JOEL E. OGLE
COUNTY COUNSEL
and
GEORGE F. HOLDEN
DEPUTY COUNTY COUNSEL

318 Hall of Records
Santa Ana, California

Attorneys for Defendants

IN THE DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

GONZOLO MENDEZ, et al,

Plaintiff,

vs.

WESTMINSTER SCHOOL DISTRICT OF ORANGE COUNTY, et al.,

Defendants.

No. 4292 M

DEFENDANTS REPLY BRIEF

I

A. THE COURT LACKS JURISDICTION OVER THE SUBJECT MATTER IN THAT IT APPEARS FROM THE EVIDENCE AND THE PLEADINGS THAT THERE IS NO SUBSTANTIAL FEDERAL QUESTION INVOLVED.

1. Education is purely a State matter within the control of the States. In Cummings v. Richmond Board of Education, 175 U. S. 528, the Supreme Court stated, on page 545:

> "..... Under the circumstances disclosed, we cannot say that this action of the State Court was, within the meaning of the Fourteenth Amendment, a denial by the state to plaintiffs and to those associated with them of the equal protection of the laws or of any privileges belonging to them as citizens of the United States. We may add that while all admit that the benefit and burdens of public taxation must be shared by citizens without discrimina-

tions against any class on account of their race, the education of the people in schools maintained by State taxation is a matter belonging to the respective states, and any interference on the part of Federal Authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

2. The State has under the Constitution of the United States, fulfilled its obligation so far as education is concerned when it has furnished to all pupils within its borders equal facilities for obtaining an education at public expense.

Gong Lum v. Rice, 275 U. S. 78

The Court states on page 85, " The right and power of the states to regulate the method of providing for the education of its youth at public expense is clear." citing Cummings v. Richmond, 175 U. S. 528.

School Dist. No. 7 v. Hunnicutt, 51 Fed. 2d 528

Wong Him v. Callahan, 119 Fed. 381

Ward v. Flood, 48 Cal. 38

It is true that in all the above cases the facts pertained to the separation of the races, while the separation as to race is not involved in this case.

It is our contention that the racial cases are squarely in point so far as the legal principle applicable is concerned. It is held in all the racial cases that the only provision of the United States Constitution applicable is that clause in the Fourteenth Amendment which provides: ".. Nor deny to any person within its jurisdiction the equal protection of the laws." (Italics ours). The above clause applies to any person regardless of race. It must certainly be conceded that any individual of any race is a person.

In the case of Pace v. State of Alabama, 106 U. S. 583, the Court states of page 583, referring to the Fourteenth Amendment:

"The Counsel is undoubtedly correct in his view of the purpose of the clause of the Amendment in question, that it was to prevent hostile and discriminatory State legislation against any person or class of persons." (Italics ours)

The Courts in discussing the racial problems have by analogy referred to problems similar to the one at bar.

In the case of Plissy v. Ferguson, 163 U. S. 537, which involved the question of the validity of a statute requiring the providing of separate coaches for persons of the white and persons of the negro race, our Supreme Court in discussing the application of the Fourteenth Amendment, referring to the case of Roberts v. Boston, 5 Cush. 19, states:

"One of the earliest of these cases is that of Roberts v. Boston, 5 Cush. 198 in which the Supreme Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. 'The great principal,' said Chief Justice Shaw, 'advanced by the learned and eloquent Advocate of the plaintiff (Mr. Charles Sumner) is that by the Constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law ..... But when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment, but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security.' It was held that the powers of the committee extended to the establishment of separate schools

for children of different sexes and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school and yet have not acquired the rudiments of learning, to enable them to enter the ordinary school." (Italics ours).

In People v. Gallagher, 93 N. Y. 438, 45 American Reports 232 AT PAGE 237, Am. Rep. in construing the Fourteenth Amendment, stated:

"It is believed that this provision will be given its full scope and effect when it is so construed as to secure to all citizens, wherever domiciled, equal protection under the laws and the enjoyment of those privileges which belong, as of right, to each individual citizen. This right, as affected by the questions in this case in its fullest sense, is the privilege of obtaining an education under the same advantages and with equal facilities for its acquisition with those enjoyed by any other individual. It is not believed that these provisions were intended to regulate or interfere with the social standing or privileges of the citizen, or to have any other effect than to give to all, without respect to color, age or sex, the same legal rights and the uniform protection of the same laws....." (Italics ours)

The Court further stated on page 239:

" ..... It would seem to follow, as the necessary result of the appellant's contention, that the action of the legislature of the various States providing schools, asylums, hospitals and benevolent institutions for the exclusive benefit of the colored, as well as other races, must be deemed to be infractions of constitutional provisions and unlawful exercise of legislative power. The literal application of its provisions as interpreted by him would prevent any classification of citizens for any purpose whatever under the laws of the State, and subvert all such associations as are limited in their

enjoyment to classes distinguished either by sex, race, nationality or creed. If the argument should be followed out to its legitimate conclusion, it would also forbid all classification of the pupils in public schools founded upon distinctions of sex, nationality or race, and which, it must be conceded, are essential to the most advantageous administration of educational facilities in such schools. Seeing the force of these contentions the appellant concedes that discimination may be exercised by the school authorities with respect to age, sex, intellectual acquirements and territorial location, but he claims that this cannot, under the Constitution, be extended to distinctions founded upon difference in color or race. We think the concession fatal to his argument.

The language of the amendment is broad, and exhibits every diserimination between citizens as to those rights which are placed under its protection. If the right therefore of school authorities to discriminate, in the exercise of their discretion, as to the methods of education to be pursued with different classes of pupils be conceded, how can it be argued that they have not the power, in the best interests of education, to cause different races and nationalities, whose requirements are manifestly different, to be educated at separate places?" (Italics ours).

In Cory v. Carter, 48 Ind. 327, 17Am. Rep. 738, the Court states on page 761, Am. Rep. 738:

" The Federal constitution does not provide for any general system of education, to be conducted and controlled by the national government, nor does it vest in Congress any power to exercise a general or special supervision over the States on the subject of education..."

On page 762, the Court states further:

"There being no further restriction upon the legislative power

and discretion, it necessarily follows, that in providing for this system of schools, the legislature is left free to fix the qualifications of pupils to be admitted to its benefits, as respects age and capacity to learn; to classify them with reference to age, sex, advancement and the branches of learning they are to pursue; to provide for the location and building of schoolhouses; and to designate to what schools and in what schoolhouses the different ages, sexes and degrees of proficiency shall be assigned; for these all concern the good order and success of the system." (Italics ours)

Further, on page 763, the Court states:

"In this system, there ought to be and must be a classification of the children. This classification ought to and will be with reference to some properties or characteristics common to or possessed by a certain number out of the whole; and these classes may be put into and taught in different parts of the same school, or different rooms in the same school-house, or different school-houses, as convenience and good policy may require..." (Italics ours).

B. THE COURT LACKS JURISDICTION OF THE SUBJECT MATTER IN THAT THE EVIDENCE FAILS TO SHOW THAT PLAINTIFFS OR EITHER OR ANY OF THEM WERE DEPRIVED OF ANY CIVIL RIGHTS, PURSUANT TO ANY LAW, RULE OR REGULATION OF THE STATE OF CALIFORNIA, OR AT ALL.

1. In discussing the above jurisdictional problem, we deem it necessary to take up the questions separately as to the Garden grove District. We feel that as to this particular District the factual situation is different.

GARDEN GROVE SCHOOL DISTRICT-

For the purpose of illustrating the point, we will assume that Mrs. Ochola is a proper party plaintiff in this action, and we will assume that her testimony is true. Basing its finding upon the

foregoing assumptions, this Court would find that she lived within a few blocks of the Lincoln School and that her children spoke the English language to some degree of efficiency.

The rule of admission of pupils in said District as adopted by the Board of Trustees on September 13, 1944, provided:

> "Some problems were presented regarding the attendance of Mexican pupils in the school. After some discussion a motion was made by Mr. Applebury and seconded by Mr. Smith that a policy be adopted whereby there be no segregation of pupils on a racial basis, but that non-English speaking pupils, so far as practical should attend schools where they can be given special instruction, that is not necessary for English speaking pupils, and that due regard be given to the proximity of the pupils residence to the nearest school."

Therefore, assuming that Mrs. Ochola's testimony is true, and viewing it most favorable to her contention, we must conclude that Mr. Kent in excluding the Ochola children was acting contrary to and in violation of the rule established by the Board of Trustees. He gave no consideration to the ability of the children to speak the English language nor due or any consideration "to the proximity of the pupils residence to the nearest school". If such are the facts, any Superior Court of the State of California would upon application grant a writ of mandate, based not upon a violation of the United States Constitution, nor a violation of any statute of the State of California, but upon a plain and clear violation of the rule of the governing board of the Garden Grove School District.

If we take the same assumptions in regard to Mrs. Sianez who resided nearest to the Bolsa School, the same conclusion would necessarily follow.

Whatever may have been the policy of the Board of Trustees prior to September 13, 1944, the policy thereafter is clearly set forth in the

above Resolution.

In Snowden v. Hughes, 132 Fed. 2d 476, C. C. 75 Dist., the Court states on page 478:

"it has always been accepted that the Fourteenth Amendment does not apply to the acts of individuals, (State of Virginia v. Rines, 100 U. S. 313, 25 Fed. 667; United States v. Harris, 106 U. S. 629, 1 S. Ct. 601, 27 Fed. 290) that the protection it offers is only against the acts of States."

The Supreme Court, in reviewing and affirming the above case, in Snowden v. Hughes, 321 U. S. 1, 88 L. Ed. 497, Mr. Justice Frankfurter in his concurring opinion on page 16, states:

"..... But to constitute such unjust discrimination the action must be that of the state. Since the state, for present purposes, can only act through functionaries, the question naturally arises what functionaries, acting under what circumstances, are to be deemed the state for purposes of bringing suit in the federal courts on the basis of illegal state action. The problem is beset with inherent difficulties and not unnaturally has had a fluctuating history in the decisions of the Court. (citing cases). It is not to be resolved by abstract considerations such as the fact that every official who purports to wield power conferred by a state is pro tanto the state. Otherwise every illegal discrimination by a policeman on the beat would be state action for purpose of suit in a federal court."

In the case of FRANK PALOMINO, here the petitioner presents a stale demand in any view we take of the evidence. Petitioner has made no effort since 1941 to enter either of his children in any school within the Garden Grove District. Reporters' transcript, page 49, line 7 to page 51, line 19. He lived nearer to the Hoover School than to any other school in the District. If the School Board had any legal

right to require his children to attend the Hoover School, it would be immaterial that they based their refusal to transfer his children on an untenable ground. The Court will not pass upon constitutional issues if the case may be decided upon another ground.

In Precision Casting Co. v. Boland, 13 Fed. Sup. 877, the Court states on page 882, #4:

> "Nor will the Court decide questions of a constitutional nature unless absolutely necessary to a decision of the case (Burton v. United States, 196 U. S. 283, 295, 25 S. Ct. 243, 49 L. Ed. 482), and never until the facts upon which its constitutionality depend are before the Court, (Abrams v. Van Schaick, 293 U. S. 188, 55 S. Ct. 135, 79 L. Ed. 278) nor if there is also present some other ground upon which disposition may be made of the case. (Ogden v. Saunders, Supra)."

Section 2204 of the Education Code of the State of California provides in part:

> "2204. The governing board of any school district shall:
> (a) Prescribe and enforce rules not inconsistent with law or with the rules prescribed by the State Board of Education, for its own government, and for the government of the schools under its jurisdiction...."

In view of the general duty of the school board with reference to the administration of the affairs of the various schools within the District, it must be implied that it has the power to require a pupil to attend the school in the District nearest to which he resides. Clearly then, on any theory of the facts, Mr. Palomino cannot base his case on the violation of any civil rights guaranteed by the Federal Constitution.

There is no evidence that the petitioner nor any witness produced by plaintiff ever at any time applied to the Governing Board of the District to admit their children to any school in this District. No complaint was ever made to the Board of Trustees.

C. SCHOOL DISTRICTS ARE MERE ADMINISTRATIVE AGENCIES OF THE STATE. ACTIONS OF SUCH DISTRICTS CANNOT BE CONSIDERED STATE ACTION, WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT.

In Denman v. Weber, 139 Cal. 452, the Court stated at page 454: "As has been said by this court, 'school districts' are quasi corporations of the most limited powers known to the laws. The trustees have special powers, and cannot exceed the limit. They are special agents without general power to represent the district." (Citing Shelly v. School District, 103 Cal. 652).

School Districts do not have police powers, Pasadena School District v. Pasadena, 166 Cal. 7.

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(a) Prescribe and enforce rules not inconsistent with law or with the rules prescribed by the State Board of Education, for its own government, and for the government of the schools under its jurisdiction..."

Section 2204 of the Education Code of the State of California specifically enjoins the governing board of any school district from making or enforcing any rules 'inconsistent with law or with the rules prescribed by the State Board of Education'. Certainly the Constitution of the United States is the law of California.

It must follow, therefore, that if the rules of the several districts are in conflict with any provision of the United States Constitution, they are expressly in violation of Section 2204 of the Education Code.

Here we have the action of the most limited agency known to the law, which the petitioners seek to charge as actions of the State of California.

California Oil & Gas Co., etc. v. Millar, et al, 96 Fed. 12, at page 22:

"Said title 24 embraces Section 1979 above quoted. The

liability declared in said Section 1979 for depriving a person of rights, privileges, or immunities secured by the constitution and laws of the United States manifestly depends upon the fact that such deprivation be under color of some statute, ordinance, etc. of a State or territory; and, therefore, to constitute a cause of action under said Section, the plaintiff must show, as part of his case, that defendant claims to act under color of a statute, ordinance, etc. of a State or territory."

In Jones v. Oklahoma City, et al, 78 F. 2d 86, C. C. of Appeals, Tenth Circuit from syllabus, page 860:

"District Court held without jurisdiction to entertain bill to restrain enforcement of segregation ordinance excluding negroes and whites from residing in certain districts, where there was no diverse citizenship."

Referring to the petition, the Court stated on page 861, in holding the complaint insufficient:

"There is no allegation of state action in authorizing adoption of the ordinance or its enforcement-legislative, judicial or executive."

United Mine Workers of America v. Chapin, 286 Fed. 959, District Court, S. D. West Virginia, the Court states on page 962:

"As I view the case, this court has no jurisdiction, because the acts charged are not done under or pursuant to any law of the State of West Virginia."

A leading case on this point is Snowden v. Hughes, 321 U. S. 1, and particularly pertinent is the concurring opinion of Mr. Justice Frankfurter in said case.

ANSWER TO THE BRIEF OF AMICI CURIAE AND
PLAINTIFF AS TO THE JURISDICTION OF THIS COURT

I

The Amici Curiae and Plaintiff in their brief wholly ignore the fundamental question upon which jurisdiction of this Court depends, which is WHERE A SCHOOL DISTRICT HAS CLASSIFIED PUPILS INTO TWO CLASSES AND HAS FURNISHED TO EACH CLASS EXACTLY THE SAME EDUCATION AT EQUALLY CONVENIENT LOCATIONS, HAS SUCH DISTRICT VIOLATED ANY PROVISION OF THE UNITED STATES CONSTITUTION OR ANY LAW OF THE UNITED STATES? In fact in Plaintiffs' brief on page 4, line 13 to 16, Plaintiff states:

> "In the instant case the petitioners do not claim that the rights of the children to attend the public schools, which right is undoubtedly created by the State Constitution and laws, has been violated."

Both the brief of the Amici Curiae and the Plaintiff assume the violation by Defendants of a violation of the Fourteenth Amendment to the Constitution. The cases relied upon by Defendants all hold that where equal facilities are furnished to the different classes of persons with equal convenience to both, there is no violation of the Fourteenth Amendment nor any law of the United States.

We have pointed out in our brief that a person is a person within the meaning of the Constitution, whether he be Negroe, Chinaman, Japanese, or of Mexican or Anglo-Saxon descent, and if it be the law, which it has been held to be in all cases before the courts, that a colored citizen has not been denied the equal protection of the laws where he has been given an equal education with others although at a different location, how can it be held that a citizen of any other race would be denied equal protection of the laws under the same circumstances?

In all cases cited by Amici Curiae it was alleged or was a fact that one class of persons were denied something that was allowed to other classes of persons.

In the case of American Sugar Refining Company v Louisiana 179 U. S. 89 cited by Amici Curiae, the question involved was a tax matter and whether or not the classifications for tax purposes was

reasonable and Juarez v State 107 Tex. Cr. 277, catholics were excluded from grand juries.

In the case at bar the petitioners were not excluded from anything. The petitioners received exactly the same priveleges as any other citizens.

Likewise in Bell's Gap R.R. v Pennsylvania 134 U. S. 232, the quotation set out by Amici Curiae has no application to the facts in this case, and the same comment would apply to the case of Missouri v Lewis 101 U.S. 22 as well as Rawlins v Georgia 201 U.S. 638, Traux v Raich 239 U.S. 33 and other cases cited by Amici Curiae.

II

Amici Curiae to support their contention that the rule of the school district would be construed to be under color of any law, cites the case of Barnette v West Virginia State Board of Education 319 U.S. 624. An examination of this case shows that under the laws of West Virginia the State Board of Education was granted by an express Legislative Act, the right to prescribe the course of studies of all courses and study, and control the education of all pupils in the elementary schools, and that the rule adopted by said Board under express authority of the Legislature required that all pupils in the public as well as private schools be required to salute the Flag, and in the event that they did not comply with such rule, they were excluded from school, and/would the parents be subject to prosecution if they failed to send their children to school. The authority granted to the Board of Education was granted expressly by the Legislature and the Board in adopting the rule was carrying out the express mandate of the Legislature.

As we have pointed out in our brief, in California, a local school board may make only such rules as are provided for in Section 2204 of the Education Code, which rules must not be:

> ".....inconsistent with law or with the rules prescribed by the State Board of Education....."

In Screws v United States 89 L. Ed 1029 cited by Amici Curiae, the court based its decision upon the fact that in making the arrest and retaining Hall in custody, the officers were acting directly under and pursuant to the laws of the State of Georgia.

In the case of Missouri ex Rel Gaines v Canada 305 U.S.337 the court stated on page 344,

> ".....in that view it necessarily followed that the Curators of the University of Missouri acted in accordance with the policy of the state in denying petitioner admission to its school of law upon the sole ground of his race".

In the case of Hague v C.I.O. 307 U.S. 496, the ordinance in question was adopted and enforced by a city pursuant to its police powers, expressly granted to the city by the Constitution of New Jersey. As we have heretofore pointed out in our brief, a school district in California has no police power.

III

Plaintiff in his brief cites the case of Hamilton v University of California 293 U.S. 245, it will be noted in that case that under the law and Constitution of the State of California it was the duty of the Board of Regents to determine who and to what extent military training should be required in the University, and the act of the Board of Regents would necessarily have the sanction of state law.

In the case at bar it is not alleged in the complaint that the Defendants or any of them were acting under any law or color of any law of the State of California, nor is it alleged in said complaint that the petitioners or any of them were denied anything which was granted to other citizens, nor is there any evidence in this case that the Defendants were acting pursuant to or under color of any law of the State of California.

IV

As a last contention, Amici Curiae contends that this Court having acquired jurisdiction the case should be decided pursuant to the law of California. It is our contention that neither the Complaint nor the evidence shows any facts which would constitute violation of the Constitution of the U. S. Such a showing would be imperative for this Court to assume jurisdiction as stated in the case of Williams v Miller 48 Fed. Sup. 277 at page 279:

> "For a plaintiff to invoke successfully the jurisdiction of the District Court on the ground that he seeks protection of a federal right, his complaint on its face must appear to raise a substantial federal question; a mere claim in words is not sufficient (citing cases). No substantial question is presented by a contention which is obviously without merit (citing cases) or on which the Supreme Court has already ruled adversely (citing cases) and a District Court is without jurisdiction."

The exact question involved in this case has never been decided by any court in the State of California. Section 8003 of the Education Code cited by Amici Curiae permits a racial segregation and in our opinion any segregation upon a racial basis other than as permitted by said Section would be contrary to the laws of the State of California. However this case does not involve a racial segregation. Here we have school districts where an unusually large mass of people who are unfamiliar with the English language congregate, often at great distances from other schools established in the district and it becomes necessary for the purpose of aiding these people to provide accommodations at locations close to where they live, due to the transportation problem of transporting them to other localities where schools are maintained. They do have a language handicap and the necessity of providing special instruction to overcome such handicap is apparent.

Having established the facilities for special instruction at the location where these people live, it would not seem to be unlawful under the law of California, to require pupils residing in the district, but not close to the schools where these special facilities are available, to attend that school in the district where special instruction may be given.

We can be reasonably certain that under the law of California, no school district would be required to pick pupils up where they reside, especially where they reside in numbers as high as 275, and transport these pupils 2 or 3 miles for the purpose of mixing them with pupils of other descent than their own.

However the matter has not been decided by any court in California, and as the practice definitely cannot be considered a violation of the Constitution of the United States or of any law of the United States, the matter should be presented for determination in a state court.

We submit that under the pleadings and under the facts in this case, that it appears that this Court does not have jurisdiction, as neither the pleadings nor the evidence show any violation of the Constitution of the United States or any law of the United States and further, that the evidence wholly fails to show that the Defendants or any of them were deprived of any civil rights under or pursuant to any law, ordinance or custom of the State of California.

SEGREGATION AS SHOWN BY THE EVIDENCE DOES NOT SHOW UNJUST DISCRIMINATION.

In discussing this question, we shall discuss each district separately as we believe that there are substantial differences in the factual situation in each district.

GARDEN GROVE SCHOOL DISTRICT-

In this district there are three schools which furnish instruction from kindergarten to the 5th grade inclusive, to-wit: the Lincoln, Bolsa and Hoover Schools. The Fitz School maintained by this District instructs in the 6th, 7th and 8th grades, in which there is no

segregation by reason of language, handicap or at all. It was admitted at the trial that the instruction and facilities in each of the schools are identical. The evidence shows that in addition to the facilities furnished in the Lincoln and Bolsa Schools, specially qualified teachers, and special instruction is given to the pupils of the Hoover School. Reporters' Transcript pages 101, line 12 to page 103, line 11.

The purpose of the special instruction and qualified teachers is for the purpose of assisting the pupils at Hoover School in their understanding of the English language.

That the pupils at the Hoover School are handicapped by their lack of understanding of the English language cannot be questioned. Reporters' Transcript, pages 101, line 12 to page 103, line 1.

Can it be said that the School Board was unjust in providing special instructors and special instruction to these pupils who were deficient in their English: If the Board is to be considered unjust, who is it unjust to? Would it be to the pupils of Hoover School, or to the pupils of Lincoln and Bolsa Schools?

We cannot see any injustice in the action of the Board, in requiring pupils who are deficient in the English language to attend the school in the District where special aids and experienced teachers are provided to assist those pupils to overcome that specific deficiency.

The evidence shows that of the pupils attending the Hoover School, 279 of them reside nearer to the Hoover School than to either the Bolsa or Lincoln School. Reporters' Transcript, page 56, line 15 to 1[illegible] and that of the 522 pupils attending the Lincoln and Bolsa schools, 492 of them reside nearer to the Lincoln and Bolsa schools than they do to the Hoover School.

The Hoover School is one and one-half to two miles distance from the Lincoln School and about the same from the Bolsa School. Reporters' Transcript, pages 637, line 22, page 638, line 1, page 56 line 16 to 18. It will be seen therefore, that at least 279 of the pupils attending the Hoover School have segregated themselves by being

in the community surrounding the school.

The evidence shows that some 30 pupils other than Spanish speaking pupils, residing nearer to the Hoover School are transported to either the Lincoln or Bolsa School. Reporters' Transcript, page 517, line 12 to 17. Can this be deemed unjust discrimination? Again the question arises, who is it unjust discrimination against? Would it benefit the Spanish speaking pupils to have 30 others in their school? Would it benefit the 30 others to attend the same school as the 279 Spanish speaking pupils attend?

There is no question under the evidence but that the Spanish speaking pupils are retarded for at least two years by reason of their language handicap. Would it be good Educational Policy to require these 30 pupils to attend the Lincoln or Bolsa School for two years and thereafter to attend the Hoover School? It would seem to us that the better policy would be that followed by the Board of Trustees, to-wit: that having once enrolled in either the Lincoln or Bolsa School and having made acquaintances and associations in that school, the pupil be permitted to remain there until graduating from the 5th grade.

Surely the transferring of the pupils from one school to another would not benefit the morale of the pupil transferred, and such procedure could not possibly be of assistance to the pupils in the Hoover School.

We feel that a far more serious question of unjust discrimination would arise should this District attempt to mix the pupils in the District.

The Spanish speaking people have a constitutional right to live wherever they want to live, and they have a constitutional right to speak the Spanish language among themselves and in their homes. As shown by the evidence, 279 of the 292 pupils enrolled in the Hoover School reside nearer that school than any other school, the distances from the Bolsa or Lincoln Schools being from one and one-half to two miles.

Assuming that the District attempted to mix the pupils, it

would be necessary to decide which individual pupils would be required to transfer to Lincoln, and which of the others now at Lincoln would be required to transfer to Hoover. If the transfer was required on an attainment basis, the pupil upon transfer would be marked either as one of high or low attainment immediately, and would become the object of envy or ridicule. Thus would class antagonism be fostered.

If the transfers were on a level of attainment, it could result in the high level all going to Bolsa, the middle level going to Hoover, and the low level going to Lincoln, which would brand each pupil in the community either as high class, middle class or low class; this in the common school system of California.

It will be seen that of the 292 Spanish speaking pupils in this District, 279 of them are segregated by their own act of living in the community surrounding the Hoover School, and only 13 of them are segregated by reason of the rule of the School Board. We cannot see how it can be considered unwise or unjust to require the 13 to attend the only school in the District where special facilities are necessarily provided to take care of the identical language difficulty these 13 are handicapped by.

Under the provisions of Section 2204 of the Education Code, the Board of Trustees of any school district may make reasonable regulations for the allocation of pupils to the schools maintained by it, and in any event may lawfully require pupils to attend the school located nearest to his residence, and may in its discretion permit certain pupils for any cause which the trustees deem reasonable, to attend a school other than the closest to his residence.

The petitioner in this district lived nearest to the Hoover School is, therefore, in a different class than is Mrs. Ochola and the other witness. Just what motive he had back in 1941 in requesting to enroll his children in the Lincoln School is not at all clear from the evidence. It does appear that he enrolled the children in the Catholic School where Sally is now in attendance. He never requested that Sally be

enrolled in any school in the Garden Grove District, and did enroll his son Arthur in the Freemont School in the Santa Ana District.

As to the Ochoa children Mr. Kent testified;

"Q Then, Mr. Kent, tell me what you remember of the policy of the Board, if that was an inadvertence on your part. What was the policy of the Board?

A I have just related it. Do you want me to do it again?

Q Yes. Will you, please, sir?

A We were to take into cinsideration the ability of the child to speak English, and the proximity of the home, the adaptability of the child to the assimilation of the school subjects taught, and that if we felt it advisable, we should send the children to the Hoover School where we have special teachers, and if we felt they could do the subject-matters, or they were sufficiently adapted, they were to be given an opportunity in the other schools upon request.

Q However, if there was no request made, the children of Spanish descent were to go to the Hoover School?

A No, no. Would you like me to explain that further?

Q Yes, sir.

A What you asked was, if no requests were made they would automatically go to the Hoover. That is not true. When they start school, if they were able to come up to the English-speaking students, or Lincoln School students, I had the right to place them in the Lincoln School. But in this particular case, I believe that it was merely a trial, and I placed Mrs. Ochoa's children there, and during the year I had 1300 children to think about, and I forgot com-

pletely about Mrs. Ochoa, but if she had made a request, if Mrs. Ochoa had, we certainly would have granted it. I have never had a request from Mrs. Ochoa during the entire year."

If it be the purpose of this District to segregate pupils solely upon the ground that they are of Mexican descent, why is it that all the children after completing the 5th grade are put together in the Fitz School?

SANTA ANA SCHOOL DISTRICT -

It is our contention that in this District there is no segregation of pupils by reason of any rule or regulation of the Board of Education. Here the segregation is made by the people of Mexican descent themselves. The general policy of the Board is that the pupil must attend the school located in the zone in which he lives.

The record shows that 95% of the people residing in the Fremont School zone are of Mexican descent. Reporters' Transcript page 591, line 20, that there are 325 pupils in attendance. Reporters' Transcript page 576, line 11, that it has ~~eight~~ ten teachers; that the pupil load per teacher is 32 ½. Reporters' Transcript page 576, line 11. The Franklin now has more pupils per teacher than the city average. Reporters' Transcript page 576, line 17. It appears that the east line of the Fremont zone passes through a Mexican community placing some Mexican descents in the Franklin School. Reporters' Transcript page 591, line 4 to 17.

That the Franklin School is filled to capacity and that it would require alterations to increase its capacity, and that the pupil load per teacher is 34. Reporters' Transcript page 576, line 8.

It further appears that the Wilson School is filled and that the pupil load per teacher is 32 ½. Reporters' Transcript page 577, line 2 to 5. It further appears that there are in attendance at the Franklin School 76 of Mexican descent and 161 others; in the Lowell School there are 5 of Mexican descent and 292 others; in the McKinley School, 20 of

Mexican descent and 237 others; in the Roosevelt School, 90 of Mexican descent and 180 others; in the Muir School, 63 of Mexican descent and 80 others; in the Lincoln School, 12 of Mexican descent and 69 others; in the Edison School 9 of Mexican descent and 323 others.

The evidence fails to show any plan or scheme on the part of the Board of Education to segregate pupils of Mexican descent solely on the ground they are of Mexican descent. The lines were drawn for the sole purpose of allocating the pupils to the several schools in proportion to the facilities available at the several schools and the evidence shows that the Board did a fair and honest job of allocation of pupils.

How can it be considered unjust or arbitrary for the Board to locate one of the finest school plants in the District right in the community inhabited by people of Mexican descent? Was it unjust to provide that community with a civic center and playgrounds for civic activities and recreation?

The pupils attending the school seem not to think it unjust. The Fremont has the best attendance record in the City. Reporters' Transcript page 569, line 21.

The pupils in all zones are permitted to attend the school maintained in that zone regardless of their origin. Reporters' Transcript page 620, line 12 to page 624, line 22.

In the Fremont zone some 12 or 14 pupils of Mexican descent are permitted to transfer to the Franklin School, and 26 other than of Mexican descent are permitted to transfer. None are required to transfer. Reporters' Transcript page 620, line 13.

In the Delhi zone there are 232 pupils of Mexican descent. Reporters' Transcript page 213, line 51. That there are residing within this zone 5 pupils who are not of Mexican descent, who are permitted to transfer to another school. Reporters' Transcript page 214, line 7 to line 10. Last year there was in attendance at this school one pupil of other than Mexican descent. Reporters' Transcript page 614, line 16 to 20. The Logan District is a solid little Mexican center and there is no evidence that transfers have been requested. Reporters' Transcript page 622, line 4 to 10.

If the Board sought by plan and design to segregate pupils of Mexican descent upon that ground, why is it that there are pupils of Mexican descent in every school, except three in the District?

In referring to the authority of a Board of Education to divide a district into sub-districts, the Ill.App. Court held in People vs Board of Education, 26 Ill. A. page 476:

1. "It is within the power of a Board of Education to lay off and divide the district into sub-districts, establish therein schools of different grades and apportion pupils to the several schools."

2. "If, in the exercise of these powers, the rules and orders made are reasonable, necessary and such as will best afford all children of school age within the district the benefits of proper instruction, they will be sustained by the courts."

In the case of Reed v. Mason County Board of Education, 220 Ky. 489, 295 S. W. 436, the court of Appeal of Kentucky in constructing statutes of that State which provided:

"Subject to the course of study and to the by-laws and policies of the State Board of Education, the County Board of Education shall determine by the consent and advice of the County Superintendent the educational policies of the County, and shall prescribe rules and regulations for the conduct and management of the schools."

The County Board of Education, subject to the laws and regulations of the State Board of Education, shall, with the advice and assistance of the County Superintendent, administer, grade and standardize the schools under its jurisdiction.

Held, page 437, "Under these sections of the Statues, the County Board of Education undoubtedly has the power to lay off the County into high school districts and to provide that those who reside in the respective high school districts shall attend the high school in that district, at least where it acts reasonably in so doing. Without this power, the County Board of Education, having provided educational facilities for all the students of a district, might be compelled to provide

other facilities for such students who might wish to attend other schools. Such a situation would tend to disrupt the financial arrangements of the Board and in a large measure to defeat the educational policy."

State vs Board of Education of Wilmington School District, 28 N. E. Rep. 2d at page 497, Supreme Court of Ohio, June 26, 1940:

"Relators' suit is based upon the claim that their children are being deprived of their right to attend the elementary school in the district most convenient to their home in furtherance of a purpose of the board of education to make the Midland School a segregated school for the exclusive use, accommodation and training of "colored children."

The respondents claim that the Midland School has adequate facilities; is fully equipped; offers the same courses ofinstruction as every other public elementary school in the district; uses the same text books; has competent teachers and provides every advantage for the acquisition of education that is furnished in any other public elementary school of the district; that the assignment of the children of relators to the Midland School was made by the Board of Education under and pursuant to its discretionary authority conferred by statute to equalize the number of students in the various schools in the district according to the physical accommodation of the school; that such assignment was made by the Board of Education in good faith in an effort to best promote the interests of education in such district; and to facilitate such purpose, motor bus transportation has been provided for all pupils living in excess of one mile from the school to which they are assigned, and is now and has been available to the relators' children.

There is no evidence in the record, nor is it claimed that the Board of Education has taken action by resolution or otherwise to make the Midland School a segregated school for Negroe children. The superintendent of schools, when called by the relators', testified that the assignment of pupils is not and cannot be made according to geographical lines; that the Smith Place School is located in the most

densly populated portion of the City and that half the grade pupils of the City live in "very close proximity" thereto. It thus became necessary to assign many pupils in that vicinity to other buildings, each case being considered on its own facts, the general intention and purpose being to so allocate the pupils that each school would have approximately the same number of pupils per room and the same cost of instruction per pupil.

Though there was a less number of pupils in the Midland School, there was approximately the same number of pupils per room as in the other schools. It is conceded that the equipment, teaching facilities and other accommodations of the Midland School are in every way equal to those provided for the other schools. The relators' in their testimony indicated their complaint was not based upon any racial distinction, but only upon inconvenience. The record shows the following testimony of one of the relators!

> The Court: "You have no objection now to the Midland School by reason of distance or anything of that kind?"
>
> Answer: "No, I don't. Other than I asked permission to send them to the school nearest my home."
>
> Question: "There is no other reason why they shouldn't go to the Midland School now, so far as you are concerned?
>
> Answer: "No, there isn't. Only I would like for them to to to the school nearest home. It would be more convenient for me."

Section 7684, General Code, provides as follows:

> "Boards of Education may make such an assignment of the youth of their respective districts to the schools established by them as in their opinion best will promote the interests of education in their districts."

(1-3) By the provisions of this Statute, broad power and discretion are conferred upon boards of education to so assign pupils to the various schools of their districts as they in good faith believe will best promote the interests of education. The Court cannot control that

discretion or substitute its own discretion for that of the board of education. Those affected by such order of assignment of pupils are not entitled to a review of that action of the board in a mandamus proceeding.

Conditions manifestly made it necessary to assign many pupils living in the vicinity of the Smith Place School to other schools. It is to be observed that the relators' resided a half mile from the Smith Place School. Action of the court directing that the assignment made by the board of education be altered and the relators' children permitted to attend the Smith Place School must logically be followed by the further direction that two pupils assigned to that school be transferred elsewhere. The court thus would be making a selection that is within the absolute power and discretion of the board of education.

(4) Upon the matter of alleged discrimination, it may be observed that the record discloses that heretofore white children have been assigned to the Midland School and colored children have been assigned to the Smith Place School; in fact, the oldest son of the relators' had attended the Smith Place School through the entire seven grades. It does not appear, therefore, that a fixed policy had been adopted by the board of education making any classification, distinction or discrimination on the basis of race or color.

It has not been established that the respondents have failed or refused to perform a duty specially enjoined by law. The judgment of the Court of Appeals is accordingly affirmed.

Judgment affirmed."

We submit that there is positively no evidence from which it can be held that that Board has designedly and in bad faith segregated any pupils in this district.

EL MODENA SCHOOL DISTRICT -

In this District two schools are maintained which give instruction from kindergarten to the 8th grade. The schools are located upon the same campus and the playground area is about 100 yards square. Reporters' Transcript page 334, line 2 to 10.

The Roosevelt School has four teachers and a pupil enrollment of 108; of the 108 pupils 25 are of Mexican descent and 83 others. Reporters' Transcript page 335, line 7. In the Lincoln School there are eight teachers. There are enrolled in the Lincoln School 249 pupils all of Mexican descent. It appears that it would be impossible to accommodate all the pupils in either the Roosevelt or Lincoln School. Reporters' Transcript page 328, line 12. Reporters Transcript page 332, line 6 to line 17, page 333. The children who enroll in the Lincoln School are deficient in the English language. Reporters' Transcript page 301, line 11 to line 11, page 302. The children voluntarily enroll in the Lincoln School. Reporters' Transcript page 302, line 11 to page 305, line 18.

There is no evidence that any person, other than petitioner Ramirez ever made any request to enter their children in the Roosevelt School.

It appears that the pupils from both schools have the same opportunity to use the playgrounds. Reporters' Transcript page 296, line 6 to 11, page 299 and page 344, line 2 to line 6, page 335.

The majority of American citizens in this district are of Mexican descent. Reporters' Transcript page 328, line 18.

Never before the filing of this lawsuit did anyone complain to any member of the School Board or the District Superintendent as to the method under which the schools were being operated.

The petitioner Lorenzo Ramirez offered to enroll his children after the school term commenced. At that time he was informed by Mr. Hammerstein that the Roosevelt School was filled, that there were no desks for his children in the Roosevelt School. Reporters' Transcript page 280, line 18 to 25 and page 330, line 11 to line 23.

Here the School District is in good faith making the best out of the limited facilities they have. The case of State v. Board of Education of Wilmington School District 28 N. C. Rep. 2d page 497, supra is squarely in point.

Clearly the School District here cannot be charged with

segregation solely on account of Mexican descent, as there are pupils of Mexican descent in both schools.

The evidence is undisputed that at the time petitioner offered to enroll his children in the Roosevelt School there were no facilities available to accommodate them at that school.

There is no evidence that this District ever at anytime refused to admit any other pupils upon request.

THE WESTMINISTER SCHOOL DISTRICT -

This District did maintain two schools furnishing instruction from the kindergarten to the 8th grade. In the Westminister School there were enrolled 642 pupils of which 14 were of Mexican descent. In the Hoover School there were enrolled 152 pupils of Mexican descent. The two Schools were located three blocks of each other. That of the 152 pupils, only approximately 40% of them were unable upon entering the first grade to speak or understand the English language.

In this District on January 16th, 1944, and before the filing of this action, the Board of Trustees decided in good faith to unify the two schools. So for as this District is concerned the issues of this case are moot questions.

PETITIONERS ARE NOT REPRESENTATIVE OF ANY CLASS -

The Complaint alleges, No. XXIII, page 6, of the Petition:

> "This action is brought on behalf of petitioners and some 5000 other persons of Mexican and Latin descent and extraction, all citizens of the United States of America, residing within said District. That the questions involved by these proceedings are one of a common and general interest and the parties are numerous and it is impractical to bring all of them before the Court. Therefore, these petitioners sue for the benefit of all."

The evidence shows that for educational purposes all persons of Mexican or Latin descent are not in one class. Some of them speak

English with some degree of efficiency; others do not speak English.

The authority for bringing a class action in this type of litigation is subdivision 3 of rule 23 Federal Practice and Procedure. The basis of such a suit must be, "... a common question of law or fact affecting the several rights....."

Actions brought under said subsection 3 of rule 23 are known as The Spurious Class Suits. The judgments in such suits binds only the named parties and all who had intervened, but would not bind others beyond the principle of stare decisis, which operates as to all judgments. (Moores Federal Practice. Under the New Federal Rules, vol. 2 page 2241.)

GARDEN GROVE SCHOOL DISTRICT -

Here the petitioner, Frank Palomino, resides among the 279 who have segregated themselves by living nearer to the Hoover School than to any other school in the District. Reporters' Transcript, pages 517, line 9 and page 45, line 4 to 14. His interest would be identical with other pupils living nearest to the Hoover School who wished to transfer to the Lincoln School, some 1½ to 2 miles distant. To hold that Mr. Palomino's children must upon request be transferred to the Lincoln School, this Court would have to hold that under Section 2204 of the Education Code, the Board of Trustees are without authority to require pupils to attend the school nearest to which they reside. Such a holding would be contrary to the authorities which are cited on pages 23 to 24 of this brief.

There is no common question of law or fact common to this petitioner and any other witness in this District.

The principle of law applicable to the case of the petitioner is entirely different than the principle to be applied in the cases of the other witness produced by plaintiff.

In the case of the other witnesses, they resided nearer to either the Lincoln School or the Bolsa School than to the Hoover School. Reporters' Transcript page 9, line 25 and page 56, line 14 to line 18.

It might very well be held unreasonable to require pupils to attend a school other than the closest to which they reside, if sufficient facilities are available in the nearest school. Thus in this case, the petitioner and the other witnesses are representative of two distinct classes.

Under the facts here it could very well be decided that Mr. Palomino has no cause for complaint, while in a different action the other witnesses would have.

To hold that Mr. Palomino must be permitted to transfer his children to the Lincoln School would be to hold that any or all of the 279 pupils residing nearer to the Hoover School must be permitted to transfer, thus taking from the Board of Trustees the right to make reasonable or any rules or regulations as to the allocation of the pupils to the schools established and maintained by it.

If it be concluded, as we deem it must be, that Mr. Palomino be denied relief in this action, then the action as to this District must fail and judgment should be for the defendant so far as this District is concerned.

The rule is stated in 47 C. J. 99, on page 51:

"If the party named as plaintiff in a representative suit fails in his suit, those whom he represents must fail, for the rights of those represented cannot rise higher than those of the party named as plaintiff."

SANTA ANA SCHOOL DISTRICT -

In the Santa Ana District the petitioner and Mrs. Fuente are undoubtedly in one class.

EL MODENA SCHOOL DISTRICT -

In this District it appears that petitioner Lorenzo Ramirez enrolled his children, after the term had commenced. Reporters' Transcript page 329, line 2 to 6. That at that time the Roosevelt School was filled to capacity. He didn't request that the Roosevelt School be opened to all pupils of Mexican descent. Reporters' Transcript pages 330, line 11 to 16.

The other witness in this District stated that for more than five years prior to the commencement of this action, no one had asked admission to the Roosevelt School. Clearly it cannot be said that this petitioner represents anyone other than himself.

WESTMINSTER SCHOOL DISTRICT -

In this case the petitioner did make some showing that he represented a class of persons of Mexican descent, but it must be assumed that he represents a class of Mexican descent who speak the English language to some degree of efficiency.

ANSWER TO PLAINTIFFS' ARGUMENT ON THE FACTS

In discussing the Garden Grove District page 8 to 18 of Plaintiffs' brief, an effort is made by Plaintiffs to make it appear that Mr. Kent personally does not have a high regard for persons of Mexican descent. In this effort Plaintiffs' cite isolated excepts from the record and reaches unwarranted conclusions. Plaintiffs' wholly ignore the facts as they pertain to this District.

We have set forth the facts as they appear to us on page 11 to 20 of this brief.

We have also set forth hereinbefore the facts as we see them from the record, as they pertain to the other districts.

CONCLUSION

We submit that the evidence wholly fails to show that any rule or practice of any of the school authorities in any of the districts are in violation of any provision of the Constitution of the United States or any law of the United States, and that judgment herein should be for Defendants.

Joel E. Ogle

JOEL E. OGLE COUNTY COUNSEL

George F. Holden

GEORGE F. HOLDEN DEPUTY COUNTY COUNSEL

Attorneys for Defendants