Landsberg

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 72-1058, 1059,
1060 and 1150

CAROLYN BRADLEY, et al.,

v.

THE SCHOOL BOARD OF THE CITY OF RICHMOND,
VIRGINIA, et al.,

On Appeal from the United States District Court
for the Eastern District of Virginia

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF CITATIONS

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INTRODUCTION

Pursuant to the order of this Court of March 31, 1972, the United States submits this brief as amicus curiae.

We have not, as noted in our motion for leave to file a brief out of time, previously participated in this case. Although we have carefully examined the district court entries of January 5 and 10, 1972, which are the subject of

this appeal, we have not had the opportunity to scrutinize the record. Therefore, we are not sufficiently apprised of all of the factual considerations which may prove determinative of at least some questions raised by this appeal. Nevertheless, this case raises questions of first impression in the appellate courts concerning the scope of school desegregation duties and remedies, and related questions of law and policy which have not directly been raised in previous cases arising under Brown v. Board of Education, 347 U.S. 483 (1954) and 349 U.S. 294 (1955). It is these novel aspects that we discuss in this memorandum in an attempt to outline, in broad form, some legal and policy considerations which we think may assist this Court in deciding the instant appeal.

This is not primarily a case about segregation required by state law, because state law has never required segregation as between Richmond and the neighboring school systems. The issue, instead, is whether the maintenance of the separate school divisions constitutes racial discrimination. The history of the state-imposed official policy of segregation within school subdivisions is only an element of the proof relating to the maintenance of the division

lines. Aside from that history, the issue in this case appears, in large measure, to be whether school authorities have the affirmative duty to overcome the racial impaction between separate school divisions resulting from residential segregation caused, in part, by public and private discrimination. Aspects of that issue are now under consideration by the Congress of the United States (proposed Equal Educational Opportunities Act of 1972) [1/] and by the Supreme Court of the United States. (Keyes v. School District No. 1, O.T. 1971 No. 71-507). We therefore think this Court should consider whether deferral of a decision would be appropriate pending action by Congress (cf. Baker v. Carr's reference to "the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion", 369 U.S. 186, 217) or by the Supreme Court (see the attached letter from the clerk of the Fifth Circuit Court of Appeals relating to Cisneros v. Corpus

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1/ See, e.g., Sec. 404 of H.R. 13915:

> In the formulation of remedies under section 401 or 402 of this Act, the lines drawn by a State, subdividing its territory into separate school districts, shall not be ignored or altered except where it is established that the lines were drawn for the purpose, and had the effect, of segregating children among public schools on the basis of race, color, or national origin.

Christi). The following discussion not only bears on the merits of the case, but also on the question whether the issues presented are of such a nature that deferral would be appropriate.

I. The Constitutional Violation

Federal courts have found discriminatory, and enjoined where appropriate, the creation of separate school districts in formerly dual systems where the purpose and effect of the creation was to impede desegregation; e.g., Lee v. Macon County Board of Education, 448 F. 2d 746 (5th Cir., 1971); Burleson v. County Board of Election Commissioners, 308 F. Supp. 352 (E.D. Ark., 1970), aff'd 432 F. 2d 1356 (8th Cir., 1970); cf. Wright v. Council of the City of Emporia, 442 F. 2d 570 (4th Cir., 1971), cert. granted, No. 70-130 (O.T. 1971), and companion cases. Federal courts have also enjoined the maintenance of rural black school districts which were created as instruments of dualism, and ordered consolidation of these with neighboring white districts; e.g., Haney v. County Board of Education of Sevier County, 429 F. 2d 364 (8th Cir., 1970); United States v. Texas, 321 F. Supp. 1043 (E.D. Texas 1970), aff'd 447 F. 2d 441 (5th Cir., 1971), cert. denied, ___ U.S. ___ (1971).

While these and other cases hold that a state's power to establish and maintain particular governmental subdivision lines is subject to the equal protection clause of the Fourteenth Amendment, Cf., Gomillion v. Lightfoot, 364 U.S. 339 (1960), they do not dispose of the question raised in this case. Here the constitutional attack is directed solely to the maintenance of longstanding political subdivision lines -- lines drawn before Brown which, at the date of Brown, divided the area covered by the three school systems in question into majority white segments of a relatively minor racial variation. 2/

The Equal Protection Clause does not require a particular racial balance in schools in a single school district, even if formerly dual, Swann v. Board of Education, 402 U.S. 1, 22-25 (1971), nor does it require racial balance between separate school districts in a single state, Spencer v. Kugler, 326 F. Supp. 1235 (D. N.J. 1971), aff'd ___ U.S. ___ (1972). In fact, Spencer stands for the proposition that, at least in states not recently operating dual school systems, extreme racial imbalance, without more, does not require

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2/ Richmond's school system was 43.5% black in 1954-55, and Chesterfield's 20.4% black and Henrico's 10.4% black in 1953-54.

the reformation of neutrally established school district boundary lines. See 326 F. Supp. at 1243.

The question then becomes whether the maintenance to the present day of these neutrally established school division lines in the Richmond metropolitan area is racially discriminatory. This, in turn, requires an examination of the correctness of the district court's method of analysis of inter-system discrimination. On balance, the district court appears to have applied to school systems collectively the concepts of racial discrimination heretofore applied to individual schools in one school system, apparently basing its decision on the fact that the Fourteenth Amendment speaks only to the states. It is true that numerous cases have recognized that state as well as local school authorities have affirmative obligations to take steps to eradicate the discrimination inherent in dual school systems. See, e.g., Cooper v. Aaron, 358 U.S. 1, 16-17 (1958); Griffin v. County School Board, 377 U.S. 218 (1964); Lee v. Macon County Board of Education, 267 F. Supp. 458 (M.D. Ala., 1967), aff'd sub nom Wallace v. United States, 389 U.S. 215 (1967);

United States v. Texas, 321 F. Supp. 1043 (E.D. Tex., 1970), 330 F. Supp. 235 (E.D. Tex., 1971); modified and affirmed, 447 F. 2d 441 (5th Cir., 1971); stay denied, 404 U.S. 1206, cert. denied, ___ U.S. ___ (1972); cf. North Carolina Board of Education v. Swann, 402 U.S. 43 (1971).[3/]

However, the district court appears not to have acknowledged that this application involves, in the circumstances of this case, a definite extension of legal principles beyond existing court decisions. The logical underpinnings of the law and the ramifications of such a major extension should be fully explored by this Court. These legal concepts and the propriety of their application to several school systems at once in a major metropolitan area are discussed below.

3/ The defendants in this case include an agency of the state of Virginia with state-wide powers (the State Board of Education) as well as subsidiary officials of the state government with only local powers (the Boards of Education and Boards of Supervisors of Henrico and Chesterfield Counties).

(a) Racial Identifiability

This concept has traditionally been used in school desegregation cases in assessing whether the effects of state-imposed dualism have been eradicated at a particular school. Thus, school authorities have been charged with the duty to "convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." Green v. County School Board, 391 U.S. 430, 442 (1968). The heart of this concept is the notion that a particular school is designated by the state for students of one race, with a concomitant community perception that schools designated for black students are inferior. The Court in Brown expressed the same notion (albeit expressed in terms of students rather than schools) when it said:

> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. 347 U.S. 483 at 493.

The district court concluded that the school systems here were racially identifiable, vis-a-vis each other, on the basis of statistical evidence, expert testimony and evidence of state action which had the effect of limiting black residence to the area circumscribed by the boundaries of Richmond.

Courts have often used statistical evidence in assessing racial identifiability of particular schools, but this assessment has been vis-a-vis schools within a dual system, and in the context of deciding whether dualism had been eradicated. Cf. Swann v. Board of Education, 402 U.S. 1, 26 (1971). Courts have not often focused on expert testimony in determining the existence of racial identifiability, and it would appear that this Court should examine the district court's findings relating to the expert testimony,[4/] to determine whether they add anything to the statistics, so as to support the conclusion of the district court that in the Richmond area, in the facts of this case, these school systems are racially identifiable. In assessing the correctness of the district court's conclusion about the imbalance, this Court must decide what significance should be attached to the fact that each of the three school systems has heretofore become unitary as required by law. This means that the racial identifiability of the schools within the system has, to the extent feasible, been erased if one looks at each

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4 / See, for example, the discussion of Dr. Pettigrew's testimony, pp. 249-254 of the district court's opinion of January 5, 1972. It seems clear that Dr. Pettigrew objects to schools over 40% black (in areas where the school population is under 40% black) regardless of whether the condition stemmed from state action. But the concept of racial identifiability includes in it, as an essential ingredient, the element of state action.

system separately. The Court should also decide whether it was proper to compare the three unitary school systems with each other, or whether the inquiry should have been limited to whether state action contributed to racial identifiability of particular schools as among the three divisions. For example, if the state had built a high school on the Richmond border to serve black children from Richmond and Henrico County and that school is 78% black today it might be perceived as racially identifiable if located 1.4 miles from a 96% white high school in Henrico County built for white students from both systems,[5/] but the same result does not follow in comparing a 90% white school in southern Chesterfield County with a 70% black school 20 miles away in Richmond.

(b) Discrimination by public and private agencies other than school authorities.

This Court has previously said that school authorities may not superimpose individual school zone lines upon racially segregated housing patterns enforced by state or private discrimination. Brewer v. School Board, 397 F.2d 37 (4th Cir. 1968). See also, Davis v. School District, 309 F. Supp. 734, 742 (E.D. Mich. 1970); aff'd 443 F.2d 573 (6th Cir. 1971); cert. denied, 404 U.S. 913 (1971). The district court

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5 / Cf. January 5 Memorandum Opinion, p. 242.

applied this principle to the three school systems covering the Richmond metropolitan area, finding that blacks had been, through various discriminatory practices, segregated and confined in the Richmond City system. No other court has, prior to the decision below, based interdistrict school relief on such a finding. But see, Gautreaux v. Chicago Housing Authority, 448 F.2d 731 (7th Cir. 1971). Regardless of whether the Brewer doctrine should be extended beyond school division lines, there is the further question whether the specific evidence cited by the district court supports its ultimate findings that political subdivision lines in fact follow the racial residential lines[6/] and that the segregation was a result of public and private discrimination. Residential racial segregation has many causes, of which racial discrimination is one.

Beyond this, Swann teaches that when school districts achieve unitariness, district courts should not be required to intervene further absent a showing that "either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns

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6 / There are approximately 13,500 white students in Richmond and 5184 black students in the two counties in 1971-72.

to affect the racial composition of the schools." 402 U.S. at 32. It would appear, reasoning from this, that district courts should not require interdistrict relief, where there is no question of changes or alterations in school district lines,[7] absent such a showing. Whether such a showing has been made as to events since 1954 in the Richmond metropolitan area becomes, in essence, one of the ultimate questions of this case.

Finally, in this connection, it has been suggested that the existence of these three separate systems amounts to a racial classification, so that the state must justify the existence of these separate systems by showing a compelling non-discriminatory interest. But not every governmental line separating a predominantly black from a predominantly white unit is a racial classification. See Wright v. Rockefeller, 376 U.S. 52, 62, 68 (1964); cf. Whitcomb v. Chavis, 403 U.S. 124 (1971). And it may be that drawing such lines today would raise a stronger inference of racial classification than merely, as here, maintaining the lines in the face of growing imbalance. Cf. Wright v. Council of City of Emporia, supra.

7/ Cf., Lee v. Macon County Board of Education, 448 F.2d 746 (5th Cir. 1971).

(c) Racial Imbalance and the Presumption of Discrimination.

A related issue raised in the district court's opinion concerns the method by which discrimination is determined and assessed in one school system. That is, the Supreme Court has held that substantial racial imbalance between schools in a dual system raises a presumption that their racial compositions are a result of discriminatory state action. Swann v. Board of Education, 402 U.S. 1, 26 (1971). While this presumption would appear to follow logically from the state imposition of racial dualism struck down in Brown, the rationale for the presumption does not warrant its extension to substantially imbalanced school systems, even if formerly dual. That is, the racial composition of a particular school in one school system might be determined to a great degree by school authority action; the overall racial composition of a comparatively large school system is or can be determined by a myriad of factors -- some within the control of school authorities and some not, some state action and some not. The choices exercised by school authorities in the first instance (and by governmental authorities on a larger scale) have at least a more immediate impact on particular schools, and it is the immediacy of the impact as well as the breadth of the action -- system-wide dualism -- which justifies the application of the presumption against one-race schools in individual school systems.

(d) System or area wide duty to promote desegregation.

The Constitution imposes an affirmative duty upon school authorities formerly operating dual systems to eliminate the vestiges and effects of that state-created dualism, and this duty encompasses site selection and school construction. Swann v. Board of Education, supra. Each of the school systems here have operated under such a duty, but that has heretofore not meant that each was under a duty to promote desegregation between school systems. Therefore, if the evidence shows that some or all of these systems violated their duty to promote desegregation within their respective systems, this would not necessarily mean that an inter-system or area-wide violation has been made out.[8/] If the district court analyzed the facts from the standpoint of an area-wide rather than a system-wide duty, this Court should examine whether the principles of racial neutrality within school systems expressed in such cases as Bell v. School City of Gary, 324 F. 2d 209 (7th Cir., 1963) and Deal v. Cincinnati Board of Education, 369 F. 2d 55 (6th Cir., 1966) should have been applied as between school systems.

8/ For example, there could be circumstances where a new school site could be picked which would promote within-system desegregation but hamper inter-system desegregation (or vice-versa); thus these duties could conflict with each other.

(e) Summary

We have outlined some areas in which the district court has applied existing concepts to a new situation -- separate school systems in a metropolitan area. We have suggested some practical difficulties involved, and there remains an additional factor to consider; i.e., the deference to be given to state-created subdivision lines. While the state's power in this area is limited by the federal constitutional guarantees, Gomillion v. Lightfoot, 364 U.S. 339 (1960), a line of Supreme Court decisions has recognized that under our federal system a state has substantial power to subdivide its territory into local governmental units. See, e.g., United States v. Railroad Company, 17 Wall. (84 U.S.) 322, 329 (1873); Hunter v. Pittsburgh, 207 U.S. 161, 178-79 (1907); Faitoute Company v. Asbury Park, 316 U.S. 502, 509 (1942); cf. Salsburg v. Maryland, 346 U.S. 454, 522-53 (1954). This principle suggests that while courts should "scrutiniz[e] schemes allegedly conceived or operated as purposeful devices to further racial discrimination," Whitcomb v. Chavis, 403 U.S. 124, 149 (1971), a finding of discrimination should not be based on the kinds of presumptions used in intra-district cases, and, indeed, the presumptions should be in favor of the long-standing lines.

II. Remedy

The remedy invoked by the district court -- consolidating the three school divisions and assigning their students so as to achieve a different racial mix -- raises questions similar to those discussed above. This is because in equity cases the Chancellor has traditionally followed the rule that "the nature of the violation determines the scope of the remedy." Swann v. Board of Education, 402 U.S. 1, 16.

Therefore, it is not sufficient for the district court to find that there has been some inter-district discrimination. The court must also define precisely what the violation is, and then tailor a remedy to fit the violation. The broad brush applied by the court below makes it difficult, on review, to say precisely what the violation, if any, was. But the opinion of the court below suggests that instead of tailoring the remedy, the court used a blanket approach. Although the Swann decision may authorize such an approach in intra-system cases, it does not authorize it here (see discussion pp. 8 to 14, supra).

If the violation here is state-imposed segregation as between neighboring schools across school system lines

(see opinion, p. 242), desegregation as between those particular schools might be warranted. If the violation is a denial of free access to housing in particular residential areas (and therefore the schools which serve those areas), the court might require that the children be given access to those schools; or it could join those responsible for the housing discrimination and provide relief against them. If there is proof of an inferior curriculum or the unfair allocation of money as among the systems, there may be specific relief for those violations. See Serrano v. Priest, 5 Cal. 3d 584 (1971); Rodriguez v. San Antonio Independent School District, ___ F. Supp. ___, (W.D. Tex., 1971); Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn., 1971).

It is not clear here whether the district court's blanket relief stemmed from a view that Swann required such relief or from the fact that this was the only relief suggested. Ordinarily, in desegregation cases where the issue of violation is presented, the district court holds a bifurcated hearing -- first it has a hearing as to violation; if it finds a violation it orders the development of plans and holds a hearing on the plans. Indeed, this is the procedure being followed in the other inter-district metropolitan

cases cited by the district court at pages 77-81 of its opinion. Even the broad discretion authorized by Swann arises only after the school authorities have defaulted by failing to propose an adequate plan. No such default has occurred here; the district court found a violation and imposed a remedy simultaneously. [9/]

III. Conclusion

For the foregoing reasons, we would suggest four possible courses of action by this Court:

(a) Defer decision pending resolution of Keyes and of the legislative proposals now before Congress.

(b) Scrutinize the district court's opinion and the record in light of the considerations listed above, and determine what if any, violation exists and what, if any, relief is warranted; enter an order of remand or reversal accordingly.

(c) Set forth guidelines for analyzing whether a violation exists and for deciding what, if any,

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9/ The district court apparently encouraged the defendants to prepare or participate in the preparation of plans. However, since the violation(s) that could have been found varied considerably in scope, it was practically impossible for the defendants to prepare plans tailored to remedy the alleged violations in advance of the violation finding.

relief is warranted; remand to the district court for application of these guidelines.

(d) Find that the legal standards used by the district court were erroneous and that therefore the decision below should be reversed.

Respectfully submitted,

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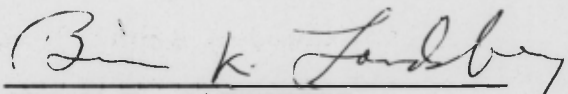

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United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

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February 7, 1972

TO ALL COUNSEL OF RECORD

No. 71-2397 - Cisneros, et al v. Corpus Christi Independent School District, et al

Gentlemen:

I am directed by the court to advise that the decision in the above referenced case is being withheld pending a decision of the Supreme Court of the United States.

As soon as a decision is rendered in the above cause, a copy of the printed opinion will be forwarded to you.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Audrey D. Glynn
Audrey D. Glynn
Deputy Clerk

/adg

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Memorandum for the United States as Amicus Curiae have been sent by United States mail on April 7, 1972 to the following persons:

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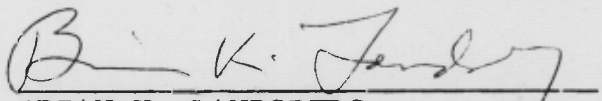

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