerke, op. cit., p. 26.

route that administrators and school committees must follow.

School Committees of Massachusetts and School Attendance Laws. 332 Mass 492, Commonwealth v. J. Harvey Renfrew and another, Suffolk, March 7, 1955 - April 6, 1955.

The parents of a child would not send the child to school because of religious objections to the Bible being read in the schools. They were Buddhists. The court ruled that the child must attend school, and further that the parents had no defense.

268 Mass 585, Commonwealth v. Howard E. Green. Berkshire, September 17, 1929 - October 2, 1929.

The parents of two children did not have their children vaccinated because they did not want them to attend school. They claimed they were against vaccination for religious reasons. The court ruled against them, holding that they must comply with state law.

299 Mass 367, Commonwealth v. Harry Childs. Norfolk, November 2, 1937 - February 2, 1938.

In this case the children of Harry Childs were not vaccinated so that they were not allowed to attend school. State law holds that children must be vaccinated to attend school. Childs persisted, and thus his children were kept from school.

As pointed out in a previous chapter, a child can absent himself from school only for a few reasons under the law. The Renfrew, Green, and Childs cases indicate the serious nature of the attendance laws, and the fact that being against vaccination is not a valid excuse for being absent from school. It is obvious that the legislature designed the

attendance laws to be stringent. The state has more control over a child and his attendance than the parent does. These cases, combined with the laws concerning school attendance, make it plain that the opinion of the Attorney General concerning the boycott of Boston schools this year was correct. These cases and statutes may prove useful if the situation arises again in the Commonwealth.

The statutes and citations contain no laws or court decisions that prohibit a child of a particular race from attending a school of his choice. On the contrary, the statutes contain the actual guarantee of education for all despite race, creed or national origin. The citations indicate a strengthening of these laws through interpretation by the courts. Massachusetts has had an enviable record in education, and its repudiation of the separate but equal idea in education in 1855 is just one example of its progressive justice:

> No other state chalked up so many "firsts" in this field: Boston's free public school in 1635, two school laws--the first in the New World--in the 1640's and between 1821 and 1852 the first high school, the first training schools for teachers, the first compulsory school attendance law, and the first State Board of Education.[2]
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> . . . . . .
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> The department, of education, administers the Fair Educational Practices Act, which stipulates that there be no discrimination in admission to schools and colleges because of race, color, or creed. Massachusetts has no segregated schools, so that racially there is complete equality of educational opportunity.[3]

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[2]The League of Women Voters of Massachusetts, Massachusetts State Government (Harvard University Press, 1956), p. 166.

[3]Ibid., p. 170.

The Commonwealth was making democracy work long before the Civil War, and it has continued to progress right up to the present day. Although much power is given the local school committee, thus increasing its home rule, the committee remains under the jurisdiction of the state legislature and the Department of Education. Massachusetts administrators must understand that they are carrying out the policy of an elective body of the state, and that they function on a legal basis. Decision-making within the framework of state law is the function of the school committee. Until the time that a committee directs an administrator otherwise, he must carry out that policy as long as it is made in good faith. School committees may decide to eliminate <u>de facto</u> segregation by bussing in one town and not in another. Whatever their decision, the administrator must carry it out. If the educational function of any school is threatened by the protest demonstration or the school boycott, it is the duty of the administrator to see that an atmosphere conducive to learning exists by turning to the law, if necessary, and at least until the committee decides what it will do about a situation.

CHAPTER V

CONCLUSIONS AND RECOMMENDATIONS

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Surely it can be argued that varied conclusions can be drawn from the information presented here, but it is hoped that these conclusions will come as close as possible to a result characterized by common sense and looked at through eyes whose first concern is children and learning.

The Schools as a Vehicle for Social Change. School authorities have been accused of creating and perpetuating de facto segregation. This writer does not think that these charges are just or valid. Factors cited, such as migration, residential segregation and discrimination in employment, are the causes of the Negro ghetto and subsequently of de facto segregation. Of course, as pointed out, the system of slavery and one of its modified derivatives, de jure segregation, increased the probability of de facto segregation occurring in the North because the Negro came North, running from the South, with little education or capital and was relegated to cheap housing and insignificant, low-paying employment. Agreed, discrimination in the North helped to put the Negro in the ghetto once he was here, and it has helped to keep him there since. The intensity of the problem grew as the white left for the suburbs and the Negro arrived from the South.

The problem has been self-perpetuating because generation after generation has repeated the pattern.

The question of why the schools have been attacked as the creators and perpetuators of de facto segregation is a difficult one to answer. This writer believes as many do, along with Conant, that the Brown decision began the attack, but the use of the schools as a vehicle for social change is a matter of choosing the route of least resistance. Civil rights organizations must realize that as public institutions the schools are an ideal vehicle to change the sociological picture by using pressure in the form of the protest demonstration and the boycott, and, more significant, the legal route, through the courts. As instruments of the public, the courts and the schools are interrelated, and the schools must follow the constitutional direction of the courts since they are public institutions. It may be concluded that the attack on the schools has been unjust, especially in Massachusetts. The injustice is evident because the laws of Massachusetts are just and equitable and do not support any form of segregation, either de jure or de facto, and historically this state has taken a position of leadership in the field of education and human rights. True, children attend the school "conveniently located" near their homes, and the laws do support the concept of the neighborhood school. The question of whether or not the neighborhood school should be the focal point of derision in the attack on the schools might be answered by a much closer look at the charges.

The Certainty Is Questionable. Some of the charges are emotionally oriented and, thus, understandably, cannot be substantiated. First, there is no evidence indicating that any school committee in Massachusetts has ever gerrymandered school district lines or prohibited a child from attending any school because of race. Second, the laws and statutes of Massachusetts are so constructed that every child is given an opportunity to attend school and his parents are obligated to see that he attends. School attendance is not predicated on race.

Charges that teachers are apathetic and that books, materials, and facilities are inferior must be answered from personal experience. There may well be some apathy among staff members in schools with large concentrations of culturally deprived children, either white or Negro, or any other group, but it is only temporary apathy in the cases this writer has witnessed, and it is more like depression than apathy. The constant, repetitive teaching of children who are ill-fed, ill-clothed, largely anti-academic and in sad need of parents who care can put temporary limits on the optimism of a teacher. But these teachers seem to be resilient. They stretch their patience as if it were as ductile as wire and care for these children very much. Again, from personal experience, books are not inferior to those of other schools. In fact, textbooks are almost universally the same by grade throughout the system this writer teaches in, and the same holds true for materials.

As to the feasibility of including Negro characters in books that are criticized as being traditional-white-middle-class-oriented, it would be quite agreeable to this writer if it is good for all culturally deprived children. The inequality of facilities, if and when there are such inequalities, is a factor that can be overcome by renovation or new school construction. Old school buildings are usually found in older neighborhoods of cities, and unfortunately Negroes live in the vicinity of them. The demolition of old buidlings and construction of new ones is part of the extended question of what to do. A new building in a Negro neighborhood is not going to reduce the high racial concentration. Should the school committee of any area so affected follow one of the six previously mentioned plans for desegregation? It is a complex question. Teachers, books, and materials are usually equal, but facilities, in some cases, are not the same, but not because school people do not want better facilities; rather, taxpayers are already overburdened with high tax bills. The most important charge is that de facto segregation can do emotional harm to children. Opinion was overwhelming that de jure segregation was emotionally harmful to children, and thus heavily influenced the Brown decision, but opinion on the emotional effects of de facto segregation is split, and spokesmen such as James B. Conant, previously cited, claim it has no emotional effects that are detrimental. Not being a sociologist or psychologist, this writer cannot judge this opinion. From experience there do not appear to be any overt

signs of emotional stress among children in the school in which this writer teaches, and this school is predominantly Negro, but again, this writer would happily acquiesce to any plan that could be proven beneficial to all children in this same school, but this depends on the policy-makers, the school committees of Massachusetts, to choose the alternatives.

Alternatives and Recourse. School committees of Massachusetts as well as other Northern state school committees have to decide whether or not they are going to allow the schools to be a vehicle for changes in the present sociological make-up of urban communities. This decision hinges on whether or not the courts decide that schools and school committees are deliberately segregating Negroes in particular schools. Presently, there is a case pending in the courts of Massachusetts which was brought by a group of parents in Springfield, Massachusetts, and the suit is against the school superintendent and the school committee. Also, there is an injunction decision pending against new school buildings in Negro residential areas. If the courts decide that the school committee and administrators are guilty of this accusation, then the committee will have to find a way to remedy the situation. If they do not, or until they do, the school committee, as others do in other cities of the state, has the power to decide whether or not it will use one of the six basic plans for desegregation, previously cited, or some alternative plan it may devise. School committees, under the law in Massachusetts, have control over the transportation and distribution

of pupils in Massachusetts, and they have the option of transporting students to other schools if they wish. Also, they have the power to redraw school district lines. Any type of transportation, such as that advocated under Open Enrollment, Open Enrollment in Reverse or the Princeton Plan, will undoubtedly bring the hue and cry of parents down on the school committee because of transportation costs and the tradition of the conveniently located neighborhood school. School redistricting would bring the same wrath. As Conant points out, there is much complexity in the choosing of those pupils who will be transported and those who will stay behind. Who would be designated to choose who would be transported? What criteria would be used to judge students who would be transported and the students who would be left behind? Also, this is a personal criticism, how would these children, whose clothing, homes and attitudes are so different, fit into a middle-class, white school? There is good reason to believe that these children would be segregated and resented and ignored by the children of the middle class, and this would create a real sense of inferiority which could well turn to hostility and social strife. Another alternative might be increased expenditures for added staff to lower the pupil-teacher ratio and thus afford more individual attention, and added expenditures for after-school supervised study programs to give the children a place to study and complete schoolwork, a place many of them presently do not have. This would be patterned after

the Higher Horizons Project of New York City. Other ideas emanating from the same source are changes in the school curriculum so that these children are not subjected to the traditional curriculum which many cannot handle and have no desire to because it lacks interest for them. Testing, too, might be readjusted so that standardized tests exclude the vocabulary of the typical middle-class American and might include the language of the deprived so that testing might be more equitable. There are many alternatives which can be utilized besides transporting and redistricting. The alternatives of increased expenditures for added teachers and counselors and changes in the curriculum and testing are optional, and the school committee may choose or not choose any or all. If the concept of the neighborhood school remains legal in Massachusetts, then reliance on desegregation through the schools will be wiped away leaving the school committees to choose the latter alternatives, but as things presently stand the neighborhood school is legal, and to see that learning is going on at all times school committees and administrators have recourse to the law. Whereas school committees have a choice in relieving the pressure presently on the schools, school administrators do not, and thus their only recourse is to the law.

Administrators have little choice in the matter of facing the problem. They must maintain reasonable order in the schools, and they must see to it that children are not

unnecessarily absent from school. In this respect, administrators have to rely on the law to see that the schools function properly. Laws such as those listed in Chapter III are designed to see that the wishes of the legislature are carried out in the areas of school attendance and in the maintenance of a learning atmosphere. Unless otherwise directed by the school committee, administrators can utilize these laws to effectuate the wishes of the legislature, and until such time as the school committees of urban areas are either forced to change the present sociological make-up of the schools by the courts or voluntarily do so themselves, the law is the guidepost of administration in these crisis areas where the protest or the boycott may upset the learning situation.

Pragmatic Alternatives for the Civil Rights Movement.

If the courts decide that the school committees of Massachusetts must change the sociological make-up of the schools, then the tide will turn to the question of how. If they do not, school committees may adopt new measures to help the culturally deprived child without changing the sociological make-up of the schools. In the meantime it might be wise for the civil rights movement to shift the direction of its attack to two of the key factors that have maintained the ghetto, and, consequently, the de facto segregated school. The first area is discrimination in employment and its various aspects. Obviously, if a Negro cannot get a decent job he is never going to be able to afford a standard of living better than the ghetto. Prejudice is a key factor in the area of employment:

> Race prejudice and discrimination in the economic sphere operate principally in three different ways:
>
> 1. Many white workers, even if they think that Negroes should have a fair share in the job opportunities in this country, are opposed to Negro competition in the localities, industries, occupations, and establishments where they themselves work.
> 2. Some customers object to being served by Negroes unless the Negro has an apparently menial position.
> 3. Many employers believe that Negroes are inferior as workers, except for dirty, heavy, hot, or otherwise unattractive work. Perhaps even more important is the fact that they pay much attention to the anti-Negro attitudes of both white customers and white workers.
>
> Another general condition behind the Negro's economic plight is the fact that most white people are ignorant about what they have done to the Negro in the economic field. This, of course, is not a primary cause. It only explains how white people have been able to do what they have done without a bad conscience. We frankly do not believe that the economic status of the Negro would have been nearly so bad if white people realized how all specific economic discrimination adds up, and how effectively they bar the way for the Negro when he attempts to better himself.[1]

Thus, the ability of the Negro to get a job, even if he is well-qualified, is hampered by prejudice and discrimination. Without a decent job he is without a decent wage--a wage that might allow him to break from the ghetto if other factors are working for him at the same time. To cite another example:

> Every recession demonstrates the old adage that the Negro is the first fired and the last hired. The Negro unemployment rate in the 1960 decline, for example, was roughly double that for whites. In industrial centers the disparity was greater. Thus in Detroit, where Negroes account for only 19 per cent of the work force, they constituted 61 per cent of the unemployed. To put it differently, they suffered an unemployment rate three times greater than that of the city as a whole.[2]

Recent efforts in this area are going well in Massachusetts.

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[1]Arnold Rose, The Negro in America (The Beacon Press, 1962), p. 125.

[2]Wallace Mendelson, Discrimination (Prentice-Hall, Inc., 1962), p. 69.

Many companies have signed up with organizations whose aim it is to eliminate discrimination in employment and are making genuine efforts to hire the Negro wherever and whenever possible. It is just a start and more work has to be done. Civil rights organizations should direct their efforts toward pushing qualified Negroes into jobs they can handle well. Negroes who can work side by side with whites and earn equal pay for equal quality are going to have the money to get out of the ghetto. Also, by working with and competing with the white, the two can get to know each other better, and perhaps skin color will become less and less a barrier to employment.

The second factor that contains the Negro in the ghetto, and thus perpetuates the problem, is the evil of segregated housing. The reasons behind the discrimination are partly economic on the part of the white person:

> Racial discrimination is more extensive in housing than in any other aspect of American life, since the ordinary problems of integration are here aggravated by special pocketbook considerations. People who would have no direct objection to neighborhood integration often feel compelled to object because of the effect--real or supposed--on property values. This is another aspect of the ring of discrimination: a primary racial tension at one level generates secondary tension--a psycho-economic pressure, at yet another level. The result is that the desire of the Negro for freedom in the housing market, threatens substantial economic loss for white property owners. If in some situations the threat is imaginary, in others it may be all too real.[3]

Is it necessary to go to the state legislature and lobby for anti-discrimination laws in housing as the Californians have done in the past? Civil rights organizations should work hard

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[3] Ibid., p. 115.

at getting the real estate boards and multiple listings services in Massachusetts to loosen up on their approaches to the Negro housing customer so that the Negro with the means can buy adequate housing and get out of the ghetto. If the Negro family can get out of the ghetto, then the opportunity to attend a school without a high concentration of Negroes will come naturally. Moreover, the Negro child whose parents can live comfortably in a better, perhaps white neighborhood, will probably have better clothes and attitudes more like his classmates and thus be accepted more easily. It is a more natural form of integration, a more peaceful form, one that would be better for the children and more palatable to the vast majority of Negro and white parents. Civil rights organizations would be wise to channel their attack away from the schools and work harder to get all the cooperation possible to integrate neighborhoods, keeping in mind the fact that no matter where the Negro youngster attends school during the day he will have to return to the ghetto at night unless his home is elsewhere. The threat of Negroes moving into a neighborhood or to a street that is predominantly white is a serious one to the white because of the idea that property values will immediately go down, and thus he may suffer a serious financial loss. Negroes who can afford better housing are aware of this feeling, and in cases this writer has witnessed or heard about the new Negro neighbor practically labors himself away trying to make his property handsome and respectable. Maybe a good public relations campaign on the part of real

estate dealers working with civil rights leaders would eliminate some of the massive hysteria that inevitably comes when a Negro moves into a white neighborhood. If real estate dealers do not wish to cooperate, then perhaps the civil rights people should use their weapons to bring about changes. It is one thing to mouth trite sayings about democracy and then not let someone move into a neighborhood or get a job he is qualified for because the color of his skin is different. The door out of the ghetto will open only when the Negro has the money and the opportunity to move elsewhere.

Unity of Purpose. The new civil rights law of this summer of 1964 is a step in the right direction, but it is necessary for all Americans to join hands now and seek out the right answers to the de facto segregation problem. Although this writer is uncertain as to the emotional effects of de facto segregation and its side effects and, therefore, against sociological changes in the neighborhood school, this does not mean that he would not acquiesce to the decisions of the state legislature or the courts or the school committee if their reasoning is that such moves will be best for all culturally deprived children. Until that time this writer feels that the law is the guidepost for all school people. It has to be.

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APPENDICES

APPENDIX I

The Commonwealth of Massachusetts
Department of the Attorney General
State House, Boston 33

Edward W. Brooke
Attorney General

85

February 10, 1964

Hon. Owen B. Kiernan
Commissioner of Education
200 Newbury Street
Boston, Mass.

Dear Sir:

You have propounded to me the following questions:

"In connection with the proposed boycott of public schools in Massachusetts on February 26, 1964, or any other regularly scheduled school day, I would appreciate being advised on the following questions:

1. Is it lawful for a child to be absent from public school on such a day?

2. If the answer is in the negative, what legal remedies are available to enforce compliance with the statutes?

3. Upon whom does the responsibility rest to enforce such legal remedies?"

The so-called "boycott" to which you refer is a plan by which parents on the day in question will keep their children absent from public schools as a form of protest against alleged injustices in one or more local school systems, and against alleged inadequacy in the methods by which those public officials with jurisdiction to do so have undertaken to remedy the said injustices.

For the purposes of this opinion, I assume that the

absentee children to whom the questions relate would otherwise attend school, will remain absent solely for the reasons set forth above, and are between the ages of 7 and 16.

The school attendance laws constitute in important part of a statutory scheme designed to implement and effectuate the principles enunciated in Part 2, Chapter 5, Section 2 of the Constitution, which reads as follows:

> Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings: sincerity, good humor, and all social affections, and generous sentiments among the people.

The antecedents of this constitutional provision reach back to the earliest days of the Massachusetts Bay Colony. "The colonial act of 1647 required each town containing fifty householders t

to

maintain a school in which the children should be taught to read and write, and each town containing one hundred householders to set up a grammar school, with a master able to instruct youth so far that they might be fitted for the university. . . . Thus they laid the foundation of a system which . . . has always retained its fundamental character and purpose. It provided free education in the elementary branches of learning to the children of every town . . . ." Jenkins v. Andover, 103 Mass. 94, 97; see also Cushing v. Newburyport, 10 Metc. 508, 511.

The dependence of a free and vital society upon an aware, concerned populace, and the importance of universal education to the creation and maintenance of such a populace, cannot be gainsaid. The fact that universal education was espoused in the Constitution illustrates its importance to the organizers of the constitutional government. By the enactment of section 2, universal education was established as a permanent aspiration of society.

Chapters 76 and 77 are designed to assure that this aspiration be realized. Section 1 of chapter 76 provides in part as follows:

> "Every child between seven and sixteen (except children between fourteen and sixteen who meet certain requirements) . . . shall, subject to section 15, attend a public day school in said town, or some other day school approved by the school committee, during the entire time the public schools are in session . . . but such

> attendance shall not be required of a child whose physical or mental condition is such as to render attendance inexpedient or impracticable or of a child granted an employment permit by the superintendent of schools when such superintendent determines that the welfare of such child will be better served through the granting of such permit, or of a child who is being otherwise instructed in a manner approved in advance by the superintendent or the school committee. The superintendent, or teachers in so far as authorized by him or by the school committee, may excuse cases of necessary absence for other causes not exceeding seven day sessions or fourteen half day sessions in any period of six months. Absences may also be permitted for religious education at such times as the school committee may establish."

The basic policy which the section clearly and unequivocally sets forth is that all children must attend an approved school for a specified period of time. The Legislature was not content merely to make public educational facilities available to those who might desire to use them. Because of the inextricable relationship between the child's education and his whole social, cultural and intellectual development and of the importance of a sound development to the Commonwealth, then notwithstanding the intimate concern of the parent with the upbringing of his child, even conscientious religious objections to the public school curriculum will not justify the parent's ignoring the mandate of section 1. Commonwealth v. Renfrew, 332 Mass. 492. Similarly, the parent whose child is refused admission to school under section 15 because he has not been vaccinated, cannot defend against a criminal

prosecution under section 2 on the basis of religious objections to vaccination. Commonwealth v. Childs, 299 Mass. 367; Commonwealth v. Green, 268 Mass. 585. The General Court has withdrawn from the parent all discretion to raise his child without a public education or one approved by the school committee.

The exceptions which are set forth in the statute fortify, rather than extenuate, the rigor of this primary policy. Many situations, some foreseeable, but many not, must inevitably arise to cause pupils to be absent from school. Yet the statute sets forth only one cause, physical or mental impairment, which can justify absence as a matter of right, and even when the child is so excused, the parent must take all reasonable steps to correct the condition or provide alternate education.

> "No physical or mental condition capable of correction, or rendering the child a fit subject for special instruction at public charge in institutions other than public day schools, shall avail as a defense unless it appears that the defendant has employed all reasonable measures for the correction of the condition and the suitable instruction of the child."
> G. L. c. 76, §2.

The supervision and control of all other absences which can be authorized under the statute, is vested in the local school administrators. Thus employment permits may be granted only with the permission of the superintendent; private education must be approved by the superintendent or school committee; and such released time

for religious training as is allowable under the statute is nonetheless subject to the approval of the school committee. The only provision in the statute authorizing absencé other than for a specified reason is for "necessary" causes. The local administrators have the jurisdiction to determine both what is a "necessary" absence, and when such an absence ought to be excused.

The statute recognizes that if parents were given the discretion to remove their children from school for reasons deemed by them to be adequate, there could be no uniform policy governing absences. The administrators would lose a great deal of the control over the operations of the schools which they now possess. Ultimately such a system would seriously devitalize the basic statutory policy by which I have referred: that the education of youth does not depend upon the pleasure of the parent, but is required by command of the Commonwealth. Accordingly, the grant of total discretion in the public school officials was deliberately done in order to assure uniformity in policy and administration of the school attendance laws.

The policy of section 1 admits of no construction which would authorize the absences to which you refer, if not excused as a necessary absence by the local authorities. Nor does section 2, which reads in relevant part as follows, provide to the contrary:

> "Every person in control of a child described in the preceding section shall cause him to attend school as therein required, and, if he fails so to do for seven days session or fourteen half day sessions within any period of six months, he shall, on complaint by a supervisor of attendance, be punished by a fine

> of not more than twenty dollars. . . . The Boston juvenile court shall have jurisdiction, concurrent with the municipal court of the city of Boston, of complaints hereunder. Complaints hereunder brought in other district courts shall be heard in the juvenile sessions thereof."

The first part of the sentence defines the duty of the parent. The second only sets forth the circumstances under which the parent will be criminally liable. The criminal law is but one weapon in the legal armory; and is reserved only to punish those whose conduct offends minimal social standards. The General Court simply determined that the person in loco parentis (but not the interloper, see section 4) ought not be held criminally responsible for keeping out his child for a short period of time. This does not vitiate his duty to comply with section 1, and his failure to do so is an appropriate subject for inquiry by the supervisor of attendance. See G.L. c. 77, §13.

Accordingly, it is my considered judgment that the absence to which your question relates is unlawful, if not excused as a necessary absence in the manner specified in section 1.

The final two questions may be answered together. As I mentioned above, the primary responsibility for the formulation of uniform policies under section 1 rests with the local school committee. Indeed, section 1 is merely a part of the whole statutory scheme which vests the school committee with plenary administrative responsibility for the conduct of the local school system. See, e.g.,

G. L. c. 71, § 37; Barnard v. Shelburne, 216 Mass. 19. The administrative and executive functions of section 1 are so inextricably intertwined, that it is not surprising that the General Court explicitly mandated that both be under the jurisdiction of the same agency--the local school committee. After setting forth the substantive provisions referred to above, section 1 continues:

> "The school committee of each town shall provide for and enforce the school attendance of all children actually residing therein in accordance herewith."

In addition to the administrative powers thereby conferred, chapter 77, section 12 requires the school committee to "appoint, make regulations governing and fix the compensation of one or more supervisors of attendance." The supervisors of attendance must inquire into all cases arising under section 1 of chapter 76, may "apprehend and take to school without a warrant any truants or absentees found wandering in the streets or public places," and may serve process issued by the juvenile or district court which has judicial jurisdiction over all offenses under section 1 of chapter 76. G. L. c. 77, §§ 11, 13.

To the extent that absenteeism is a problem involving the youth or his parent, it deserves to be handled by an agency with substantial flexibility and expertise, which can fashion and enforce a highly individualized remedy. The statute seeks to have these problems treated in the first instance by the school committee,

which

has the closest, continuing relationship with the problem and the pupils, and then by the juvenile court, and district courts, which have special competence in problems relating to juveniles. G.L. C. 76, §2; C. 77, §11. It is, therefore, my considered judgment that the statutes confer upon the school committee the primary power, responsibility, and means by which to formulate and enforce programs to effectuate the school attendance laws.

Very truly yours,

EDWARD W. BROOKE

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APPENDIX II

The Commonwealth of Massachusetts
Department of the Attorney General
State House, Boston 33

Edward W. Brooke
Attorney General

February 19, 1964

Honorable Owen B. Kiernan
Commissioner of Education
200 Newbury Street
Boston, Mass.

Dear Sir:

You have propounded four additional questions on the proposed so-called "school boycott", for the definition of which I refer to my opinion to you of February 10, 1964 (hereinafter referred to as the prior opinion). You will recall that in the prior opinion I expressed the views (a) that pupils' absences from school in order to take part in the school boycott were not authorized, if not excused in the manner specified in G. L. c. 76, § 1; and (b) that the school committee has primary power, responsibility and means by which to formulate and enforce the school attendance laws.

The first question reads as follows:

> "Whose responsibility is it to assign and distribute pupils throughout the Boston school system?"

The school committees of the various cities and towns have broad discretionary powers under c. 71, § 37 of the General Laws, to effectuate the purposes of the General Laws relating to public education. See generally, Dowd v. Dover, 334 Mass. 23; Davis v. School Committee of Somerville, 307 Mass. 354; Rinaldo v. Dreyer, 294 Mass. 167; Carr v.

Dighton, 229 Mass. 304. Under § 37, the School Committee is specifically authorized to "make regulations as to attendance" in the public schools. See also G. L. c. 76, § 5. The assignment of pupils in the various schools throughout the city clearly is essential to the proper functioning of the school system. Over a hundred years ago, the Supreme Judicial Court, through Chief Justice Shaw, held: "The power of general superintendence vests a plenary authority in the committee to arrange, classify, and distribute pupils, in such a manner as they (the school committee) think best adapted to their general proficiency and welfare." Roberts v. Boston, 5 Cush. 198, 208. Although there are now limitations on the scope of the committee's discretion which did not exist at the time Roberts was decided, see G. L. c. 76, § 5: Brown v. Board of Education, 347 U.S. 483, it is my considered judgment that subject to these limitations, the School Committee of the City of Boston is responsible for the assignment and distribution of pupils throughout the Boston School System.

In the next three questions, you ask what legal action, if any, may be taken against children who remain absent from school pursuant to the boycott, their parents who authorize such absences, and the "leaders" of the boycott.

In the prior opinion, I pointed out that the Legislature had vested in the school committee the basic responsibility for formulating and executing policies for the enforcement of the school attendance laws. G. L. c. 76, § 1. The Committee is the agency with the flexibility necessary for the task; and it is the agency with continuing responsibility for the conduct of all phases of the school system. The whole spectrum of administrative remedies including that which would require the pupil to make up the work which he missed by virtue of his absence, is available to the committee. Heavy reliance, in my judgment, was placed by the General Court, on the resourceful and imaginative exercise of such remedies by the school committee. Pupils who might become distracted on the way to school and are "wandering in the streets or public places" are not to be taken by police to court; they are to be taken by school committee employees to school. G. L. c. 77, § 13. It should be fairly obvious that these employees must be sure that those whom they so apprehend in fact are truant and must be taken to the appropriate school. To be sure, § 11 of c. 77 vests jurisdiction of "offences arising under section one of chapter seventy-six" in the district courts and Boston Juvenile Court. I think it unnecessary for the purposes of this opinion for me to determine whether an absence pursuant to the boycott would constitute an "offence" within the meaning of § 11 under one or more of the various

fact situations which could arise in that context. Resort to the courts against a child ought to be the last resort, after all available administrative remedies have failed. All reported expressions from those public officials who are concerned with the boycott have disclaimed any disposition to institute such court proceedings; and there is no indication that the arsenal of administrative remedies is in any way inadequate to cope with the problem. It would therefore be inappropriate for me to speculate on what legal remedies might be available or utilized against any child in a hypothetical situation.

Under § 2 of c. 76, a person in control of a child is required affirmatively to insure the child's attendance in school. Such a person must do more than merely refrain from encouraging truancy; he must "cause him (the child) to attend school" as required in § 1. Myriad reasons could cause an occasional parental failure to discharge this duty. Administrative remedies can be invoked which would require the pupil to make up the studies which he missed during his absence. The General Court determined that the parent ought not be held criminally liable for an isolated default in the requirements of section 2. Persistent failure to enforce such attendance, however, indicates a serious disregard by the parent of his legal responsibilities, justifying the imposition of criminal sanctions. The General Court determined that there was not such a disregard until the child

has missed seven day or fourteen half-day sessions in a six month period. Section 2 of c. 76 provides in part as follows:

> "Every person in control of a child described in the preceding section shall cause him to attend school as therein required, and, if he fails so to do for seven days session or fourteen half day sessions within any period of six months, he shall, on complaint by a supervisor of attendance, be punished by a fine of not more than twenty dollars."

A person who is not in control of such a child should be and is treated separately by our statutes. Such a person has no primary duties comparable to those set forth in § 2. He has no responsibility for the child's development comparable in any way to that of the person in control. The person in loco parentis, must accommodate himself for about ten years to a compulsory school year of at least 160 days, in which he has minimal discretion over absences of his child. G. L. c. 71, § 1; c. 76, §§ 1, 2. This fact, as I pointed out in the prior opinion, illustrates the esteem in which education is held in the Commonwealth. The third person is under no comparable compulsion.

Section 4 of c. 76 of the General Laws provides as follows:

> "Whoever induces or attempts to induce a minor to absent himself unlawfully from school; or unlawfully employs him or harbors a minor who, while school is in session, is absent unlawfully therefrom, shall be punished by a fine of not more than fifty dollars."

It could be argued that § 2 punishes only parental failures of diligence; and that § 4, which proscribes the affirmative act of inducement, applies as well to parents as to others. The word "induce", however, is not appropriate to describe the actions of a parent toward his child. Further, the prohibitions against attempting to induce, harboring and employing, all in § 4, indicate that that section was designed to deal with others than the persons in control of the child. Accordingly, although the answer is not free from doubt and will not be so until the Suprome Judicial Court considers the question, it is my considered judgment that § 2 contains the exclusive criminal remedies against the parents for violations of § 1.

I have but briefly directed your attention to some applicable statutes, and have given summary attention to the principles upon which they rest. Because of the possibility that private citizens may rely upon this opinion as a basis of action--a possibility indicated by your reference to the fact that your request was prompted by a like request to you by interested citizens--I think it important to set forth some qualifications. No dogmatic or categoric answer can be given to the question of what legal action may be taken against those to whom you refer. A complete answer would require an analysis of all possible fact situations, and of the applicability thereof to all civil and criminal actions. Factors for consideration would vary widely from

case to case. An analysis of the availability of advance injunctive relief, for example, would be almost completely different from one of the availability of the criminal law after the fact.

The words "induces" and "harbors" are not mathematically precise. No definition could be devised to answer simply and mechanically all the problems which might arise in litigations under § 4. The attempt to invoke § 4 of c. 76 against persons who might have talked directly to pupils would raise problems different from those which would be raised if the communication were not direct, but were by means of mass communication; and these problems would be different from those which would be raised if the communication was directed only to the parents. Whether the "leaders" of the boycott to whom your question relates include those who advocate a "boycott" in principle but do not participate in its organization or execution is unclear; and whether such persons, to the extent they do not advocate positive action, are "inducers", and if so, whether they are protected by the doctrine of Yates v. United States, 354 U.S. 298, could only be determined on a particular set of facts. Similarly, the applicability of the recently enunciated doctrines in Peterson v. Greenville, 373 U.S. 244, and Shuttlesworth v. Birmingham, 373 U.S. 262, as defenses to any civil or criminal action could be determined only upon an established set of facts.

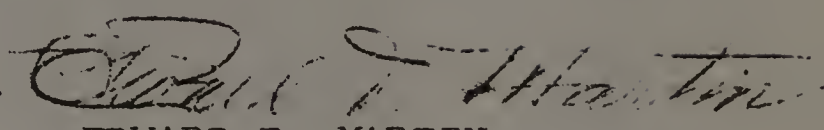
Illustrations could be multiplied ad infinitum. Suffice it to say that the law is life; and all the subtleties and nuances of life are necessary to give content to the general principles of behavior prescribed or proscribed by the statute. Without a recitation of the particular facts of each case, any attempt to predict how such facts might be developed and what a court might decide on the basis thereof would inevitably be incomplete and misleading.

I think it is important to clarify one further point. Both §§ 2 and 4 of c. 76 describe misdemeanors. The maximum penalty under § 2 is $20., and under § 4, $50. G. L. c. 274, § 1. Neither section provides that violators may be arrested without a warrant. Under long and established Massachusetts law, in the absence of specific statutory authority, a peace officer may not arrest without warrant one who has committed a misdemeanor except for a misdemeanor involving a breach of the peace committed in the presence of the officer. E.g., Muniz v. Mehlman, 327 Mass. 353. Accordingly, if no breach of the peace were being committed in his presence, a peace officer could not arrest without a warrant. Further, since the penalties for violation of both §§ 2 and 4 are fines only, the justice may issue a summons instead of a warrant if there is reason to believe the defendant will appear on

the summons. G. L. c. 276, § 24.

Very truly yours,

EDWARD W. BROOKE

By 
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APPROVED:

Chas. F. Olin

Robert C. Jones

(Problem Committee)

Date: Sept. 4, 1964