Missouri Law Review

Volume 31
Issue 3 *Summer 1966*

Article 5

Summer 1966

Albertson v. School Board of Fenway: Is Racial Imbalance in Public Schools Unconstitutional--No

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ALBERTSON V. SCHOOL BOARD OF FENWAY: IS RACIAL IMBALANCE IN PUBLIC SCHOOLS UNCONSTITUTIONAL?—NO

I. Education is Traditionally Controlled by Local Authorities and Courts Will Interfere Only Where There is a Clear Showing of Unreasonable Discriminatory Action.

A. *Administration of Schools Requires the Solution of Many Local Problems and Local School Authorities Are Best Equipped to Deal with These.*

The function of providing basic educational opportunities is one which has rested with local governmental units since the inception of public education in the United States. This fact is so firmly established as to be almost incontrovertible. While the state and federal governments have initiated certain measures assisting communities in this function, it remains primarily local in nature.

An illustration of this policy of local control may be found in the Missouri Constitution.

> The general assembly shall not pass any local or special law: . . . (21) creating offices, prescribing the power and duties of officers in, or regulating the affairs of counties, cities, townships, election or *school districts*; (Emphasis added.) . . . (24) regulating the management of public schools, the building or repairing of schoolhouses, and the raising of money for such purposes. . . .[1]

The reason for such a policy is clear: the management of a local school system is a complex and formidable job, which requires a special knowledge of local conditions and needs.

B. *Courts Will Not Substitute Their Discretion for That of the Local Boards, Unless the Discretion Has Been Clearly Abused.*

There has been widespread judicial recognition of the dominant function of local school administrative bodies in management and control of the schools.[2] In the landmark case of *Brown v. Board of Educ.*,[3] the Court held that school authorities have the primary responsibility for elucidating, assessing, and solving these problems, the courts considering only whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. The Court in *Brown* has made it clear that they consider the heart of the job to be a local one, which if properly carried out, should never become a judicial concern. In *Calhoun v. Board of Educ.*,[4] the evidence of segregation was so clear cut that the judge took judicial notice that segregation existed. The opinion stated: "school authorities have the inherent power to exercise their own discretion as to

1. Mo. Const. art. III, § 40.
2. *Infra*, notes 3, 4, & 6.
3. 349 U.S. 294 (1955).
4. 188 F. Supp. 401 (N.D. Ga. 1959).

the assignment of pupils to various schools within their respective systems so long as their discretion is exercised in good faith and discrimination does not exist."[5]

In *Northcross v. Board of Educ.*,[6] the court found that a clear policy of segregation existed through the method of "gerrymandering" the school districts. The court said, however, "We cannot draw school-zone lines. That is a discretionary function of the school boards."[7]

Respondents do not contend that the districting and management of the school systems are within the *absolute* and uncontrolled discretion of the school board. Obviously there are certain criteria upon which districts may not properly be based. The opinions discussed above, however, indicate that the courts recognize a high degree of discretion in the local board in the area of districting and will interfere with such discretion only upon a clear showing that the board acted to achieve a constitutionally prohibited goal.

II. THERE IS NO DEPRIVATION OF THE RIGHTS OF INDIVIDUALS TO EQUAL PROTECTION OF THE LAW AND DUE PROCESS OF LAW RESULTING FROM THE FACT THAT THERE IS RACIAL IMBALANCE IN THE SCHOOLS OF THE STATE, AND THEREFORE THE SCHOOL BOARD OF FENWAY SHOULD NOT BE REQUIRED TO REVISE ITS EXISTING SCHOOL DISTRICT PLAN, BECAUSE:

A. *The Equal Protection and Due Process Clauses of the Fourteenth Amendment Require Only That Students Be Given Equal Educational Opportunity and it has been Expressly Held that Racial Imbalance which is not the Result of Separation of the Students on the Basis of Race does not Result in Unequal Educational Opportunities.*

The equal protection clause of the Fourteenth Amendment, as interpreted in recent cases involving students and school assignment, does not require that racial balance be achieved in all schools.[8] These cases were based upon the hypothesis that by their nature segregated schools are unequal. That is, where school authorities separate students according to their race, the students are not being afforded equal educational opportunity.[9] Clearly these decisions did not say that mere racial imbalance in a school results in inferior educational opportunities.

The opinions indicate that the unequal educational opportunity results from the refusal to admit students to the school they would ordinarily attend if race were not a factor in the assignment. The decision in *Brown*[10] condemns only purposeful segregation.[11]

There has been no showing in the present case that the educational opportunities available to the plaintiffs are in any way inferior to the educational opportunities offered to the other children in Fenway. Plaintiffs allege that a large

5. *Id.* at 408.
6. 333 F.2d 661 (6th Cir. 1964).
7. *Id.* at 663.
8. Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1964).
9. *Ibid.*
10. 347 U.S. 483 (1954).
11. *Ibid.*

percentage of the students in district five are Negro, and contend that this alone is sufficient to demonstrate that the educational opportunities of the children in that school are inferior. This view is not followed in the cases involving school segregation and Fourteenth Amendment freedoms.

In *Brown v. Board of Educ.*[12] the Supreme Court set down the principle that *"segregation solely on the basis of race"* violates the equal protection clause of the Fourteenth Amendment. (Emphasis added.) Subsequent to that decision, the district court approved a plan for the schools of Topeka eliminating segregation but retaining racial imbalance, saying: "Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color."[13]

The court further said that "no violation of any constitutional right results because they are compelled to attend the school in the district in which they live." It is the respondent's contention that this is a clear and correct statement of the meaning and effect of the equal protection of the law as required by the Fourteenth Amendment, and as interpreted by the Supreme Court of the United States.

The rule of *Brown* was followed in *Bell v. School City of Gary, Indiana,*[14] a situation very similar to the case at bar. In *Bell,* racial imbalance in the schools of the city was such that twelve schools had Negro enrollments of 99 to 100 per cent. The court determined that there was no deprivation of equal protection of the law where schools are administered on a neighborhood school plan and students are assigned on non-racial grounds.

In *Downs v. Board of Educ.,*[15] the court held, on the basis of *Brown* and other federal court decisions, that racial imbalance existing in the schools of Kansas City, Kansas, did not constitute a denial of equal protection of the law to the Negro students attending school there. The *Downs* case involved school boundaries that the board had recently changed in response to a shift in population of school-age children. The effect of the board's plan was to expand the district of a predominately Negro school into areas where Negroes had recently moved. It was found that the boundaries were not set for the purpose of racial separation. The court held that since the board set the boundaries on reasonable bases, its decision would not be disturbed. In holding that there was no deprivation of equal protection of the law, the court said: "[A]lthough the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them."[16]

In *Brown* the Supreme Court, in declaring discrimination in education to be a deprivation of equal protection of the law,[17] clearly contemplated and approved

12. *Supra* note 10, at 493.
13. Brown v. Board of Educ., 139 F. Supp. 468, 470 (D. Kan. 1955).
14. 324 F.2d 209 (7th Cir. 1963).
15. 336 F.2d 988 (10th Cir. 1964).
16. *Id.* at 998.
17. In Brown v. Bd. of Educ., *supra* note 3, the Court directed the lower

a plan such as the one which is in effect in Fenway. The Court said that in effectuating policy and forming decrees, the courts should give attention to certain local problems including "revision of school districts and attendance areas into *compact units* to achieve a system of determining admission to the public schools on a non-racial basis."[18] (Emphasis added.) The Supreme Court apparently believes school districts based on geography, safety, and school capacity are consistent with the equal protection requirements of the Fourteenth Amendment, so long as the divisions are made on "nonracial" factors. Nothing in that decision or in subsequent decisions indicates that a neighborhood school plan *drawn* and *maintained* without regard to race is offensive to the equal protection requirement of the Fourteenth Amendment, even though a complete "integration" or mixing of the races is not achieved.

The cases involving segregation have been based on the principle that unequal educational opportunity afforded by a state to some of its citizens is a deprivation of equal protection of the law, or under the doctrine of *Bolling v. Sharpe*,[19] of due process of law. The Supreme Court laid down the clear principle in *Brown v. Board of Educ.*,[20] that *segregation* in public schools results in unequal educational opportunities as a result of the discrimination practiced prior to that decision. At that time, the Court set forth broad guidelines to the requirements of the due process and equal protection clauses: (1) desist from discrimination because of race in school assignments; (2) establish nonracial methods of school assignment; and (3) make educational facilities available to all persons within a particular district on an equal basis *without regard* to race.

Further evidence of the scope of the constitutional requirements regarding school assignment may be found in the Civil Rights Act of 1964:

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.[21]

Also, under Section 2000c-6 (a) (2), regarding authorization of the attorney general to bring suit on behalf of Negro plaintiffs in order to insure compliance with the constitutional mandate, it is said:

> [N]othing herein shall empower any official or *court* of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.[22] (Emphasis added.)

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courts to be guided by geographic and other factors, making clear that race was not to be a factor in school districting.

18. *Supra* note 3, at 300.
19. 347 U.S. 497 (1954).
20. *Supra* note 10.
21. 78 Stat. 246, 42 U.S.C.A. § 2000c.
22. 78 Stat. 248, 42 U.S.C.A. § 2000c-6 (2).

The Civil Rights Act of 1964 recognizes the difference between racial imbalance and segregation. Clearly, Congress was guided by the holdings of the Supreme Court as to the scope of the requirements of the Fourteenth Amendment, and carefully provided for a remedy where there is segregation and excluded those situations that only amount to racial imbalance.

According to the stipulated facts in the instant case, the constitutional requirements have been met. The school districts were drawn without regard to race. The boundaries were apparently established on geography, safety, and school capacity. Students, regardless of their race, are required to attend the school in the district in which they live. Further, there is no allegation that any district has less adequate facilities, less qualified teachers, less per pupil expenditures, or any of the other many factors that may give rise to inequality in education. Appellants contend that because more Negro students attend school in district five than non-Negroes, they are being deprived of their constitutional rights to due process and equal protection of the law.

A closer examination of this allegation reveals some rather significant defects. Appellants contend that whatever the source of the racial imbalance, the effect must necessarily be the same on the children. They contend, further, that according to the "underlying theory" of the segregation cases, the children are adversely affected by racial imbalance. There is a vast difference, between requiring a student to attend school in the district where he lives, and requiring him to attend a school that may be very remote from his home because he is of a particular color and others don't want to associate with him.

Attending the school in the district where he resides would seem to be the natural situation to the child. He attends school in his neighborhood regardless of race, and the situation does not foster the feeling that he is being discriminated against merely because of race or place of residence.

Consider, however, the situation where the child is denied admittance to the school in his own district and segregated from the others in his neighborhood who are not Negro. In this situation it seems rather clear that the implication is that the child is separated from others and required to go to a distant school because the community considers him inferior. While this example does not encompass all of the forms of discrimination that may be practiced, it is illustrative of the difference in the effect on the child of segregation, as distinguished from mere racial imbalance.

It seems reasonable that, as a result of the special and unusual treatment, a child might be hampered in his educational opportunities through the fostering of a feeling of inadequacy or inferiority. On the other hand, it is unreasonable to assume that the same feelings would be fostered in an individual who received no special treatment or separation and who was given rights and opportunities identical to all other individuals in the community.

The courts have not held that mere racial imbalance results in unequal educational opportunities,[23] and it is respondent's contention that it does not. There-

23. The case of Barksdale v. Springfield School Committee, 237 F. Supp. 543 (D. Mass. 1965), would seem to some to be in conflict with this statement. That

fore, mere racial imbalance in schools does not comprise a deprivation of the rights of equal protection of the law or due process of law as guaranteed by the Fourteenth Amendment. The facts demonstrate that there has been no discrimination against the appellants and therefore there has been no denial of equal protection or due process of law.

B. *The Racial Imbalance Which Exists in the School System of Fenway is the Result of Voluntary Action on the Part of Individuals in Choosing A Place of Residence and is not Brought About by the School Board as a Plan or Means of Maintaining Separation of School Children According to Race.*

Appellants contend that the racial imbalance existing in the school system of Fenway is the result of action by the school board, and through them, of the state; therefore, the schools are actually operated on a segregated basis.

School segregation developed during the period in which separate educational facilities were operated for Negro and non-Negro students. At that time, it was the practice to *separate,* or segregate, pupils according to their race. Separation according to race continued under the "separate but equal" doctrine of *Plessy v. Ferguson*[24] until 1954, when, in *Brown v. Board of Educ.*,[25] the Supreme Court held that segregated schools were unequal and declared the practice of segregation (separation) to be a deprivation of equal protection of the law. The companion case to *Brown* held that segregation was also a violation of the rights of the individual to due process of law.[26] This, then, is *segregation*: the separation of school children according to race. The appellants, however, want to apply this term which denotes constitutionally prohibited conduct, to another and entirely different situation.

According to the stipulated facts in the case below, the racial imbalance in this case is not the result of any separation on the basis of race by the school board; therefore, there is no *segregation.* True, the schools of Fenway are not balanced according to the ratio of Negro students to non-Negro students; but there is, nevertheless, none of the segregation that the Supreme Court has declared to be impermissible under the Fourteenth Amendment.

The Constitution forbids the separation of students in a school district according to race; however, there can be no *separation* according to race when there is not even any cognizance taken of the race of the students attending the school. Under the proposition urged by the appellants, they are being denied equal protection of the law because the school board, following *Brown, refused* to assign them to schools on the basis of their race.

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case did not present this question directly for judicial determination, however, since the school board had already found that there was unequal educational opportunity. The case was brought before steps could be taken by the board to correct this inequality.

24. 163 U.S. 537 (1896).
25. *Supra* note 10.
26. Bolling v. Sharpe, 347 U.S. 497 (1954).

Appellants also contend that because the school board must know the racial composition of the districts, their action constitutes affirmative acceptance of the residential pattern. The setting of the districts amounts to a sanction and perpetuation of the segregated conditions that are imposed on the members of the Negro race living in Fenway. Aside from the fact that there is no allegation that the school board even took cognizance of the racial composition of the districts, this argument fails under closer scrutiny.

Appellants base this line of reasoning on the situation they say exists in some areas (although not alleged to exist in Fenway) that Negroes are unable to purchase or rent housing other than that located in certain areas. Assuming, without conceding, that such a situation exists in Fenway, appellants have still failed to demonstrate that there has been a denial of equal protection or due process of law through the action of the school board. The argument that school districting on non-racial grounds "reinforces" private discrimination, presupposes that racially imbalanced schools are discriminatory—the very fact in issue in this case.

If the state were responsible for *enforcing* or *requiring* such a housing pattern, it would clearly be a denial of equal protection of the law.[27] Appellants do not contend, though, that the state is responsible for the residential patterns. They recognize in their brief that such state action is forbidden. They contend, however, that given the residential pattern, which is the result of voluntary action on the part of individual members of the community, the school board should be required to remake the school attendance pattern to achieve an artificial racial balance different from the neighborhood residential pattern. They call the failure of the board to make such reallocation state action denying to individuals who choose to live in a particular area equal protection of the law.

A brief review of the cases dealing with the state action concept will demonstrate that state action does not include the failure to afford preferential treatment to certain individuals because of some real or imagined handicap or inferior community status. *Shelley v. Kraemer*[28] dealt with court enforcement of racial restrictive covenants. The Supreme Court held that a state court could not enforce these covenants because doing so constituted state action. The state action in *Shelley* was the state court enforcing sanctions of damages or ejectment against those who violated the private restrictive agreements. In *Lombard v. Louisiana*,[29] the Supreme Court found state action where the mayor and the chief of police had issued statements which indicated that segregation would be given the force of the law in New Orleans, Louisiana. In *Peterson v. City of Greenville*,[30] the Supreme Court found state action in violation of the equal protection clause in a city ordinance that required segregated eating facilities for Negro and non-Negro patrons. It is significant that in all of these cases the state action which was prohibited was either the *enforcement* of a policy of *segregation*, or the policy of segregation itself.

27. Shelley v. Kraemer, 334 U.S. 1 (1948).
28. *Ibid.*
29. 373 U.S. 267 (1963).
30. 373 U.S. 244 (1963).

In the case at bar, however, there is no state action requiring the residential pattern that developed in Fenway. There is no allegation that race was taken into consideration in any way for the purpose of setting or maintaining the school district boundaries. No individual is denied the right to attend school in the district where he lives. Where individuals voluntarily reside in a partcular district and district boundaries are set without regard to racial patterns there is no state action.

The appellants contend further that the failure of the school board to act on a notorious fact is state action. They have cited cases in which they contend that inaction on the part of the state or state officials constituted state action. Their reliance on these cases is misplaced. The cases cited were situations where there was culpable inaction on the part of the state; where the inaction constituted a breach of duty on the part of state officials. In the case of *Lynch v. United States*,[31] which appellants cite, there was a failure of a police officer to give proper protection to an individual in his custody, and the court found a violation of the rights of the prisoner in the failure of the defendant to protect one in his custody, saying:

> We are of the opinion that "equal protection of the law" relates, not only to the right of protection from the officer himself, but also relates to the right of protection due the prisoner by the arresting officers against injury by third persons . . . . It may be that failure by inaction to discharge official duty may constitute a denial of equal protection of the laws.[32]

In the case of *Catlette v. United States*,[33] also cited by appellants, state police officers allowed and *participated* in subjecting prisoners who were Jehovah's Witnesses to certain indignities and humiliations. The court in that case found state action through a breach of the officer's duty.

> Accordingly, the acts of Catlette in compelling the victims to submit to the indignities proved in the case constituted a breach of the peace. (Citations omitted.) And since the failure of Catlette to protect the victims from group violence or to arrest the members of the mob who assaulted the victims constituted a violation of his common law duty, his dereliction in this respect comes squarely within the provisions of 18 U.S.C.A. § 52.[34]

In both of the preceding cases, the officers, by allowing a breach of the peace to take place in their presence, violated their duty as law enforcement officers. The cases might present a valid analogy to the case at bar except that there is no affirmative duty of the board to achieve racial balance.

An examination of the cases makes it clear that the school board has no duty to achieve racial balance in the schools. In *Bell v. School City of Gary, Indiana*,[35] the court said:

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31. 189 F.2d 476 (5th Cir. 1951).
32. *Id.* at 479.
33. 132 F.2d 902 (4th Cir. 1943).
34. *Id.* at 907.
35. 213 F. Supp. 819 (N.D. Ind. 1963).

> The court finds no support for the plaintiffs [sic] position that the defendant has an affirmative duty to balance the races in the various schools under its jurisdiction, regardless of the residence of students involved.[36]

In *Evans v. Buchanan*,[37] it was held that "the States do not have an affirmative, constitutional duty to provide an integrated education."[38] The court also said: "[I]f races are separated because of geographic or transportation considerations or other similar criteria, it is no concern of the Federal Constitution."[39]

In *Holland v. Board of Pub. Instruction*,[40] the court said: "[T]he Fourteenth Amendment does not speak in positive terms to command integration, but negatively, to prohibit governmentally enforced segregation."

The cases indicate that there is no duty to achieve racial balance in schools where there has been no active attempt to separate the students according to race.[41] Therefore, appellant's contention that the state has acted by reason of a failure to act, must fall for the lack of a breach of any duty owed.

C. *School Boards will be Required to Reallocate Students Among the Schools Within Their Jurisdiction Only Where There Is A Showing That the Board is Practicing A Policy of Segregation or Discrimination, and Injunctive Relief Will be Denied to Plaintiffs Who Fail to Establish That These Policies are Practiced, Even Though the Negro Students are not Distributed Evenly Among the Schools Within the Board's Authority.*

In some cases courts have granted injunctive relief requiring school boards to provide plans for the redefinition of school district boundaries or the reassignment of students to schools. But, in these cases, the school board had a prior policy of racial separation in the schools.

In *Taylor v. Board of Educ.*,[42] the plaintiffs complained that the school board had pursued an active policy of district gerrymandering up to 1934, and a discriminatory pupil transfer plan until 1949. Subsequent to 1949, the board instituted a neighborhood school policy which amounted to very little more than a continuation of its prior policy of segregation. The court in *Taylor v. Board of Educ.* said:

> I also conclude that if a Board of Education enters into a course of conduct motivated by a purposeful desire to perpetuate and maintain a

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36. *Id.* at 831.
37. 207 F. Supp. 820 (D. Del. 1962).
38. *Id.* at 823.
39. *Ibid.*
40. 258 F.2d 730, 732 (5th Cir. 1958).
41. Rippy v. Borders, 250 F.2d 690, 692-3 (5th Cir. 1957); School Board v. Allen, 240 F.2d 59, 62 (4th Cir. 1956). The case of Dowell v. School Bd. of Oklahoma City Public Schools, 244 F. Supp. 971 (W.D. Okla. 1965), illustrates the requirement by courts of correction of segregation *if* there is a present policy of segregation.
42. 191 F. Supp. 181 (S.D.N.Y. 1961).

> segregated school, the constitutional rights of those confined within this segregated establishment have been violated.[43]

In the case at bar, the boundaries were not originally set with the purpose of racial segregation; and there is no allegation that they have been continued for that purpose. Therefore, the reasons for granting relief in the *Taylor* case do not exist in this case.

In *Blocker v. Board of Educ.*,[44] the case cited by appellants which most nearly resembles this one, the court found both a policy of segregation and inequality of educational opportunity.

> Were there Negro children in the two all-white schools, it could be argued that there was *mere racial imbalance* in the three elementary schools; that the Negro children of the entire District, though not distributed proportionately throughout all of the elementary schools, were not *separated* from their white contemporaries *as they are here*.[45] (Emphasis added.)

The court in *Blocker,* then, found actual segregation from the fact that no Negroes attended two of the three schools in the district, and that the predominantly Negro school was less than one-third the size of the other two schools under the supervision of the board. The court also said there was clear evidence that the individual students of the predominantly Negro school had been deprived of equal educational opportunity resulting in inferior achievement.

The case at bar does not present the same situation as in *Blocker* because: (1) there is no segregation in the case at bar, merely racial imbalance; and (2) there is no allegation and there has been no demonstration that the racial imbalance resulted in inferior achievement or educational opportunities.

The court in *Blocker* recognized the peculiar facts upon which that case rested, saying:

> It is advisable, therefore, to state precisely what today's opinion has and has not decided. The court does *not* hold that the neighborhood school policy is per se unconstitutional; it does hold that this policy is not immutable. It does *not* hold that racial imbalance and segregation are synonymous or that racial imbalance, not tantamount to segregation, is violative of the Constitution. . . . The court does *not* hold that the Constitution requires a compulsive distribution of school children on the basis of race in order to achieve a proportional representation of white and Negro children in each elementary school within a school district.[46] (Emphasis added.)

The case of *Branche v. Board of Educ.*,[47] cited and relied on by appellants, reached the court on a motion by the school board for summary judgment. The court, in denying the motion, merely held that there were substantial issues of fact

43. *Id.* at 194.
44. 226 F. Supp. 208 (E.D.N.Y. 1964).
45. *Id.* at 225.
46. *Id.* at 229-230.
47. 204 F. Supp. 150 (E.D.N.Y. 1962).

which necessitated a trial on the merits. The judge made several comments by way of dictum upon which the appellants rely heavily, but the real basis for the case may be found in the following statement by the court:

> It cannot be said *at this stage* that the 1949 adoption of the geographical rule of school attendance was necessarily free of an unpermitted effect on constitutional interests or that adherence to it in changing circumstances that perhaps increased segregation has not become an infringement of constitutional interests.[48] (Emphasis added.)

It is significant that there was no finding or holding in the *Branche* case that the board's plan constituted a violation of the plaintiff's right to equal protection of the law; the opinion was written prior to a trial on the merits. It is equally significant that no injunction was issued as the result of this litigation.

Appellants also cite the case of *Dowell v. School Bd. of Oklahoma City Public Schools*[49] as authority for the proposition that there is a duty to alleviate conditions of segregation in the schools. An examination of the *Dowell* case reveals that the holding of the court was based on a prior policy of segregation that had not been abandoned subsequent to the decision of the *Brown*[50] case. The board had followed a policy of active segregation for some years, and then abandoned that for a discriminatory transfer plan. It was on these facts that the court found that the board had a duty to act and ordered it to desist from its policy of segregation.

It is clear from an examination of the cases relied on by appellants that they are considerably different from the instant case. In some cases courts have granted injunctive relief, but the basis of that relief was not racial imbalance (so called *de facto segregation*). In the cases where injunctions have issued, there have been findings that the school boards followed a policy of *segregation*; the injunctions were issued to end that policy.[51]

It has been stipulated by the parties to this case that the board did not set the boundaries of the school districts on racial grounds. There is no allegation that the boundaries have been maintained for the purpose of segregation. Therefore, the very important bases for allowing injunctive relief, although present in the cases in which such relief was granted, are absent in the school system of Fenway.

The courts have consistently held that, where there is neither segregation nor attempt to segregate by the school board, plaintiffs are not entitled to injunctions requiring school boards to achieve racial balance in the school systems.[52]

Injunctive relief is proper only where there has been a prior policy or plan of segregation, and should be denied in this case. According to the stipulated facts, there is no policy or plan of segregation in the schools of Fenway.

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48. *Id.* at 153.
49. 244 F. Supp. 971 (W.D. Okla. 1965).
50. *Supra* note 10.
51. Taylor v. Board of Educ., *supra* note 42; Blocker v. Board of Educ., *supra* note 44; Branche v. Board of Educ., *supra* note 47; Dowell v. School Bd. of Oklahoma City Public Schools, *supra* note 49.
52. *Supra,* notes 30-49.

III. THE RELIEF REQUESTED IS INCONSISTENT WITH THE PRINCIPLE OF PUPIL ALLOCATION WITHOUT REGARD TO RACE AND WILL MAKE A CONSISTENTLY HIGH LEVEL OF EDUCATION EVEN MORE DIFFICULT, BY THE ADDITION OF ANOTHER FACTOR TO THE MYRIAD OF CONSIDERATIONS WHICH GOVERN SCHOOL ADMINISTRATION.

A. *Appellants Contend, and Correctly So, That the Issue is Equal Educational Opportunity. Pupil Allocation or Assignment on the Basis of Race Carries With it the Necessary Implication that the Negro Children are Inferior, Since They Will Learn More and Learn Better When They Are Not in School With A Large Number of Other Negro Children.*

Appellants claim to aspire to the goal of equal educational opportunity for all students in the community. They cite many cases that enunciate the principle that education must be made available to all in the community on equal terms and without regard to race, religion, or national origin. Yet they go further and contend that education on equal terms with other members of the community does not afford them equal educational opportunity. They ask this court to require the school board to take cognizance of their race and adopt a plan of pupil assignment whereby they will be assigned or allowed to attend a school other than the one they would ordinarily attend if their race were not a factor in the determination.

Much has been said in appellants' brief about the feelings of inferiority which are engendered in Negro school children who are located in a school district that is populated largely by Negroes. It is contended that this feeling of inferiority stifles intellectual growth. It is interesting to note that in demanding "equal protection," the appellants are asking for very unequal treatment by the school board.

The question might well be asked of the appellants: "Why won't assignment or admission of the Negro pupils to schools outside their district engender feelings of inferiority and therefore hinder educational opportunity?" Such a procedure carries with it the necessary implication that the child will learn more and learn better when he is not in school with a large number of other Negro children. The fact that the educational authorities take special care, under the rule requested by appellants, to mix pupils racially would seem to lead the Negro child to the conclusion that non-Negro classmates are superior to Negro classmates and, therefore, superior to himself.

In their zealous determination to correct an imagined wrong, appellants are asking for relief which may well result in unequal educational opportunity.

B. *Where the Time of the Administrator and a Portion of the Total Budget Must be Expended Toward the Satisfaction of Appellants' Desires, Those Resources Will No Longer be Available for Expenditure on the Necessary Items Such as Textbooks, Classrooms, Solution of the Already Difficult Problems of Transportation, and Provision of Adequate Facilities for a Rapidly Expanding Student Body.*

Appellants also have failed to give any attention to the serious difficulty in school administration that would arise from the requested relief. Rapidly growing

enrollment has placed a heavy burden on educational systems. There is constant pressure to expand educational facilities to keep pace with the population growth. Many educators consider themselves fortunate if minimal facilities can be supplied. In addition to buildings and classrooms, society's demands for a higher level of education require the attention of administrators and the attraction of better qualified personnel requiring additional expenditure for teachers' salaries. Add to these problems the need to reach our highly mobile population with educational facilities in newly developing areas and the difficult transportation problems attendant to this aim, and the job of school administration is a formidable one indeed.

Appellants request, however, that an additional factor be added to the bases for decisions in educational administration—the achievement of balance of races of students attending each educational unit. They further suggest that this consideration is based upon a constitutionally guaranteed right; and, therefore, would be paramount to all other factors considered in determining educational policy. This seems to mean that racial balance must become the first consideration of the educator. The requirements of adequate facilities, material, and personnel become secondary, since there is no constitutional right to adequate school facilities, material, or personnel comparable to the one which appellants argue exists in favor of racial balance.

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