A64 SEP.T. 1964 4558

Superior Court of New Jersey

Appellate Division

Docket No. A-662-63

CHARLES B. BOOKER, et al.,
Petitioners-Appellants,

v.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,
Respondent-Appellee.

Civil Action on Appeal from Decision of State Board of Education of New Jersey.

APPENDIX FOR PETITIONERS-APPELLANTS

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APPENDIX

Petition of Appeal

(September 4, 1962)

BEFORE THE

COMMISSIONER OF EDUCATION OF NEW JERSEY

—o—

CHARLES B. BOOKER, a minor, by Charles F. Booker, his father and next friend;
JOHN H. CARTER, III, and JANE D. CARTER, minors, by John H. Carter, Jr., their father and next friend;
RENNE E. CHERRY, a minor, by Mrs. Mary E. Cherry, her mother and next friend;
WILLIAM COLE, JR., a minor, by Mr. and Mrs. William Cole, his parents and next friends;
DENISE COOK AND JACQUELYN COOK, minors, by Mrs. Norma E. Cook, their mother and next friend;
ISAAC DANNER, JR., a minor, by Isaac Danner, Sr., his father and next friend;
CYNTHIA N. DAVIS AND REDOLPHUS DAVIS, III, minors, by Mrs. Nannie Bell Davis, their mother and next friend;
JAFFREY DAVIS, a minor, by Mrs. Bernice Davis, his mother and next friend;
CRAIG STANLEY EVANS, DERKE KEITH EVANS AND LYNN ROXANNE EVANS, minors, by Stanley Evans, their father and next friend;
HANNAH C. FORD, a minor, by Mrs. Karl S. Ford, her mother and next friend;
RODNEY J. FRANKLIN AND GREGORY FRANKLIN, minors, by Junius Franklin, their father and next friend;
EDWARD GRIMES AND MAURICE GRIMES, minors, by Mrs. Lenora Chambers, their guardian and next friend;
SAMUEL C. HOWE, JR., MARCELLA D. HOWE, RAPHAEL C. HOWE, AND SHERRYLL A. HOWE, minors, by Samuel C. Howe, Sr., their father and next friend;
CLARENCE E. NELSON, a minor, by Mr. and Mrs. Clarence Nelson, his parents and next friends;
NORMAN NICHOLES AND ROBERT NICHOLES, minors, by Ralph Wise, their guardian and next friend;
BRIDGET PAGE, KIM PAGE AND PATRICK PAGE, minors, by Mrs. Inez Page, their mother and next friend;
ANGELIA PHILLIPS, a minor, by Mr. and Mrs. Lincoln Phillips, her parents and next friends;

CARLTON D. PRICE AND CARLA D. PRICE, minors, by Calvin D. Price, their father and next friend;
CANDI QUARLES AND ROBIN QUARLES, minors, by Mrs. Marylou Quarles, their mother and next friend;
LINDA M. RHEA, CALVIN D. RHEA, SHARON F. RHEA AND GARRY N. RHEA, minors, by Clarence E. Rhea, Sr., their father and next friend;
JULIUS A. SHELL, JR., AND LINDA RENEE SHELL, minors, by Mrs. Ruth G. Shell, their mother and next friend;
CHRISTINA SNELL, a minor, by Mr. and Mrs. John Snell, her parents and next friends;
JOHN EMORY TUCKER, a minor, by Anthony Tucker, his father and next friend;
MARY Van BLAKE, NANCY Van BLAKE AND CLARE Van BLAKE, minors, by Mr. and Mrs. Seymour Van Blake, their parents and next friends;
STEPHEN G. WHETSTONE, a minor, by Freeman Whetstone, his parent and next friend;
GALE WINIFRED WIGGS, DWIGHT LAMONT WIGGS AND A. ROSS BRENT WIGGS, minors, by Mr. and Mrs. Winifred Wiggs, their parents and next friends;
THOMASINA YUILLE, ANTONIA YUILLE, AND EUGENIA YUILLE, minors, by Mrs. Laura L. Yuille, their mother and next friend;
WANDA M. YOUNG AND FLORIDA E. YOUNG, minors, by Mrs. Esther L. Young, their mother and next friend,

Appellants,

VS.

THE BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, NEW JERSEY,

Respondent.

To the Commissioner of Education of the State of New Jersey:

Come now the appellants, Charles B. Booker, a minor, by Charles F. Booker, his father and next friend; John H. Carter, III, and Jane D. Carter, minors, by John H.

Carter, Jr., their father and next friend; Renne E. Cherry, a minor, by Mrs. Mary E. Cherry, her mother and next friend; William Cole, Jr., a minor, by Mr. and Mrs. William Cole, his parents and next friends; Denise Cook and Jacquelyn Cook, minors, by Mrs. Norma E. Cook, their mother and next friend; Isaac Danner, Jr., a minor, by Isaac Danner, Sr., his father and next friend; Cynthia N. Davis and Redolphus Davis, III, minors, by Mrs. Nannie Bell Davis, their mother and next friend; Jaffrey Davis, a minor, by Mrs. Bernice Davis, his mother and next friend; Craig Stanley Evans, Derke Keith Evans and Lynn Roxanne Evans, minors, by Stanley Evans, their father and next friend; Hannah C. Ford, a minor, by Mrs. Karl S. Ford, her mother and next friend; Rodney J. Franklin and Gregory Franklin, minors, by Junius Franklin, their father and next friend; Edward Grimes and Maurice Grimes, minors, by Mrs. Lenora Chambers, their guardian and next friend; Samuel C. Howe, Jr., Marcella D. Howe, Raphael C. Howe and Sherryll A. Howe, minors, by Samuel C. Howe, Sr., their father and next friend; Clarence E. Nelson, a minor, by Mr. and Mrs. Clarence Nelson, his parents and next friends; Norman Nicholes and Robert Nicholes, minors, by Ralph Wise, their guardian and next friend; Bridget Page, Kim Page and Patrick Page, minors, by Mrs. Inez Page, their mother and next friend; Angelia Phillips, a minor, by Mr. and Mrs. Lincoln Phillips, her parents and next friends; Carleton D. Price and Carla D. Price, minors, by Calvin D. Price, their father and next friend; Candi Quarles and Robin Quarles, minors, by Mrs. Marylou Quarles, their mother and next friend; Linda M. Rhea, Calvin D. Rhea, Sharon F. Rhea and Garry N. Rhea, minors, by Clarence E. Rhea, Sr., their father and next friend; Julius A. Shell, Jr., and Linda Renee Shell, minors, by Mrs. Ruth G. Shell, their mother and next friend; Christina Snell, a minor, by Mr. and Mrs. John Snell, her parents and next friends; John

Emory Tucker, a minor, by Anthony Tucker, his father and next friend; Mary Van Blake, Nancy Van Blake and Clare Van Blake, minors, by Mr. and Mrs. Seymour Van Blake, their parents and next friends; Stephen G. Whetstone, a minor, by Freeman Whetstone, his father and next friend; Gale Winifred Wiggs, Dwight Lamont Wiggs and A. Ross Brent Wiggs, minors, by Mr. and Mrs. Winifred Wiggs, their parents and next friends; Thomasina Yuille, Antonia Yuille and Eugenia Yuille, minors, by Mrs. Laura L. Yuille, their mother and next friend; Wanda M. Young and Florida E. Young, minors, by Mrs. Esther L. Young, their mother and next friend, of the City of Plainfield in the County of Union and State of New Jersey, by their attorneys, and say:

1. This is an appeal pursuant to N.J.S.A. 18.3-14 of the Education Law of the State of New Jersey by children attending and enrolled in the public schools in Plainfield, New Jersey, through their parents, guardians and next of kin, protesting the maintenance of racially segregated public schools by the respondent Board of Education, its officers, employees and any other municipal and state officials with the responsibility therein, and the refusal of the said Board and officials to put into operation plans, rules, regulations, practices and procedures which would eliminate the presently existing and entrenched patterns of racial segregation in the public schools, and the denial of equal educational opportunities to appellants and to others similarly situated in the public schools of Plainfield, New Jersey, even though plans were proposed, based upon a study made pursuant to the direction of the Board, which would eliminate segregation and the denial of equal educational opportunities, herein complained of.

2. This appeal is authorized by the provisions of N.J.S.A. 18:3-2(e), 18:3-7.1, 18:3-16(a) and 18:2-4.1; the supervisory powers of the State Board of Education are

described in N.J.S.A. 18:2-1, 18:2-4(c) and (d), and its power to decide appeals of proceedings before the Commissioner of Education is pursuant to N.J.S.A. 18:2-4.1.

3. This appeal arises under the school laws of the State of New Jersey, as more particularly set forth in N.J.S.A. 18:6-17, 18 and 19; 18:6-38 and 47; 18:11-1, Article 1, Paragraph 5, of the Constitution of the State of New Jersey, and under Title 42, United States Code, Section 1981, and the Fourteenth Amendment of the United States Constitution.

4. There are eleven (11) elementary schools and one (1) special elementary school for retarded children maintained by the respondent Board. There is a total enrollment of 5,144 pupils in these schools, of which 1,905 pupils, or 37%, are Negro. The eleven elementary schools are: Washington, Emerson, Stillman, Bryant, Clinton, Jefferson, Barlow, Woodland, Cedarbrook, Evergreen, and Cook. Lincoln is the special school referred to above.

5. Washington has a total enrollment of 589, and of this number 560, or 95.1%, are Negro; Emerson has a total enrollment of 525, and of this number 340, or 64.8%, are Negro; Stillman has a total enrollment of 365, and of this number 217, or 59.5% are Negro; Bryant has a total enrollment of 234 and of this number 134, or 57.3%, are Negro; Clinton has a total enrollment of 356 of which 163, or 45.8%, are Negro; Jefferson has a total enrollment of 278 of which 67, or 24.1%, are Negro; Woodland has a total enrollment of 439 of which 66, or 15%, are Negro; Cedarbrook has a total enrollment of 677 of which 35, or 5.2%, are Negro; Evergreen has a total enrollment of 518 of which 14, or 2.7%, are Negro; Cook has a total enrollment of 495 of which none, or no per cent, are Negro. Lincoln, the special school for retarded children, has a total enrollment of 94 of which 61 are Negro, or 64.9%. Thus, if the

Lincoln School is put to one side, 1,251 Negroes out of a total of 1,844 are in the Washington, Emerson, Stillman and Bryant Schools; 1,662 out of a total of 1,844 are in those four schools, plus the Clinton and Jefferson Schools. Thus, 1,622 Negro children are in six schools and only 182 are in five schools, or, to put it another way, Washington, Emerson, Stillman, Bryant, Clinton and Jefferson contain approximately 90% of the total Negro enrollment in the elementary schools, and Barlow, Woodland, Cedarbrook, Evergreen and Cook have only 10% of the total number of Negro children enrolled in elementary schools in Plainfield.

6. All of the junior high schools and all of the secondary schools are presently adequately integrated, although Negro children because of discrimination and denial of equal educational opportunities practiced at the elementary school level, suffer severe educational handicaps at the junior and senior high school level—handicaps adverse to their future educational development and job or professional opportunities as adults.

7. Protests were made to the respondent School Board concerning segregation and the denial of equal educational opportunities to Negro children in the elementary schools. The School Board, on September 27, 1961, decided that a professional study of its school system should be made. On November 21, 1961, it appointed a lay advisory committee to organize the study, and on March 20, 1962, accepted and approved the committee's recommendation that a group of consultants headed by Dr. Max Wolff study the racial composition of the school population in each of the Plainfield public schools, the effect of "de facto segregated" education on the children involved and "possible changes towards integration in order to overcome 'de facto segregated' school facilities." The study was undertaken and the findings, conclusions and recommendations were submitted to the lay advisory committee of the Plainfield

Board of Education and to the Board itself on June 15, 1962. The recommendations made would, in substance, call for a complete rezoning of the school system so as to eliminate the concentration of Negroes in excess of 50% of the total enrollment in any one school in the system.

8. These recommendations for the elimination of segregation were not accepted by a majority of the lay advisory committee. The respondent Board of Education, on July 17, 1962, also rejected the proposals and recommendations proposed by the consultants referred to above and proposed an optional pupil registration plan, pursuant to which, under certain conditions with the exception of the kindergarten, all children could request permission to attend schools outside their zone.

9. The appellants herein have protested to the Board that the plan proposed by it does not satisfactorily meet the issue of the existence of segregation in the public elementary schools or alter the fact that they and other children similarly situated are being and will continue to be required to attend segregated schools in Plainfield, New Jersey, in denial of their state and federally secured constitutional rights. Indeed, under the plan proposed by the Board, the present segregation and denial of equal educational opportunities will become more and more an entrenched pattern of the school system. The appellants assert that the study made and the findings which resulted therefrom show without question the adverse effect of segregation on these appellants and upon all other Negro children similarly situated. Moreover, it is now clear that the Board is insistent upon maintaining and perpetuating the system of segregation which it knows to exist and which it knows to deny equal educational benefits to appellants and all other children similarly situated and to be in violation of the legal and constitutional rights guaranteed under the Constitution of the United States and of the

State of New Jersey to appellants and all other Negro children similarly affected.

10. Segregated education is unequal education under the Constitution of the United States, and it is unequal whether *de facto* or *de jure*.

11. Appellants, therefore, pray as follows:

(a) That a prompt and early hearing be set to dispose of this appeal. In view of the fact that a study of the school system has been made by responsible educators, employed by the School Board, appellants rely upon the findings, conclusions and recommendations resulting from this study to support their claims. Respondent has studied the proposals and recommendations on which appellants place reliance and have rejected same. There is, therefore, little reason or basis for delay by either party in bringing this matter on for final adjudication. [The report of Dr. Wolff is attached hereto as Exhibit A; the Special High School Study is attached hereto as Exhibit B; the majority report of the lay advisory committee is attached hereto as Exhibit C; the minority report of said committee is attached hereto as Exhibit D; the final decision of respondent School Board is attached hereto as Exhibit E.]

(b) That after such hearing, study, evaluation of the law and data, that the Commissioner order the Board of take immediate steps to eliminate all aspects of segregation in the Plainfield public school system.

Answer to Petition of Appeal

(November 5, 1962)

Respondent, The Board of Education of the City of Plainfield, in the County of Union, a Chapter Six School District of the State of New Jersey, having its office at 504 Madison Avenue, in the City of Plainfield, Union County, New Jersey, in answer to the allegations in the Petition of Appeal of Appellants, filed herein on September 6, 1962, says:

RESPONDENT'S ANSWER

1. Respondent admits that Appellants are enrolled in the Plainfield Public Schools; Respondent denies the allegation that it maintains racially segregated public schools; Respondent denies the allegation that it has refused, or its officers or employees have refused, to eliminate racial segregation; Respondent denies that Appellants, or others similarly situated, suffer unequal educational opportunities in Plainfield Public Schools. Respondent has received the plans set out in Appellants' Exhibits "A", "C", and "D"; it denies that these plans would eliminate the alleged segregation or the alleged denial of equal educational opportunities complained of by Appellants.

2. Respondent admits that N.J.S.A. 18:3-2 (e) empowers an Assistant Commissioner of Education to hear and determine controversies arising under the School Laws and Rules pertaining thereto. Respondent admits that the State Board of Education has certain supervisory powers; it denies that the other statutory references in this allegation bear upon this Appeal, for the reason that this Appeal is to the Commissioner, and not to the State Board of Education. Respondent denies the remaining allegations of paragraph 2.

3. Respondent admits that this Appeal arises under the School Laws of the State of New Jersey, Article 1,

paragraph 5, of the Constitution of the State of New Jersey, and the 14th Amendment of the Constitution of the United States of America. It denies the remaining allegations of paragraph 3.

4. Respondent admits that as of April, 1962, the total enrollment of eleven elementary schools was 5,144, of which 1,905 or 37% were Negro. Except as so modified, Respondent admits the other allegations in paragraph 4. Respondent has set out the more recent enrollment figures for September, 1962, in Respondent's Exhibit Two, filed herewith.

5. Respondent admits that the figures reported in paragraph 5 are correct as of April, 1962, *except* that Jefferson School had a total enrollment of 574, of which 248 were Negro, Barlow School had a total enrollment of 278, of which 67 were Negro; and that the correct summary for April, 1962, was that 1,662 Negro children were then attending Washington, Emerson, Stillman, Bryant, Clinton and Jefferson Schools. Respondent has set out the more recent enrollment figures for September, 1962, in Respondent's Exhibit Two, filed herewith.

6. Respondent admits that the racial composition of the two Plainfield Junior High Schools and of the Plainfield Senior High School has not been questioned. Respondent denies the allegation that racial discrimination is practiced in the elementary schools, and the allegation that equal educational opportunities are denied in the elementary schools. Respondent denies the allegations that Negro Junior and Senior High School students suffer educational handicaps which adversely affect their future educational and employment opportunities as adults.

7. Respondent admits it has received various protests concerning alleged racial segregation and claiming a denial of equal educational opportunities to Negro children in some of the elementary schools of its District. It admits that on November 21, 1961, it appointed a Lay Advisory

Committee to make a study of these protests; it admits that upon the recommendation of this Committee, it employed Dr. Max Wolff to conduct a study and make a report on the racial composition of the Plainfield elementary schools, with particular emphasis on the educational impact of alleged racial imbalance on the children who attend "so-called segregated schools". It admits that the Wolff study was intended to be made with the aid of a group of consultants who were to be a team of specialists in the areas of education, sociology and psychology. It admits that Dr. Max Wolff made a report which was supplemented by reports from the Lay Advisory Committee. It denies that the recommendations of the Wolff and of the Lay Advisory Committee Reports would in substance call for a complete rezoning of the school system in order to eliminate a concentration of Negroes in excess of 50% of the total enrollment of any one school.

8. Respondent admits that the recommendations of the Wolff Report were not accepted by a majority of the Lay Advisory Committee. Respondent denies that it rejected all the proposals of the Wolff Report. Respondent admits that it has put into effect for the 1962 school year, an Optional Pupil Registration Plan which permits elementary school pupils from grades 1 through 6 to transfer to any school in the City, all as set forth in the conditions and terms of such plan disclosed in Exhibit E filed with the Petition of Appeal.

9. Respondent denies the allegation that the Optional Pupil Registration Plan effected in the Plainfield School District, beginning September, 1962, does not satisfactorily meet the alleged issue of segregation in its elementary schools. Respondent again denies the allegation that there are segregated schools in the Plainfield School District. Respondent denies that petitioners and others in the Plainfield School District are being required to attend segre-

gated schools. Respondent denies that children in the Plainfield School District are being denied their State and Federal constitutional rights.

Respondent denies that the Optional Pupil Registration Plan will produce an entrenched pattern of segregation or deny equal educational opportunities to Plainfield pupils.

Respondent denies the allegation that the study made and the alleged findings therefrom show, without question, the adverse effect of alleged segregation on these Appellants, and upon all other Negro children similarly situated.

Respondent denies knowledge of segregation in the Plainfield School District. Respondent denies knowledge that its administration of the Plainfield Public Schools denies equal educational benefits to Plainfield pupils, or that its administration is in violation of rights guaranteed under the New Jersey and United States Constitutions.

Respondent denies the allegation that it maintains a system of segregation.

10. With respect to the allegations in paragraph 10 of the Appeal, Respondent denies that there is any question of "de jure" segregation at issue in this Appeal. Respondent contends that the words "de facto segregation" have no legally established meaning; and it contends that the words "de facto segregation" as used in the Petition of Appeal, do not bear upon the issue of alleged unconstitutional discrimination by reason of race, creed, color, national origin or ancestry.

11. Respondent answers the allegations made in the prayer for relief set out in paragraph 11 of the Petition of Appeal, as follows:

While it admits that the Wolff Reports, Petitioners' Exhibits "A" and "B", have been submitted to it as studies of the school system, it contends that these reports are fragmentary, based on insufficient data and draw con-

clusions that are not supported by the information presented in them.

Respondent admits it has studied the proposals and recommendations set forth in the exhibits filed with the Petition of Appeal. It denies it has rejected these proposals.

Respondent admits that following its study of all the reports submitted to it, Respondent set up an Optional Pupil Registration Plan which is referred to in paragraph 11, as Petitioners' Exhibit "E". It denies that Exhibit "E" represents the "final decision" of the Respondent. It contends that the Optional Pupil Registration Plan is but a "first step" in its continuing study of this problem.

By way of Separate Defenses to the Petition of Appeal, Respondent says:

FIRST SEPARATE DEFENSE

1. Respondent is in control of the school system provided for the children of the City of Plainfield. Pursuant to the New Jersey School Law, Respondent is empowered to make reasonable rules and regulations for the government of such schools.

2. For the proper conduct of its schools, Respondent has set up elementary school attendance areas. The Senior High School accepts students from the entire City, and the two Junior High Schools accept students from approximately equal student population areas; for example, on September 12, 1962, the enrollment of Hubbard Junior High School was 954, and the enrollment of Maxson Junior High School was 940.

3. In setting up elementary school attendance areas, Respondent has not made an enumeration of the racial or

religious composition of pupils in the areas adjacent to present or proposed elementary schools.

4. Respondent has hitherto been advised that the New Jersey Constitution, Article 1, paragraph 5, and the New Jersey School Law R.S. 18:14-2 and R.S. 18:25-1 have prohibited officials of a school district from enumerating pupils on the basis of race, creed, color, national origin or ancestry. As a consequence, the school attendance areas have been fixed without regard to the racial composition of the schools.

5. Respondent is still in doubt as to the applicability of the Constitutional and Statutory anti-discrimination provisions above referred to as respects demands that the Respondent alter its attendance areas so as to produce a relatively lower racial imbalance than is now claimed to be the case. In order to accomplish the objective of Petitioners, Respondent must necessarily make an enumeration of the racial composition of its pupils, notwithstanding the prohibition of the law. Respondent seeks the direction of the Commissioner of Education in the resolution of this question.

6. In setting up attendance areas for Plainfield elementary schools, Respondent has always endeavored to be guided by sound educational principles oriented to the needs of all pupils, including the age groupings of all pupils. To this end, Respondent has set up areas on a neighborhood basis, bearing in mind the utilization of existing classroom facilities, the location of existing school buildings, the land available for new school buildings, and for outdoor physical educational facilities, traffic flow, traffic controls, the advice of municipal traffic experts, the safety conditions of streets between schools and pupil residences, the proximity of pupils to existing buildings, pre-school as well as in-school pupil population density, and other related factors.

Answer to Petition of Appeal

7. Respondent points out to the Commissioner of Education that Respondent, in the exercise of its duties under the School Laws, has no control over local municipal officials empowered to legislate and to administer laws in the fields of residential and non-residential zoning, planning, building standards, traffic flow and traffic control. As a consequence, Respondent is powerless to influence or to alter the development of the residential areas adjacent to its schools. Because of the cost, it is unable to pick up and move its buildings to other areas as the population may move. Respondent's school buildings are well maintained and have considerable more useful life remaining to them.

8. Respondent is aware that the racial composition of its elementary schools, differs. It alleges that the racial imbalance so exhibited, is the product of the racial composition of the families living adjacent to the schools. Respondent alleges that, over the years, the racial composition of the schools has varied as a result of differences in population growth, differences in population movement, and as a result of the construction of large multiple housing units by the Plainfield Housing Authority. Respondent observes that the school population in the Plainfield Public Housing projects is predominantly Negro.

9. Respondent is informed and believes that the increase of Negro families in certain school neighborhoods is in large part the result of the voluntary movement of such families into these areas.

10. Respondent has never set up school attendance areas for the purpose of segregating pupils of any particular race, color, creed, national origin or ancestry; nor has Respondent ever established school areas by reference to the racial composition of any pupil residential area.

11. Respondent disputes the claim of Petitioners that it is obliged by any constitution or law to establish school

attendance areas by reference to an optimum or average racial balance, or by changing a school attendance area as the racial composition of the pupils in that area may fluctuate.

SECOND SEPARATE DEFENSE

1. For the purposes of this Defense, Respondent repeats the statements set forth in the First Separate Defense.

2. Following receipt of the Wolff and Lay Advisory Committee Reports, Respondent and its staff made a study of the proposals therein contained. On July 27, 1962, Respondent issued a statement commenting on its analysis of the Wolff and Lay Advisory Committee Reports. Such statement is attached hereto as Respondent's Exhibit One, filed herewith.

3. Thereafter, on July 31, 1962, and after considering various statements presented at a special meeting of the Board of Education, Respondent adopted an Optional Pupil Registration Plan beginning September, 1962. This Plan is set forth in Petitioners' Exhibit "E". Respondent recognized that the subject of racial imbalance and its possible effect on the educational program deserved further detailed study. It concluded that this Plan was all that could be undertaken in September, 1962, without throwing the entire school system into a state of turmoil and adversely affecting the educational program. It estimated that there were about 500 possible openings for transfer. In announcing the Plan, Respondent expressed its determination to undertake further study and to provide community leadership in the task of bringing special education to pupils who have motivational, family, environmental and other problems which adversely affect their response to education.

4. The Optional Pupil Registration Plan adopted by Respondent enables any pupil to transfer out of his regularly assigned neighborhood school to any other school in the system where space is available. Under this Plan, parents who prefer a school other than the one in their neighborhood may move their children elsewhere.

5. The number of pupils who have transferred under the Plan as of October 30th, 1962, is 66.

6. Respondent contends that if a parent feels that there is any social or educational advantage to be achieved by attending a class with a lower percentage of pupils of a particular race, creed, color, national origin or ancestry, the Optional Pupil Registration Plan, to a reasonable degree, permits Negro and other parents to utilize that advantage.

7. The September 1962 enrollment figures for Plainfield elementary schools are set out in Respondent's Exhibit Two, filed herewith.

8. Respondent contends that the nature of the problem posed by this Appeal is such that it must study all available information with reference to the performance and achievement of Negro pupils in far greater depth than was possible within the limited scope of the Wolff Report.

Respondent realizes that this may involve a departure from its established policy of providing equal educational opportunities for all students, while making provisions for differences among individuals rather than among racial or ethnic groups.

Respondent calls attention to the possible necessity of providing additional services heretofore not included as primarily educational functions, at considerable extra expense, if it decides to broaden its base of responsibility in areas where there is a preponderance of Negro pupils.

Subsequent portions of the *Separate Defenses* will indicate the studies that have been initiated or are under consideration at the present time.

For these reasons, the Optional Pupil Registration Plan is but a first step in progress toward a fair solution. Until further information and informed opinion are available, Respondent has no valid reasons, nor is it obligated to rezone the entire City of Plainfield for the sole purpose of attaining any particular school building percentage of pupil concentration based upon any race, creed, color, national origin or ancestry.

THIRD SEPARATE DEFENSE

1. For the purposes of this Defense, the Respondent repeats all the statements made in the allegations of the First and Second Separate Defenses.

2. In the Section B portion of his report, Dr. Max Wolff makes an analysis of pupil achievement from which he draws various conclusions. He states these conclusions in spite of his own explanation of the serious limitations involved:

> "These do not exhaust the many factors that could be compared. Because of the sharp limitation of time for this Study, the more time-consuming, but equally important questions of comparative curriculum, staff attitudes, guidance techniques and other somewhat subjective factors could not be evaluated." See Exhibit A, p. B-8.

3. Respondent has prepared an analysis of the Section B achievement studies in Exhibit A, and has filed such analysis herewith, as Respondent's Exhibit Three.

4. The Respondent's study of Section B in Exhibit A shows the need for much more study in depth in order to

explore the questions raised by Dr. Max Wolff. Such a study requires that specific classes and individuals be adequately followed through their secondary school experience. The Respondent is preparing to undertake further studies for this purpose.

5. Respondent contends that Dr. Max Wolff's direct comparison of average achievement test scores of the Washington School pupils with average achievement scores of other elementary school pupils represented a superficial statistical treatment of the data that was submitted to him for his study. Accordingly, Respondent contends that there was no valid or reasonable basis for Dr. Max Wolff's conclusions on that subject.

6. Respondent has undertaken a formal statistical study of the reading and arithmetic achievement of the 1961-62 sixth grades in the Plainfield Public Schools, in order to obtain a true picture of the relative effectiveness of instruction in the Washington School, and in the other elementary schools. The report of such study is filed herewith as Respondent's Exhibit Four.

7. The results of Respondent's formal statistical study are summarized as follows:

a. The reading achievement of pupils of equal general ability shows *no* differentiation among the eleven schools. This means that the reading achievement of pupils of equal general ability is the same *regardless of the racial composition of the school attended.*

b. The Negro pupils' reading achievement is lower by five months than the reading achievement of non-Negro pupils of the same general ability, *regardless of the school.* Apparently there are outside factors not connected with the Plainfield Schools which have a depressing effect upon the reading achievement of the Negro pupils.

c. The arithmetic achievement of pupils of equal general ability and of equal reading achievement shows no differentiation between the Negro and the non-Negro pupils, *regardless of the school.*

d. The arithmetic achievement of pupils of equal general ability and of equal reading achievement shows two rational groupings of schools which differ from each other in arithmetic achievement. However, these two rational groupings are not connected with the racial composition of the schools.

8. Petitioners' Exhibit B contains a sub-study of the Wolff Report submitted by Dr. Max Wolff to the Lay Advisory Committee of Respondent in July, 1962, and entitled, "Annex, Special High School Study". This report contains a note of caution in the third paragraph of the first page, which seriously limits the usefulness of the report, as follows:

> "Statistically firm conclusions cannot be drawn from these data because of the small numbers involved. Where percentages are given, the reader is cautioned to observe the small number of cases on which the percentages are based."

Then follows a footnote to this caveat, as follows:

> "No family income information is available for the years, 1954-59. The U. S. Census of 1960 data by Census tracts are not directly applicable to the zones of the two schools studied. However, a rough approximation of school zones and Census tracts indicates that non-white families in the Emerson School zone had a higher income than non-white families in the Washington zone."

This footnote introduces a factor that the Respondent believes is of particular importance in evaluating this por-

tion of the study because it suggests a line of investigation directed toward such elements in the out-of-school environments of students that exert an influence on his motivation, his aspiration levels, and his performance as a student.

9. School drop-out statistics, academic group placement of students, and the number of students who continue their education beyond high school are the results of many complex and variable factors that have been and are being investigated in research studies throughout the nation. They require intensive study in local school systems involving individuals and agencies from the community as well as from the public educational system.

10. Respondent believes that it is the responsibility of the school system to study and to cooperate with other agencies and individuals to reduce the number of drop-outs, to improve the performance of students in terms of their individual potential, and to encourage post high school study for a higher percentage of its students. However, Respondent does not believe that these problems can be attributed solely to attendance in a particular elementary school without taking into consideration the home, the neighborhood, and the many social, economic, and cultural influences that contribute to the results enumerated in this section of the Wolff Report.

FOURTH SEPARATE DEFENSE

1. For the purposes of this Defense, Respondent repeats all of the statements made in the allegations contained in the First, Second and Third Separate Defenses.

2. The proposals set out by Dr. Max Wolff, in Section C of his report (Petitioners' Exhibit "A") purport to demonstrate methods of rezoning Plainfield Schools. Except with respect to Dr. Max Wolff's goal #1: "good racial balance,

etc.", and goal #3: "close Bryant School" (Exhibit A p C-1), the proposals in Section C do not achieve the goals so presented. An analysis of Respondent's reasons for this conclusion are set forth in Respondent's Exhibit Five, filed herewith. The advantages of the proposals are not substantiated by Dr. Max Wolff; and, in some cases, the information submitted is contradictory.

3. The Section C proposals fail to adequately explore alternate plans, even though reference is made to them in Appendix C-3 of Exhibit "A".

4. The changes proposed by Dr. Max Wolff would tend to create turmoil in the administration and programming of the elementary schools, impose unreasonable dangers upon elementary school pupils in their travel to and from schools, and preclude the advantage of keeping a family unit together during the elementary grades.

5. The present elementary school attendance areas have been based upon hitherto well accepted criteria. The changes proposed by Dr. Max Wolff would require purely artificial attendance areas.

6. The disadvantages to all pupils of every race, color, creed, national origin or ancestry inherent in the attendance area proposals of Dr. Max Wolff outweigh the alleged advantages to be gained by a gerrymander for the sole purpose of producing a particular racial balance throughout the school system.

FIFTH SEPARATE DEFENSE

1. For the purposes of this Defense, Respondent repeats the allegations in paragraph 1 of the First Separate Defense.

2. Respondent has adopted an Optional Pupil Registration Plan beginning September, 1962, as but a "first step" in an effort to improve the racial balance of its elementary schools. It refers the Commissioner of Education to the statement made by Dr. Richard F. Clash, at a special meeting of the Plainfield Board of Education held July 31, 1962, prior to adoption of such Plan, Respondent's Exhibit Six, filed herewith.

3. In addition, as a result of the Wolff, and Lay Advisory Committee Reports, Respondent has undertaken to study the questions raised in these reports and to explore ways and means of going beyond the current philosophy of "equal educational opportunity for all" by providing special education for pupils with various problems that adversely affect their response to education.

4. As evidence of the recognition given to the quality of Respondent's educational plans and programs, it submits the following:

a. *Reports of the Junior High School Evaluation Committees of the Department of Education of the State of New Jersey.* These committees visited the Hubbard and Maxson Junior High Schools on March 8th, and 10th, 1960, reporting on curricula, organization, instructional staff and other aspects of these schools in their first year of operation.

The evaluation committee commented on the thorough, coordinated planning that involved the administration and staff of the elementary and secondary schools in the three years prior to the opening of these Junior High Schools.

These visitors commended the schools on the variety of educational experiences provided, with particular reference to the development of basic skills, the opportunity to explore new areas of interest, the grouping of pupils for differentiation of instruction and the encouragement of interest in the fields of art, music, and the practical arts.

The teams noted the thoroughness and effectiveness of the guidance programs in these schools.

In the Hubbard Junior High School, it was noted that the guidance program was the center of the school's educational program by which qualified guidance personnel conducted an extensive program of pupil counseling, and also provided leadership to the entire staff in the development of guidance activities extending into the classroom and other pupil activities, and into the home through scheduled individual parent-teacher conferences.

b. *Elementary School Libraries.* After more than two years of planning, the first step in the development of a complete library program for all elementary schools was taken in September of 1962, with the opening of libraries in two elementary schools. Under this plan, two libraries will be opened each year until all elementary schools are equipped with libraries under the direction of professional teacher-librarians with library clerks in sufficient numbers to permit full-time operation during each school day.

The plan also includes integrated classroom and library instruction geared to increase reading and research skills within the framework of the curriculum.

This program should provide opportunities for the development of reading and study skills that may be especially beneficial to students who might not otherwise have the opportunity to broaden their reading beyond the regular classroom textbooks and supplementary reading materials.

c. *Human Relations in Professional Education.* During the Summer of 1962, Plainfield teachers from its elementary, junior and senior high schools, attended a workshop course, held at Rutgers University, devoted to problems involving human relations, minority group attitudes, and particularly techniques of dealing with students of low aspirational levels.

This workshop stressed demonstration teaching by instructors and in-service teachers, providing an opportunity to learn and put into practice desirable teaching techniques.

Through the cooperation of the Rutgers University staff, these teachers are following up their workshop experience by utilizing these procedures in their own classes, by meeting regularly as a group, and by planning to extend this program to include other staff members through intervisitation and the utilization of consultants and demonstration teachers from the Graduate School of Education of Rutgers University.

5. Respondent is continuing to study and experiment in the areas of curriculum, guidance, and human relations that may lead to increased educational opportunities for all students. Programs in the planning and early operational stages include:

a. A curriculum sub-committee study in the senior high school concerned with lower achievement (Y) groups. This involves study of present programs, study of "drop-outs" in these groups, and visitation of business and industrial concerns where graduates of these groups are employed.

b. A staff study of the Kindergarten through Twelfth Grade testing program with particular reference to the selection and administration of ability and achievement tests and the cultural factors that might influence individual scores, and educational decisions that are based, in part, on the results of these tests.

c. A study of guidance procedures at the secondary school level with emphasis on individual scheduling and subject matter placement in order to develop means of discovering latent ability in students whose performance and achievement are low, so that motivational and aspirational levels may be raised through individual and group

counseling and utilizing members of the community at large to assist in planning and operating this project. One community service club has volunteered to participate in a program of this type.

d. The assignment of an additional reading teacher in a school where there is a heavy concentration of Negro students to provide individual and small group instruction beyond the present limits under which remedial reading programs are operated.

e. The planned employment of a group social worker to develop a program involving increased parental interest and participation in their children's educational progress.

f. Planned experimentation in pre-kindergarten classes for children who reside in areas where cultural experiences may be limited.

g. Planned after-school study classes for intermediate grade children under the direction of qualified, experienced teachers.

WHEREFORE, RESPONDENT PRAYS:

A. That the Petition of Appeal be dismissed.

Dated: November 1, 1962.

THE BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, COUNTY OF UNION,

By DONALD E. CARTER,
President.

VICTOR R. KING,
Attorney for Respondent,
111 East Front Street,
Plainfield, New Jersey.

Stipulation of Issues and Facts Before the Commissioner

(June 13, 1963)

Pursuant to Pre-hearing Conference held at the office of Mr. Eric Groezinger, Assistant Commissioner of Education, on March 13, 1963, the Appellants and Respondent by their respective attorneys have, and do, hereby stipulate regarding the issues and facts to be presented at the hearing in this appeal, as follows:

ONE: ISSUE—

A. The issue to be decided is:

Are there any elementary schools operated by the Plainfield Board of Education, in which Negro pupils predominate, and, if so, should the Plainfield Board of Education reduce the concentration of Negro pupils in such schools?

B. *Note*: There is no issue of intentional or deliberate segregation of elementary school pupils.

TWO: FACTS STIPULATED—

A. The color distribution of pupils in the Plainfield, New Jersey elementary schools, April, 1962, September, 1962 and April, 1963, was as shown on schedule attached hereto and identified as "Stipulation Exhibit 1".

B. On November 21, 1961, Respondent appointed a Lay Advisory Committee of fourteen citizens (later increased to seventeen) to study the color composition of the elementary schools, and claims of alleged denial of equal educational opportunity to Negro children, and report by June 1, 1962. The Committee met independently of the Respondent and its staff. Members of the Board or staff did not attend meetings of the Committee, except when specifically invited. On March 20, 1962, the Respondent Board accepted the recommendation of the Lay Advisory Committee that

Dr. Max Wolff be retained to make a study of the racial composition of the elementary schools. Under date of April 17, 1962, the Respondent Board of Education entered into a written agreement with Dr. Max Wolff, a copy of which is attached hereto and identified as "Stipulation Exhibit 2".

C. On June 15, 1962, Dr. Max Wolff made his report to the Lay Advisory Committee, and in it presented various findings and proposals, Appellants' Exhibit A, which report is incorporated in this Stipulation as "Stipulation Exhibit 3".

D. Thereafter, the members of the Lay Advisory Committee submitted various reports and proposals, Appellants' Exhibits C and D, which reports are incorporated in this Stipulation as "Stipulation Exhibits 4 and 5, and reports of Dunham and Barlow, copies of which are attached hereto and identified as "Stipulation Exhibits 6 and 7".

E. Respondent did not implement any of the proposals made by Dr. Max Wolff, or by the members of the Lay Advisory Committee, to alter the racial composition of the elementary schools. The Respondent prepared various replies and comments on the Wolff and Lay Advisory Committee proposals, Respondent's Exhibits One, Two, Three, Four, Five and Six, which Exhibits are incorporated in this Stipulation as "Stipulation Exhibits 8, 9, 10, 11, 12 and 13", respectively.

F. On July 31, 1962, Respondent adopted an Optional Pupil Registration Plan for the school year beginning September, 1962, Appellants' Exhibit E, which plan, the attached transfer and reservation letters used in the plan, and the attached results of such plan as of May 1, 1963, are made a part hereof and identified as "Stipulation Exhibits 14, 15, 16 and 17", respectively.

G. All Stipulation Exhibits referred to herein are stipulated into evidence by agreement of all parties.

THREE: THE CONTENTIONS OF THE PARTIES

A. The Appellants contend that:

1. Objections have been made to Respondent regarding the existence of elementary schools that are predominantly Negro, or potentially so, that such concentration engenders feelings and attitudes which tend to interfere with successful learning; and that the Respondent should adopt a pupil assignment policy to prevent such concentration.

2. Respondent has caused studies to be made and received reports on available ways to alter the racial homogeneity of pupil population in its elementary schools. Respondent took no action on the ways reported to it.

3. Respondent's failure to alter the color distribution of elementary school pupils which are predominantly Negro, or nearly so, tends to produce a sense of stigma and a feeling of inferiority in the minds of Negro pupils and their parents, results in an undesirable effect upon their attitudes toward education, and interferes with successful learning.

4. Respondent has an affirmative constitutional duty to operate its school system by maintaining a pupil color distribution that will not produce a sense of stigma or feeling of inferiority in the minds of Negro pupils or parents, or adversely affect their attitudes toward education.

5. The Optional Pupil Registration Plan does not meet or relieve the problem of racial imbalance.

B. The contention of the Respondent is that:

1. The elementary school attendance areas in use in Plainfield are set up on sound educational principles; and

there is no affirmative constitutional or legal duty to alter these areas for the sole purpose of maintaining any particular percentage of pupil distribution by color or race.

FOUR: There will be no expert testimony offered by either side.

FIVE: Appellants and Respondent will rely on the stipulated exhibits and offer no witnesses.

SIX: In the event the Commissioner shall determine that there is a racial imbalance in the Plainfield elementary schools or in any of them which should be eliminated, the parties contend as follows:

A. The Appellants urge the Commissioner to approve of Plan 2, described as "Sister School or Paired School Plan" of the Wolff Report, Appellants' Exhibit A (Stipulation Exhibit 3) Section C, page C-5, et seq. or Plan 1, described as "Rezoning Plan" of the Wolff Report, Appellants' Exhibit A (Stipulation Exhibit 3) Section C, page C-2 et seq.

B. The Respondent urges the Commissioner to approve of the plan described as the "Sixth Grade Plan" which it now offers to put into effect by Board action prior to July 1, 1963, to be effective in September 1963 and which plan is attached hereto and described as "Stipulation Exhibit 18."

The above Stipulation is hereby signed by the attorneys for the respective parties, the original to be filed forthwith in the Commissioner's office with Assistant Commissioner Eric Groezinger this 13th day of June, 1963.

For Appellants:

HERBERT H. TATE
Attorney for Appellants

WILLIAM WRIGHT, JR.
Attorney for Appellants

For Respondent:

VICTOR R. KING
Attorney for Respondent

Stipulation Exhibit 1

April 15, 1963

PLAINFIELD PUBLIC SCHOOLS

ELEMENTARY SCHOOL ENROLLMENTS

TABLE III

School	Enrollment April 1, 1963 Total	Negro	White or Other	Per Cent Negro April 1962	Sept. 1962	April 1963	Difference April 1962 April 1963
Washington	586	564	22	95.1	95.8	96.2	+1.1
Emerson	535	386	149	64.8	69.3	72.1	+7.3
Stillman	361	244	117	59.5	66.0	67.6	+8.1
Bryant	200	131	69	57.3	60.6	65.5	+8.2
Clinton	457	269	188	45.8	53.3	58.9	+13.1
Jefferson	574	258	316	43.2	45.9	44.9	+1.7
Barlow	328	101	227	24.1	31.1	30.8	+6.7
Woodland	463	87	376	15.0	15.5	18.8	+3.8
Evergreen	634	53	581	2.7	7.7	8.4	+5.7
Cedarbrook	645	25	620	5.2	3.6	3.8	—1.4
Cook	523	3	520	0	0.5	0.6	+.6
Lincoln	100	63	37	64.9	60.2	63.0	—1.9
Total Elementary	5406	2184	3222	37.0	39.0	40.4	+3.4

Stipulation Exhibit 2

BY THIS AGREEMENT, made the 17th day of April, 1962,

Between

THE BOARD OF EDUCATION OF THE CITY OF PLAINFIELD IN THE COUNTY OF UNION, a school district of the State of New Jersey organized under Chapter Six of the New Jersey School Law, having its office at 504 Madison Avenue, Plainfield, New Jersey, hereinafter sometimes called the "Board", and

DR. MAX WOLFF, of 322 West 45th Street, New York 36, New York,

WITNESSETH THAT:

In consideration of the promises herein made, it is agreed that:

1. Dr. Max Wolff, working together with a team of specialists in the areas of education, sociology, psychology and zoning, will conduct a study of the racial compositions of the Plainfield elementary schools, with particular emphasis on the educational impact on the children who attend so-called "segregated" schools, and will submit findings, conclusions and suggestions reached by Dr. Max Wolff and by his team of consultants, and furnish 100 copies of his report to the Lay Advisory Committee (appointed by the Board, November 21, 1961) by June 15, 1962.

2. The Board, upon presentation of warrant required by law, will pay Dr. Max Wolff for such services, a total sum of $5,450.00, to include all fees or expenses and cost of materials paid to or for the account of the members of Dr. Max Wolff's team of consultants, except the cost of

such data as will be submitted by the Board staff pursuant to Dr. Max Wolff's letter of March 22, 1962. Such sum of $5,450.00 shall be paid as follows: $3,000.00 on April 30, 1962, and the balance of $2,450.00 when, and provided, the work and services required to be performed shall be completed.

3. In the performance of the services required by this Agreement, Dr. Max Wolff further agrees to perform or cause to be performed, the following:

a. By April 10, detailed tables and maps explaining the racial constituency of the public school system in Plainfield will be prepared.

b. These tables and maps, and a detailed plan for the study procedure will be submitted to the consultants for their evaluation and for suggestions of additions, omissions or other changes.

c. By May 10th, the factual data assembled mainly by, or with, the help of the school administration, will be in order and organized so that such factual data can be presented to each of the consultants for his evaluation, etc.

d. Immediately afterwards, the consultants, as a group, will meet with Dr. Max Wolff for one or two days, as it might prove necessary, to discuss analysis of the factual data and such proposals to the Board of Education, as the findings of the study may suggest.

e. The report on the study will include the opinion of each of the consultants, if their considerations should not lead to unanimously accepted findings.

4. In setting up the above study, and in carrying out the steps above provided for, Dr. Max Wolff will, from time to time, consult with the Chairman of the Board's Lay Advisory Committee appointed November 21, 1961, so as to

keep the Committee Chairman apprised of the progress of the work.

In Witness whereof, this instrument is duly executed by the individual party and the Officers of the corporate party, in duplicate, the day first stated.

The Board of Education of the City of Plainfield in the County of Union
By Donald E. Carter
Donald Carter, President
Max Wolff, L. S.
Dr. Max Wolff

Attest:
D. B. Cole
D. B. Cole, Secretary

In the presence of
.....

Stipulation Exhibit 6

955 Charlotte Road
Plainfield, New Jersey
June 23, 1962

Board of Education
Plainfield, New Jersey

Gentlemen:

You already know that I voted against the Lay Advisory Committee's Majority Report, since I could not support all its recommendations. The Minority Report had to be written without sufficient time to get in touch with all the dissenting members of the committee, consequently it does not include my basic reason for disagreement. Under these circumstances I should like to present my own point of view.

Stipulation Exhibit 6

My lack of support stems from my belief that two of the recommendations would tend to perpetuate the uncertainties which now exist in Plainfield. I refer specifically to proposals 1 and 2: "We recommend to the Board of Education that a zone change be effected in the area of Washington School" and "That a similar examination be made of other areas that have become predominantly Negro student body and that the Board of Education attempt in like manner by rezoning to effect similar changes." It seems to me that this step-by-step approach is apt to create special situations within the city which can be expected to produce more, not less, instability and tension. The accomplishment of integration is a challenge for all of Plainfield, not limited sections of it. I believe that an over-all plan, based on the recommendations of the Wolff Report, should be adopted.

Personally, I lean toward Plan I since it can be so set up that children in only one section of town—the northeast —would be inconveniently far from school. I can see, however, that the Sister-School Plan might produce more stability in residential patterns. I would, therefore, support either plan and include such adaptations as the Board of Education deems necessary, so long as the community-wide concept is maintained.

I agree with the Majority opinion that integration alone will not guarantee more stimulating and effective education for the children in our schools. Any plan for the future should surely include the effort to focus all possible community forces upon the problem of increasing each child's own desire for education and his parents' interest in it. I hope one specific can be included immediately within this broad program of lifting the sights of our school children: that is a full-thrust effort to improve reading ability where it is presently low. If a plan for the whole city could be adopted—perhaps to be activated a year from now—and great emphasis given to raising reading ability in schools

which have a poor rating, children going into any new set-up would be ready to benefit from the change. Without this kind of deliberate and conscious preparation I would fear that those with poor reading ability would go into a new plan under the same kind of handicap which is showing up in the Junior high schools.

Very sincerely yours,

DOROTHY COE DUNHAM
(Mrs. George S. Dunham)

Stipulation Exhibit 7

1350 Martine Avenue
Plainfield, New Jersey
June 21, 1962

Mr. Rubin Lefkowitz, Chairman
The Lay Advisory Committee to the
Board of Education of the City
of Plainfield
Plainfield, New Jersey

Dear Rubin:

As one of those members of the Committee who did not join with the majority in support of the recommendation to the Board of Education, I should like to take this opportunity of expressing my dissenting opinion.

You may remember that I was one who believed that it was not necessary for the Committee to employ the services of outside specialists to investigate segregation conditions in the elementary schools. I believed that the facts spoke for themselves and that little, if anything, would be gained through the expenditure of a sizeable sum of money on such an investigation. The Lay Advisory Com-

mittee's action at its final meeting on June 20 in failing to agree on the acceptance of Dr. Wolff's report and in failing to adopt the proposals in that report seem to me to bear out, at least in part, the very criticisms that I raised earlier.

The Committee agreed in its first deliberation, and I concurred, that a racial imbalance exists in the Washington School. I prefer the words, "racial imbalance" to "de facto segregation" since the latter seems to imply a directed action to separate one race from another. The Committee was in early agreement as was, I believe, the NAACP that there had been no conscious, premeditated, or planned effort on the part of the Board of Education to force segregation on the Washington or any other school. The racial imbalance merely occurred over the years as the result of socio-economic conditions in that particular school zone.

In Section B of his report, Dr. Wolff and his colleagues state that while, "school authorities have made deliberate efforts to achieve equity in the treatment of all schools" conditions in the Washington School adversely affect the quality of education there and "Washington's pupil achievement ranks lowest in the City." While I do not disagree with Dr. Wolff's facts, I am not completely convinced that pupils' failure to achieve is largely attributable to racial imbalance or can be largely corrected by integration. It seems to me that factors such as social and economic conditions, the home environment, the intelligence and motivation of parents and associates have much greater bearing on pupil achievement. These factors cannot be altered by integrating a school. There are far deeper problems in the community which must be met and solved before we can hope to develop the highest educational capabilities of our pupils.

In view of this, I cannot in good conscience subscribe to either of the proposals of the Wolff report—a re-zoning of all elementary schools or a paired-school plan. I am of

the opinion that either proposal would be more disruptive than beneficial. Both proposals constitute artificial means of changing a situation which has grown naturally. In effect, they would discriminate against some people in an attempt to end what is purported to be discrimination against others. If either of these proposals were pursued, I could envision an increase in racial tensions in the city, bitterness over reductions in property values, and anguish caused by disruptions of school friendships and associations. I do not think we can ask the Board of Education to accept the responsibility for such drastic changes with slight prospect that these changes would correct the problem and with ominous prospect that they would depreciate the city as a whole.

Likewise I could not join with the majority of the Lay Advisory Committee in its recommendation to the Board of Education adopted as a compromise after several hours of frustrating discussion. This recommendation is based in part on an arbitrary re-zoning affecting one or more school districts to which, as I have said, I cannot subscribe. The remainder of the Committee's recommendation, however, I endorse and commend. It contains the elements of sound thinking and planning on the whole socio-economic problem in the community of which the school integration demand is only a reflection.

In conclusion, I should like to affirm that the Board of Education has done an excellent job of running the schools of Plainfield and is continuing to do so. For this reason, I cannot get too exercised over the charges of the NAACP and their demands that Plainfield Schools be more completely integrated. We already have well-integrated high schools, junior high schools and some elementary schools. The Board of Education is well aware of the problems and is taking constructive steps to meet these problems in due course. In view of this, I do not believe that precipitous

or drastic action would serve any constructive purpose at this time.

Sincerely,

CARLTON M. BARLOW

CMB;mbi

Stipulation Exhibit 15

PLAINFIELD PUBLIC SCHOOLS
504 Madison Avenue
Plainfield, New Jersey

VICTOR J. PODESTA
Superintendent

September 10, 1962

Dear

Your application for Optional Pupil Registration for ..... has been approved.

Your child is to report to the ..... School office at 8:15 a. m. tomorrow, September 11th for assignment to class.

This transfer is being granted under the provisions of the Optional Pupil Registration Plan as adopted by the Board of Education.

Very truly yours,

Victor J. Podesta
VICTOR J. PODESTA
Superintendent of Schools

VJP:K

Stipulation Exhibit 16

PLAINFIELD PUBLIC SCHOOLS
504 Madison Avenue
Plainfield, New Jersey

VICTOR J. PODESTA
Superintendent

September 10, 1962

Dear

Your application for transfer of ..... to an elementary school outside your zone of residence has been received and processed.

At this time there are no openings in the appropriate grade of the school of your choice.

We are retaining your application in order that a transfer may be made if a vacancy occurs within a reasonable period of time.

If you should like to revise your application in terms of your original choice, there are, at the present time, vacancies in ..... grade of ..... schools.

Very truly yours,

Victor J. Podesta
VICTOR J. PODESTA
Superintendent of Schools

Stipulation Exhibit 17

Showing results of Optional Pupil Registration Plan as of May 1, 1963, in the Plainfield, New Jersey elementary schools, including copies of form letters used in acting on transfer requests.

Elementary school transfer requests under the Optional Pupil Registration Plan have been made for one hundred and eight (108) pupils as of May 1, 1963.

Sixty-nine (69) transfers have been made to the school and grade of the applicants' choice.

No openings existed in the grade and school in twenty-one (21) of the cases. Each parent was notified by letter of these. The letter also indicated all of the schools that did have openings in the appropriate grade. (See attached forms.)

Nineteen (19) requests were withdrawn by parents for various reasons.

Enrollment in Kindergarten and the special education school (Lincoln) resulted in seven (7) requests that did not comply with the Optional Pupil Registration Plan.

RESUME:

School	Pupils Received			Pupils Transferred		
	Negro	Other	Total	Negro	Other	Total
Barlow	2	4	6	0	0	0
Bryant	1	0	1	1	14	15
Cedarbrook	2	13	15	0	1	1
Clinton	3	1	4	0	0	0
Cook	1	2	3	0	0	0
Emerson	0	0	0	3	5	8
Evergreen	0	4	4	2	12	14
Jefferson	1	2	3	2	1	3
Stillman	20	2	22	2	3	5
Washington	1	0	1	21	2	23
Woodland	0	10	10	0	0	0
TOTAL	31	38	69	31	38	69

Stipulation Exhibit 18

VICTOR R. KING
Counsellor at Law
National Bank Building
111 East Front Street
Plainfield, New Jersey

PLainfield 6-7804

June 13, 1963

Eric Groezinger, Assistant Commissioner, State Board of Education.

(By Hand)
Re: *Booker vs. Plainfield Board of Education*

Dear Sir:

Herewith the "Sixth Grade" plan which is proposed on behalf of the Plainfield School District in response to your request:

All sixth grades are to be placed in the Washington School.

All K-5 grades in Washington School are to be transferred to other schools as determined by the administrative staff. Transfers will be based on availability and utilization of classrooms.

Washington School pupils will *not* be transferred to Emerson, Bryant, Clinton or Stillman Schools where the Negro enrollments are over fifty per cent. The attached tables show the consequences of such a plan as applied to September, 1963.

Bus transportation will be provided for all students who are transferred out of their original school zone, irrespective of distance.

Stipulation Exhibit 18

At present, there are no cafeterias in elementary schools. School lunch facilities will be provided.

Respectfully yours,

VIC R. KING
VICTOR R. KING
Attorney for the Plainfield Board of Education

VRK/ns
cc: HERBERT TATE, Esq.
WILLIAM WRIGHT, JR., Esq.
ROBERT CARTER, Esq.
BARBARA MORRIS, Esq.

April 15, 1963

PLAINFIELD PUBLIC SCHOOLS

ELEMENTARY SCHOOL ENROLLMENTS

TABLE III

School	Enrollment April 1, 1963			Per Cent Negro			Difference
	Total	Negro	White or Other	April 1962	Sept. 1962	April 1963	April 1962 April 1963
Washington	586	564	22	95.1	95.8	96.2	+1.1
Emerson	535	386	149	64.8	69.3	72.1	+7.3
Stillman	361	244	117	59.5	66.0	67.6	+8.1
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Cook	523	3	520	0	0.5	0.6	+.6
Lincoln	100	63	37	64.9	60.2	63.0	—1.9
Total Elementary	5406	2184	3222	37.0	39.0	40.4	+3.4

Stipulation Exhibit 18

June 11, 1963

SIXTH GRADE STUDENTS TRANSFERRED TO WASHINGTON SCHOOL

TABLE I.

School	Number of Pupils
Barlow	29
Bryant	23
Cedarbrook	100
Clinton	50
Cook	74
Emerson	72
Evergreen	79
Jefferson	59
Stillman	39
Washington	82
Woodland	51
Total	658
Total Excluding Washington	576

Resulting racial composition of Washington School—35.2% Negro.

Stipulation Exhibit 18

June 11, 1963

STUDENTS TRANSFERRED FROM WASHINGTON SCHOOL TO OTHER ELEMENTARY SCHOOLS—GRADES K-5

TABLE II.

	Kdg.	1st	2nd	3rd	4th	5th	6th	Total	Percentage Negro
Barlow	15	3	9	2	18	20	—	67	44.3
Bryant								—	71.3
Cedarbrook	20	41	28	26	4	2	—	121	20.0
Clinton								—	64.9
Cook	20	28	15	23	11	25	—	122	21.6
Emerson								—	75.8
Evergreen	50	32	—	20	14	3	—	119	25.7
Jefferson	—	5	5	17	3	15	—	45	52.4
Stillman								—	69.2
Washington								—	
Woodland	25	17	24	7	21	19	—	113	35.7
Total	130	126	81	95	71	84		587	

Decision of the State Board of Education, February 5, 1964

This is an appeal from a decision of the Commissioner of Education rendered on June 26, 1963. It is brought on behalf of the appellants in the name of 54 elementary school children in the schools of the City of Plainfield, and involves the question of alleged racial "imbalance" in said schools. This Board granted leave to the Plainfield Council for Educational Progress to intervene as Amicus Curiae, to file a brief and participate in oral argument. Briefs were filed and oral argument was had before this Board on November 15, 1963.

In his decision, the Commissioner made the following findings:

1. That the enrollment in the Washington School in the City of Plainfield is comprised almost exclusively of pupils of the Negro race;

2. That such an extreme concentration of Negro pupils in a school, enforced by compulsory assignment, engenders feelings and attitudes which tend to interfere with successful learning;

3. That reasonable and practicable means consistent with sound educational and administrative practice do exist to eliminate the extreme concentration of Negro pupils in the Washington School;

4. That, where means exist to prevent it, the extreme racial concentration in the Washington School constitutes a deprivation of educational opportunity under New Jersey law for the pupils compelled to attend it; and

5. That either Plan 1 or Plan 2 of the Wolff report urged by petitioners, or the Sixth Grade plan advanced by

respondent, will effectively reduce the racial homogeneity of the Washington School enrollment; that all three plans appear to be educationally sound, reasonable and practicable; and that the Commissioner will approve whichever one of the three plans the Board of Education decides to put into operation.

The Commissioner directed the respondent Board:

1. To decide which of the three plans submitted is best suited to the needs of the Plainfield School system;

2. To take such steps as are necessary to insure the implementation of the chosen plan for the 1963-64 school year; and

3. To notify the Commissioner of Education as soon as is reasonably possible of its choice of plans and the action to be taken to put it into effect.

It will be seen that the decision below ordered the respondent Board to decide which of the 3 plans submitted was best suited to the needs of the School System. Subsequent to the decision, and on June 27, 1963, the respondent Board adopted the so-called "Sixth Grade Plan" to become effective in September, 1963. In essence, this Plan provided for the transfer of students from the Washington School (which had had a percentage of 96.2 of Negro students) to other elementary schools in Plainfield, except for Emerson, Bryant, Clinton and Stillman Schools, and all "sixth grade students" in all of the elementary schools were to be transferred to Washington School. The following table shows the percentage of Negro pupils in each school (a) as of April 1963 before the adoption of the "Sixth Grade Plan" and (b) after the adoption of said Plan:

Decision of the State Board of Education, February 5, 1964

School	*Percentage of Negro, April 1963*	*Percentage of Negro, October 1963 (After Adoption of "Sixth Grade Plan")*
Washington	96.2%	36.6%
Emerson	72.1%	76.4%
Stillman	67.6%	65.2%
Bryant	65.9%	67.1%
Clinton	58.9%	66.1%
Jefferson	44.9%	52.1%
Barlow	30.8%	40.8%
Woodland	18.8%	39.8%
Evergreen	8.8%	26.5%
Cedarbrook	3.8%	17.7%
Cook	0.8%	23.4%
Lincoln	63.0%	63.3%

It will thus be seen that the extreme concentration of Negro pupils in the Washington School was greatly reduced and the 5 highest percentages of Negroes were found in the following schools: Emerson, 76.4%, Bryant, 67.1%, Clinton, 66.1%, Stillman, 65.2% and Jefferson, 52.1%.

Since the change in percentages occurred after the decision of the Commissioner, but before the decision of this Board, the parties have stipulated that this Board will decide the case on the facts as they existed after the adoption of the "Sixth Grade Plan".

Appellants complain that the resulting percentages after the adoption of the "Sixth Grade Plan" did not eliminate what is variously called "racial imbalance" and "segregation", and the complaint is that the Commissioner failed to order the reduction of "racially imbalanced schools other than the Washington School". It is further the contention of the appellants that either the so-called "sister-school plan" or, in the alternative, the "re-zoning plan" suggested

by respondent's consultant, Dr. Wolff, should have been adopted rather than the "sixth grade plan". The claim as made by Amicus Curiae is that the local board of education had a legal duty to eliminate "segregation" and achieve "racial balance" in the schools.

The Commissioner in his decision made the observation that there is no claim here that there existed any intentional or deliberate segregation of elementary school pupils. Indeed the parties so stipulated. He noted the awareness of the local board as to the problem existing in the school system, the various and conscientious studies made by the board in an effort to resolve the problem. He held, in essence, that, while the school district is not, by reason of the fact that the concentration of Negro pupils is unintentional, relieved of its responsibility "to take whatever reasonable and practicable steps are available to it to eliminate, or at least mitigate, conditions which have an adverse effect upon its pupils", it does have the responsibility and prerogative to determine which proposals are best suited to the needs of the school system provided the proposals are "reasonable, practicable and consistent with sound educational practice." After giving careful consideration to each of the 3 plans under consideration by the local board, the Commissioner held that each of them was "reasonable, practical and consistent with sound educational practice" while recognizing that each of them has certain advantages, but that the favorable aspects of each does not so far outweigh the unfavorable in any one so as to make one alone the plan of choice. Having thus passed upon the reasonableness of the 3 proposals, the Commissioner left it to the local board to decide which was best suited to the needs of the Plainfield Public School System.

The Board having adopted the "Sixth Grade Plan" with the results above set forth, this Board is now called upon to weigh the attack upon the "Sixth Grade Plan"

as argued by the appellants and by the Amicus Curiae. It is argued that the Commissioner departed from the principles established by him in his previous decision in the case of *Fisher, et al.* v. *The Board of Education of the City of Orange,* decided May 15, 1963. It is said by appellants that while the Commissioner recognized the existence of "completely or almost exclusively" Negro schools, he failed "to order the reduction of racially imbalanced schools other than the Washington School and has sanctioned the adoption of the Sixth Grade Plan which does not effectuate a solution to the problem." The Commissioner did not hold in *Fisher, et al.* v. *The Board of Education of the City of Orange* that any and all imbalance (if by "imbalance" is meant any percentage of Negro pupils in excess of 50%) constitutes the deprivation of equal educational opportunity which he condemned in *Fisher* and other decisions. In *Fisher* he held invidious an enrollment which was "completely or almost exclusively" Negro and in that case the effect was that the percentage of Negro children in the schools reached 99%. The same criticism was properly leveled against the concentration of Negro pupils in the Washington School prior to the Commissioner's decision, namely, 96.2%. This the Commissioner struck down by his decision here appealed from. To extend the same criticism to the result obtained by the adoption of the "Sixth Grade Plan" here, *i.e.,* that the concentration of Negro pupils in the Emerson School (76.4%), Bryant (67.1%), Clinton (66.1%), Stillman (65.2%) or Jefferson (52.1%) simply is not tenable. Such percentages did not result in a school "completely or almost exclusively Negro". The Commissioner, with his experience in the field of education, has held that such percentages do not in fact result in deprivation of equal educational opportunities. This is the crucial question—not mere mathematical "imbalance". We respect that judgment and

concur in it. We further hold that there is no fine line which can be drawn in terms of numbers, and that each case must be judged upon its own facts.

Further, while the brief and argument of Amicus Curiae frequently interchanges the phrases "racial imbalance" and "segregation", we hold that racial imbalance (i.e., more than 50% of one race over the other) is not to be equated to invidious segregation as condemned by the Commissioner below and by this Board in *Volpe* v. *The Board of Education of the City of Englewood* (opinion filed September 25, 1963). The argument of the Amicus Curiae is that the "Sixth Grade Plan" results in "segregation". This begs the question—what *is* segregation, in the invidious sense? If a concentration of Negro children of 99% is such, is 90%, 85% or 76% also to be condemned? We repeat that we do not wish to, nor do we feel that we can, draw such a line. As recognized in the case of *Brown* v. *Topeka Board,* 347 U. S. 483, 74 Sup. Ct. 686 (1954), 349 U. S. 294, 75 Sup. Ct. 753 (1955):

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."
>
> * * *
>
> "To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local

laws and regulations which may be necessary in solving the foregoing problems."

In this instance, the local board conducted conscientious studies to solve the very difficult problems confronting it, and has attempted to implement the constitutional principles which are a guiding light, even though this is not an instance of intentional segregation as existing in *Brown*, and even though it has not been authoritatively decided that *de facto* segregation is "unconstitutional". See *Volpe* v. *The Board of Education of the City of Englewood, supra.* We respect the local board's awareness of its own local school problems. To the local board's judgment there is added the expertise of the Commissioner of Education, who does not find that the percentages of Negro pupils which results from the "Sixth Grade Plan" amounts to a deprivation of "equal educational opportunities." We find that there is no showing here that the "imbalance" resulting from the adoption of the "Sixth Grade Plan" does deprive the Negro pupils of equal educational opportunities, the standard by which we are guided. We therefore affirm the Commissioner's decision and also the adoption of the "Sixth Grade Plan" by the local board of education. At the same time we note that the local board represents that it will constantly study the effects of the "Sixth Grade Plan" and, if experience determines that it is detrimental to the educational opportunities of the pupils it will adopt such remedial measures as may be required.

February 5, 1964.

Decision of the Commissioner of Education, June 26, 1963

This petition of appeal is brought to the Commissioner of Education in the name of 54 elementary school children by their parents. They allege that the respondent Board of Education is maintaining a racially segregated public school system in the City of Plainfield, thus denying equal educational opportunity to pupils of the Negro race. They charge that the Board of Education has failed to take effective action to correct the situation, despite the fact that a study caused to be made by the Board proposed several plans to eliminate the complained of segregation. They appeal to the Commissioner to order the Board to take immediate steps to eliminate all aspects of segregation in the Plainfield public school system. Respondent, in its answer, denies that it is maintaining a school system in which there is racial segregation or discrimination and asserts that it has taken steps and is continuing to study ways and means to reduce any undesirable racial imbalance which may have developed in its schools.

This matter is submitted to the Commissioner for his determination, following a series of conferences of counsel, by a Stipulation of Issues and Facts, which is accompanied by some 18 Exhibits.

The appeal herein is directed to the elementary schools and does not include the single high school or the two junior high schools whose racial integration is not questioned. The enrollment of the 12 elementary schools in the City of Plainfield and their racial ratios in April, 1963, was as follows:

ENROLLMENT APRIL 1, 1963

School	*Total*	*Negro*	*White or Other*	*Percent Negro April, 1963*
Washington	586	564	22	96.2
Emerson	535	386	149	72.1
Stillman	361	244	117	67.6
Bryant	200	131	69	65.5
Clinton	457	269	188	58.9
Jefferson	574	258	316	44.9
Barlow	328	101	227	30.8
Woodland	463	87	376	18.8
Evergreen	634	53	581	8.4
Cedarbrook	645	25	620	3.8
Cook	523	3	520	0.6
Lincoln	100	63	37	63.0
Total Elementary	5406	2184	3222	40.4

Prior to petitioners' filing of this appeal, respondent appointed a Lay Advisory Committee in November, 1961 to study the racial composition of the elementary schools and concomitant problems. At the request of the Committee, respondent provided funds for the employment of a consultant and assistants to make the study for the Committee, which functioned independently of respondent and the school staff.

The report of the consultant, containing findings and various proposals, hereinafter referred to as the Wolff report, was presented to the Lay Advisory Committee in June, 1962. The Lay Advisory Committee approved, in principle, the procedures and findings of fact of the consultant team but could reach no unanimity or even majority opinion with respect to the proposals suggested for the elimination of racial concentrations in various elementary

schools. The Committee then made various proposals of its own, including a majority and a minority report, to the Board of Education.

Respondent did not implement the proposals made in the Wolff report nor those advanced by the Lay Advisory Committee to alter the racial composition of the elementary schools. That it gave consideration to them, however, is evident from the series of replies and comments it made to the various recommendations. Instead, in July, 1962, it announced the adoption of an Optional Registration Plan to become effective with the opening of the new school year in September. Under this plan, children above kindergarten grade, through their parents, could request and would be granted transfer to a school outside their zone of residence as long a acceptable class size in the selected school was not exceeded. Petitioners objected to the plan and on September 4, before it became operative, filed the petition of appeal herein.

Petitioners contend that in the Plainfield school system there are schools which have a preponderantly Negro enrollment; that attendance at such schools has adverse effects upon pupils and their learning; that despite objections, studies and reports which have disclosed that the problem can be eliminated or at least reduced, respondent has taken no action; that the Optional Pupil Registration Plan does not meet or relieve the problem; and that respondent has an affirmative constitutional duty to institute pupil assignment procedures which will not result in a concentration of Negro pupils to the disadvantage of their educational opportunities.

Respondent contends that its elementary school attendance areas are set up on sound educational principles and that there is no affirmative constitutional or legal duty to alter these areas for the sole purpose of maintaining any particular percentage of pupil distribution by color or race.

Decision of the Commissioner of Education, June 26, 1963

The issue to be decided is stated in the Stipulation as follows: Are there any elementary schools operated by the Plainfield Board of Education in which Negro pupils predominate, and if so, should the Plainfield Board of Education reduce the concentration of Negro pupils in such schools? There is no issue raised of intentional or deliberate segregation by race, it being agreed that whatever concentrations of Negro pupils exist result from socio-economic factors and not by purposeful action of the Board of Education.

New Jersey law relevant to this issue is found in the New Jersey Constitution, Article I, section 5.

> "No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin."

and in R.S. 18: 11-1;

> "Each school district shall provide suitable school facilities and accommodations for all children who reside in the district and desire to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. * * * "

The Commisioner notes that both parties agree that there is no issue of deliberate segregation herein. It is apparent that the cause of whatever concentration of Negro pupils in particular schools there may be, is to be found in patterns of housing resulting from a constellation of socio-

economic factors. As the Commissioner observed in a similar case, *Fisher, et al.* v. *Board of Education of the City of Orange,* decided May 15, 1963:

> "It is clear that the ultimate solution lies in the free choice of residence and in the elimination of segregated housing which lie beyond the control of the board of education or the Commissioner."

But even though the underlying cause and the final answer do not lie with the Board of Education, the school district is in no way thereby relieved of its responsibility to take whatever reasonable and practicable steps are available to it to eliminate, or at least mitigate, conditions which have an adverse effect upon its pupils. As the Commissioner said in *Fisher, supra*:

> "* * * the Commissioner is of the opinion that in the minds of Negro pupils and parents a stigma is attached to attending a school whose enrollment is completely or almost exclusively Negro, and that this sense of stigma and resulting feeling of inferiority have an undesirable effect upon attitudes related to successful learning. Reasoning from this premise and recognizing the right of every child to equal educational opportunity, the Commissioner is convinced that in developing its pupil assignment policies and in planning for new school buildings, a board of education must take into account the continued existence or potential creation of a school populated entirely, or nearly so, by Negro pupils."

The enrollment table indicates that the racial ratio varies from school to school but that in only one, the Washington School, is the enrollment almost entirely Negro.

The Commissioner notes also that a number of plans designed to improve the racial balance in the Plainfield ele-

mentary schools have been put forward. On the one hand, petitioners, in the Stipulation, urge the approval of either Plan 2 or Plan 1 of the Wolff report. Plan 2, titled the "Sister-School or Paired School Plan," would set up three pairs of schools, combining the attendance areas of each pair of adjacent schools, with all the pupils in grades 1-3 attending one school and those in grades 4-6 the other. Plan 1, referred to as "Rezoning Plan," would realign the attendance area boundary for each school. On the other hand, respondent, in the Stipulation, urges the approval of a third plan, described as the "Sixth Grade Plan." Under this proposal, the Washington School would house the sixth grade pupils from the entire district, and children now enrolled there for grades K-5 would be distributed among the other elementary schools except that none would be assigned to a school in which already more than half of the pupils are Negro.

The Commissioner has given careful consideration to each of these plans. He notes that although there are variations in the effect which each will have on the racial composition of particular schools, there will be no "all or nearly all Negro" school under any of the three proposals. Each plan also has certain advantages and disadvantages but the favorable aspects do not so far outweigh the unfavorable in any one so as to make it the plan of choice. Finally, the Commissioner is of the opinion that each plan is reasonable, practicable, and consistent with sound educational practice.

The Commissioner believes that it is the responsibility and the prerogative of the Board of Education to determine which of the proposals is best suited to the needs of the school system which it is called upon to operate. He has confidence in the ability of the Plainfield Board of Education, as advised by its administrative staff, to make the best choice of the proposals in this case. That this confidence is well-founded is evidenced by the manner in which the Board of Education, its administrators and school staff

have faced this problem and have attempted to deal with it since it came to the fore more than a year ago.

The Commissioner finds and determines

1. that the enrollment in the Washington School in the City of Plainfield is comprised almost exclusively of pupils of the Negro race;

2. that such an extreme concentration of Negro pupils in a school, enforced by compulsory assignment, engenders feelings and attitudes which tend to interfere with successful learning;

3. that reasonable and practicable means consistent with sound educational and administrative practice do exist to eliminate the extreme concentration of Negro pupils in the Washington School;

4. that, where means exist to prevent it, the extreme racial concentration in the Washington School constitutes a deprivation of educational opportunity under New Jersey law for the pupils compelled to attend it; and

5. that either Plan 1 or Plan 2 of the Wolff report urged by petitioners, or the Sixth Grade plan advanced by respondent, will effectively reduce the racial homogeneity of the Washington School enrollment; that all three plans appear to be educationally sound, reasonable and practicable; and that the Commissioner will approve whichever one of the three plans the Board of Education decides to put into operation.

The Commissioner notes that the respondent Board of Education, in its Stipulation, offers to put a plan into effect by Board action prior to July 1, 1963, to be effective in September, 1963.

The Commissioner therefore directs the Plainfield Board of Education

1. to decide which of the three plans submitted is best suited to the needs of the Plainfield School system;

2. to take such steps as are necessary to insure the implementation of the chosen plan for the 1963-64 school year; and

3. to notify the Commissioner of Education as soon as is reasonably possible of its choice of plans and the action to be taken to put it into effect.

FRED RAUBINGER,
Commissioner of Education.

Notice of Appeal

(March 5, 1964)

NOTICE IS HEREBY GIVEN THAT Appellants CHARLES B. BOOKER, *et als,* appeals to the Superior Court Appellate Division from a final decision in the above entitled matter, filed by the State Board of Education on February 5, 1964, affirming a decision of the Commissioner of Education dated June 26, 1963.

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A64 SEPT. 1964

Superior Court of New Jersey

APPELLATE DIVISION—DOCKET NO. A-662-63

CHARLES B. BOOKER, *et al.*,
Petitioners-Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD IN THE COUNTY OF UNION,
Respondent-Respondent.

Civil Action

On Appeal from Decision, Determination and Order of the State Board of Education of New Jersey

BRIEF AND APPENDIX FOR COMMISSIONER OF EDUCATION AND STATE BOARD OF EDUCATION

FILED
FEB 8 1965
SUPREME COURT
OF NEW JERSEY

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Counter-Statement of Questions Involved

1. Did the action of a local Board of Education to reduce extreme *de facto* racial segregation in the school system, undertaken with the approval of the Commissioner and State Board of Education, violate any requirements of the New Jersey Constitution or the Fourteenth Amendment to the United States Constitution by failing to eliminate completely all racial imbalance in the school system?

2. Did the action of a local Board of Education which reduced extreme *de facto* racial segregation but not all racial imbalance in the school system, undertaken with the approval of the Commissioner and State Board of Education, in the context of State school policy requiring attendance at public schools, violate any rights of Negro pupils guaranteed by the First Amendment to the United States Constitution?

Preliminary Statement

This brief is submitted by the Attorney General on behalf of the Commissioner of Education and the State Board of Education at the informal request of the Supreme Court. Neither the State Board nor the Commissioner is a party to the action although the appeal involves their decisions as implemented by the Board of Education of the City of Plainfield.

Counter-Statement of the Case

This is an appeal from a decision of the State Board of Education, filed February 5, 1964, affirming and concurring in a decision of the Commissioner of Education, filed June 26, 1963 (P50a-40; P52a-25). By this decision the Commissioner directed respondent, Board of Education of the City of Plainfield (P59a-40) to select and adopt one of three plans which had been approved by the Commissioner (P59a-25) for the purpose of eliminating the "extreme concentration of Negro pupils" in the Washington School in Plainfield (P59a-9 to 24).

Respondent, Board of Education (hereinafter sometimes referred to as Board or Board of Education) adopted one of the plans, denominated the "Sixth Grade Plan" (P47a-25). The petitioners encompass within their appeal the adoption by the Board of this particular plan on the grounds that this action is contrary to the Fourteenth Amendment (Pb16-23) and the First Amendment (Pb16-30).

The pertinent proceedings and facts of this case are amply set forth in the briefs filed by petitioners and respondent. It appears therefrom and from the filed appendix that the Board appointed a citizens committee in 1961 to study the problem of racial segregation and imbalance in the Plainfield school system (P27a-32). A report was filed by

Doctor Mac Wolff (P28a-11). The conclusions of the Wolff report indicate among other things that the Washington School constituted a "*de facto* segregated school because it contained over 90% Negroes in its enrollment" (Rb3). The citizens committee proposed that the Washington School zone be altered (R3a-28) and that other general measures be taken designed to effectuate a long-range solution (R4a-5 to 7a-3).

The Board also obtained an independent study to investigate the achievement of the sixth grade pupils and other areas of elementary and transitional education (R28a-12 to 21).

Conferences were held March 13, 1963 and June 13, 1963 with the Assistant Commissioner of Education. The issues and facts were stipulated at the second Pre-hearing Conference; and, on June 13, 1963, the Commissioner heard the appeal on the stipulated record (P27a to P30a), without witnesses (P30a-11) and without expert testimony (P30a-9).

The Stipulation specified the issue, *viz*:

> "Are there any elementary schools operated by the Plainfield Board of Education, in which Negro pupils predominate, and, if so, should the Plainfield Board of Education reduce the concentration of Negro pupils in such schools?" (P27a-18).

The Commissioner found "extreme concentration" of Negro pupils at the Washington School, actually 96.2% as of April 1963, (P59a-9 to 20) and directed the Board to select one of the three stipulated plans and put it into effect in the 1963-64 school year (P59a-40 to P60a-11).

Before the State Board of Education, the parties stipulated that the case be decided on the October 1963 enrollments after adoption of the "Sixth Grade Plan" (P48a-28). The State Board specifically held that "racial imbal-

ance (*i.e.*, more than 50% of one race over the other) is not to be equated to invidious segregation * * *'' (P51a-11). It concluded that the local Board of Education:

> ''* * * conducted conscientious studies to solve the very difficult problems confronting it, and has attempted to implement the constitutional principles which are a guiding light, even though this is not an instance of intentional segregation * * *'' (P52a-8).

The State Board also made a finding on the intent of the local Board of Education:

> ''We respect the local board's awareness of its own local school problems'' (P52a-16).

And,

> ''At the same time we note that the local board represents that it will constantly study the effects of the 'Sixth Grade Plan' and, if experience determines that it is detrimental to the educational opportunities of the pupils, it will adopt such remedial measures as may be required'' (P52a-28).

The State Board accepted the ''judgment'' of the local Board of Education (P52a-16), and the qualifications and experience of the Commissioner (P52a-17); and it affirmed the Commissioner and the Board's adoption of the ''Sixth Grade Plan'' (P52a-25).

ARGUMENT

POINT I

The action of the Board of Education in adopting the "Sixth Grade Plan" as one of three plans approved by the Commissioner and State Board of Education did not offend the United States and New Jersey Constitutions by failing to eliminate completely all racial imbalance in the Plainfield school system.

The petitioners urge that local boards of education are mandated by the Constitution "to eliminate segregated education" (Pb6-28). It is asserted that "separate education is inherently unequal" and therefore constitutes an "infringement of the right of equal educational opportunity" (Pb6-40). It is suggested that the evil is "separation" as such and that there is no meaningful distinction between a situation wherein "students are segregated" and where "they are totally segregated" (Pb9-32).

Petitioners recognize that there is involved herein a *de facto* school segregation situation resulting not from purposeful or intentional action by State and local school authorities but "from the application of the neighborhood school policy to preponderantly Negro residential areas" (Pb11-35). They point to the racial statistics as of April 1, 1962, which showed the following proportion of Negro pupil enrollment: Washington, 96.2%; Emerson, 72%; Stillman, 67.6%; Bryant, 65.5%; Clinton, 58.9%; and Jefferson, 44.9% (Pb11-38).* In contrast, as a result of the action taken by the local board of education, with the ap-

* These statistics apparently obtained in April 1963. It is also to be noted that the percentage of Negro pupils in the remaining 5 schools were 30.8%, 18.8%, 8.4%, 3.8%, and 0.6% respectively. One school, Lincoln, was a special school for retarded children with a 63.0% Negro enrollment (R54a).

proval of the State Commissioner and State Board of Education, the so-called "Sixth Grade Plan," the enrollment figures were: Washington, 36.5%; Emerson, 76.4%; Stillman, 65.2%; Bryant, 67.1%; Clinton, 66.1%; and Jefferson, 52.1% (Pb12-10).

The petitioners conclude that "[t]he net result [of the 'Sixth Grade Plan'] is that there are still five racially imbalanced schools in the Plainfield school system, the racial imbalance in four of them having been aggravated by the adoption of the Sixth Grade Plan" (Pb12-13).

In effect, reduced to its simplest terms the question posed by petitioners is whether an increase in the percentage of Negro students enrolled in some local schools, namely, from 72% to 76.4%, from 65.5% to 67.1%, from 58.9% to 66.1% and from 44.9% to 52.1%, with a concomitant reduction in the proportion of Negro students enrolled in other local schools, namely from 96.2% to 36.5% and 67.6% to 65.2%, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or *Art.* I, *par.* 5 of the *N. J. Constitution* (1947).

No analysis or development of the law pertaining to racial segregation in public schools can be meaningful without initial reference to the historic decision of *Brown* v. *Board of Ed. of Topeka,* 347 U. S. 483, 74 S. Ct. 686 (1954). The *Brown* case was concerned with a situation involving *de jure*—intentional or purposeful—segregation in public schools. It established the universal principle that local school authorities may not, under the Fourteenth Amendment, act consciously or intentionally to segregate pupils by race or, presumably, by other invidiously discriminatory factors such as religion or ancestry. In this connection, the Court said, considerations of race are constitutionally prohibited. As a tool with which to destroy a barrier to the full effectuation of constitutionally demanded principles of equality and justice, the *Brown* de-

cision has had an eminently salutary effect. Its requirement that *de jure* segregation in the public schools be eliminated as a matter of constitutional obligation is set forth with sterling clarity. No less clear is the policy underlying that declaration that such "segregation of children in public schools solely on the basis of race . . . deprive[s] the children of the minority group of equal educational opportunities." 347 U. S. at 493.

The policy of the State of New Jersey concerning the impact of racial segregation upon public school education, in a sense, antedates the edict of the United States Supreme Court as reflected in the *Brown* case. The policy of this State is rooted firmly in the New Jersey Constitution and public school laws which corelatively prohibit discrimination and the denial of civil rights and equal opportunities on the basis of race or other invidious classifications and, require the furnishing of sound education to all public school pupils. In evaluating the actions of the local board herein and the decisions of the State Commissioner and State Board of Education pursuant to which the local board acted, it is well to understand the backdrop or framework of the policy of the State of New Jersey concerning *de facto* segregation or racial imbalance in public schools.

The approach of the State of New Jersey is reflected graphically and lucidly in a series of recent decisions issued by the Commissioner of Education. The position of the State, spelled out in these decisions, had its inception with the now famous "Orange" case. In *Fisher* v. *Board of Education of the City of Orange* (decided May 15, 1963), an action had been brought in the name of several Negro children of school age by their parents. The gravamen of their complaint involved the extreme racial homogeneity of the Oakwood School, which had an enrollment of 99% Negroes. The pivotal issue was defined to be:

"Does the existence of the Oakwood School as virtually an all Negro school, constitute such an educational handicap to the pupils assigned to it, that the board of education is duty bound to eliminate its racial imbalance or reduce it within the limits of reasonableness and practicability consistent with sound educational practice?" (S7a-33 to 39).[1]

Cognizance was taken of the pertinent New Jersey law:

"No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin." (N. J. *Const.* (1947), Art. I, Sec. 5).

and

"Each school district shall provide suitable school facilities and accommodations for all children who reside in the district and desire to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. * * *" (R.S. 18:11-1).

The Commissioner reached this important factual conclusion:

"[T]he Commissioner is of the opinion that in the minds of Negro pupils and parents a sigma is attached to attending a school whose enrollment is completely or almost exclusively Negro, and that this sense of

[1] (S a) refers to the appendix of the State Board and Commissioner of Education.

stigma and resulting feeling of inferiority have an undesirable effect upon attitudes related to successful learning. Reasoning from this premise and recognizing the right of every child to equal educational opportunity, the Commissioner is convinced that in developing its pupil assignment policies and in planning for new school buildings, a board of education must take into account the continued existence or potential creation of a school populated entirely, or nearly so, by Negro pupils." (S8a-23 to 35).

With respect to an appropriate form of relief, the Commissioner stated:

"[T]he Commissioner concludes that the Board of Education can also eliminate the extreme concentration of Negro pupils in the Oakwood School. He is further convinced that this can be done without doing violence to logical attendance areas or at the sacrifice of sound educational considerations. The practice of assigning pupils to schools near their homes, particularly with regard to children of elementary school age, is well established and is attended by educational values that are widely accepted, not only by educators, but by the public generally. Consideration of such factors as distance to be traveled, safety, economy of time, establishment of rapport between school and home, and knowledge by the school staff of the child's environment have operated to establish convenience of access as the controlling criterion of pupil assignment, and the importance of these values cannot be denied. It is the Commissioner's conviction, nonetheless, that one or more solutions to the present problem can be developed which will mitigate the existing undesirable concentration of Negro enrollment in the Oakwood School and which can at the same time preserve and protect in great part the values of the time-tested pattern of pupil assignment." (S8a-40 to 9a-26).

One of the ultimate determinations of the Commissioner was thus stated:

> "[E]xtreme racial imbalance as obtains in the Oakwood School, at least where means exist to prevent it, constitutes under New Jersey law a deprivation of educational opportunity for the pupils compelled to attend the school." (S10a-36 to 40).

The next decision of the Commissioner in this area involved the case *sub judice, Booker* v. *The Board of Education of the City of Plainfield* (decided June 26, 1963). The issue before the Commissioner, as previously noted, was:

> "Are there any elementary schools operated by the Plainfield Board of Education in which Negro pupils predominate, and if so, should the Plainfield Board of Education reduce the concentration of Negro pupils in such schools? There is no issue raised of intentional or deliberate segregation by race, it being agreed that whatever concentrations of Negro pupils exist result from socio-economic factors and not by purposeful action of the Board of Education." (R56a-1).

The Commissioner repeated the standard set forth in the *Fisher* decision, indicating that separation of Negro students in a school system resulting in extreme racial imbalance has a deleterious effect upon education (R57a-20). But, it was further observed that while the ratio varied from school to school within the district, in the only one, the Washington School, was the enrollment almost entirely Negro (R57a-40).

With respect to an implimentation of the decision, it was stated:

> "The Commissioner notes also that a number of plans designed to improve the racial balance in the Plainfield elementary schools have been put forward.

On the one hand, petitioners, in the Stipulation, urge the approval of either Plan 2 or Plan 1 of the Wolff report. Plan 2, titled the 'Sister-School or Paired School Plan,' would set up three pairs of schools, combining the attendance areas of each pair of adjacent schools, with all the pupils in grades 1-3 attending one school and those in grades 4-6 the other. Plan 1, referred to as 'Rezoning Plan,' would realign the attendance area boundary for each school. On the other hand, respondent, in the Stipulation, urges the approval of a third plan, described as the 'Sixth Grade Plan'. Under this proposal, the Washington School would house the sixth grade pupils from the entire district, and children now enrolled there for grades K-5 would be distributed among the other elementary schools except that none would be assigned to a school in which pupils already more than half of the pupils are Negro.

"The Commissioner has given careful consideration to each of these plans. He notes that although there are variations in the effect which each will have on the racial composition of particular schools, there will be no 'all or nearly all Negro' school under any of the three proposals. Each plan also has certain advantages and disadvantages but the favorable aspects do not so far outweigh the unfavorable in any one so as to make it the plan of choice. Finally, the Commissioner is of the opinion that each plan is reasonable, practicable, and consistent with sound educational practice." (P57a-40 to 58a-32).

Thereafter, in accordance with the decision of the Commissioner, the Plainfield Board of Education adopted one of the three plans, namely, the "Sixth Grade Plan." On an appeal from this action, the State Board of Education, in *Booker* v. *The Board of Education* (decided February 5, 1964), framed and resolved the issues as follows:

"The Board having adopted the 'Sixth Grade Plan' with the results above set forth, this Board is now called upon to weigh the attack upon the 'Sixth Grade Plan' as argued by the appellants and by the Amicus Curiae. It is argued that the Commissioner departed from the principles established by him in his previous decision in the case of *Fisher, et al.* v. *The Board of Education of the City of Orange,* decided May 15, 1963. It is said by appellants that while the Commissioner recognized the existence of 'completely or almost exclusively' Negro schools, he failed 'to order the reduction of racially imbalanced schools other than the Washington School and has sanctioned the adoption of the Sixth Grade Plan which does not effectuate a solution to the problem.' The Commissioner did not hold in *Fisher, et al.* v. *The Board of Education of the City of Orange* that any and all imbalance (if by 'imbalance' is meant any percentage of Negro pupils in excess of 50%) constitutes the deprivation of equal educational opportunity which he condemned in *Fisher* and other decisions. In *Fisher* he held invidious an enrollment which was 'completely or almost exclusively' Negro and in that case the effect was that the percentage of Negro children in the schools reached 99%. The same criticism was properly leveled against the concentration of Negro pupils in the Washington School prior to the Commissioner's decision, namely, 96.2%. This the Commissioner struck down by his decision here appealed from. To extend the same criticism to the result obtained by the adoption of the 'Sixth Grade Plan' here, i.e., that the concentration of Negro pupils in the Emerson School (76.4%), Bryant (67.1%), Clinton (66.1%), Stillman (65.2%), or Jefferson (52.1%) simply is not tenable. Such percentages did not result in a school 'completely or almost exclusively Negro'. The Commissioner, with his experience in the field of education, has held that such percent-

ages do not in fact result in deprivation of equal educational opportunities. This is the crucial question—not mere mathematical 'imbalance'. We respect that judgment and concur in it. We further hold that there is no fine line which can be drawn in terms of numbers, and that each case must be judged upon its own facts." (P49a-38 to 51a-8).

And, further:

"In this instance, the local board conducted conscientious studies to solve the very difficult problem confronting it, and has attempted to implement the constitutional principles which are a guiding light, even though this is not an instance of intentional segregation as existing in *Brown,* and even though it has not been authoritatively decided that *de facto* segregation is 'unconstitutional'. See *Volpe* v. *The Board of Education of the City of Englewood, supra.* We respect the local board's awareness of its own local school problems. To the local board's judgment there is added the expertise of the Commissioner of Education, who does not find that the percentages of Negro pupils which results from the 'Sixth Grade Plan' amounts to a deprivation of 'equal educational opportunities.' We find that there is no showing here that the 'imbalance' resulting from the adoption of the 'Sixth Grade Plan' does deprive the Negro pupils of equal educational opportunities, the standard by which we are guided. We therefore affirm the Commissioner's decision and also the adoption of the 'Sixth Grade Plan' by the local board of education. At the same time we note that the local board represents that it will constantly study the effects of the 'Sixth Grade Plan' and, if experience determines that it is detrimental to the educational opportunities of the pupils it will adopt such remedial measures as may be required." (P52a-8 to 33).

The Commissioner, after the *Plainfield* opinion, issued a decision in *Spruill* v. *The Board of Education of the City of Englewood* (decided September 25, 1963). The focus of the complaint was upon the Lincoln School, the enrollment of which was comprised almost exclusively of Negro children, to the extent of 98%. The Commissioner reiterated his opinion in *Fisher* v. *The Board of Education of the City of Orange, supra,* and stated:

> "The Commissioner holds, therefore, that compulsory attendance at an all Negro school, such as the Lincoln School, at least where appropriate means can be found to avoid it, constitutes a denial of educational opportunity under New Jersey law which the school district is required to correct." (S21a-35 to 39).

With respect to modes of relief, the Commissioner observed that:

> "The evidence in this case discloses that a number of plans have been proposed to and considered by the Board. That there are still other plans which can be devised, effectively dealing with the problem, the Commissioner has no doubt. The formulation of the most suitable plan, however, is a function of the respondent Board of Education and the Commissioner reserves to it the right to prescribe the precise formula which will provide the best answer to this complex problem." (S22a-7 to 16).

And, additionally:

> "The Commissioner believes that a plan for the reduction of the racial concentration at the Lincoln School can be formulated which will not do violence to reasonable attendance areas. Whatever plan is adopted must, of course, meet the tests of reasonableness, of practicability, and of consistency with sound educational practice. From his study of the evidence in this case, the

Commissioner is convinced that the respondent Board of Education can choose from among the proposals already made to it, or from others that it has already devised or will formulate, the means best suited to reduce the present concentration of Negro pupils in the Lincoln School which will at the same time maintain long-recognized values." (S23a-36 to 24a-17).

The most recent decision of the Commissioner is *Alston* v. *The Board of Education of the Township of Union* (decided April 7, 1964). Within the school district, the Jefferson School contained 95% Negroes. The local board of education had, without compulsion, adopted a plan of voluntary optional pupil transfer for regular pupils of the Jefferson School to other schools in the Township and to a proposed demonstration school at the neighboring Newark State College. The Commissioner stated, in distinguishing that case from his prior decisions in *Orange, Plainfield* and *Englewood,* as follows:

"In those cases the issue, decided affirmatively, was whether a school district has a duty to reduce the extreme concentration of Negro pupils in a school when appropriate means exist to do so. In the instant case respondent Board has accepted the duty enunciated in the Commissioner's decisions and has on its own initiative adopted a specific plan aimed at reducing the extreme proportion of Negro pupils in its Jefferson School.

The question in this case then is not whether the Commissioner should direct the Board of Education to formulate a plan but whether he will interfere with the exercise of the Board's discretion to adopt the proposal which is here challenged." (S30a-33 to 31a-10).

The Commissioner hearkened to his earlier decisions, particularly the *Plainfield* case:

"The Commissioner has already made it clear in previous decisions that he does not consider it his func-

tion to formulate a plan such as petitioner prays for and impose it upon a local board of education where the board is competent to act. Nor will he usurp the powers of the board of education to choose from among several plans the one most appropriate to the particular school district and its problems. In his judgment the local board of education is not only best suited but also has the responsibility under law to determine attendance areas and assignment of pupils to schools. R.S. 18:11-1." (S32a-36 to 33a-11).

The Commissioner eschewed an approach which would invalidate the plan on the basis of its characterization as an open enrollment plan.

"The Commissioner, therefore, will not condemn a plan adopted by a board of education for the sole reason that it bears the label of or is similar to a plan which proved unsuccessful elsewhere. There are about 600 school districts in New Jersey, ranging in size from densely populated large cities to small rural areas with few inhabitants. The problems and interests of one district may have little meaning for another which has its own kinds of concerns. In this diversity, many different remedies may be employed to meet similar problems. Methods which function well in some districts fail in others so that it is impossible to prescribe a solution of choice for all. It is clear that the Union Township Board of Education gave much study to this problem and evolved the present policy only after due consideration. It must be presumed that in choosing this method they acted in good faith and with the best interests of the school district as a whole as their primary consideration. There is no evidence of arbitrary, capricious, or unreasonable action and, absent such a showing, the Commissioner will not interpose his judgment but will afford the Board a proper opportunity to test the merits of its plan.

* * *

The Commissioner holds that the Union Township Board of Education is entitled to select and implement its plan to eliminate unequal educational opportunity resulting from extreme concentration of Negro pupils in one of its schools. He finds that the Board of Education has considered and adopted such a plan and has put it into operation. At this posture of the case the Commissioner will take no position with respect to the merits of the plan nor intervene to set aside the policy before it has had fair opportunity, with the full cooperation and good will of all parties, to become fully effective." (S36a-32 to 37a-18; 38a-17 to 28).

These decisions of the Commissioner and State Board disclose a consistent philosophy with respect to the troublesome problems of *de facto* racial segregation in public schools. The touchstone of State policy in this area is the goal of sound education for *all* school children and equal educational opportunity for *all* school children; no child or group of children is to suffer discrimination on account of race in the exercise and enjoyment of their right to a public education. It has been recognized uniformly that extreme and intense concentrations of children of a racial minority in any public school, without regard to the cause or genesis of the condition, disadvantages these children in their quest for equal and sound education. To rectify this evil, responsible school authorities are enjoined to adopt measures which may be available, reasonable and practicable to eliminate and reduce such racial disproportions. It is also recognized that local school authorities, because of their experience and familiarity with conditions within their school districts, are vested with wide discretion and latitude in their selection of methods to eliminate *de facto* segregation.

This was the policy followed by all responsible officials in this case. The salient inquiry, therefore, is whether this state policy pursued by state and local officials, and its par-

ticular implementation as reflected in the decisions *sub judice,* contravenes the New Jersey Constitution or the Federal Constitution.

Judicial precedent indicates that the mandate of the New Jersey Constitution is satisfied. In *Schults* v. *Bd. of Ed. of the Tp. of Teaneck,* 86 N. J. Super. 29 (App. Div. 1964), plaintiffs sought to enforce the "neighborhood school concept in opposition to a plan advanced by the local board of education known as the voluntary optional pupil transfer plan." The plan involved the transfer of pupils from the William Cullen Bryant School to other schools in different neighborhoods in order to create a central school for all sixth grade pupils in the Bryant School. The court held specifically that under operative New Jersey law a local board of education was not bound rigidly or inflexibly to the neighborhood school policy:

> "As early as *Pierce* v. *Union District School Trustees,* 46 N. J. L. 76, 78 (*Sup. Ct.* 1884), affirmed o.b. 47 N. J. L. 348 (E. & A. 1885), the court although holding that the relator was entitled to have his children educated in the public school nearest his residence, added the significant language 'unless there was some just reason for sending them elsewhere.' In *Walker* v. *Board of Education of Englewood* (*Div. Against Discrimination* 1955), the Commissioner of Education, in pointing out that there are valid reasons for assigning pupils to schools other than those nearest to their homes, observed that 'The principle that a pupil must be permitted to attend the nearest school may be modified by safety factors, or need for special education on the part of the particular pupil, or the necessity for particular groupings, such as are to be found in junior and senior high schools.'
>
> The Legislature has specifically provided for sending certain children out of their neighborhoods to attend special schools where proper training can be ob-

tained. Thus, under N.J.S.A. 18:14-71.5, it is the duty of every board of education to provide suitable facilities and programs of education or training for all children who are classified as educable or trainable under L. 1954, c. 178. Similar provisions for physically handicapped pupils may be found in N.J.S.A. 18:14-71.22 and 71.23, and for emotionally disturbed or socially maladjusted pupils under N.J.S.A. 18:14-71.39." *Schults* v. *Bd. of Ed. of Teaneck, supra* at 39.

Reference was made to *Morean* v. *Board of Ed. of Montclair,* 42 N. J. 237 (1964), involving the Glenfield Junior High School in Montclair which had an enrollment of 90% Negro students. After a report and public hearing the local board determined that a central junior high school which was educationally sound and economically feasible should be established and devised an initial plan involving the transfer of Glenfield pupils to other junior high schools in the district. The Supreme Court clearly was of the view that the efforts of the local board comported with the New Jersey Constitution and statutes:

"The Montclair Board's obligation was to maintain a sound educational system by the furnishment of suitable school facilities and equal educational opportunities. It could not, consistently with either sound legal principles or with sound educational practices, maintain an official policy of segregation with its inherent inequities of educational opportunities and its withholding of the democratic and educational advantages of heterogeneous student populations. See *Brown* v. *Board of Education,* 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955); N. J. Const. Art. I, par. 5; N.J.S.A. 18:14-2, 18:25-4, 18:25-5. Nor need it close its eyes to racial imbalance in its schools which, though fortuitous in origin, presents much the same disadvantages as are presented by segregated schools. [citing cases]" 42 N. J., at 242-43.

In sum, the New Jersey Constitution and school laws have been found the basis of a duty on the part of school authorities to pursue all reasonable measures to eliminate segregation and reduce detrimental racial imbalance to achieve a sound educational system and equal educational opportunities. This duty was recognized in the present case.

It forcibly appears that such conscientious actions of local boards of educations and the State Commissioner and State Board of Education, in pursuing reasonable methods to effectuate a sound educational system by eliminating or reducing extreme racial concentrations, violate no rights of affected pupils under the Fourteenth Amendment to the Federal Constitution.

In *Morean* v. *Bd. of Ed. of Montclair, supra,* the Supreme Court stated emphatically:

> "* * * The Board's action was reasonable and there is no substance to the petitioners' contention that since its plan of relocation had some racial motivation it was violative of the fourteenth amendment. The motivation was to avoid creating a situation at Hillside which would deprive the pupils there of equal educational opportunities and subject them to the harmful consequences of practical segregation. *Constitutional color blindness may be wholly apt when the frame of reference is an attack on official efforts toward segregation; it is not generally apt when the attack is on official efforts toward the avoidance of segregation.* The moving purpose of the Montclair Board and its fulfillment in the manner here may not sensibly be viewed as violative of the fourteenth amendment; to us the Board's action appears clearly to have been in sympathetic furtherance of the letter and spirit of the amendment and in fair fulfillment of the high educational functions entrusted to it by law." (Emphasis supplied.) 42 N. J. at 243-44.

In *Schults* v. *Bd. of Ed. of Teaneck, supra,* the Court similarly stated:

> "We perceive no merit in the argument that the present case presents an unresolved constitutional question involving the equal protection clause.
>
> * * *
>
> In short, we find that the constitutional question as to whether a local board of education may adopt a reasonable plan to resolve a *de facto* segregation situation, has already been decided contrary to plaintiffs' position." 86 N. J. Super. at 40-41.

In *Fuller* v. *Volk,* 230 F. Supp. 25 (D. N. J. 1964), the Federal District Court specifically considered a constitutional attack upon the plan of the Board of Education of the City of Englewood involved in *Spruill* v. *Bd. of Education, supra.* The court did not consider the issue to be "whether a local board of education must or is constitutionally required to act, but rather whether a board may or is not constitutionally prohibited from acting" 230 F. Supp. at 33. It held that a local board of education is under no constitutional interdiction from considering race in adopting measures reasonably intended to reduce or eliminate *de facto* segregation in its public schools.

Some courts have determined that there is no Federal constitutional compulsion requiring local boards of education to act affirmatively in order to eliminate or mitigate *de facto* school segregation. In support of this approach has been the theory that "the Fourteenth Amendment does not speak in positive terms to command integration, but negatively, to prohibit governmentally enforced segregation." *Bell* v. *School City of Gary, Indiana,* 213 F. Supp. 819 (N. D. Ind. 1963), *aff'd* 324 F. 2d 209 (7th Cir. 1963), *cert. den.* 377 U. S. 924, 84 S. Ct. 1223 (1964); *Holland* v. *Board of Public Instruction,* 258 F. 2d 730, 732 (5th Cir.

1958); *Downs* v. *Bd. of Ed. of Kansas City,* 336 F. 2d 988 (10th Cir. 1964); *Lynch* v. *Kenston School Dist. Bd. of Ed.,* 229 F. Supp. 740 (E. D. Ohio 1964); *Evans* v. *Buchanan,* 207 F. Supp. 820 (D. Del. 1962); *Henry* v. *Godsell,* 165 F. Supp. 87 (E. D. Mich. 1958); *Cf., Briggs* v. *Elliott,* 132 F. Supp. 776 (E. D. S. Car. 1955).

Clearly, these decisions are not apposite in the present case. The New Jersey education authorities and the local board of education herein, have advanced well beyond the thesis of these decisions to the effect that the Fourteenth Amendment does not require the abandonment or modification of neighborhood schools to eliminate *de facto* segregation where there has been no affirmative effort on the part of school authorities to perpetuate segregation. In all of the decisions and actions of the State Commissioner and the State Board of Education on this question there has been a forthright recognition that there is an affirmative duty on the part of a local board of education to eliminate *de facto* segregation and to reduce extreme or deleterious racial imbalance where reasonable means exist to accomplish this.

It would appear, therefore, that the actions of the State and local officials with respect to *de facto* segregation fall comfortably within the ambit of those Federal decisions which in fact posit an affirmative requirement under the Fourteenth Amendment to eliminate *de facto* public school segregation. *Blocker* v. *Board of Education of Manhasset, New York,* 226 F. Supp. 208 (E. D. N. Y. 1964); *Id.,* 229 F. Supp. 709 (E. D. N. Y. 1964); *Id.,* 229 F. Supp. 714 (E. D. N. Y. 1964); *Branche* v. *Board of Education of Town of Hempstead,* 204 F. Supp. 150 (E. D. N. Y. 1962); *Jackson* v. *Pasadena City School District,* 382 P. 2d 878 (Cal. Sup. Ct. 1963).

Assuming the applicability of these latter decisions, it is not discernible that the actions in the instant case would fail to satisfy the mandate which they suggest. There is no

decision which would impose an affirmative and inflexible constitutional duty on the part of local school authorities to eliminate completely all racial disproportions or to excise every vestige of continuing racial imbalance which might result from the adoption of a bona fide plan which has in fact reduced extreme racial concentrations in substantial measure. The Commissioner and State Board of Education have eschewed an approach which would define in mere numbers or arithmetic percentages the degree of racial segreation which would offend constitutional as well as statutory policies (P51a). The Board's reasons for avoiding percentages as a meaningful criterion is supported by comparable language in *Brown* v. *Board of Ed. of Topeka, Kansas, supra,* 349 U. S. at 299, 85 S. Ct. at 756; *Accord, Jackson* v. *Pasadena City School District, supra*; *Blocker* v. *Bd. of Education of Manhasset, supra.*

The "Sixth Grade Plan," as well as the two plans espoused by the petitioners, was found by all responsible school officials to be an effective means for the elimination of the extreme racial composition of the Washington School and that all three plans were educationally sound. The Commissioner agreed to approve whichever one the Plainfield board adopted after its review and evaluation of all circumstances. The State Board was fully aware of the enrollment percentages in the other schools and affirmed the Commissioner's determination. The Plainfield board has set forth its reasoning for the adoption of the "Sixth Grade Plan" (R49a to 53a). Because of the petitioner's insistence on a certain percentage of Negro enrollment, their brief does not explore the merits of the "Sixth Grade Plan" aside from asserting that it aggravated in arithmetic terms the racial balance in some of the elementary schools. It gives no consideration or weight to countervailing factors which properly influenced the school board in reaching its ultimate determination. The decision in the case of *Morean* v. *Bd. of Education of Montclair, supra,* recognized that there can be troublesome and complex edu-

cational or transportation problems in bringing about an increased measure of integration, although the Montclair plan for relocation was found to be free of them.

Over the years the State of New Jersey has taken a very progressive and enlightened approach on matters of racial discrimination. For many years prior to *Brown* v. *Board of Education, supra,* it was unlawful in this State for boards of education to operate segregated schools. The Commissioner of Education's approach to racial discrimination has at all times followed this clearly expressed policy of the State. *Shepard* v. *Bd. of Ed. of City of Englewood,* 207 F. Supp. 341, 347-48 (D. N. J. 1962). The Commissioner has struck down both intentional and *de facto* segregation and has refused to follow the *Bell* case, *supra* and this line of authority. The essential standard followed by the Commissioner is whether the degree of racial imbalance in a public school fosters inimical attitudes towards learning and creates educational handicaps for the affected pupils so that a board of education is duty bound to eliminate the imbalance or reduce it within the limits of reasonableness and practicability consistent with sound educational practices. *Fisher* v. *Bd. of Ed. of Orange, supra*; *Spruill* v. *Bd. of Ed. of Englewood, supra*; *Alston* v. *Bd. of Ed. of Union Twp., supra.* Petitioners have not adduced proof which would establish that the percentages or ratios in the various public schools in Plainfield have the tendency to or will deprive Negro pupils of sound and equal educational opportunities by engendering the attitudes detrimental to learning which have been found to exist in situations where racial imbalances are extreme. If, in fact, the "Sixth Grade Plan" fails to meet the essential standard, petitioners will always have further recourse and can elicit the Commissioner's assistance. N.J.S.A. 18:3-4. However, it seems unlikely that the Plainfield board will not itself act promptly to remedy any defects in its plan should they develop. This case, it is to be empha-

sized, presents no question of deliberate or purposeful segregation nor does it present a question of duplicity or lack of good faith on the part of the Board. The Commissioner has found the "Sixth Grade Plan" to be free of the evils and consequences of invidious segregation. This plan should be given a fair opportunity, with the full cooperation and good will of all parties, to become fully effective.

In conclusion, it is respectfully urged that the action of the local board of education, taken with the approval of the State Commissioner and State Board of Education, comport with the standards of the New Jersey Constitution and school laws and do not violate any requirement of the Fourteenth Amendment to the United States Constitution.

POINT II

The action of the Board of Education in adopting the "Sixth Grade Plan" with the approval of the Commissioner and the State Board of Education, in the context of State school policy requiring attendance of children at public schools, did not violate rights of Negro pupils guaranteed by the First Amendment to the United States Constitution.

Petitioners contend that the action of the Board in adopting the "Sixth Grade Plan" violates the "right of freedom of association" which is "cognate to other First Amendment rights" (Pb16-35). The gist of the argument is that compulsory education laws, requiring the attendance of children at public schools, constitute a "limitation" on the right of association and can be justified only as a proper exercise of state policy powers (Pb17-12); where, however, the education policies or practices in a school are invalid, the association of pupils at such schools is "unrealistic" or

improper and therefore the compulsion to attend the public school itself becomes vitiated (Pb19-20).

Concededly, the rights of association—the freedom to engage in the association for the advancement of beliefs and ideas—are within the ambit of the constitutional protections afforded by the First as well as the Fourteenth Amendment to the United States Constitution. *Gibson* v. *Florida,* 372 U. S. 539, 83 S. Ct. 889 (1963); *N.A.A.C.P.* v. *Button,* 371 U. S. 539, 83 S. Ct. 328 (1963); *N.A.A.C.P.* v. *Alabama,* 357 U. S. 449, 78 S. Ct. 1163 (1958). It must be recognized that many of these cases deal with governmental action designed to interfere with the right of privacy and associational relationships. *N.A.A.C.P.* v. *Alabama, supra; Gibson* v. *Florida, supra; N.A.A.C.P.* v. *Button, supra; Bates* v. *City of Little Rock,* 361 U. S. 516, 80 S. Ct. 412 (1960); *Shelton* v. *Tucker,* 364 U. S. 479, 81 S. Ct. 247 (1960); *Barenblatt* v. *United States,* 360 U. S. 109, 79 S. Ct. 1081 (1959); *Sweezy* v. *New Hampshire,* 354 U. S. 250, 77 S. Ct. 1203 (1957). There are instances in which it has been held that individuals may be required to be members of an association or organization against their volition. *International Association of Machinists* v. *Street,* 367 U. S. 740, 81 S. Ct. 1784 (1961); *Lathrop* v. *Donohue,* 369 U. S. 820, 81 S. Ct. 1826 (1961); and conversely, in some cases an association or organization must accept an individual in membership against its professed desires or policies. *Falcone* v. *Middlesex County Medical Soc.,* 34 N. J. 582 (1961).

The only case, *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, 70 S. Ct. 851 (1950), having even a remote bearing on this constitutional issue, involved a single negro graduate student attending an all white state university. The school officials had restricted the student's contacts with his white classmates. In holding this treatment to be a denial of equal protection, the Court commented upon a student's need to associate with his fellows:

"The result [of the restrictions] is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.

* * *

"There is a vast difference—a Constitutional difference —between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. (Citations omitted.) The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits." 339 U. S. at 641-42, 70 S. Ct. at 853-54.

In the instant case, the factual premise upon which petitioners structure their argument is not tested. Thus, it has not been founded that the attendance of Negro pupils in the Plainfield schools, pursuant to the "Sixth Grade Plan" adopted by the local Board of Education, will, or is likely to, produce the evils which are decried. In short, it is not apparent from the record of these proceedings that Negro children in the Plainfield public school system by their compulsory attendance at school are prevented in any meaningful way from a normal association and intermingling with all members and strata of the community in reasonable measure.

It is respectfully urged, in conclusion, that the compulsory attendance of children at public schools in the Plainfield school district, pursuant to the "Sixth Grade Plan" adopted by the local board of education, with the approval of the State Commissioner and State Board of Education do not violate any rights guaranteed under the First Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the actions of the local Board of Education, which have been approved by the Commissioner of Education and the State Board of Education, be upheld and affirmed.

Respectfully submitted,

ARTHUR J. SILLS,
Attorney General of New Jersey,
Attorney for Commissioner of Education and State Board of Education.

ALAN B. HANDLER,
First Assistant Attorney General,
Of Counsel and on the Brief.

MORTON ANEKSTEIN,
Law Assistant,
On the Brief.

APPENDIX

Decision of the Commissioner of Education (Re: *Craig Fisher, et al.* v. *Board of Education of City of Orange*)

CRAIG FISHER, DEBORAH FISHER, KIM FISHER, DIANE FISHER, and LINDA FISHER, minors, by Mrs. Gloria Fisher, their parent and next friend;

CRAIG FRAZIER, KAREN FRAZIER, WAYNE FRAZIER and CHERYL FRAZIER, minors, by Mrs. Hellen Frazier, their parent and next friend;

ALETHIA SMITH, HORACE SMITH, JR., and BRUCE SMITH, minors by Mr. and Mrs. Horace W. Smith, their parents and next friend,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,

Respondent.

For Petitioners, Herbert H. Tate, Esq., William Wright, Jr., Esq., Robert L. Carter, Esq., Maria L. Marcus, Esq., Barbara A. Morris, Esq.

For Respondent, Lee A. Holley, Esq., Walter D. Van Riper, Esq., Special Counsel.

This appeal, brought in the name of several children of school age by their parents, alleges the maintenance of a racially segregated school system in the City of Orange

and protests the refusal of the Board of Education to formulate and execute plans and procedures designed to eliminate the existing pattern of racial segregation. The relief sought is an order requiring the respondent Board to take steps to eliminate all aspects of racial segregation in the Orange Public School System. Respondents enter a general denial of these allegations.

A hearing on the issues was conducted by the Assistant Commissioner in charge of Controversies and Disputes in Newark on November 20, 21, December 3, 5, 6, and 14, 1962.

The facts underlying this controversy are relatively few and are undisputed to any material degree.

The charge of segregation herein is leveled against the assignment of pupils to the eight elementary schools in the City of Orange. The single high school in the district, which receives all of the pupils of secondary grade, is not involved.

The eight public elementary schools of the City of Orange have an enrollment of 50 percent white and 50 percent Negro pupils distributed by schools as follows:

School	*Grades*		*% Negro Pupils*	
	1961-62	*1962-63*	*1961-62*	*1962-63*
Oakwood School	K-5	K-4	99	99
Central School	5-8	7-8	99	66
Park School	K-8	K-6	44	50
Lincoln School	K-8	K-6	42	60
Forest School	K-8	K-8	41	43
Cleveland School	K-8	K-8	25	19
Heywood School	K-8	K-5	20	19
Tremont School	K-8	5-8	20	24
Total			48	50

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Some controversy has existed for a number of years with regard to the Oakwood School which has an enrollment of 99 percent Negroes. In 1958, in the process of investigating a complaint of pupil assignments, the Division Against Discrimination of the New Jersey State Department of Education entered into discussions with the Orange Board of Education which resulted in the modification and establishment of new attendance area boundaries for the Heywood-Tremont, Oakwood, Park, and Cleveland Schools. Subsequently, at a meeting on December 6, 1961, the Board received from a group of citizens four proposals designed to relieve the concentration of Negro pupils in the Oakwood School and Central School. After taking the four proposals under consideration, the Board at a meeting on February 13, 1962, adopted a resolution embodying a different plan than any of those submitted. The group submitting the four proposals found this plan to be unacceptable and voiced objection to it. Its primary feature was a change in the use of Central School which reduced its range of grades to 7-8 instead of 5-8. The consequent reassignment of pupils affected in slight degree each of the other schools except Forest, Heywood, and Tremont. This plan became effective in September 1962. As a result the concentration of Negro pupils in Central School was reduced from 99 percent to 66 percent. While there was some shifting of racial ratios in the other schools, Oakwood remained almost entirely Negro. That the pupil population of this school continues to be racially homogenous is the primary basis of petitioners' attack on the policies of the Board of Education.

While petitioners maintain that the actions of respondent Board of Education have been such as would keep as many Negro children as possible in schools separate and

apart from those attended by white pupils, thus practicing deliberate and purposeful segregation, the main thrust of their petition is that the fact of racial segregation, by design or not, violates their legal and constitutional rights. They assert that the Courts have established that segregated education is unequal education and whether such segregation exists as a result of deliberate efforts or whether it is caused by socio-economic or adventitious forces is immaterial; the results are one and the same and disadvantage the Negro child. They contend that no matter how caused, the existence of racially imbalanced schools requires action by the Board of Education which will result in the elimination of racially homogeneous school enrollments.

Respondent denies that there has been any attempt to segregate pupils by race in its schools and asserts that it has at all times administered its schools upon sound educational and legal principles. It contends that the utilization of race as a factor in the determination of school policies is as improper as discriminatory practices based on racial considerations. It finds no legal necessity or desirability for the adoption of the proposals advanced to mitigate the present racial concentration in preference to those already in effect.

In their brief, petitioners frame the issues herein as follows:

> "* * * whether a requirement, rule, regulation or policy of the respondent School Board that compels the appellants and other Negro children to attend a school to which only or virtually only Negro children are required to attend constitutes a violation of the constitutional rights of appellants and of the class they repre-

sent and is in derogation of the fundamental obligation of the School Board, thereby necessitating remedial action * * *."

In respondent's words the issues are:

"* * * (1) have the various Orange school officials been derelict in their legal and constitutional responsibilities in failing to administer a school system, upon prime racial distinctions and standards, without discriminatory racial quotas, and upon necessary and important educational considerations? and, (2) assuming for the purposes of argument, some duty or desirability to utilize some 'benign' racial discrimination in school assignments, has the Board of education utilized its facilities with proper judgment and with legal authority, considering the numerous matters of local concern, regarding Oakwood Avenue School, *vis-a-vis,* other Orange elementary schools?"

It has been argued by the respondent that the issue in this matter presents novel questions of constitutional law which are beyond the scope of the Commissioner's quasi-judicial function. The Commissioner, while applying constitutional principles to the determination of school controversies, has consistently refused to attempt to decide constitutional questions, and to the extent that such issues are present herein, he will not presume upon the function of the Courts. He is aware, however, that in dismissing a similar complaint brought by other parents in the United States District Court for New Jersey, saying that it should be subject first to the exhaustion of administrative remedies, Judge Augelli said:

"Plaintiffs have not satisfied this Court that the Commissioner lacks authority to grant the specific relief

requested herein. There is ample power in the Commissioner to hear all disputes and controversies arising under the school laws and to make binding decisions with respect thereto. * * *

"* * * a determination of the manner in which the 'neighborhood school policy' operates in any particular community requires a consideration and evaluation of a multitude of factors. This Court feels that the Commissioner is especially well qualified, by reason of his knowledge and experience in the specialized field of education, to make these factual determinations. There is no reason to assume that the Commissioner, in the performance of his duty, will not be guided by the applicable legal principles. Under all of the circumstances, the Commissioner should be given the opportunity, at least in the first instance, to pass upon the matters set forth in plaintiffs' complaint. Until such time as plaintiffs have exhausted the state administrative remedies provided by N.J.S.A. 18:3-14 and 15, this Court should not entertain the action." *Shepard* v. *The Board of Education of the City of Englewood*, 207 F. Supp. 341 (U. S. D. C. N. J. 1962); *Allen* v. *The Board of Education of the City of Orange*, *Ibid.*

Under this mandate from the Court and confronted with a controversy obviously involving the proper administration of a public school district, the Commissioner has taken cognizance of this dispute and will make his determination of the issues herein in accordance with the application of educational principles and the school laws of New Jersey.

The pertinent New Jersey law is found in the New Jersey Constitution, Article I, section 5:

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"No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin."

and R.S. 18:11-1:

"Each school district shall provide suitable school facilities and accommodations for all children who reside in the district and desire to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. * * *"

The first question to be answered is: Have the Orange school authorities, by intent or design, segregated or attempted to segregate the Negro pupils?

No evidence has been presented to establish such a charge. Although petitioners make this general allegation they advance no proof of deliberate and purposeful action to maintain racially segregated schools or to discriminate between pupils on the basis of race.

The pivotal question in this case is: Does the existence of the Oakwood School as virtually an all Negro school, constitute such an educational handicap to the pupils assigned to it, that the board of education is duty bound to eliminate its racial imbalance or reduce it within the limits of reasonableness and practicability consistent with sound educational practice?

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The area adjacent to the Oakwood School is densely populated by Negro families almost exclusively. A large part of the enrollment comes from a Federal housing project close to the Oakwood School whose occupants are practically all Negro. The school attendance boundaries, roughly rectangular, approximate equidistant points between Lincoln, Central, and Park Schools and include almost all of this highly congested Negro population area. The boundary lines are regular and the Commissioner finds no evidence that they have been drawn with deliberate intent to make Oakwood an all Negro school. That its enrollment is 99 percent Negro results obviously from the housing pattern.

It is clear that the ultimate solution lies in the free choice of residence and the elimination of segregated housing which lie beyond the control of the board of education or the Commissioner. Nevertheless, the Commissioner is of the opinion that in the minds of Negro pupils and parents a stigma is attached to attending a school whose enrollment is completely or almost exclusively Negro, and that this sense of stigma and resulting feeling of inferiority have an undesirable effect upon attitudes related to successful learning. Reasoning from this premise and recognizing the right of every child to equal educational opportunity, the Commissioner is convinced that in developing its pupil assignment policies and in planning for new school buildings, a board of education must take into account the continued existence or potential creation of a school populated entirely, or nearly so, by Negro pupils.

The Orange City Board of Education took steps at the beginning of this school year which effectively reduced the concentration of Negro pupils in the Central School. From his study of this problem, the Commissioner concludes that

the Board of Education can also eliminate the extreme concentration of Negro pupils in the Oakwood School. He is further convinced that this can be done without doing violence to logical attendance areas or at the sacrifice of sound educational considerations. The practice of assigning pupils to schools near their homes, particularly with regard to children of elementary school age, is well established and is attended by educational values that are widely accepted, not only by educators, but by the public generally. Consideration of such factors as distance to be traveled, safety, economy of time, establishment of rapport between school and home, and knowledge by the school staff of the child's environment have operated to establish convenience of access as the controlling criterion of pupil assignment, and the importance of these values cannot be denied. It is the Commissioner's conviction, nonetheless, that one or more solutions to the present problem can be developed which will mitigate the existing undesirable concentration of Negro enrollment in the Oakwood School and which can at the same time preserve and protect in great part the values of the time-tested pattern of pupil assignment.

The Commissioner does not mean to suggest that the solution to this problem is necessarily simple. He notes also that petitioners recognize the difficulties confronting the Board when they say in their brief:

> "Obviously, however, logic makes its demands. The School Board cannot be required to do the impossible, but if there are reasonable and administratively feasible alternatives available which would reduce or eliminate the school segregation complained of, the respondent is under constitutional obligation to put those alternatives into effect."

He points out, however, that a number of plans have already been proposed, some by civic organizations and others in a report of a committee of the New Jersey State Department of Education. For instance, it has been suggested that the Oakwood and Park Schools be combined into one attendance area. Under this proposal all pupils in this district would attend one school for grades 1-3 and the other school for grades 4-6. Such a plan would reduce the ratio of Negro children in Oakwood as indicated in the report of the Department of Education. (See appendix)

The above plan is cited not to imply that it is favored or that it necessarily offers the best solution, but only for purposes of illustration and to indicate that the problem is not incapable of solution. Doubtless there are other plans than those already offered which the Board may want and need to consider. Because the Board has had this matter under study for a long time, the Commissioner is certain that a satisfactory plan can be formulated and approved without delay in order that the beginning of the next school year will see the elimination of this problem.

The Commissioner finds and determines

(1) that the concentration of Negro pupils in the Oakwood School does not result from the employment of deliberate and purposeful segregation policies;

(2) that attendance at the Oakwood School engenders feelings and attitudes which tend to interfere with successful learning;

(3) that such extreme racial imbalance as obtains in the Oakwood School, at least where means exist to prevent it, constitutes under New Jersey law a deprivation of educational opportunity for the pupils compelled to attend the school; and

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(4) that reasonable means consistent with sound educational and administrative practice do exist to avoid the extreme concentration of Negro pupils in the Oakwood School.

The Commissioner of Education directs the Orange Board of Education

(1) to formulate a plan consistent with the principles and findings enunciated in this decision to reduce the imbalance in the Oakwood School,

(2) to submit such plan or plans for approval on or before July 1, 1963; and

(3) to implement its plan as approved with the beginning of the 1963-64 school year.

Jurisdiction over this appeal is retained by the Commissioner pending the adoption by the Orange City Board of Education of a plan which meets with the approval of the Commissioner, and the Commissioner reserves the right to make such further order or orders in this cause as shall be necessary to effectuate a plan approved by the Commissioner for the 1963-64 school year.

COMMISSIONER OF EDUCATION

MAY 15, 1963

Decision of the Commissioner of Education (Re: Craig Fisher, et al. v. Board of Education of City of Orange)

APPENDIX

COMBINE OAKWOOD AND PARK SCHOOLS INTO ONE (1) DISTRICT*

Under this proposal pupils of the combined district would be assigned to one school for the first, second and third grades and in the other school for grades four, five and six. Kindergarten children would attend the school nearest their homes.

Advantages seen were:

1. It would reduce the present racial concentration in the Oakwood School to an approximately 72% Negro—28 white ratio in both schools.

2. It would require no transportation by the Board of Education.

Disadvantages seen were:

1. Increased walking distance for more children as well as increased over-all child travel distance.

2. Children from the extremes of the combined district would have to cross two heavy traffic arteries.

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* A Study Concerning Alleged Segregation and Discrimination in the Orange Public Schools, New Jersey State Department of Education, October, 1962, p. 57.

Decision of the Commissioner of Education (Re: *Deborah Spruill* v. *Board of Education of City of Englewood*)

DEBORAH SPRUILL, a minor, by Mr. and Mrs. John T. Spruill, her parents and next friends,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent.

KENNETH ANCRUM and LESLIE ANCRUM, minors, by Mortimer W. Ancrum, their parent, *et al.*,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent.

LAURA, ROBERT and JAY VOLPE, minors, by Mr. and Mrs. Jerry Volpe, their parents, *et al.*,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent.

Decision of the Commissioner of Education (Re: Deborah Spruill v. Board of Education of City of Englewood)

For Petitioner Spruill:

William K. Kunstler, Esq. of the New York Bar
Robert G. Platoff, Esq.

For Petitioners Ancrum, *et al.*:

Arnold E. Brown, Esq.
Robert G. Platoff, Esq.
George B. Gelman, Esq.
David S. Greenberg, Esq.
Robert L. Carter, Esq.
Herbert H. Tate, Esq.
Barbara Morris, Esq.
Maria Marcus, Esq.

For Petitioners Volpe, *et al.*:

William V. Breslin, Esq.

For Respondent:

Abraham A. Lebson, Esq.

Two of the petitions in this matter, the first brought in behalf of their child by Mr. and Mrs. John T. Spruill and the second filed in the name of a group of children by their parents and captioned Ancrum, et al., charge the respondent Board of Education with the maintenance of racially segregated public schools and with refusal to implement plans to eliminate patterns of racial segregation alleged to exist in the public schools. They seek an Order requiring respondent to take immediate steps to eliminate all aspects of racial segregation in the Englewood public school system. The Ancrum petitioners pray further that

the Board of Education be directed to put into effect a particular proposal referred to as the "central intermediate school" plan described more fully hereinafter. Respondent denies both charges.

The third group of petitioners, Volpe, et al., in a Cross-Petition of Appeal directed against the Englewood Board of Education, protest any intentional deviation from the present composition of the elementary schools and seek to enjoin the establishment of the central intermediate school sought by the Ancrum petitioners. They pray for an Order restraining the Board of Education from violating the neighborhood school principle or from unnecessary expenditures of public funds. Respondent requests dismissal of all petitions on the grounds that the Board of Education is not discriminating against any children and that there is no basis in law or in fact for the petitions or the cross-petition.

After the joining of this action, the Volpe petitioners filed a Petition to Intervene in the Spruill matter. A motion to strike the Petition to Intervene, filed by counsel for Mrs. Spruill, was denied by the Commissioner and intervention was granted. Subesquently, leave was also given to the Volpe party to intervene in the Ancrum matter.

In addition to the Board of Education, the Ancrum petition also named the Board of School Estimate and the Mayor and Common Council of Englewood as respondents. A Motion made to dismiss the Board of School Estimate and the Mayor and Common Council from the complaint, on the ground that the Commissioner of Education lacks jurisdiction over these parties, was granted, leaving the Englewood City Board of Education as the sole respondent.

Decision of the Commissioner of Education (Re: Deborah Spruill v. Board of Education of City of Englewood)

By consent of all parties, the separate Petitions of Appeal herein were consolidated and heard as one matter. Hearings were held by the Assistant Commissioner of Education in charge of Controversies and Disputes on April 1, 2, 3, 4, 5, 10, 15, 16, and 17 in the Bergen County Court House, Hackensack.

The School District of the City of Englewood is organized under the provisions of Chapter 6 of Title 18 of the Revised Statutes. Its Board of Education consists of 5 members appointed by the Mayor, and its funds for operation of the schools are subject to approval by the Board of School Estimate. There is one high school housing grades 10, 11, and 12 and one junior high school attended by grades 7, 8, and 9. As all the children in these grades attend these schools without regard to where they reside in the school district, the issues raised herein pertain only to the five elementary schools, to which pupils are assigned on the basis of residence in designated attendance areas. These schools, their enrollment and racial composition as of September 19, 1962, were as follows:

School	*No. of Pupils*	*% White*	*% Negro*
Cleveland	477	99.6	.4
Liberty	418	38.0	62.0
Lincoln	505	2.0	98.0
Quarles	343	96.8	3.2
Roosevelt	345	85.5	14.5
Total	2088	60.9	39.1

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While this complaint is directed to the school system generally, its focus is on the Lincoln School, whose enrollment is comprised almost exclusively of Negro children.

The Lincoln School was also the center of an earlier controversy involving racial issues. In 1954, a complaint was brought before the Commissioner of Education under the Law Against Discrimination, R.S. 18:25-1, *et seq.*, claiming that the Board of Education had drawn its attendance area boundaries so as to unlawfully discriminate against Negro pupils. *Walker and Anderson* v. *Englewood Board of Education,* decided May 19, 1955. In May, 1955, the Commissioner directed the Board to redraw the boundary lines affecting the Lincoln and Liberty Schools and also ordered the elimination of a second junior high school housed in the Lincoln School. The Board complied with the Commissioner's directive and its action was approved by him.

On April 10, 1961, respondent directed its Superintendent of Schools to make a study of school enrollment problems and future needs. Two months later the Board supplemented this directive by instructing the Superintendent to include in his survey the question of the racial composition of the elementary schools. The study was completed in February, 1962, and reported to the Board by the Superintendent in a publication entitled "Englewood, its People and its Schools," since commonly referred to as the "Stearns Report."

Before the Stearns Report was completed, an action was initiated in the United States District Court in Newark, New Jersey, on behalf of Ellen Shepard and others, naming the Englewood Board of Education, its Superintendent of Schools and the Commissioner of Education as defendants and raising issues similar to those herein. Judge Augelli dismissed the suit, saying:

Decision of the Commissioner of Education (Re: Deborah Spruill v. Board of Education of City of Englewood)

"Until such time as plaintiffs have exhausted the state administrative remedies provided by N.J.S.A. 18:3-14 and 15, this Court should not entertain the action." *Shepard, et al.* v. *Board of Education of City of Englewood, et al.*, 207 F. Supp. 341.

Plaintiffs above have not brought the matter before the Commissioner of Education as of this date.

Following receipt of the Stearns Report, two plans aimed at relieving the concentration of Negro pupils in any of the elementary schools were proposed by the Board of Education. The first, announced in May, 1962, provided for enrollment on a voluntary basis in a "demonstration school" to be housed in the former Engle Street Junior High School building now used for administrative offices. This idea was abandoned when a poll of parents failed to produce a sufficient number of potential pupils to be enrolled. The second plan, announced in July, 1962, proposed rehabilitation of the former junior high school building at 11 Engle Street and the establishment there of a "central intermediate school." All 5th grade pupils, irrespective of residence, would have attended this building during the 1962-63 school year and all 5th and 6th grade pupils in subsequent years.

The Board of Education then made a request for an appropriation of $35,000 to the Board of School Estimate, to be used with available surplus funds to accomplish the rehabilitation needed to put the central intermediate school plan into operation. This request was not approved by the Board of School Estimate, and the proposal to establish a central intermediate school was not carried out. There followed then the filing of the petitions of appeal herein.

Decision of the Commissioner of Education (Re: Deborah Spruill v. Board of Education of City of Englewood)

Shortly after the filing of these appeals, six members of the staff of the State Department of Education conducted a survey of the Englewood Public Schools and presented their findings to the Commissioner of Education on October 5, 1962, in a report entitled "A Study of Racial Distribution in the Englewood, New Jersey, Public Schools," referred to hereinafter as the "Fact-Finding Report."

The New Jersey law applicable to the issues raised herein is found in the New Jersey State Constitution, Article I, section 5:

> "No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin."

and in R.S. 18:11-1:

> "Each school district shall provide suitable school facilities and accommodations for all children who reside in the district and desire to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. * * *"

These appeals require the Commissioner to determine the following questions:

Decision of the Commissioner of Education (Re: Deborah Spruill v. Board of Education of City of Englewood)

1. Is the Englewood Board of Education maintaining a racially segregated school system by deliberate action and intent?

2. Does the fact that the enrollment in Lincoln School is comprised almost exclusively of Negro pupils, whether by design or not, require the Board of Education to take affirmative action to improve the racial balance in the school?

The answer to the first question must be in the negative. While petitioners in their pleadings and in some of the testimony imply that respondent may have been guilty of intentional racial segregation, they do not press the issue nor has evidence of any kind been produced to establish such a charge. Petitioner Spruill, in fact, very plainly states in her brief that "No accusation that respondent was or is guity of *de jure* segregation has been made" and that she "is concerned only with *de facto* segregation." All witnesses who were questioned on this issue were emphatic in their denial of any action aimed at deliberate segregation by race in the schools. The Commissioner finds no evidence to support a charge of intentional racial segregation by respondent.

This leads to the second question and the fact that the population of the Lincoln School is almost entirely Negro. That this concentration of pupils of one race results from patterns of housing and the operation of other socio-economic forces is apparent. The Commissioner agrees with respondent when it says in its brief, "However lamentable the housing and other non-school problems may be, it is not the responsibility of the Board, nor does it have any control over these housing and non-school problems." The Commissioner has previously stated that in his opinion the

ultimate solution to this problem lies in the free choice of residence and the elimination of segregated housing. *Fisher* v. *Orange City Board of Education,* decided May 15, 1963.

Respondent maintains that the educational opportunities afforded Englewood children are equal regardless of school attended. It argues that former Superintendent Harry Stearns so testified and points also to a statement to that effect in the Fact-Finding Report. The Commissioner finds no reason to dispute this claim in terms of measurable objective criteria such as similarity of instructional materials, class size, teacher preparation and assignment, facilities and equipment, expenditure per pupil, etc. But as he has already said in *Fisher* v. *Orange, supra,* he is of the opinion that

> "* * * in the minds of Negro pupils and parents a stigma is attached to attending a school whose enrollment is completely or almost exclusively Negro, and that this sense of stigma and resulting feeling of inferiority have an undesirable effect upon attitudes related to successful learning. Reasoning from this premise and recognizing the right of every child to equal educational opportunity, the Commissioner is convinced that in developing its pupil assignment policies and in planning for new school buildings, a board of education must take into account the continued existence or potential creation of a school populated entirely, or nearly so, by Negro pupils."

The Commissioner holds, therefore, that compulsory attendance at an all Negro school, such as the Lincoln School, at least where appropriate means can be found to avoid it, constitutes a denial of educational opportunity under New Jersey law which the school district is required to correct.

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There remains the question of appropriate means for reducing the racial homogeneity in the Lincoln School. The evidence in this case discloses that a number of plans have been proposed to and considered by the Board. That there are still other plans which can be devised, effectively dealing with the problem, the Commissioner has no doubt. The formulation of the most suitable plan, however, is a function of the respondent Board of Education and the Commissioner reserves to it the right to prescribe the precise formula which will provide the best answer to this complex problem. As he said in the case of *Booker* v. *Plainfield Board of Education,* decided June 26, 1963:

> "The Commissioner believes that it is the responsibility and the prerogative of the Board of Education to determine which of the proposals is best suited to the needs of the school system which it is called upon to operate."

It is toward the adoption of a plan that would alter present pupil assignment policies that the main thrust of the Volpe petitions is directed. These petitioners argue that the "neighborhood school policy" is the law of New Jersey and any change in that policy on the basis of racial considerations is illegal. They contend that the Commissioner has no authority to set aside the "neighborhood school policy" but is required to uphold it and prevent its abuse. This group opposes the central intermediate school advocated by the Ancrum petitioners or any other plan that assigns pupils to a school other than the one nearest their place of residence.

It is well established that the assignment of pupils to the schools they are to attend is within the authority of the local board of education. *Pierce* v. *Union District School*

Decision of the Commissioner of Education (Re: Deborah Spruill v. Board of Education of City of Englewood)

Trustees, 46 N. J. L. 76 (Sup. Ct. 1884); *Edwards* v. *Atlantic City Board of Education,* 1938 S. L. D. 683 (1923); *Clausner, et al.* v. *Board of Education of Millburn,* 1938 S. L. D. 645 (1936). The assignment of pupils in terms of proximity of home and school is the most commonly employed method of establishing attendance areas not only in New Jersey but in the United States generally. Traditionally, school districts have erected schools in areas of most concentrated population with the purpose of locating school buildings as close as possible to the homes of the children to be served. The logic and the inherent educational values of such a program are indisputable. The Commissioner has also made his position clear on this question in *Fisher* v. *Orange, supra,* when he said:

> "The practice of assigning pupils to schools near their homes, particularly with regard to children of elementary school age, is well established and is attended by educational values that are widely accepted, not only by educators, but by the public generally. Consideration of such factors as distance to be traveled, safety, economy of time, establishment of rapport between school and home, and knowledge by the school staff of the child's environment have operated to establish convenience of access as the controlling criterion of pupil assignment, and the importance of these values cannot be denied."

Obviously, however, the assignment of pupils to nearby schools is a general principle and is not to be applied inflexibly when other considerations outweigh its values. The Commissioner believes that a plan for the reduction of the racial concentration at the Lincoln School can be formulated which will not do violence to reasonable attendance

areas. Whatever plan is adopted must, of course, meet the tests of reasonableness, of practicability, and of consistency with sound educational practice. From his study of the evidence in this case, the Commissioner is convinced that the respondent Board of Education can choose from among the proposals already made to it, or from others that it has already devised or will formulate, the means best suited to reduce the present concentration of Negro pupils in the Lincoln School which will at the same time maintain long-recognized values.

It is entirely possible that there may be of necessity both a short-range and a long-range solution to this problem. The Commissioner is aware that any long-range solution will possibly require expenditures for capital construction, which cannot be accomplished by September, 1963.

Although the controversy which the Commissioner is asked to decide in this and similar cases is centered around the question of civil rights, it must be remembered that so far as the schools are concerned their fundamental purpose is the proper conduct of the educational process. Controversy must be resolved so that teachers and school leaders may go ahead with the task of improving educational opportunities for all pupils. Discussions which the Commissioner has had with teachers, principals, and superintendents throughout the State convince him that these persons to whom education is entrusted cannot perform their duties effectively when their work is carried on in a climate of continuous tension and controversy. It is for this reason as well as the others stated that the Commissioner concludes that the current and long-standing dispute involving the Lincoln School must be resolved without delay. Continuation will damage the pupils of not only that school

but all others in the community. Hence, the entire community has a stake in a solution which will make it possible for the school staff to devote its undivided attention and effort to planning for better educational opportunities for all pupils.

The Commissioner finds and determines:

1. that there is no evidence in this case of any deliberate intent by the Englewood Board of Education to segregate its pupils by race in the public schools;

2. that the pupil assignment policies currently in force in the Englewood School District result in an extreme concentration of pupils of the Negro race in the Lincoln School;

3. that attendance at the almost exclusively Negro Lincoln School engenders feelings and attitudes in pupils which tend to interfere with learning;

4. that, where means exist to prevent it, such a concentration of educational opportunity under New Jersey law for the pupils compelled to attend the school;

5. that reasonable and practicable means consistent with accepted educational and administrative practice can be devised to reduce the present racial concentration in the Lincoln School.

Having reached these conclusions, the Commissioner sees no need to determine other issues raised and argued in this matter.

The Commissioner of Education directs the Englewood Board of Education

1. to formulate a plan or plans to reduce the extreme concentration of pupils of the Negro race in the Lincoln

School consistent with the principles and findings enunciated in this decision;

2. to submit such plan or plans to the Commissioner of Education for approval on or before August 1, 1963;

3. to put a plan, as approved, into effect at the begining of the 1963-64 school year.

The Commissioner reserves the right to make such further order or orders in this matter as shall be necessary to effectuate a suitable pupil assignment plan, approved by him, for the 1963-64 school year.

COMMISSIONER OF EDUCATION

July 1, 1963

Decision of the Commissioner of Education (Re: *Clarence Alston, et al.* v. *Board of Education of The Township of Union*)

CLARENCE ALSTON and DONNA ALSTON, by their parents, CLARENCE ALSTON and ONEIDA ALSTON, *et al.*,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,

Respondent.

For the Petitioners, Gross & Stavis (William Rossmore, Esq., and Morton Stavis, Esq., of Counsel).

For the Respondent, Harrison B. Johnson, Esq.

Protest is made by a group of petitioners against the adoption by respondent of a plan aimed at reducing the high proportion of Negro pupils in one of its elementary schools. Petitioners contend that the plan is inadequate and illegal.

Testimony was heard and exhibits received by the Assistant Commissioner of Education in charge of Controversies and Disputes at a hearing on October 2, 1963, at the office of the Union County Superintendent of Schools in Elizabeth.

There are seven elementary schools in the Union Township School District. In a pupil census made in or about February and March 1963, the enrollments and racial composition thereof are shown to be as follows:

Decision of the Commissioner of Education (Re: Clarence Alston, et al. v. Board of Education of The Township of Union)

School	*White Pupils*	*Negro Pupils*	*Total*	*% Negro*
Battle Hill	735	—	735	—
Connecticut Farms	685	1	686	0.1%
Franklin	764	—	764	—
Hamilton	385	—	385	—
Jefferson	25	444	469	95. %
Livingston	713	15	728	2. %
Washington	829	—	829	—
	4136	460	4596	10. %

During the 1962-63 school year, a community group known as the Vauxhall Committee held a series of meetings with respondent Board and advanced various suggestions and plans for achieving more integration of the two races in the schools of the district. These sessions culminated in a meeting on June 3, 1963, at which the Board presented a plan which it had formulated and which it subsequently adopted at its regular meeting on June 18, 1963, as follows:

> "That the Union Township Board of Education adopt a voluntary optional pupil transfer policy for the regular pupils of the Jefferson School District only, commencing September, 1963. It is the Board's intention to implement this policy on a limited basis effective September, 1963, and to provide for complete implementation to coincide with the opening of the Newark State College Demonstration School in September, 1964."

Decision of the Commissioner of Education (Re: Clarence Alston, et al. v. Board of Education of The Township of Union)

Under respondent's plan provision is made in the 1963-64 school year for the transfer to the other six elementary schools on a free choice basis of approximately 150 pupils now assigned to the Jefferson School. In the succeeding 1964-65 school year opportunity will be afforded for transfer to the same six schools and the Newark State College Demonstration School now under construction, of all pupils in the Jefferson School area. Other features of the plan provide (1) that transfers are to be approved in the order in which applications are received; (2) after the first year pupils are assured of completing their elementary education in the school to which they transfer; and (3) transportation is to be provided at public expense to pupils who transfer to schools more than two miles from their homes.

Both parties rely for support on the decision of the Commissioner in three prior appeals in which the issue of racial segregation was raised: *Fisher, et al.* v. *Board of Education of Orange,* decided May 15, 1963; *Booker, et al.* v. *Board of Education of Plainfield,* decided by the Commissioner June 26, 1963, affirmed State Board of Education February 5, 1964; and *Spruill, et al.* v. *Board of Education of Englewood,* decided by the Commissioner July 1, 1963, affirmed State Board of Education September 24, 1963. In these cases the Commissioner found that housing patterns in each district had led to the maintenance of a school whose enrollment was all or virtually all Negro. He further found, as most recently stated in *Spruill, supra,* that compulsory attendance at an all or nearly all Negro school

"* * * engenders feelings and attitudes in pupils which tend to interfere with learning;

"that, where means exist to prevent it, such a concentration of Negro pupils as exists in the Lincoln School

constitutes a deprivation of educational opportunity under New Jersey law for the pupils compelled to attend the school; * * *"

In each of these cases the Commissioner determined that reasonable and practicable means, consistent with sound educational and administrative practice, were available to reduce the extreme concentration of Negro pupils in the particular school in the district, and placed upon the local board of education the responsibility of adopting a plan, subject to his approval, to achieve that purpose.

To the extent that the Union Township school system contains a school whose enrollment is made up almost entirely of Negro pupils who are compelled to attend that school by virtue of their residence in its established attendance area, the instant matter shares elements common to the *Orange, Plainfield* and *Englewood* cases, *supra.* The Commissioner finds no reason herein to depart from his previous conviction enunciated in those cases that such a situation engenders feelings and attitudes which tend to interfere with learning, and that where means exist to prevent it, continuance of such a situation constitutes a denial of equal educational opportunity under New Jersey law.

The instant situation, however, is clearly distinguishable from the *Orange, Plainfield,* and *Englewood* matters, *supra.* In those cases the issue, decided affirmatively, was whether a school district has a duty to reduce the extreme concentration of Negro pupils in a school when appropriate means exist to do so. In the instant case respondent Board has accepted the duty enunciated in the Commissioner's decisions and has on its own initiative adopted a specific plan aimed at reducing the extreme proportion of Negro pupils in its Jefferson School.

Decision of the Commissioner of Education (Re: Clarence Alston, et al. v. Board of Education of The Township of Union)

The question in this case then is not whether the Commissioner should direct the Board of Education to formulate a plan but whether he will interfere with the exercise of the Board's discretion to adopt the proposal which is here challenged.

Petitioners contend that the plan should be set aside on the grounds that it places the "burden of achieving racial balance within the school system upon the children attending the Jefferson School who would attend other schools, and provides for no transfers of white children from other schools into Jefferson School." They predict that the Board's plan is destined to failure, and whether designedly so or not, will cause a continuance and indeed an intensification of the racial imbalance of the Union Township Schools." In support of this latter contention, they offer evidence that for the 1963-65 school year, 15 pupils, of whom 11 are white, transferred from Jefferson School under the terms of respondent's plan, thereby increasing the ratio of Negro to white pupils in that school. They contend that this is, *ipso facto,* proof of the ineffectiveness of respondent's plan.

Petitioners' attack on the plan rests largely on the testimony of an expert witness, a sociologist, who testified that in his judgment the policy adopted by the respondent does not and will not accomplish the purpose for which it is designed. He characterizes it as an "open enrollment plan" and basis his conclusions of inadequacy and failure on his knowledge of the experience of other school districts, specifically New York City, New Rochelle, Newark and Plainfield, in each of which, he alleges, similar plans were unsuccessful. As an alternative, petitioners offer a plan devised by this witness which they predict would result in

much greater racial balance and would be far superior to respondent's allegedly inadequate solution.

Respondent, on the other hand, contends that its plan will not only eliminate the high proportion of Negro pupils in Jefferson School but will also, with the implementation of both phases of the plan, produce a better balance of races in all other elementary schools of the district than could be achieved "by any other workable plan suggested or considered." In presenting its plan to the Vauxhall Committee, the Board said:

> "One of the strongest points of this policy will be the *guaranteed* availability of a seat for every regular pupil from the Jefferson School District in one of the remaining elementary schools or the Newark State College Demonstration School effective September, 1964. In fact, it is possible that the remaining student body in Jefferson School could become so small as to warrant the closing of Jefferson School for the regular Jefferson School pupils."

Moreover, respondent contends, it has developed a plan consonant with the directives of the Commissioner in *Fisher, et al., supra.*

In their prayer for relief, petitioners ask that "the Commissioner of Education formulate a plan to be applied to the elementary schools of Union Township to eliminate de facto segregation * * *."

The Commissioner has already made it clear in previous decisions that he does not consider it his function to formulate a plan such as petitioner prays for and impose it upon a local board of education where the board is competent to act. Nor will he usurp the powers of the board

of education to choose from among several plans the one most appropriate to the particular school district and its problems. In his judgment the local board of education is not only best suited but also has the responsibility under law to determine attendance areas and assignment of pupils to schools. R.S. 18:11-1. Thus, in *Booker* v. *Plainfield, supra,* where three plans were stipulated, the Commissioner said:

> "The Commissioner believes that it is the responsibility and the prerogative of the Board of Education to determine which of the proposals is best suited to the needs of the school system which it is called upon to operate. * * *"

The plan *sub judice,* whether it be called "open enrollment" or "voluntary optional pupil transfer," is the plan adopted by respondent after

> "* * * some twenty-two meetings to discuss the Vauxhall Committee's request, with many hours of outside reading, review and study of the many facets involved in a solution. The administrative staff has spent countless hours in studying, reviewing and preparing reports of the many questions raised during our discussions. We have given careful and detailed deliberation to formulate a plan which will be of a long-range nature and not just temporary, which will enure to the best interests of the entire educational system and which will still correct 'de facto' segregation in Jefferson School. * * *" *Union Township Board of Education's Decision Concerning Racial Imbalance in Jefferson School. June* 3, 1963.

It is possible that a number of plans could be evolved to deal with this problem and each would have its proponents. It is also probable that any plan will have certain advantages and disadvantages. Even the plan urged by petitioners, as devised by its sociologist, contains elements which are debatable when educational values are considered. It is apparent, therefore, that evaluation and choice of the various solutions proposed should be made in the first instance by the local board of education whose members have been chosen by the people of the community to make the decisions affecting their schools.

There can be no question that a board of education has the authority to correct a school assignment policy which works a disadvantage to some pupils. It is equally clear that in reviewing the action taken by a board to remedy the situation such as that herein, the Commissioner is constrained to keep within proper limits of judicial inquiry. As the Commissioner said in *Boult and Harris* v. *Passaic Board of Education,* 1939-49 S.L.D. 7, 13, affirmed State Board of Education, 1939-49 S.L.D. 15, affirmed 135 N. J. L. 329 (Sup. Ct. 1947), 136 N. J. L. 521 (E. & A. 1948):

> "* * * it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. * * *"

Petitioners point to the fact that only 15 pupils elected to transfer during the 1963-64 school year as conclusive

proof that respondent's plan is ineffective. But it is as reasonable to assume that there has been insufficient time thus far to test its operation adequately. The new policy was announced on June 3, 1963; applications became available on June 7; and all applications were required to be submitted by July 1. It is not unreasonable to conclude that such a short period of time was insufficient to overcome a natural reluctance to change patterns of long standing. Moreover, the plan is in its first year and not yet fully operative. The second year not only offers opportunity for all pupils in the Jefferson School to transfer elsewhere but assures completion of their elementary school education in the school to which they transfer. The possibility is also recognized that the Jefferson School may ultimately be closed. Under these circumstances the Commissioner is of the opinion that respondent's plan has not yet been given a fair trial and he cannot indulge in a presumption that it will fail to achieve its purpose.

The Commissioner will also point out that any plan may fail, not so much because of any inherent imperfections but because of disinterest in making it work or even efforts exerted to see that it does. If those who oppose the proposal take an active part in encouraging parents not to transfer their children, it is very likely that little change will result. The Commissioner believes, however, that all persons of good will in the community should work together to solve this problem by means of the Board's plan in order that it may be properly tested.

The Commissioner also rejects petitioners' argument that this is an "open enrollment" plan and that such plans when tried in other communities have been unsuccessful. It is well to be chary of labels. Such categorizing and the assumptions which follow can be misleading. What is

tagged "open enrollment," "optional transfer," or any other label may vary so widely in its specific application to any school district as to make it unique. The Commissioner is aware that pupil transfer plans of one kind or another have been tried and in many cases abandoned. He cannot fail to recognize, however, that the basic feature of respondent's plan herein is the same as that which the Court found to be acceptable in the case of *Taylor* v. *New Rochelle Board of Education,* 195 F. Supp. 231 (S. D. N. Y.), aff'd, 294 F. 2d 36 (2d Cir.), cert. denied, 368 U. S. 940, 82 S. Ct. 382 (1961). In that case, the New Rochelle Board of Education provided for voluntary transfer of pupils from an all Negro school to any of the other schools in the district but did not offer or arrange for such transfers to children in schools other than the one sought to be desegregated. This policy the Court accepted as providing a proper solution to the problem. While it may be true that New Rochelle has modified this polciy as a result of experience since its inception, the Commissioner cannot overlook the fact that in its original form it satisfied the requirements of law as interpreted by the U. S. District Court and the Circuit Court of Appeals. Respondent's plan herein is similar in its main features, and in other respects is even broader in scope.

The Commissioner, therefore, will not condemn a plan adopted by a board of education for the sole reason that it bears the label of or is similar to a plan which proved unsuccessful elsewhere. There are about 600 school districts in New Jersey, ranging in size from densely populated large cities to small rural areas with few inhabitants. The problems and interests of one district may have little meaning for another which has its own kind of concerns. In this diversity, many different remedies may be employed

to meet similar problems. Methods which function well in some districts fail in others so that it is impossible to prescribe a solution of choice for all. It is clear that the Union Township Board of Education gave much study to this problem and evolved the present policy only after due consideration. It must be presumed that in choosing this method they acted in good faith and with the best interests of the school district as a whole as their primary consideration. There is no evidence of arbitrary, capricious, or unreasonable action and, absent such a showing, the Commissioner will not interpose his judgment but will afford the Board a proper opportunity to test the merits of its plan.

In his study of this case the Commissioner has taken note of the case of *Goss, et al.* v. *Knoxville Board of Education,* 373 U. S. 683, 83 S. Ct. 1405, 10 L. Ed. 2d 632 (1963). In that matter, the plan adopted by the Knoxville Board of Education would have permitted transfer of a pupil from any school in which he was in the minority as to race to a school in which his race was in the majority. In rejecting the Board's plan, the Court said:

> "* * * Here the right of transfer, which operates solely on the basis of a racial classification, is a one-way ticket leading to but one destination, *i.e.,* the majority race of the transferee and continued segregation. * * *"

This condition is distinctly different from that under review here, where pupils in one school may transfer to other schools without regard to race. The end actually sought in *Goss* was continued racial segregation rather than the opposite result hoped to be achieved here. Later on in the *Goss* decision, after noting that the transfer plans proposed for Knoxville were purely racial in character and

for the purpose of discrimination and therefore invalid, the Court went on to say:

> "This is not to say that appropriate transfer provisions, upon the parents' request, consistent with sound school administration and not based upon any state-imposed racial conditions, would fall. Likewise, we would have a different case here if the transfer provisions were unrestricted, allowing transfers to or from any school regardless of the race of the majority therein. * * *"

The Commissioner holds that the Union Township Board of Education is entitled to select and implement its plan to eliminate unequal educational opportunity resulting from extreme concentration of Negro pupils in one of its schools. He finds that the Board of Education has considered and adopted such a plan and has put it into operation. At this posture of the case the Commissioner will take no position with respect to the merits of the plan nor intervene to set aside the policy before it has had fair opportunity, with the full cooperation and good will of all parties, to become fully effective.

The petition is dismissed without prejudice to its reinstitution at a subsequent time should the facts and circumstances so warrant.

COMMISSIONER OF EDUCATION

April 6, 1964

A64 SEPT. 1964

Superior Court of New Jersey

APPELLATE DIVISION—DOCKET NO. A-662-63

CHARLES B. BOOKER, *et al.*,
Petitioners-Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD IN THE COUNTY OF UNION,
Respondent-Respondent.

Civil Action

On Appeal from Decision, Determination and Order of the State Board of Education of New Jersey

BRIEF FOR RESPONDENT-RESPONDENT

VICTOR R. KING,
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VICTOR E. D. KING,
(Michigan 2L.)
On the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

Fuller v Volk 230 F. Supp. 25 (D.C.N.J.)

References in Respondent's brief:

page 12 - line 40 -230 F. Supp. 25, 27, 30.

Veters v Mitchell 251 N.Y. S. 2nd 480

References in [illegible] information on brief

Index page iv - [illegible]

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page 29 line 33 - 251 N.Y.S. 2nd 480,483

Enclose herewith, photo copy of copy of memorandum [illegible] Court Arizona 1954, together with [illegible] letter of Sept. 1, 1964 by the clerk of that Court to me [illegible] the case is not officially reported.

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September 25, 1964

Lester Warwick, Esq.
Deputy Clerk
Superior Court Appellate Division
State House Annex
Trenton, New Jersey

Re: Booker vs Board of Education-Plainfield
A-662-63
Supplemental information on briefs

Dear Mr. Warwick:

In our brief, several cases were cited that had not yet appeared in advance sheets. The information to complete the citations is as follows:

Fuller v Volk 230 F. Supp. 25 (D.C.N.J.)
References in Respondent's brief:
Index at page iii - as above
page 8 - line 25 as above
page 12 - line 40 -230 F. Supp. 25, 27, 30.

Veterre v Mitchell 251 N.Y. S. 2nd 480
References in our brief;
Index page iv - as above
page 16 line 3 - 251 N.Y.S. 2nd 480, 482
page 29 line 33 - 251 N.Y.S. 2nd 480, 483

Also I enclose herewith, photo copy of copy of memorandum opinion in Heard v Davis Superior Court Arizona 1954, together with photo copy of letter of Sept. 1, 1964 by the clerk of that Court to me confirming that this case is not officially reported.

Respectfully yours,

Victor R. King

VRK/al
Enc. 2
cc: Robert L. Carter, Esq. &
Barbara Morris, Esq.
20 West 40th St., N.Y.C. 18, N.Y.

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COPY

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Counter-Statement of the Questions Involved

1. Is a state under a constitutional duty to require that compulsory public school enrollment be maintained within a particular range of racial balance?

a. Is the right of equal educational opportunity denied to Negro pupils who are required to attend public schools where more than 50% of the pupils are Negro?

b. Is there a substantial encroachment on any First Amendment freedom of Negro pupils who are required to attend public schools where more than 50% of the pupils are Negro?

(Note: Question "b" was not previously presented to the Commissioner of Education, nor to the State Board of Education from whose decision this appeal is taken. It is presented for the first time in Appellant's brief before this Court (Pb16-30).)

Counter-Statement of the Case

Appellants appeal from a decision of the State Board of Education filed February 5, 1964, which concurred in the decision of the Commissioner of Education filed June 26, 1963 (P50a-40; P52a-25), whereby the Commissioner directed Respondent (P59a-40) to select and adopt one of three "Plans" then approved by the Commissioner (P59a-25) for the purpose of eliminating the "extreme concentration of Negro pupils" in the Washington School (P59a-9 to 24). Although respondent has adopted an approved plan (P47a-25), appellants claim that compulsory attendance of Negro pupils at five schools having enrollments of from 52% to 76.4% of Negro pupils (Pb12-11) offends the Fourteenth Amendment (Pb16-23), and infringes on rights assured by the First Amendment (Pb16-30), because such schools are allegedly racially imbalanced (Pb12-12); and, they seek an order requiring respondent to eliminate the alleged racial imbalance (Pb16-24, Pb21-8).

On November 21, 1961 respondent appointed a citizens committee (P27a-32), to study claims of alleged denial of equal educational opportunity to Negro children. On April 17, 1962 respondent engaged Dr. Max Wolff to study the racial composition of its elementary schools as requested by the citizens committee (P27a-40 to P28a-10 and P32a). Dr. Wolff's report was made June 15, 1962, (P28a-11). Although the charge to Dr. Wolff required that he compose a report based on consultation with a study team as a group (P32a-24 and P33a-18 to 31), and that the report include their opinions if the findings were not unanimous (P33a-32), the Wolff Report (Stipulation Exhibit 3) fails to indicate observance of these conditions or to show in what areas the consultants agreed or disagreed with him. See Wolff Letter of Transmittal (Wi-19), and The Introduction (W1-21 and W2 to W5).* However, there are brief references

* References preceded by letter "W" are to Special Appendix referred to in appellants' brief as Wolff Report.

to comments by one consultant in the Wolff Report at Section B page 9-5, to another at Section B page 15 footnote and at Section C page 5 footnote; and there is a general comment by a third consultant which is taken from a statement published elsewhere (W Appendix C-3 pages 2 and 3).

In the Wolff Report, the Negro pupil population for 11 elementary schools was 37% in April 1962, (W Section A page 1-5). The comparable figure for April 1964 is 44.7% (R16a). Dr. Wolff suggested a desirable distribution of Negro pupils in Plainfield in a range of from 24 to 49 per cent Negro pupils in any school (W Section A page 4-7). He reported the Washington School as a "*de facto* segregated" school because of its over 90% Negro enrollment (W Section A 1-18) and noted that the tables showed 7 "integrated" elementary schools ranging from 15 to 65 per cent Negro (W Section A page 3-13). The April 1964 table shows Negro enrollment in 5 elementary schools from 18.1% to 42.4%, in 5 others from 51.0% to 76.5%, and 38% in the Sixth Grade Washington School (R16a).

The Citizens Committee failed to agree on the Wolff proposals (R1a-6); but the majority concluded that:

> "* * * our immediate concern is to deal with the Washington School situation and also with any of the predominantly Negro schools which may indicate a trend toward de facto segregation in the very near future" (R1a-21).

It proposed that the respondent alter the Washington School zone (R3a-28), study and rezone other predominantly Negro areas (R4a-5) and embark on a special long-range "Higher Horizons" program to reduce the "cultural lag" (R4a-26) between Negro and white persons (R5a-25 to R7a-3).

The respondent's published comments on the Wolff Report included its reasons for disputing Dr. Wolff's con-

clusions on achievement (R23a-19, 24; R24a-1 to R25a-2 and R25a-14 to R26a-5). In announcing the Optional Pupil Registration Plan, the respondent stated its intention to study the questions raised and to "provide special education to youngsters who have motivational, family, environmental or other problems which affect adversely their response to education" (R55a-1 to 10).

As part of its proof, Stipulation Exhibit 11, respondent obtained and filed an independent professional study of 534 1961-62 Sixth Grade pupils to investigate their achievement, the culmination of the elementary school work and the transition to secondary school work by mathematical statistics using the results of 3 tests in reading, arithmetic and general ability (R28a-12 to R28a-21). The principal conclusion of this study was that reading and arithmetic achievement of Negro pupils of equal general ability was the same regardless of school attended (R44a-2 and R45a-4 to 23).

In the proceedings below, pre-hearing conferences were held March 13, 1963 and June 13, 1963 with Mr. Eric Groezinger, Assistant Commissioner of Education. The issues and facts were stipulated at the second Pre-hearing Conference; and, on June 13, 1963, the Commissioner heard the appeal on the stipulated record (P27a to P30a), without witnesses (P30a-11) and without expert testimony (P30a-9).

The Stipulation excluded the issue of intentional segregation (P27a-23); and limited the issue to:

> "Are there any elementary schools operated by the Plainfield Board of Education, in which Negro pupils predominate, and, if so, should the Plainfield Board of Education reduce the concentration of Negro pupils in such schools?" (P27a-18).

The Commissioner found "extreme concentration" of Negro pupils in the 96.2% April 1963 Negro enrollment at the Washington School (P59a-9 to 20); and directed the

Board to select one of the three stipulated plans and put it into effect in the 1963-64 school year (P59a-40 to P60a-11).

Before the State Board of Education, the parties stipulated that the case be decided on the October 1963 enrollments after adoption of the "Sixth Grade Plan" (P48a-28). The State Board held that "racial imbalance (*i.e.*, more than 50% of one race over the other) is not to be equated to invidious segregation * * *" (P51a-11). It concluded that the respondent:

> "* * * conducted conscientious studies to solve the very difficult problems confronting it, and has attempted to implement the constitutional principles which are a guiding light, even though this is not an instance of intentional segregation * * *" (P52a-8).

The State Board also made a finding on the intent of the respondent:

> "We respect the local board's awareness of its own local school problems" (P52a-16),

and later at the end of the decision:

> "At the same time we note that the local board represents that it will constantly study the effects of the 'Sixth Grade Plan' and, if experience determines that it is detrimental to the educational opportunities of the pupils, it will adopt such remedial measures as may be required" (P52a-28).

The State Board accepted the "judgment" of the respondent (P52a-16), and the expertise of the Commissioner (P52a-17); it found no proof that the October 1963 racial distribution deprived Negro pupils of equal educational opportunity (P52a-21); and it affirmed the Commissioner and the respondent's adoption of the Sixth Grade Plan (P52a-25).

The parties have agreed to augment the record by three tables which show a comparison of the distribution of Negro pupils in neighborhood school areas from April 1962 through April 1964, (R17a), and the racial distribution of those actually enrolled in the elementary schools October 1, 1963 (R15a) and April 1, 1964 (R16a) under the school assignment policies then in operation.

ARGUMENT

POINT I

There is no constitutional duty requiring a State to control the racial balance of public school enrollment except where the concentration of Negro pupils becomes large enough to be equated with invidious segregation.

A. Compulsory attendance of Negro pupils at an all-Negro school constitutes invidious segregation and a deprivation of constitutional rights.

In the social science statements dated September 22, 1952, appended to briefs of appellants in *Brown* v. *Bd. of Ed., Topeka,* 347 U. S. 483, 74 S. Ct. 686 (1954), segregation is defined for the purposes of that statement as:

> "* * * that restriction of opportunities for different types of associations between the members of one racial, religious, national or geographic origin, or linguistic group and those of other groups, which results from or is supported by the action of any official body or agency representing some branch of government. We are not here concerned with such segregation as arises from the *free movements* of individuals which are neither enforced nor supported by official bodies * * *." (Emphasis added). *A Social Science Statement,* p. 1.

State requirements that compel attendance in the all-Negro school are held to be constitutionally discriminating and invidious because such attendance denies equal educational opportunity. *Brown* v. *Bd. of Ed., Topeka, supra.* The State has the obligation to provide a sound educational system. This means both tangible and intangible benefits. Prior to the first *Brown* decision of the United States Supreme Court, Judge CHARLES C. BERNSTEIN* of the Superior Court of Arizona stated the role of the school broadly as:

> "It is the office of the school environment to balance the various elements in the social environment and to see to it that each individual gets an opportunity to escape from the limitations of the social group in which he was born and to come into living contact with a broader environment." *Heard et al.* v. *Davis et al.* (not officially reported), (No. 77497, Superior Court of Arizona, Maricopa County, May 5, 1954).

A Negro pupil who is required to attend the all-Negro school fails to have the opportunity to interact and associate in school with white pupils; the intangible benefits he thus lacks include the exchange of views and competition with persons with whom he will have contact later as an adult. In short, it impairs his ability to learn. *McLaurin* v. *Oklahoma Regents,* 339 U. S. 637, 70 S. Ct. 853 (1950).

Another result is the sense of inferiority and stigma that develops in a minority group which early in life finds itself kept apart from the majority and is treated as inferior. These considerations have been determined to interfere with the learning process; and so, schools in which these matters occur are found to be inherently unequal in respect to educational opportunities. The effects of such discrimination are obviously more significant in elementary

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* Now Chief Justice Supreme Court of Arizona.

and grade schools. Hence, compulsory attendance at such schools is held to be a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution.

Brown v. *Bd. of Ed., Topeka, supra*;
Morean v. *Bd. of Ed., Montclair,* 42 N. J. 237, 200 A. 2d 97 (1964).
Blocker v. *Board of Education Manhasset,* 226 F. Supp. 208 (1964); 229 F. Supp. 709 (1964).
Jackson v. *Pasedena School District,* 59 Cal. 2d 876, 382 P. 2d 878 (1963).
Branche v. *Bd. of Ed., Hempstead,* 204 F. Supp. 150 (E. D. N. Y. 1962).
Balaban v. *Rubin,* 248 N. Y. S. 2d 574 (App. Div. 1964).

Fisher et als v. *Board of Education Orange,* decided by Commissioner of Education May 15, 1963.

Spruill et als v. *Board of Education Englewood,* decided by Commissioner of Education July 1, 1963. Affirmed by State Board of Education of New Jersey, September 24, 1963. See related case of *Fuller* v. *Volk,* 230 F. Supp. 25, U. S. D. Ct., N. J., June 3, 1964.

Alston v. *Board of Education Union Township,* decided by Commissioner of Education April 6, 1964. Affirmed by State Board of Education of New Jersey, July 8, 1964.

For a discussion of the *Segregation Cases* and the historical background of the events leading to the adoption of the Fourteenth Amendment see *Bickel, The Original Understanding,* 69 H. L. R. 1, and particularly pages 18, 21, 38, 42 on the framers' conviction of the importance of "equal protection" in education.

And, where the same considerations applied to segregated schools in the District of Columbia the Court held that racial segregation in such schools is a denial of due process of

law guaranteed by the Fifth Amendment to the Constitution. *Bolling* v. *Sharpe*, 347 U. S. 497, 74 S. Ct. 693 (1954). The Court said at 347 U. S. 499:

> "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted *except for a proper governmental objective.* Segregation in public education is not reasonably related to any proper governmental objective." (Emphasis added).

The invidious character of segregation has been established even though there is support for the view that there is a correlation between socio-economic levels and scholastic achievement. See *Blocker* v. *Bd. of Ed., Manhasset, supra,* at page 227 where the court refers to a Quality Measurement Project of the New York State Department of Education on that subject. Nevertheless, the state through administration of the education laws must take reasonable means to eliminate or to mitigate such conditions as adversely effect the learning process. *Blocker* v. *Bd. of Ed., Manhasset, supra.* But query whether mixing will aid education where socio-economic factors are relevant? In New Rochelle the results of transfer were not entirely clear as to schools combining divergent groups. *Public Schools North & West U. S. Civil Rights Commission,* 90 (1962), 64 *Colum. L. R.* 216.

Nor does it matter that the segregation is the result of housing patterns and adventitious rather than intentional as has been stipulated here (P56a-11, 37); for, to do nothing would produce the same disadvantages to pupils. *Morean* v. *Bd. of Ed., Montclair, supra.*

B. Compulsory attendance at a 50% or more Negro School does not necessarily result in invidious segregation.

The essential question is whether or not all schools should be attended by pupils in racially mixed groupings. Is there any virtue in a particular racial mix in schools? And,

to what extent is a "mix" to be used as against other considerations commonly required in setting up an educational system? In New York City an old 1890 school, P. S. 23, is attended by pupils of whom 75% are Chinese. A report in *The Christian Science Monitor,* October 28, 1963, p. 9, describes this school in glowing terms: "The close family life of the Chinese has kept truancy and delinquency problems at a very low figure * * *" Parents are reported to be in close contact with the school. The children excel in mathematics, win prizes at science exhibits and cause few behaviour problems. The experience of this homogenous school raises a practical question as to the degree to which racial mixing is necessary.

Examination of the United States Civil Rights Commission Reports for 1961, 1962, and 1963 entitled:

Education, 1961; Civil Rights U. S. A. Public Schools North and West 1962; and *Civil Rights 1963,* fails to show any preferred or recommended racial mixtures. In *Civil Rights U. S. A. Public Schools North and West, 1962,* the report dealing with Chicago schools and discussing the Segregation Cases says at page 183:

> "It is thus legitimate to inquire whether the sheer fact of racial admixture, whatever its other advantages, improves the learning experience, debilitates it, or is irrelevant. It is possible that some students may benefit and others suffer depending upon individual characteristics of such complexity as to elude enumeration, much less suffice as a standard for administrative judgment. Is it merely an act of democratic faith deliberately to mix Negro and white children in one classroom with hope that this experience will promote interracial empathy?"

In the U. S. Civil Rights Commission Report, *Civil Rights,* 1963, issued September 30, 1963, the report at page 55, discusses "racial imbalance" and its definition by the

N. Y. Commissioner of Education as a school having 50% or more Negro pupils (*Id.* 56).

That report says in part: "There is no consensus on a mathematical definition of imbalance." Part of the difficulty in reaching a consensus may lie in the fact that the proportion of non-whites in many cities in increasing (*Id.* 58). Although that report discusses measures to reduce segregation (*Id.* 58) and State policies against such imbalance (*Id.* 60), it fails to make a percentage recommendation on racial balance (*Id.* 69).

Even were we to assume some specific balance, what would occur to that balance in the light of population trends? For how long would the balance remain non-discriminatory? And at what cost can school administrators rezone, and rearrange their enrollments to maintain a balance? Where cost is a factor it must necessarily be based upon a comparison of what other uses such costs could be put to and their relative benefits to the "disadvantaged" child.

For a discussion of what has been done and the choices available see Alexander M. Bickel, *The Decade of School Desegregation,* 64 *Colum. L. R.* 212. Professor Bickel's omission of a discussion of optimum racial balance may be significant. His article emphasizes "free choice" plans; and he points out that even with "free choice" solutions the schools gradually tend to become attended entirely by one or the other race perhaps because most eventually come to choose the neighborhood school. (*Id.* 215). See *Alston* v. *Bd. of Ed., Union,* decided by N. J. State Board of Education July 8, 1964, page 2, where the board pointed to the petitioners' desire to keep their neighborhood school but sought a change in balance by requiring children to be brought from outside.

Even among New York City Negroes there is a divergent opinion on the importance of a racial mix as against im-

proved schooling. See New York Times July 27, 1964, pages 1 and 19. This reviews a survey of 190 Negroes by 4 reporters on 43 basic questions. The questions on schooling, bussing to white schools and similar questions showed sharp differences of opinion. They all agree that good schooling is their need. But many feel that this can be accomplished in a good neighborhood school without a forced racial mix. Although 63% asked for integrated schools against 24% who want "a good school," the answers to questions on school problems show that improved school plant, equipment, policies and personnel are a large factor. (*Id.* col. 6). Only 12% claimed the Negro schools not as good as white or integrated schools (*Ibid.*).

In New Jersey, the Commissioner of Education inferentially has indicated that 50% to 74.5% Negro schools were not invidiously segregated. *Fisher* v. *Board of Education Orange, supra.* There the eight elementary schools averaged 50 per cent Negro; of them one was 50%, one 60% and one 66% Negro, in addition to the 99% Negro school. In directing the alteration of the imbalance in the 99% school, the Commissioner pointed out that a reasonable plan did exist; in the appendix to his decision he referred to one of the plans reported by the New Jersey Department of Education Study of the Orange Schools as a plan to combine the 99% school with the 50% school producing a resulting 74.5% (72% in Decision) Negro enrollment in both schools. See his Decision pp. 9 and 11.

In the Commissioner's decision of *Spruill et als* v. *Board of Education Englewood, supra,* page 3, he directed elimination of the extreme racial concentration in the 98% school, with no comment on the 62% school. The State Board of Education affirmed. In the U. S. District Court for New Jersey, plaintiffs sought to attack the plan adopted by that board, (and similar to the Plainfield Sixth Grade Plan) which altered the 98% school to an all sixth grade school 41.7% Negro (*Fuller* v. *Volk, supra,* 230 F. Supp. 25, 27, 30),

raised one school from 4% Negro to 33.7%, one from 3.2% to 18.6%, one from 14.5% to 34.2% and reduced the 62% school to 61%. In the federal case, the Negro parties appear to have made no objection to the 62% school. The attack by white plaintiffs on constitutional grounds was denied.

Various other administrative efforts have been made respecting the alteration of racial balance. See *New York Herald Tribune,* July 5, 1964. There it is reported that in Seattle, Washington, the elementary school administrators consider any school with 40%, or more, of one racial group to be unbalanced. They provide free transfer to other schools, as the Negro pupil may wish.

As this brief is being written, the press has carried word of an order by Dr. James E. Allen, Jr., New York Commissioner of Education, whereby he directed the White Plains Board of Education to close a school located in an old racially mixed area with a 63.7% Negro enrollment. Although the building was one of the best, the order was apparently based on achieving a better racial mix. There were two schools with no Negroes; three with less than 1% and five other schools with an average of 19%. The new plan adopted by the board required bus transportation and transfers to the entire area. It was supposed to result in a racial composition of from 13.3% to 25.8% in the remaining schools. The news item reported a suit to prevent the plan from being carried out. See *New York Times,* July 24, 1964, p. 9.

No reported case has yet defined a percentage requirement. *Jackson* v. *Pasedena School District, supra,* was a reversal of judgment of the lower court sustaining defendant's demurrer. The plaintiff sought a transfer from a predominantly Negro school to another school conveniently located but in another attendance zone. There were no facts on relative numbers of racial groups. The allegations of segregation and gerrymandering were treated as

admitted. In directing that the demurrer should have been overruled, the court said at 382 P. 2d 878, 881:

> "Although in general, the federal cases have been concerned with instances of complete, or almost complete, segregation, it is not decisive that absolute segregation is not present. Improper discrimination may exist notwithstanding attendance by some white children at a predominantly Negro school or attendance by some Negro children at a predominantly white school."

and further, at page 882:

> "*School authorities, of course, are not required to attain an exact apportionment of Negroes among the schools,* and consideration must be given to the various factors in each case, including the practical necessities of governmental operation. For example, consideration should be given, on the one hand, to the degree of racial imbalance in a particular school and the extent to which it affects the opportunity for education and, on the other hand, to such matters as the difficulty and effectiveness of revising school boundaries so as to eliminate segregation and the availability of other facilities to which students can be transferred." (Emphasis added.)

In *Branche* v. *Board of Education Hempstead,* 204 F. Supp. 150 E. D. N. Y. (1962), the court denied motion for summary judgment in suit to enjoin alleged maintenance of segregated schools and to enjoin a proposed bond issue for the reason that the evidence advanced raised questions of fact. The pendency of proceedings before the State Commissioner of Education was also a factor. Here, Negro percentages by schools were 1%, 5%, 33%, 67%, 78% and 86%. In discussing proposals offered, the court said at page 152:

"To redistribute the children so as to have the *same percentages* of Negro and white children in each school would involve about 1,000 transfers." (Emphasis added.)

And, referring to the duty of a local board to take some mitigating action to alleviate imbalance caused by housing patterns, the court raised a question as to the degree to which a board must go, and said at page 153:

"How far that duty extends is not answerable perhaps in terms of an unqualified obligation to integrate public education without regard to circumstance and it is certainly primarily the responsibility of the educational authorities and not the courts to form the educational system."

In *Blocker* v. *Bd. of Ed. Manhasset, supra,* there was no question of selecting a percentage, but the court said at 226 F. Supp. 208, 222:

"The question, however, is not whether the state has an affirmative duty to balance the races, but rather, whether it is to be enjoined from countenancing and thereby perpetuating a system of virtually separate elementary schools for Negro and white children."

and further, at page 230:

"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."

If requiring a particular racial mix may be equated to a quota system, i.e. a ratio to be fixed and maintained, it might well be held illegal. See *Balaban* v. *Rubin,* 248 N. Y. S. 2nd, 574, 584. And, see lead editorial in The New York Times, page 26, July 18, 1963.

In *Vetere et al.* v. *Mitchell et al.*, 251 —— N. Y. S. 2d —— 480, 482 New York Supreme Court, Appellate Division, July 21, 1964 (not yet officially reported), the plaintiffs attacked the Commissioner of Education's decision directing Hempstead's school district to reorganize the attendance areas of the district so that K through 3 pupils would go to either one of two schools (each previously 14% Negro) and all 4 or 5 pupils to a third school (previously 75% Negro). There was no discussion of optimum percentage or ideal balance. The Appellate Division upheld the Commissioner's decision as reasonable and reversed the lower court's determination adverse to the Commissioner.

Appellants have presented no authority for a percentage requirement. Indeed, the practical difficulties militate against it, and it may be that the reason for the lack of such authority is the attitude of the courts that the judicial function in these matters is not to impose a particular solution but to decide whether or not to enjoin the state from carrying out a plan that offends constitutional requirements. See *Blocker* v. *Bd. of Ed. Manhasset, supra,* at page 222; *Balaban* v. *Rubin,* 248 N. Y. S. 2d 574, 581, 585; *Bickel, supra,* 64 *Column. L.R.* 193, 218; *Public Schools North and West,* 26 (1962).

Appellants at Pb12-39 suggest a broad application of the *Segregation Decisions* which could require a holding that a school was invidiously segregated with a less than 50% Negro enrollment because it was the *only* Negro school; and, hence, would be identified in the minds of students and staff as *The Negro School.*

Further, should the balance of the entire district increase to more than 50%, how can any school there be "desegregated" even by achieving that average balance in each? The present enrollment data for Plainfield shows this to be a realistic problem for the future. In the Staff Report *Camden and Environs, Civil Rights, U.S.A., Public Schools*

Cities in the North and West (1963) pages 13-23, Professor Albert P. Blaustein discusses this problem as it faces Camden and Camden County. There, Lawnside is now all Negro (*Id.* 3). Camden City, then at a 44.6% Negro school population (*Id.* 13) may become wholly so (*Id.* 15). He concludes it may be impossible to do anything in most of Camden (*Id.* 23).

If equal educational opportunity must be provided for all of the children of New Jersey by means of a process of assuring a benign racial mix, then the only feasible method for places like Camden, Lawnside and Plainfield, is to require free transfer of Negroes to schools outside of the school districts in which they reside. Reference to the *U.S. Census 1960, General Population Characteristics, New Jersey,* shows very few Negro children under 15 years of age in the eight municipalities adjacent to Plainfield: Dunellen, Fanwood, Green Brook, Piscataway, North Plainfield, Scotch Plains, South Plainfield and Watchung. See *U.S. Census Final Report, P.C.* (1) 32B *N. J.*, tables 20, 22 and 25, and pages 37, 69, 72, 76, 87, 103, 104, 111, 118, 120 and 121. A plan that would produce such a solution would bring about a less than 50% mix, provided Negroes were willing to transfer. It would also assure a "nervous population" that the neighborhood school plan was not to be eliminated with consequent flight of whites to the outlying districts. In *Civil Rights '63,* the U. S. Civil Rights Commission urged that Congress alter urban renewal laws so that school districts that accepted pupils from outside could participate in the credit for public facilities provisions. See *Civil Rights '63,* 70 (1963). Cf. *Evans* v. *Buchanan,* 207 F. Supp. 820 (D. Delaware 1962), where the plaintiffs were granted transfer to white schools in another district. And note cautionary footnote 15 that if 200 applied, the court might not order transfer as a matter of course (*Id.* 825).

C. On the facts, Appellants have failed to show that there is any correlation between the over-50%-Negro school and deprivation of equal educational opportunity.

Reference is made at Pb14-7 to the application of the Wolff achievement data to the 50% plus schools. As appelants state, Dr. Wolff concentrated on the over 90% school (Pb3-16 and Pb14-2). His argument for an optimum composition of 24 to 49% (W. A4-7) was not supported. Dr. Wolff was offered as an expert in *Bell* v. *School City of Gary,* 213 F. Supp. 819 (N. D. Ind. 1963), aff'd 324 F. 2d 209 (7th Cir. 1963) cert. den. 84 S. Ct. (mem. 1964), and endeavored to apply his formula there. The court commented on the limitations of his expertness: "* * * a sociology professor with no experience in public school administration, or for that matter, no experience in the field of public school education." 213 F. Supp. 819, 829 and refused to accept Dr. Wolff's opinion.

The information provided the Commissioner of Education in Stipulation Exhibits 10 and 11 (R18a; R27a) supplied convincing data to rebut the appellants' claim that poor achievement was correlated with degree of racial balance (R23a-19, 24; R24a-1 to R25a-2; R25a-14 to R26a-5; R28a-12 to 21; R44a-2 and R45a-4 to 23). Compare the New Jersey State Department of Education *Study Concerning Alleged Segregation and Discrimination in the Orange Public Schools,* October 1962, from p. 47-1 to p. 51-5. That report, at p. 51-1 said:

> "Examination of childrens' individual test scores failed to show that any one school had any consistent pattern of higher achievement level for matched cases."

Bearing in mind that the Orange report dealt with a varied enrollment of up to a 99% Negro enrollment, the findings apply *a fortiori* to the over 50% Negro school in Orange. Of course, we must assume that the Orange tests would not

necessarily produce the same conclusion if given to the Plainfield pupils.

Also compare the New Jersey Department of Education *A Study of Racial Distribution in the Englewood N. J. Public Schools,* 41 (October 5, 1962), where the state committee of experts finds similarly as to that City and warns on the difficulty of making judgments based on race. It says at page 41:

> "The Committee wants particularly to point out the hazards of making gross judgments regarding equality of elementary school experience and its relationship to race. Almost certainly the data reflected disadvantaged cultural backgrounds and the accompanying need for unique program experiences based on factors of readiness and need."

D. Compulsory attendance at a public school enrolling 50% or more Negro pupils does not encroach on the First Amendment Freedoms of such pupils.

Where a local school board requires students to be grouped together for teaching purposes within the broad context of the administration of proper teaching methods to guarantee every student, regardless of race or religion an equally excellent and equally enduring education, such administrative groupings are not to be equated to governmental interference with the associational freedoms guaranteed in the First Amendment of the Constitution.

The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for redress of grievances." *U. S. Constitution Amendment I.*

The rights or freedoms guaranteed by the First Amendment are secured to all persons against abridgment by a state by the operation of the Fourteenth Amendment. *Schneider* v. *State of New Jersey,* 308 U. S. 147, 60 S. Ct. 146 (1939).

But freedom of association as it has been developed by the U. S. Supreme Court has followed a factual basis entirely foreign to the instant case. See *Brotherhood of Railroad Trainmen* v. *Virginia State Bar,* 377 U. S. —, 84 S. Ct. 1113 (1964); *Gibson* v. *Florida Legislative Investigation Comm.,* 372 U. S. 539, 83 S. Ct. 889, 9 L. Ed. 2d 301 (1963); *NAACP* v. *Button,* 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963); *Louisiana ex rel, Gremillion* v. *NAACP,* 366 U. S. 293, 81 S. Ct. 1333, 6 L. Ed. 2d 301 (1961); *Shelton* v. *Tucker,* 364 U. S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231, (1960); *Bates* v. *City of Little Rock,* 361 U. S. 516, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960); *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958); *Schneider* v. *State of New Jersey, supra.*

In *Bates* v. *Little Rock, supra,* Justice STEWART provided a clear idea of the scope and meaning of freedom of association as protected by the Constitution:

> "Like freedom of speech and a free press the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry * * * a government dedicated to the establishment of justice and the preservation of liberty. And it is now beyond dispute that freedom of association *for the purpose* of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the states." (Emphasis supplied). 361 U. S. 521, 522, 80 S. Ct. 412, 416.

Freedom of association has developed from our basic freedoms of speech and assembly as being necessary to the operation of a government devoted to democratic ideals which necessitate that every individual under protection of the law, be able to disagree with the established customs, laws and mores and to advocate change through legislative, administrative and judicial action.

Freedom of association has been used to protect certain groups within our society who wish to band together to advocate certain commonly held beliefs, to change public opinion or to protect themselves from compulsory disclosure of membership lists and legislative investigation. Most recently it has been used to protect railroad workers' rights to gather together for the purpose of helping and advising one another in asserting rights under federal statutes, *Brotherhood of Railroad Trainmen* v. *Virginia State Bar, supra.*

It is not readily apparent from appellants' brief what place *In re Skipwith,* 180 N. Y. S. 2d 852 (1958), *Meyer* v. *Nebraska,* 262 U. S. 390, 43 S. Ct. 625 (1923), *Bartels* v. *State of Iowa,* 262 U. S. 405, 43 S. Ct. 628 (1923), or *Pierce* v. *Society of Sisters,* 268 U. S. 510, 45 S. Ct. 571 (1925), have in the instant case, as there are no proofs in the record that the Plainfield Board of Education seeks to impose any of the restrictions or policies dealt with in the above mentioned cases. In *Pierce, supra,* the court was considering property rights of the appellee, the right to engage in the business of conducting a school. The question of the right of the state to require children to attend school was not challenged. The court stated:

> "No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age shall attend some school * * *" 268 U. S. 510, 534, 45 S. Ct. 571, 573.

Furthermore, there was no challenge alleging the encroachment on the freedom of association.

In *Meyer* v. *Nebraska, supra,* the court was concerned with a prohibition against teaching the German language to children under fourteen years unless they had completed eighth grade work; and the court did not touch on the question of the power of the state to compel education. It dealt with the right of the teacher to practice his profession, which was regarded as a property right. The court said:

> "The power of the state to compel attendance at some school and to make reasonable regulations for all schools * * * is not questioned." 262 U. S. 390, 402, 43 S. Ct. 625, 628.

Stephens v. *Bongart,* 15 N. J. Misc. 80, 189 Atl. 131 (Juv. & Dom Rel. Essex County, SEIGLER, J. 1937) involving a conviction under Chap. 307 Laws of 1931 (now N.J.S.A. 18:14-14) requiring parents of children under 16 years to attend school regularly. This Act was upheld and was not deemed unconstitutional as an invasion of property rights. It was not attacked on the basis of an encroachment on freedom of association. The issue in *Stephens, supra,* dealt with individual as distinguished from group teaching where the particular home teaching on an individual basis was not found to be equivalent to the techniques of group teaching offered in the public school system. The "groups" cited by appellants (Pb19-9) were not particular racial groupings. The overtones of racial imbalance were not even alluded to when the court made this pronouncement on group importance. Another New Jersey case on the same issue, with a similar result, is *Knox* v. *O'Brien,* 7 N. J. Super. 608, 72 A. 2d 389 (Cape May County Ct., Law Div. TENENBAUM, J. 1950). Also see 79 C. J. S. 468 p. 394.

The associational freedoms under the First Amendment are positive freedoms or positive rights, *i.e.* the right to

band together, (with its corollary the right not to be prevented from banding together) to associate with people of similar interests or objectives. These freedoms also protect minorities within society in their right to perpetuate their group interests. See *Greenberg, Race Relations and Group Interests in the Law,* 13 R. L. R. 503 (1959).

However, appellants seek to use the associational freedoms in a negative manner applying these rights to the limited context of Negro school children attending school where members of their race exceed 50% of the students in any one school. Compulsory attendance to such a school, they urge, violates their constitutional right *not* to be associated together (Pb16-40) (Emphasis added).

Compulsory education within the scope of the neighborhood school system does not result in *de facto* limitation of personal associations within any one school to Negro children. The Board of Education in any school system cannot hope to dictate to the individual child who his playmates and study partners should be. The board can only create a situation where every child has an equal opportunity for an equally excellent education. The mandate of the Segregation Cases must be taken to heart within the broad context of school administration in order to provide proper teaching for all students.

The constitutionality of agency action cannot be decided from mere words or conjecture. Adequate proof must be present. Appellants offer no proof of virtual compulsion in the limitation of Negro school pupils in the five Plainfield schools involved here. Compare *Blocker* v. *Bd. of Ed. Manhasset, supra,* 226 F. Supp. 208, 227 (1964). Appellants fail to present anything concrete in the record to support their claim that Negro children attending an over 50% Negro school are compelled to submit to a limitation on their rights of expression, free speech or association (Pb19-35).

There is a subtle, but very important, difference between the right to associate with others, *i.e.* freedom to interact with all members of society and freedom to associate with individuals of like beliefs, race or religion as enunciated in *NAACP* v. *Alabama ex rel. Patterson, supra; NAACP* v. *Button, supra; Shelton* v. *Tucker, supra; Gibson* v. *Florida, supra; Bates* v. *Little Rock, supra.* Freedom of association in its second sense has been upheld by the U. S. Supreme Court, but the question still remains: is there a constitutional freedom to interact with all members of society within the specific context of artificial school groups where Negroes are in the majority and where such racial imbalance is created by the application of the neighborhood school concept?

Appellants maintain that *International Association of Machinists* v. *Street,* 367 U. S. 740, 81 S. Ct. 1784 (1961) drops the dark pall of unconstitutionality on that action of a school board which compels Negro pupils to attend an over 50% Negro school. However, respondent urges that the decision of the court in that case be read within the context of the section of the Railway Labor Act authorizing union shop agreements and the case of *Railway Employees Dept.* v. *Hanson,* 351 U. S. 225, 76 S. Ct. 714, 100 L. Ed. 1112 (1956) and the factual allegations of *Street, supra.*

Respondent further urges that the appellants' failure to offer concrete proof of unconstitutional action on the part of the Board of Education and their failure to bring to the fore decisions affirmatively holding that there is a constitutional freedom to interact with all members of society within the context of the *Booker* facts, is fatal to appellants' petition.

In terms of interaction and within the context of social engineering, respondent points out that its present pupil assignment policies have produced and continue to produce an adequate opportunity for Negro pupils to interact with substantial numbers of white pupils in the Plainfield School

District consistent with the primary objective of providing equal educational opportunity for all (R16a). Also see *Tumin, The Process of Integration,* p. 26, in *Integrating the Urban School, Teachers College, Columbia University* (1963). Negro students are not prevented from interacting with students of the majority race as assumed by appellants (Pb20-13).

On appellants' own thesis (Pb19-25) it would be necessary to provide an artificial grouping of children within each school comparable to the political grouping of Negro and white adults within the particular school district. But if the proportion of minority members in elementary schools of a district is greater than the proportion of that same group in the world of political influence of that same district, a problem develops (W. A-8). It then becomes impossible to provide the same balance as exists in the political life of the district without some system of transfer out of the district not presently provided for by our school laws. If constitutional requirements must bring about a school balance comparable to the general racial balance of political influence, then the matter is necessarily appropriate for legislative action.

POINT II

The decision of the New Jersey State Board of Education should not be reversed in the absence of a showing that either it, or the decision of the Commissioner of Education, is arbitrary, capricious or unreasonable.

The formulation of school law policy within constitutional and legislative limits, is primarily the proper function of the state acting through local boards of education, but subject to the supervisory authority of the Commissioner of Education. *Brown* v. *Topeka,* 349 U. S. 294, 299, 75 S. Ct. 753, 756 (1955); *Morean* v. *Board of Education, Montclair, supra; Boult* v. *Board of Education Passaic,* 135

N. J. L. 329, 51 A. 2d 537, (Sup. Ct. 1947) *aff'd,* 136 N. J. L. 521, 57 A. 2d 12, (E. & A. 1948); *Balaban* v. *Rubin,* 248 N. Y. S. 2d 574, 585 (1964); *Vetere* v. *Mitchell, supra* (July 21, 1964); see 78 C. J. S. sections 119, 120, scope of judicial review at section 128, control over admission, transfers, etc., 79 C. J. S. section 445 to 451.

These cases also hold that the obligation to carry out the letter and spirit of *Brown* v. *Topeka, supra,* is primarily a function of the educational authorities, rather than the courts. Following the Brown cases, the court reaffirmed the Brown principles and held that every state agency, legislative, executive and judicial was bound to carry out and to implement the law of the land so expounded. *Cooper* v. *Aaron,* 358 U. S. 1, 78 S. Ct. 1401 (1958). See 64 *Colum. L. R.* 198; *Griffin* v. *Prince Edward County,* 84 S. Ct. 1226 (1964).

The U. S. Supreme Court made clear in *Brown* v. *Topeka,* 349 U. S. 294, 300, 75 S. Ct. 753, 756 (1955), that the task of the courts was to test state action on equitable principles, and it said:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal." 349 U. S. 294, 299, 75 S. Ct. 753, 756.

In its review of school cases, the United States Supreme Court has made clear it does not intend to take over the duties of local boards of education. *Minersville School Dist.* v. *Gobitis,* 310 U. S. 586, 598, 60 S. Ct. 1010, 1015 (1940); *Gobitis* was reversed on constitutional grounds in

West Virginia State Bd. of Ed. v. *Barnette,* 319 U. S. 624, 63 S. Ct. 1178 (1943) but without affecting the court's attitude of judicial restraint where there was no clear violation of constitutional safeguards. 319 U. S. 624, 637, 63 S. Ct. 1178, 1185, and see, *McCollum* v. *Board of Education,* 333 U. S. 203, 237, 68 S. Ct. 461, 478 (1947). The very nature of schools and school administration makes it clear that the judicial function in school enrollment and attendance matters should be a limited one. See *Bickel,* 64 *Colum. L. R.* 193, 218 (1964).

The Sixth Grade Plan adopted by the respondent was reasonable and a rational administrative decision in exercise of its duties under the school law. After the study of the Wolff and other reports (R8a, R18a, R49a) it set up an interim transfer plan (R54a, P39a-20, P40a, P41a) and announced its intention to undertake further studies of the problem (R55a-3). Then, it received the results of a statistical study (R27a to R48a). After Commissioner approval of its proposal, respondent adopted a "Sixth Grade Plan" (R15a, R16a, R17a). The respondent's action eliminated the all-Negro Washington School. In an elementary school population of 5,325 pupils averaging 44.7% Negro it transferred all of the Washington School area K-5 pupils elsewhere so that in every regular elementary school there were at least 109 Negroes in April, 1964. Although five schools exceed 50% Negro enrollment even there the numbers of children who are thus placed in contact with one another is sufficient for practical purposes to provide substantial opportunities for both racial groups to associate with one another. Even in the two 76% schools: in Bryant 153 Negro pupils may associate with 47 others (R16a-8); in Emerson 351 Negro pupils attend school with 109 other pupils (R16a-12).

In setting up its present plan, respondent has altered the time honored New Jersey neighborhood school idea to a considerable degree in setting up an all sixth grade school.

Washington School K-5 pupils go outside their residence area. However, transfer of Washington area K-5 out to other schools is a necessity if they are to obtain constitutionally safeguarded association with others. They cannot be said to suffer discrimination where the action is to their benefit. Respondent understandably regards the neighborhood school as an ideal easily administered and with built-in factors of traffic control and safety.

> "Moreover, the neighborhood school is a tenet of the American educational faith which could scarcely be held unconstitutional." *Bickel,* 64 *Colum. L. R.* 193, 217.

Appellants have considered the respondent's action as token integration (P20a-25). The tabulations (R16a), prove the board's action to have integrated every elementary school. But there is no need for a compulsive distribution. See *Blocker* v. *Bd. of Ed. Manhasset, supra,* and also at 229 F. Supp. 709 (1964) where the court reviewed the board's plan. The decree in *Blocker* merely directs acceptance of transfer requests, 229 F. Supp. 709, 713, and at that, respects the need for independent board judgment on matters of space, class size, instructional requirements and distance from home to school, 229 F. Supp. 709, 713.

Respondent school district acted reasonably in its pursuit of studies and ways to improve educational opportunities (R55a, P24a-15 to P26a-23). The experience in the St. Louis areas described as the *Banneker Group,* where all schools are over 95% Negro, shows that equal educational opportunity can be materially improved in other ways than by an arbitrary racial mix. *Civil Rights, U. S. A., Public Schools North and West,* 303 (1962) and see the story of Oakland California, in *Civil Rights, U. S. A., Public Schools Cities in the North and West 1963 Oakland* 24 (1963).

The contention that respondent's course of action in *Booker* has been reasonable is supported by the expertise of the Commissioner in his evaluation of the stipulated

facts. Note that both Commissioner and the State Board gave regard to respondent's efforts and plans to deal with its racial problem (P58a-40, P52a-16, 28).

Clearly the record shows that reasonable men may differ on the possible ways to deal with racial imbalance. Is the issue then so clear that judicial action is required? Compare Justice HOLMES' dissent in *Bartels* v. *Iowa,* 262 U. S. 404, 412, 43 S. Ct. 628, 630 (1923).

Appellants attack the five schools with over 50% Negro enrollment as constituting invidious imbalance. But in a practical sense it may be impossible to achieve absolute equality in racial matters. The Fourteenth Amendment is not violated if some inequality results from state action. *Breedlove* v. *Suttles,* 302 U. S. 277, 281, 58 S. Ct. 205, 207 (1937). See *Greenberg, The Benign Quota,* 17 R. L. R. 531, 545 (1963).

In the State Board's decision under attack the State Board gave consideration to the Commissioner's findings in *Fisher* v. *Bd. of Ed. Orange, supra* (P50a-17) and in *Volpe* v. *Bd. of Ed. Englewood,* Commissioner's decision of September 25, 1963 (P51a-14). The State Board's decision gives a careful exposition of the record and reasons for its affirmance. The basis of decision thus disclosed exhausts the judicial function. *Vetere* v. *Mitchell, supra* (not yet reported) July 21, 1964 at page 6.

Since *Booker* fails to exhibit any arbitrary, capricious or unreasonable administrative state action this court should affirm. *Morean* v. *Bd. of Ed. Montclair, supra, Boult* v. *Bd. of Ed. Passaic, supra, Vetere* v. *Mitchell, supra.* See 73 C. J. S. section 202. 251 NYS2d 480 483

Respondent recognizes that solutions to correct racial imbalance are various; but achievement may be a relative matter. For, as Justice FRANKFURTER has observed:

"Only those lacking responsible humility will have a confident solution for problems as intractable as the fric-

tions attributable to differences of race, color or religion." *Beauharnais* v. *People,* 343 U. S. 250, 262, 72 S. Ct. 725, 733 (1952).

CONCLUSION

Respondent respectfully urges the dismissal of this appeal.

VICTOR R. KING,
Attorney for and of Counsel with Respondent.

VICTOR E. D. KING,
(Michigan 2L.)
On the Brief.

A64 SEPT. 1964

ROBERT E. MILLER
Clerk of the Superior Court
MARICOPA COUNTY
PHOENIX 3, ARIZONA
September 1, 1964

Mr. Victor R. King
Counsellor at Law
National Bank Building
111 East Front Street
Plainfield, New Jersey

Dear Mr. King:

In reply to your letter of April 24, I must point out that our Court, in the State of Arizona, is a Trial Court; unlike your Court there by the same name.

Case Number 77497 was settled in this Trial Court and not appealed; therefore no record would be found in the Arizona or Pacific Reporters.

If I can be of any further assistance to you in this important matter, please write.

Yours very truly,

Robert E. Miller

Robert E. Miller

REM/bla

Rec'd. 9/8/64.

Heard
Vs
Davis

FILED
WALTER F. WILSON
CLERK

MAY 5 1954

DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

CARL HEARD and FRANK HEARD by their next friends and parents WILLIAM HEARD and EMMA MANOR HEARD, husband and wife; and CYNTHIA WILLIAMS, MYRNA RUTH WILLIAMS, PEARLIE MAE WILLIAMS and FLENOY WILLIAMS, JR., by their next of friends and parents FLENOY WILLIAMS and BEATRICE WILLIAMS, husband and wife,

Plaintiffs,

vs

HAROLD DAVIS, as President, GEORGE T. MONROE, as Clerk, CALVIN McKNIGHT, as a Member of the Board of Trustees of the Wilson School District, a legally organized public school district in Maricopa County, State of Arizona; and G. S. SKIFF, as Superintendent of the Wilson Schools,

Defendants.

No. 77497

MEMORANDUM OPINION

Plaintiffs bring this action in their own behalf and in behalf of all other children of the African or Negro Race now attending school in the Wilson School District, Maricopa County.

The School District admits that members of the African or Negro Race are segregated from members of the Caucasian Race, thereby directly presenting the question whether such segregation is lawful.

The questions between the parties are:

1. Whether Chapter 138, 152 laws and Section 55-416 Arizona Code Annotated, 1939, and Section 54-430 Arizona Code Annotated, 1939, empowers the defendants as members of the Board of Trustees, to segregate groups of pupils solely because of race.

2. Whether the educational opportunities, advantages and facilities for children of the Negro or African Race of elementary school age, residing in the Wilson School District are equal to the educational opportunities, advantages and facilities

afforded and available to white children of elementary school age similarly situated.

Though there are other questions in the complaint, it appears to the Court that such questions are included in the two questions set forth above.

The laws of this State are found in its Constitution, statutes, institutions and general laws; then, if not there, the ancient common law of England. It is to these sources judges must resort to discover them. If they abandon these guides, they pronounce their own opinions, not the laws of those whose officers they are.

Unless the legislature has clearly conferred power upon the school boards to establish separate schools for the education of white and colored children, no such power exists.

Every society gets encumbered with dead wood from the past. The school has the duty of omitting such things from the environment which it supplies. By selecting the best for its exclusive use it strives to reinforce the power of this best. As a society becomes more enlightened it realizes that it is responsible not to transmit and conceive the whole of its existing achievements, but only such as make for a better future society. The school is its chief agency for the accomplishment of this end. It is the office of the school environment to balance the various elements in the social environment and to see to it that each individual gets an opportunity to escape from the limitations of the social group in which he was born and to come into living contact with a broader environment.

The school is society's chief agency for conserving and transmitting its culture; educational segregation has extra significance. A segregated educative system is likely to transmit to each succeeding generation the superiority-inferiority value attitudes of a racially conscious society. Furthermore, it provides public approval and reinforcement of private privileges

which has become the primary symbol of the Negro's inferiority.

Our Legislature, in 1952, recognizing this, amended the law and struck therefrom in Section 54-416:

> "* * * They shall segregate pupils of the African race from pupils of the Caucasian race in all schools other than high schools and provide all accommodations made necessary by such segregation."

And substituted therefor in Section 54-416, as amended 1952, Chapter 138, paragraph 1:

> "* * * they (the Board of Trustees) may segregate groups of pupils."

By doing this they, in effect, transferred the responsibility of the transition to the local school authorities. Such delegation is clearly unconstitutional; particularly is it true, as in this case, where the legislature has delegated its power to an administrative board without, at the same time, establishing a standard criterion or guide as to the circumstances under which such power may be exercised.

The State of Arizona vs. Marana Plantations, Inc., 75 Ariz. 111; 252 P. 2d 87:

> "* * * It may safely be said that a statute which gives unlimited regulatory power to a commission, board or agency with no prescribed restraints nor criterion nor guide to its action offends the Constitution as a delegation of legislative power. The board must be corralled in some reasonable degree and must not be permitted to range at large and determine for itself the conditions under which a law should exist and pass the law it thinks appropriate. To use the apt phraseology of the late Justice Cardozo in Schechter Poultry Corporation v. United States, 295 U.S. 495, 55 S. Ct. 837, 852, 79 L. Ed. 1570, an administrative board cannot be 'a roving commission to inquire into evils and upon discovery correct them' and it must be 'canalized within banks that keep it from overflowing.' It cannot be 'unconfined and vagrant.'"

Our Supreme Court in Hernandez vs. Frohmiller, 68 Ariz. 245, 204 P. 2d 854, has adopted the strictest of requirements concerning the criteria and standards with which the legislature may surrender its delegation of legislative power to administrative boards. This attitude is clearly indicated when our courts said:

> "* * * May the state, in order to accomplish this, transfer to an administrative board the unlimited

> power to use its judgment and discretion in determining what conditions shall be rectified and how this shall be accomplished? We have no hesitation in saying such is legally impossible. Legislation may pass to administrative boards or officials the right or power to find facts or conditions properly prescribed under which the law as passed will or will not operate, but it may not permit the board to say what the law shall be."

This Court holds that the Legislature of this State has not given or attempted to give the power of establishing separate schools for the education of white and colored children. Article 11, Section 6 of the Arizona Constitution provides:

> "* * * The Legislature shall provide for a system of common schools by which a free school shall be established and maintained in every school district for at least six months in each year, which school shall be open to all pupils between the ages of six and twenty-one years."

The Legislature, under the mandate of this constitutional provision, provided for a uniform system of common schools by which a school shall be established and maintained in the Wilson District. The school board does not have authority, because the Legislature has not conferred power upon the school board to establish separate schools for the education of white and colored children.

The history of legislation and decisions of the courts on this subject from 1868 to the present time amounts almost to a legislative declaration that in the absence of an express grant thereof, no school district or trustee of a school has any authority to discriminate against any child or to deny its admission in any public school thereof on account of its color. This has been the uniform tenor of the decisions.

State of Nevada ex rel Streutmeyer v. Duffy, 7 Nev. 342
Roll v. Board of Education, 91 Pac. 88
Board of Education v. Tennon, 26 Kan. 1
Knox v. Board of Education, 45 Kan. 152, 25 Pac. 382
Cartwright v. Board of Education, 84 Pac. 382
Board of Education v. Dick, 70 Kan. 434, 78 Pac. 812
Richardson v. Board of Education, 72 Kan. 629, 84 Pac. 538
Bibb v. Alton, 193 Ill. 290, 61 N.E. 1077
Westminister School District of Orange County v. Mendez, 161 Fed. 774
Gonsales v. Sheeley (Ariz.) 96 F. Supp. 1004
Sweatt v. Painter, 339 U.S. 629
McLaurin v. Oklahoma State Board of Regents, 339 U.S. 367

The second question as to whether the educational opportunities, advantages and facilities for children of the Negro or African Race are equal to the educational opportunities, advantages and facilities afforded and available to the white children of elementary school age similarly situated is answered by counsel for the defendants conceding to the Court's question on oral argument that facilities afforded the children of the Negro or African Race were not and are not now equal to those afforded and available to white children at the school. The courts have held without exception that such a denial of equal facilities is a violation of the equal protection of law and a consequent deprivation of liberty and property without due process of law, as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

In all of the cases the courts have discussed the physical equality of facilities in teaching and school plant; however, there are intangible inequalities in segregation. These are more difficult to demonstrate. However, we know the impact on the child of the Negro Race. These children would seem either to be in conflict about their status or to have resigned themselves to inferior self-images. Our general experience as we observe human status each day, tells us that segregation intensifies rather than eases racial tension. Instead of encouraging racial cooperation, it fosters mutual fear and suspicion which is the basis of racial violence.

For the foregoing reasons, it is ordered that the plaintiff have judgment on his motion for summary judgment and that he prepare the proper written form of judgment in accordance with the foregoing decision.

DATED this 5th day of May, 1954, Phoenix, Arizona.

Charles C. Jennings
Judge of the Superior Court

A64 [illegible] 1964

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-662-63

CHARLES B. BOOKER, et als, Petitioners-Appellants, vs. BOARD OF EDUCATION OF THE CITY OF PLAINFIELD IN THE COUNTY OF UNION, Respondent.	Civil Action on Appeal from Decision of State Board of Education of New Jersey.

APPENDIX FOR RESPONDENT

Victor R. King
111 East Front Street
Plainfield, New Jersey 07060

Attorney for Respondent.

FILED
JUL 29 1964
A-1
George A. Brunow
Acting Clerk

FILED
JUL 29 1964
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LAY ADVISORY COMMITTEE - MAJORITY REPORT
STIPULATION EXHIBIT 4

MAJORITY REPORT June 20, 1962

The Lay Advisory Committee met in final session on June 20, 1962 to review in detail the proposals and conclusions growing out of the Max Wolff Report as well as projecting, by the committee itself, its own recommendations. The Lay Advisory Committee approved, in principle, the procedure and the fact finding of the specialists team but departed in support of the proposals made by the professional team - namely, proposal #1, rezoning; and proposal #2, sister plan. Since there was was no unanimity or even a majority feeling expressed by members of the committee in regard to the Wolff Report proposals, there was a very serious attempt made by the committee to develop its own recommendations, noting that these recommendations grow out of:

a. the preliminary hearings held by the Lay Advisory Committee with the NAACP, Board of Education, and the administrative staff, and

b. the factual, statistical tables gathered in the Wolff Report.

RACIAL COMPOSITION

We accept the findings of the committee as reported that:

1. 37% of the public elementary school population are Negro and of the eleven regular public elementary schools, seven are integrated. The junior high schools and the senior high school are integrated. One school, Washington, comprises a "de facto segregated" situation by virtue of the imbalance of Negro to White - 94% Negro, 6% White.

It would thus appear from the professional study that our immediate concern is to deal with the problem presented by the Washington School situation and also with any of the predominately Negro schools which may indicate a trend toward de facto segregation in the very near future.

THE EFFECT OF DE FACTO SEGREGATION

It is apparent and evident from the study material presented to us through the Wolff Report by its tables and statistical analysis, that the effect on

the children attending Washington School has been negative. This is conclusively proven by the fact that the youngsters leaving Washington School and moving on to the higher grades in junior high and senior high school levels, find themselves in the lowest track. This, without doubt, points out the tremendous responsibility we in the community have in attempting to correct the situation and it is obvious to all of us that the uneducated child, be he Negro or White, becomes the unskilled adult of tomorrow that makes up the greatest portion of unemployables and unemployed as well as, for social and psychological reasons, make up our delinquent, emotionally disturbed, and criminally oriented community.

However, the Lay Advisory Committee also recognizes the fact that in seeking out solutions for the problem, we must keep in mind not only the problem as it presents itself to us by the group directly affected but also the problems of any other group with which it has to inter-relate. We must bear in mind attitudes and social reactions in order to avoid violent repercussions of hostility developing towards serious tension between races. We must also bear in mind that when we attempt to offer a solution or make corrective measures that they be offered, not in relation to the symptom picture but to the causes involved.

With this in mind, the committee would like to make a number of observations

1. At the moment there does not appear in evidence available to us that in communities where these problems have been met by the integration process alone, that the educational level of the Negro child involved had been raised. If any, evidence appears to be contrary.
2. In the Plainfield system - though here again it has not been sufficiently studied - where integration has been in effect over a number of years in about six or seven schools, the Negro children in these schools have not performed as a group on a higher level than the youngsters who have been attending the so-called de facto segregated school, Washington.

This is conclusively proven by the fact that a majority of our Negro youngsters whether they come from the integrated schools or the segregated school, still find themselves, when tested, in the lower track both on the junior high school and the senior high school levels. Unfortunately, we do not have statistics to determine the drop-out rate, but if we take the over-all percentage figure of drop-outs of Negro children in our junior high and senior high school level, we may find that a number of them also come from the integrated schools.

3. Experience around the country has shown that the mere acceptance of an integrated plan within a limited geographical or political unit, has a tendency because of population mobility of that particular unit, to become segregated again in a very short space of time. Many social scientists are advocating integration on an area basis much broader in geographical scope in order to off-set this active population mobility factor.

These observations in themselves, do not necessarily lead to the conclusion that integration is not desirable but the committee strongly feels that if integration is started, whether it be on a limited or wide basis, that it be coupled with another program. For want of a better term, we will call it "Higher Horizons." This assures:

a. desegregation wherever necessary

b. a scientific approach to the problem of lifting the educational level of youngsters in under-privileged areas either Negro or White.

PROPOSALS

Based on the facts presented in the Wolff Report and on the observations made by the committee, the group would like to support the following proposals and forward them to the Board of Education for study and implementation:

1. We recommend to the Board of Education that a zone change be effected

in the area of the Washington School coupled with adjacent areas which will result in a more favorable balance of Negro and White children in the Washington School.

2. That a similar examination be made of other areas that have become predominantly Negro student body and that the Board of Education attempt in like manner by rezoning to effect similar changes.

3. That the Board of Education begin seriously to come to grips with the real causes that make for this problem and not be concerned only with the fact that a school is predominately Negro or imbalanced to the point of segregation.

With regard to points #1 and #2, the details of boundary changes can best be left with the administrative staff of the Board of Education, again bearing in mind the seven goals proposed in the study. In regard to #2, there are a number of experiences around the country, especially in New York City and St. Louis which could give us guide lines as to how to approach the implementation of a Higher Horizons program in the Plainfield area. It would be a worthwhile study and experiment if it can be adopted.

The Lay Advisory Committee is working on the assumption that all human beings, regardless of color, are endowed with basic potentials with variations from individual to individual. We have to accept a further assumption that any child, whether Negro or White, not performing up to his potential, may be blocked in doing so by a variety of other factors. It is of these factors that we have to address ourselves when we are concerned with the Negro group.

FACTORS

1. It is an established fact, scientifically developed through many controlled studies, that a cultural lag exists between the Negro and White population. That because of this lag, it is almost impossible for a Negro child to maintain an equal rating with the White child in

examinations or measurement tests which are based solely on the White culture.

2. The socio-economic position of minority groups, and in this case we are concerned with the Negro group, because of the negative cycle created by lack of education and therefore unprepared for employment, makes for economic deprivation. In society, the Negro creates a negative self-image of himself, the child included, which does not permit him individual motivation or stimulation to perform on any level which would enable him to reach such goals as is set by the over-all society.
3. The neighborhood and home conditions resulting primarily from point #2 invariably creates a situation which, at best, is not conducive for good educational results in a school system even though the Board of Education may adopt the best of procedures, offer the best facilities with qualified staff to both Negro and White.

It should be noted that the Lay Advisory Committee in projecting these three major social factors also recognizes that the Board of Education as an institution is responsible solely for the education of our children and cannot possibly deal alone with all of these factors. There is no doubt in our minds that it requires a total community approach and thus we would strongly recommend that the Board of Education take the initiative with other public agencies to work out this community approach in order to deal with the problem. However, we do recognize that the Board of Education does, by itself, have an excellent opportunity through its educational processes to deal with a number of aspects of these major factors especially in the area of cultural lag.

With this in mind, the committee would like to project what we deem to be a worthwhile program along the lines commonly identified as "Higher Horizons."

1. In those areas where the problem exists, smaller size classes should be created -smaller than what is normally called for. This will give the

teacher a better opportunity for individualization as well as an excellent opportunity to develop a type of cultural program with these youngsters in question, thereby narrowing the gap.

2. A specialized training program for teachers in conjunction with our State University should be established in order to give teachers specific training and orientation to deal with this problem. This, by the way, has just been proposed in New York City in conjunction with Hunter College where teacher training classes are being developed.

3. The Board of Education should accept premise that again in these areas where needed, that additional assignment of specialists that cover the fields of remedial teaching, music, art, health, etc. be made and in that way further individualizing teaching.

4. The Board of Education should embark upon a joint program of school and home utilizing the services of social workers so that we can effect a better working relationship between the parent and the school. At the moment, it is the attitude of the parent in many of these areas that remains a stumbling block to progress even though serious efforts are being made by the school authorities to improve the situation. Social workers, properly trained, can bridge the gap and create a climate of receptivity between the parent and the school.

5. Recognizing the fact that this is not a problem solely of the Board of Education, a joint program with other public agencies dealing with the problems of health and welfare, slum clearance, urban redevelopment, housing, etc. should be adopted. It is obvious that in the society that we are living in today, no one public agency can operate on its own without establishing the proper relationships with other agencies that are dealing with the same individual.

6. The Board should create a broad but specific program of adult education

mostly for parents of children attending these schools. This will result in the ability of the parent to keep abreast of the kind of things which are being done with their children by the teacher and the school.

These are but a few of the suggestions that we deem important in order to deal with those elements which are causing the problem. Success would be related to our ability to deal with this problem on the two fronts. The committee recognizes that the suggestions and recommendations, especially those contained in the Higher Horizons program would become an expensive item for any community. It further recognizes that in some communities, and possibly this will include Plainfield, it is almost impossible to implement this type of program with local finances. It thus requires funds from state and federal sources and here, again, experiences in New York and other major cities where the community has shown a readiness and a plan of action along these lines, that not only state and federal monies have been made available but also private money through existing foundations.

This Majority Report has been approved by ten members of the Lay Advisory Committee based on the facts and study that in certain areas integration by rezoning is required in order to correct the imbalance that has been created over the years. The committee further recognizes that integration in itself, is no sure answer to the problem; that it requires the refined approach as indicated above.

Respectfully submitted,

Rubin Lefkowitz, Chairman
LAY ADVISORY COMMITTEE

RESPONDENT'S EXHIBIT ONE: July 27, 1962
STIPULATION EXHIBIT 8

COMMENTS OF THE PLAINFIELD BOARD OF EDUCATION ON THE

REPORTS OF DR. MAX WOLFF AND THE LAY ADVISORY COMMITTEE

The Board of Education has had under active consideration for the past year the requests set forth by the N.A.A.C.P. These pertained to the adequacy of education for Negro children due to the existence at Washington School of a preponderance of Negro students.

Since the introduction of this problem, the Board and its Administrative staff have devoted a great deal of time and effort in deliberations on this subject. The Board has been aided in this study by a Lay Advisory Committee consisting of seventeen members from various walks of life in the city. The Lay Advisory Committee requested and the Board supported its request for the help of a team of professional consultants in the gathering and interpretation of data.

The Board of Education recognizes its responsibility for making the evaluation and determinations which will offer the best solutions to the issue, as it effects public education, in the best interest of the entire city.

The majority and minority reports of the Lay Advisory Committee and the report and recommendations of the team of consultants have been studied by the Board. The Board finds, however, that no plan as yet suggested takes into consideration many of the factors that affect the educational welfare of all the children of Plainfield.

The purpose of this statement is to outline the Board's reasons for not implementing at this time the recommendations of its Lay Advisory Committee.

The proposals and the Board's reaction to these proposals follows:

MAJORITY REPORT OF THE LAY ADVISORY COMMITTEE

Proposal 1.

> "We recommend to the Board of Education that a zone change be effected in the area of the Washington School coupled with adjacent areas which will result in a more favorable balance of Negro and white children in the Washington School."

Comments:

The feasibility of this proposal was investigated by the Administrative staff, and it was found that a reasonable balance could not be achieved without requiring

large numbers of students to travel excessive distances to and from school. Safety hazards for a larger number of children would be increased.

The racial census conducted by the study team reveals that, presently, all the school zones that are adjacent to the Washington zone, except Cedarbrook, have a Negro enrollment that exceeds the citywide average. This limits the proposed change to the Cedarbrook and Washington zones and would result in the necessity of establishing zone lines that could be interpreted as gerrymandering to establish racial balance.

The situation is further complicated by the high pupil density north and northwest of Washington School and the relatively low pupil density immediately north and south of the Cedarbrook-Washington boundary line.

Proposal 2.

> "That a similar examination be made of other areas the moment they become predominantly Negro student body and that the Board of Education attempt in a like manner by rezoning to effect similar changes."

Comments:

This proposal requires further study. No action is planned at this time.

Proposal 3.

> "That the Board of Education begin seriously to come to grips with the real causes that make for this problem and not be concerned only with the fact that a school is predominantly Negro or imbalanced to the point of segregation."

Comments:

The Board will continue to study the data and educational implications pertaining to this proposal in order to develop educational programs at all levels that will be designed to better meet the needs and develop the abilities of individual students in our schools. This is an educational problem which the Board will continue to accept as its responsibility.

MINORITY REPORT OF THE LAY ADVISORY COMMITTEE

Proposal.

> "Based on the facts presented to the Lay Advisory Committee from all sources investigated, including the Wolff Report, we recommend that the Plainfield Board of Education effect with all speed, the preferred best solution of Dr. Wolff, Dodson, Steinhauer, Cook, and Harmin. We urge the Board of Education to consider this report in the same objective manner in which it was compiled, analyzed, and evaluated by the experts on the study team.
>
> As members of the Lay Advisory Committee and responsible citizens of Plainfield, we would be guilty of grave disservice to the community and its children if we joined in disputing the actual facts, gathered in Plainfield about the Plainfield school system. We strongly suggest that an effective total rezoning to achieve maximum integration be effected as the necessary first step toward securing the best possible education for every one of our children."

Comments:

For purposes of the discussion below, Plan 1 consists entirely of rezoning, and Plan 2 is the sister-school plan.

Neither of these plans achieve most of the goals set by the Wolff Report as pertinent objectives. These goals included:

"To maintain or achieve good utilization of each building."

The Wolff Report indicates that Woodland, Cedarbrook, Evergreen, and Cook would be over utilized immediately under rezoning and under the sister-school plan Cedarbrook would be over utilized. This would result in large size classes or the use of rooms reserved for coordinate instruction.

Plan 1 would add three hundred seven pupils to the Evergreen School which would have an enrollment of eight hundred twenty eight. This exceeds capacity by one hundred eight and does not allow flexibility for any uneven pupil distribution among grades.

The Wolff Report does not consider the effect pre-school children have on future school enrollments. The Evergreen zone is increased by two hundred sixty-nine pre-school children under rezoning, thereby continuing over utilization for some time to come.

The increased number of pre-school children residing in the Evergreen-Stillman sister zone and the Jefferson zone, two hundred and one hundred fifteen respectively will soon lead to over utilization of these buildings.

"To retain walking distance to school equivalent to those presently in use."

While it is true that the longest distance presently traveled (1.3 miles) by elementary school pupils is exceeded only at the revised Cook zone (Rezoning Plan), the number of students traveling one mile or more would be greatly increased as indicated below:

Present Zoning	161
Rezoning Plan	690
Sister-School Plan	1070

Plainfield Board of Education buses would not be available at the time needed to transport elementary school pupils. The buses are scheduled to transport mentally and physically handicapped children each morning and afternoon. The time of these trips conflicts with the opening and closing times of the elementary schools.

"To rezone as few children as possible to achieve these purposes."

The rezoning plan would require that one thousand six hundred twenty-three students be rezoned. The sister-school plan incorporates two types of rezoning. First an actual zoning change for five hundred seventy-eight pupils and second, under the "sister-school" plan, approximately sixteen hundred students would be immediately transferred to a more distant sister-school that is paired with the

school presently serving their zone. In the course of a complete elementary school cycle, this would result in approximately three thousand pupils attending schools outside their present zone.

"To avoid additional costs."

The Traffic and Parking Division of the Plainfield Police Department has studied the zoning changes. It is their opinion that a maximum of twelve additional crossing guards would be needed for the rezoning plan and seventeen for the sister-school plan. The annual additional cost would be $10,211. and $14,466. respectively.

A large number of students traveling more than one mile to school would require additional lunchroom facilities and additional supervision. None of the elementary schools is adequately equipped to provide these facilities. The cost of converting rooms to lunch rooms would be high, and the rooms would not be available for use in the educational program. In some schools this loss of rooms would be critical. State law requires that each teacher have a daily lunch period free from supervision of students. Under present conditions this is possible without the addition of staff by rotating the lunchroom supervision assignments. A substantial increase in the number of students having lunch at school would make this rotation of assignments impossible due to the number of teachers needed to supervise at one time.

"To provide for future growth."

In planning elementary school zones, the number of pre-school children living within the proposed zone is of primary importance if a degree of stability for the proposed zone is desired. By carefully studying the pre-school factor, enrollment can be predicted quite accurately for a period of five years.

The proposals made by Dr. Wolff utilize only the present elementary school pupils in calculating enrollments. These data are very useful for projecting enrollments of children already in school but are of little value in estimating future growth. Sound procedures for rezoning always include pre-school data and projections.

Rezoning does not allow for future growth at Woodland, Cedarbrook, Evergreen, Cook, or Stillman schools.

Future growth at the Cedarbrook/Washington, Evergreen/Stillman, Cook/Emerson, and the Jefferson schools has not been adequately provided for under the sister-school plan.

MINORITY REPORT OF DOROTHY COE DUNHAM

Proposal.

> "I would, therefore, support either plan and include such adaptations as the Board of Education deems necessary, so long as the community-wide concept is maintained."

Comments:

The Board has been unable to develop adaptations to either Plan 1 or Plan 2 that would enable it to alleviate the objections as stated in the Minority Report of the Lay Advisory Committee.

MINORITY REPORT OF CARLTON M. BARLOW

Proposal.

> "I do not believe that precipitous or drastic action would serve any constructive purpose at this time."

Comments:

Mr. Barlow's recommendation has been given consideration by the Board.

OTHER COMMENTS BY THE BOARD CONCERNING THE WOLFF REPORT

The Board takes strong exception to the analysis and interpretation of the data in the various parts of the B section of the Wolff Report. Data in question were furnished by the Board and its staff in accord with specific requests from Dr. Wolff.

It is implied that these statistics support the conclusion that education received at Washington School is inferior to that offered in other schools in the community. Actually, what seems to be proven is that the achievement is poorer as the percentage of Negro enrollment increases at all schools as a group.

This generalization is further complicated when it is considered that there has been a large influx of Negro children into the school system at all levels, primarily from other parts of the country. To be meaningful, the data should trace - when the student entered the Plainfield school system, what his achievement level was at that time, and what progress he has made in the Plainfield schools. Further comparisons are then needed between the performance of the children at Washington School as compared to the performance of Negro children at other schools taking into consideration out of school environmental factors that effect educational achievement.

There is no question that specific steps should be taken to improve the 10
generally poor performance record exhibited by the Negro student. Sociologists and psychologists agree that the capacity to learn does not differ among races. The school, the home, and the community share the responsibility for providing the necessary motivation as well as the opportunity to receive the maximum benefit of public education.

Copies of the Wolff Report, the majority and minority recommendations of the Lay Advisory Committee, and the Board of Education's detailed comments on the Wolff Report are available for inspection at the Administration Building, 504 Madison Avenue, and the Plainfield Public Library.

A - PLAINFIELD PUBLIC SCHOOLS
Enrollment October 1, 1963
Elementary Schools
(STIPULATED JUNE 16, 1964)

SCHOOL ZONE	NEGRO	OTHER	TOTAL	PERCENT NEGRO
Barlow	147	213	360	40.8
Bryant	129	63	192	67.1
Cedarbrook	107	499	606	17.7
Clinton	289	148	437	66.1
Cook	122	400	522	23.4
Emerson	362	112	474	76.4
Evergreen	177	492	669	26.5
Jefferson	286	263	549	52.1
Stillman	240	128	368	65.2
Washington	223	387	610	36.6
Woodland	199	300	499	39.8
Lincoln*	69	40	109	43.2
Total Elementary	2350	3045	5395	43.6

*Lincoln School is a special school for mentally retarded children.

B -PLAINFIELD PUBLIC SCHOOLS
Enrollment April 1, 1964
Elementary Schools
(STIPULATED JUNE 16, 1964)

SCHOOL ZONE	NEGRO	OTHER	TOTAL	PERCENT NEGRO
Barlow	135	183	318	42.4
Bryant	153	47	200	76.5
Cedarbrook	109	493	602	18.1
Clinton	307	137	444	69.1
Cook	125	392	517	24.1
Emerson	351	109	460	76.3
Evergreen	166	481	647	25.6
Jefferson	280	268	548	51.0
Stillman	254	130	384	66.1
Washington	230	375	605	38.0
Woodland	198	293	491	40.3
Lincoln*	73	36	109	66.9
Total Elementary	2381	2944	5325	44.7

*Lincoln School is a special school for mentally retarded children.

(STIPULATED JUNE 16, 1964)

C - Plainfield Public Schools, April 1, 1964, Comparison of enrollment in elementary school zones with all students counted in their place of residence, except Lincoln School, for period from April 1962, and including per cent of Negro students April 1964 enrolled under "Sixth Grade Plan".

PLAINFIELD PUBLIC SCHOOLS

	Enrollment*April 1, 1964			Per Cent Negro					Difference		
SCHOOL ZONE	TOTAL	NEGRO	WHITE OR OTHER	APRIL 1962	SEPT. 1962	APRIL 1963	SEPT. 1963	APRIL 1964	APRIL 1962 APRIL 1964	Sixth Grade Plan April 1964	
Washington	621	593	28	95.1	95.8	96.2	96.1	95.4	+ .3	38.0	10
Emerson	531	400	131	64.8	69.3	72.1	74.7	75.3	+10.5	76.3	
Stillman	412	270	142	59.5	66.0	67.6	63.9	65.5	+ 6.0	66.1	
Bryant	225	151	74	57.3	60.6	65.5	65.1	67.1	+ 9.8	76.5	
Clinton	500	346	154	45.8	53.3	58.9	65.2	69.2	+23.4	69.1	
Jefferson	572	286	286	43.2	45.9	44.9	49.9	50.0	+ 6.8	51.0	
Barlow	274	80	194	24.1	31.1	30.8	26.7	29.1	+ 5.0	42.4	
Woodland	430	108	322	15.0	15.5	18.8	23.3	25.1	+10.1	40.3	
Evergreen	617	66	551	2.7	7.7	8.4	9.7	10.6	+ 7.9	25.6	
Cedarbrook	583	8	575	5.2	3.6	3.8	1.3	1.3	- 3.9	18.1	
Cook	451	0	451	0	0.5	0.6	0.2	0	----	24.1	20
Lincoln	109	73	36	64.9	60.2	63.0	63.3	67.0	+ 2.1	67.0	
Total Elementary	5325	2381	2944	37.0	39.0	40.4	43.2	44.7	+ 7.7	44.7	

* Enrollment is by elementary school zones with all students counted in their place of residence, except Lincoln School.

of Hagerstown, except Funston School.

RESPONDENT'S EXHIBIT THREE
(STIPULATION EXHIBIT 10)

PLAINFIELD BOARD OF EDUCATION'S ANALYSIS OF PAGES B-6 TO B-41 OF THE WOLFF REPORT

Page B-6 - Paragraph 2 - October 30, 1962

This paragraph sets the tone for the remainder of Section B which purports to evaluate the quality of education as measured by quantitative data with no reference to teaching-learning conditions which actual observation and discussion with the teaching and administrative staffs would have made possible. This limitation of the study, acknowledged on Page B-8, is a serious defect that has made it necessary to ~~reply~~ RELY on numerical data to the exclusion of the qualitative factors that are essential to the measurement or evaluation of an educational program.

Succeeding comments on the data as presented will tend to reveal this weakness throughout the study.

Page B-7 -

No attempt has been made to discover the achievement level of junior and senior high school students who made up the 70% of the Negro elementary school population who attended schools other than Washington School. Students are placed in the W, X, Y groups in the junior high schools on the basis of performance as measured by report card grades, achievement as measured by standardized tests, and aptitude as measured by the School and College Ability Tests. Considerable flexibility is maintained by grouping students individually by subjects and by making adjustments whenever performance indicates that a higher or lower grouping would be advisable.

Page B-10 -

Use of "Square feet of ground floor" is not a valid measurement of instructional area per pupil when building has more than one floor.

Page B-11 -

At the time these data were collected educational equipment was counted in each building on a specific day. This equipment is circulated through the central audio-visual aids center at the request of individual teachers or schools. On another day, this could yield an entirely different list of schools.

TV sets were borrowed for the experimental Parlons Francais Program in two elementary schools and are not a part of our regular school equipment inventory.

Page B-12 -

At the time of the study there were no libraries in any of our elementary 10
schools. In some schools supplementary instructional volumes are kept on shelves in the classroom while in others they have been collected and placed in a room. The mere physical collection of books does not constitute a library, but is a pooling of available library type books preparatory to the development of an elementary school library program.

Library and school authorities are in agreement that regardless of where the collection of books is located, a library is not in operation until it is staffed by a teacher-librarian and kept open for the major portion of the day so that it is available to all of the children of the school.

Page B-13 - Table B-3 - 20

Indicates that average class sizes are maintained throughout the system, with slight variations among all schools.

Page B-14 - Table B-4

Presents a distorted picture of the allocation of teachers' time in special instructional areas. Materials for this table were obtained from schedules which indicate the location in which the teacher is working for the major portion of a school session. Its chief use is that of directory for

Page B-14 - Table B-4 - (Continued)

contacting these teachers. Teacher time is allocated on the basis of the number of classes to be served in each building. The number of days is also misleading unless it is understood that the morning session is 30 minutes longer than the afternoon session. The allocation of teachers' time on the basis of classes rather than days and half days is used throughout the system. These comments also apply to all tables affecting instruction in speech, remedial reading, art, music, and physical education.

Page B-15 -

Refers to remedial reading teachers' load at Washington School and Evergreen School. The teacher at Evergreen School is spending an additional 1/2 day a week as part of a departmentalized or "platoon" teaching experiment designed to discover whether this type of instruction in reading will improve the over-all quality of reading instruction. When the results of this experiment are evaluated the decision will be made as to whether this system of grouping may be utilized in other elementary schools.

Comments concerning use of I.Q. scores for remedial reading placement are not representative of the procedures used in the school system. Children are placed in remedial reading classes on the basis of referral by their classroom teacher, reading achievement as measured by standardized reading tests and by their reading potential as measured by reading capacity tests. The achievement level by itself does not indicate a need for remedial instruction.

There are three general classifications of reading instruction:

(1) The regular or developmental reading program

(2) The corrective reading program

(3) The remedial program

Developmental and corrective instruction take place in the regular

Page B-15 - (Continued)

classroom reading groups. Corrective instruction involves the classroom teacher identifying the cause of reading difficulties and taking measures to correct them. Remedial reading instruction is given to students whose reading difficulties are of such a nature that they could not be corrected by classroom teachers.

Remedial reading placement is based on the disparity between reading capacity and achievement which could be caused by such factors as physical defects, emotional blocks, slow maturation, or lack of continuity of schooling. One way to illustrate this concept is by stating that a child in the 4th grade with 3rd grade reading capacity who is reading at the 3rd grade level is neither a corrective nor a remedial case. A child in the 4th grade with 4th grade capacity who is reading at the 3rd grade level may be a corrective or remedial case depending on the analysis of his problem. All children in Washington School who qualify for remedial reading under our established procedures are receiving such instruction.

Page B-16 - Table B-5 -

Number of teachers' days is misleading as indicated previously.

Page B-16 -

Last paragraph - Dividing total enrollment by number of teaching days indicates differences in class sizes rather than in allocation of teachers. Teachers are assigned to classes whether these classes have 25 students or 30 students enrolled.

Page B-17 -

The 3 elementary school nurses are on call as needed throughout the day. For purposes of location and for routine tests they are scheduled in various "home" schools throughout the week. However, they serve all schools as needed with the time in each school being directly related to the need for their services.

Page B-18 -

There is no support for statements such as "the generally low status assigned by the community to a segregated school, etc." These generalizations are unwarranted by data, observation, or experience. The leadership in Washington School is measured quantitatively without reference to qualification or actual circumstances. The Washington School Principal holds a Doctor's Degree and has had more than 30 years of successful experience in the system. When the vice principalship at Jefferson School was vacated by a resignation in 1961, this position was not filled since plans were being made to install individual principals in each building.

The state of the administration and supervision of the Washington and Jefferson Schools should not be classed as "deprived" unless the Cook, Woodland, Cedarbrook, and Clinton Schools are also placed in this category.

No mention is made of the Helping Teachers' Program whereby experienced elementary supervisors are assigned to work with beginning and non-tenure teachers in all elementary schools, including the Washington School.

Page B-20 -

The Washington School was expanded by the addition of 8 classrooms in the 1957-58 school year. This required the employment of 8 additional teachers who were properly designated as non-tenure teachers. Since non-tenure teachers throughout the system experience the highest rate of turnover, the problem in Washington School is no more acute than it is throughout the rest of the district.

Page B-22 - Table 10 -

Use of "pupils per clerk" is not related to the clerical duties of teachers. One full-time clerk is adequate to handle the clerical responsibilities of a 21 teacher school. Teachers are not required to assume "extra"

Page - B-22 - Table 10 - (Continued)

clerical work in any of our schools. Larger class sizes increase the professional responsibilities of teachers in terms of grading papers and examinations, keeping pupil records and reporting to parents. These duties are never assigned to clerks.

Page B-22 -

Racial composition of the school personnel - Comments on this page are contrary to the employment procedures used in our school system. Teachers and administrators are employed as teachers and administrators, without racial designations. The Plainfield School System has clearly defined procedures designed to provide the best professional instructional personnel available for our school system.

Page B-26 - Table B-13 -

There are no significant differences among schools nor justification for comments on this page. Per pupil expenditures for Clinton, Cedarbrook, Woodland, Cook, Evergreen, Washington, and Jefferson School vary only slightly due to the number of students enrolled and the two-school administrative assignments.

Page B-27 -

Comments relating to achievement are not supported by the data.

The assumption that 39% of the Washington students are "undereducated" without taking into consideration other factors affecting student performance is neither realistic nor accurate, as illustrated by succeeding comments.

Page B-29 - Table B-14 -

Generalizations concerning low achievement in Washington School have failed to take into consideration educational results revealed in this table. The difference in reading achievement between the 4th and 6th grade classes is 2.7 years for Washington School over a period representing an actual 2.0 years. This is the greatest difference among any schools, or school groupings.

Page B-29 - Table B-14 - (Continued)

It seems reasonable to infer that the cumulative effect of reading instruction in Washington School results in a level of achievement that is only 3 months below the expected norms at the 6th grade level despite a 10 months' difference at the 4th grade level. This would indicate a gradual overcoming of the cultural lag and other factors outside the school environment, since the next highest difference is recorded in those schools with over 50% Negro enrollments. These results are consistent in terms of the measured gains of 2.5 years in mean reading achievement recorded in schools having more than a 50% Negro enrollment.

Page B-30 - Table B-15 -

This table also illustrates a gain of 2.1 years in arithmetic achievement in 2.0 actual years for Washington School pupils.

Page B-31 - Table B-16 -

Indicates that over a 5 year period the gains in reading achievement between the 4th and 6th grades in the Washington School have resulted in an average difference of 2.1 years in 2.0 years. This reveals consistency in the achievement results referred to in Table B-29 substantiating the position that the instructional program tends to overcome the out of school factors that retarded achievement in the primary grades.

Page B-32 - Table B-17 -

Indicates 5 year average gain of 1.9 years in arithmetic between the 4th and 6th grades in Washington School which is within one month of the average gain based on national norms.

Page B-33 - Table B-18 -

Changes recorded in these tables are relatively slight. The preceding tables tend to indicate that from an educational standpoint the total effect of the instructional program in the Washington School shows a pronounced rise between the 4th and 6th grades which results in an increase in average scores

Page B-33 - Table B-18 - (Continued)

that approaches the national averages despite the poor achievement in the primary grades.

Page B-34 and B-35 -

The method of assigning rank based on a shifting base in the case of ties is misleading and is not regarded as a preferred procedure particularly where the number of cases involved is less than 100.

These rankings are a summary of the analyses of preceding tables, and are, therefore, worth no more nor less than the basic data from which they are derived. For example, rankings based on the age of a building without taking into consideration the state of maintenance and modernization are not indicative of the true condition of the physical plant. A school by school and room by room inspection would have revealed better comparisons.

Page B-37 - Table B-20 -

These tables indicate the racial composition of subject area classes in the W, X, and Y groupings. The data require further investigation in considerable depth before the generalizations made can be accepted. For example, although none of the Washington, Stillman, Clinton, or Jefferson Negro students attend Maxson Junior High School, the percentages of students enrolled in the W sections at Maxson Junior High School are below the percentage of Negro enrollment in this school. It would be interesting to undertake a study of the socio-economic and cultural background of individual students as a means of determining the factors outside the school environment that might affect group placement. Also it is interesting to note that the percentage of Negro students in the Maxson Junior High School 7th grade W sections is almost twice that of Negro students in the 9th grade W sections in mathematics, language arts, and social studies.

Page B-38 - Table B-21 -

The same trend is indicated in the Hubbard Junior High School groupings.

Page B-39 -

There is little doubt that this represents a problem area where further study is necessary in order to determine the cause and effect relationships, including the out of school environment, motivation and aspiration levels, and other factors that combine to produce these results.

Page B-41 - Table B-23 - Same as above.

RESPONDENT'S EXHIBIT FOUR:

(STIPULATION EXHIBIT 11)

Achievement of Students
on
Objective Tests
with particular reference to
Eleven Elementary Schools
and to
Negro and White Students
in the
Sixth Grade
1961 - 1962
Plainfield Public Schools

October 29, 1962

For: The Board of Education
Plainfield, New Jersey

STACO STATISTICAL CONSULTANTS

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The relationships between the elementary pupil's achievements in the various elementary schools with the several tests administered in the public schools, necessarily need constant reevaluation. Moreover, the question of a purported racial difference in achievement has been raised in the City of Plainfield, New Jersey. The Board of Education of the City of Plainfield wished to investigate the elementary pupils' achievement, the elementary schools and the racial groups as objectively as possible, using mathematical statistics.

Such a study could include all the grades, but, to save time and money, this preliminary study was centered on the sixth grade in 1961-62; the culmination of the elementary school program and the transition to the secondary school program. Since there are a series of objective tests available for sixth grade pupils, this study was further narrowed to a consideration of only the pupils' reading achievements and the pupils' arithmetic achievements together with a general ability test. The pupils' reading achievement utilized the Iowa Tests of Basic Skills score in reading. The pupils' arithmetic achievement utilized the Iowa Tests of Basic Skills composite score in arithmetic. All of the Iowa Tests of Basic Skills were administered in October, 1961. The general ability test used was the Kuhlman-Anderson Intelligence Test administered and scored in the fifth grade (see Appendex A).

The Iowa Tests of Basic Skills were reported in two digit numbers, e. g. 63. For interpretation a grade equivalents divide by 10. With the decimal point, this number 63 would become 6.3 which is read as 6 years, 3 months. The Kuhlman-Anderson units were standard I.Q. units where 100 is the publisher's national average.

The staff of the Plainfield Public Schools furnished a card for each of the sixth grade pupils in 1961-62 who had complete records for these three tests. There were 534 cards. Each card contained the pupil's name, his

school, his Iowa reading score, his Iowa composite arithmetic score, his Kuhlman-Anderson I.Q. score and the teacher's best judgment of his race, classified only as Negro or non-Negro.

In order to facilitate the reporting of the results of the mathematical statistical analysis, some symbalization is necessary. These symbols will be defined as:

X_{ijk} = pupil's Kuhlman-Anderson score

Y_{ijk} = pupil's reading score on the Iowa Tests of Basic Skills

Z_{ijk} = pupil's arithmetic composite score on the Iowa Tests of Basic Skills

where

i = ethnic group

1 = Negro

2 = non-Negro

j = elementary school

1 = Barlow

2 = Bryant

3 = Cedarbrook

4 = Clinton

5 = Cook

6 = Emerson

7 = Evergreen

8 = Jefferson

9 = Stillman

10 = Washington

11 = Woodland

k = order number of an individual pupil in a specific racial group in a specific school.

$$n = \sum_i \sum_j n_{ij} = 534$$

It will be noticed that the Lincoln School was not included in this study since this school is for mentally retarded pupils.

This study starts with a visualization of the frequency distribution of a variable (Ref. 1, Chapter 5). Consider the y variable, the reading score on the Iowa Tests of Basic Skills. All of the 534 pupils had a reading score. This collection of data is the finite population of the scores in reading. These scores can be put in order starting with the lowest score up to the highest. There will be few pupils with either very low or very high scores. This statement can be visualized by a graph of a frequency distribution in Figure 1. The continuous curve is a mathematical formulation consistent to the discrete data. The assumption is that the actual data will be consistent to a type of frequency distribution. There is nothing stated as to the type of the frequency diagram. In the mathematical model of this study, a selection of frequency distributions is possible. Suppose one theoretical distribution has been selected. The actual data must be tested for consistency to this theoretical distribution by the chi^2 contingency test (Ref. 1, p. 742 and Ref. 2, Vol. 1, Chapter 12). The theoretical normal frequency distribution is easily the most tractable and for this reason is the first one tried. However, it is not necessarily the best theoretical distribution.

In this study, the two tailed confidence limits will be assumed at the 0.05 level. This assumption means that 95% of the available data will be within the limits of the theoretical distribution (each tail 0.025).

There will be two types of probability used in this study; Type I and Type II. For a visual explanation of these types of probability, assume a theoretical normal distribution (Figure 2, parent distribution A). There will be an estimate of the mean calculable and an estimate of the standard deviation (u, s). From the parent frequency distribution, a distribution of the mean has the same mean but the standard deviation is divided by the square roat of n (Ref. 1, p. 219). The same interpretation of the confidence limits prevails,

Figure 1.

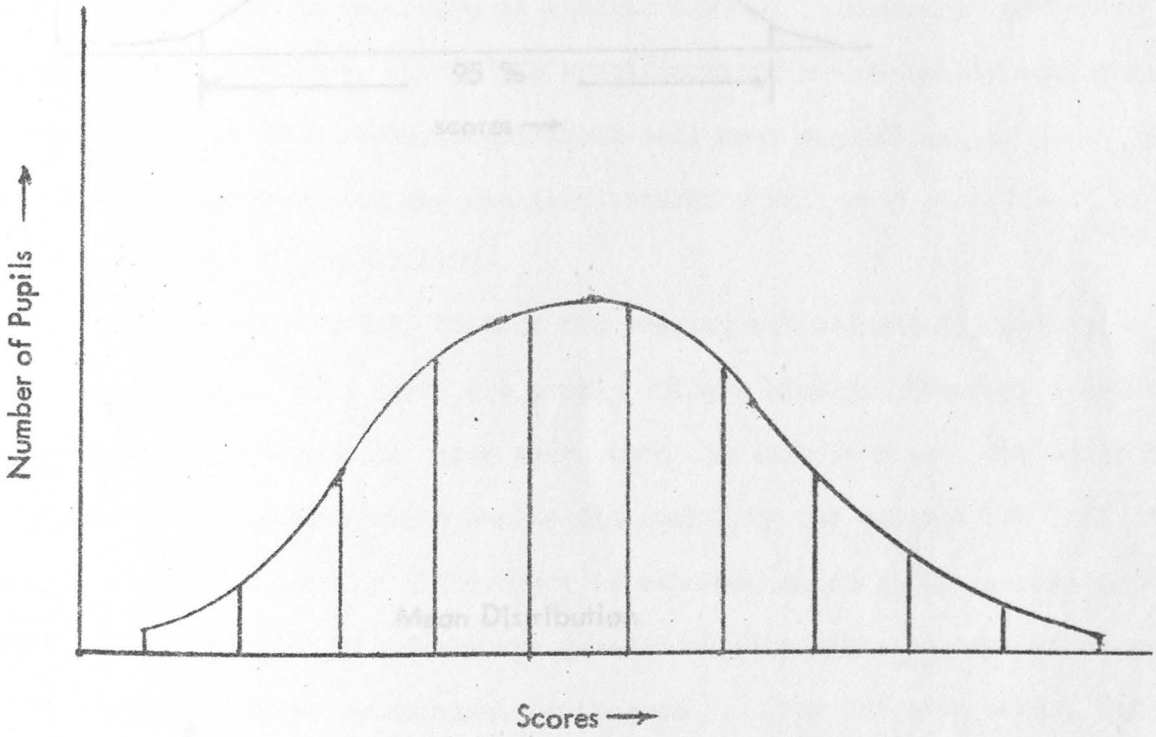
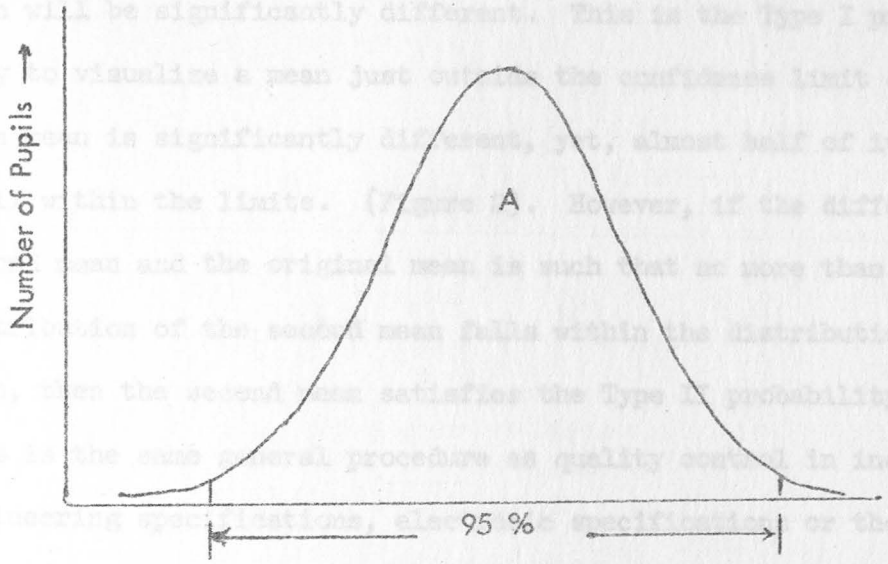
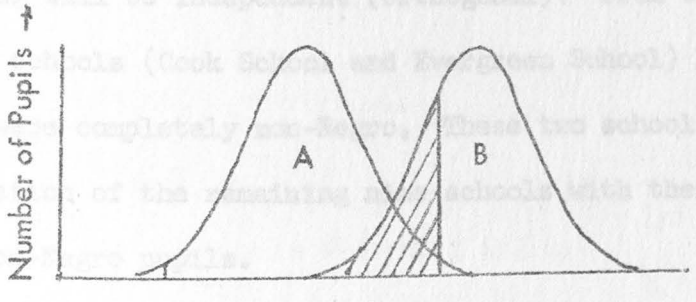


Figure 2.

Parent Distribution



Mean Distribution



i. e., 95% of the means of similar distributions will fall within the limits, if identical. However, if a new mean falls outside this limit, then, this new mean will be significantly different. This is the Type I probability. It is easy to visualize a mean just outside the confidence limit of the original mean. This mean is significantly different, yet, almost half of its distribution is still within the limits. (Figure 2). However, if the difference between the second mean and the original mean is such that no more than 0.05 of the distribution of the second mean falls within the distribution of the original mean, then the second mean satisfies the Type II probability at the 0.05 level. This is the same general procedure as quality control in industry whether it be engineering specifications, electronic specifications or the specifications at Cape Canaveral. In this study, significant will mean significant at the 0.05 level for Type I probability and decisive assurance will mean significant at the 0.05 level for Type II probability.

Consider the relationship between the reading achievement (y) and the general ability (x). Both tests are partly culture biased. However, there is more information contained in these tests than the culture bias. The tests have some information in common which can be discovered by the correlation (Ref. 2, Chapter 14 and 15). Reading achievement is related, in part, to general ability. The problem is, then, to eliminate the general ability with <u>its</u> culture bias so that the reading will be independent (orthogonal). From the data cards, two of the elementary schools (Cook School and Evergreen School) had sixth grades in 1961-62 which were completely non-Negro. These two schools will be treated after consideration of the remaining nine schools with their varying proportions of Negro and non-Negro pupils.

Consider the pupils in the nine schools. Do not assume any differentiation by race or school. At the moment it is not necessary to assume the frequency distribution of either y or x. Calculate the least squares expected value of

y for the linear regression (first approximation) (Ref. 1, Sec. 18.3)

Expected value of y = E (y)

$$E(y) = \bar{y} + b(x - \bar{x})$$

where

$$\bar{y} = \frac{1}{n} \sum_{i,j,k} y_{i,j,k}$$

$$s_y^2 = \frac{1}{n-1} \sum_{i,j,k} (y_{i,j,k} - \bar{y})^2$$

$$\bar{x} = \frac{1}{n} \sum_{i,j,k} x_{i,j,k}$$

$$s_x^2 = \frac{1}{n-1} \sum_{i,j,k} (x_{i,j,k} - \bar{x})^2$$

$$r = \frac{1}{n-1} \sum_{i,j,k} \frac{(y_{i,j,k} - \bar{y})}{s_y} \frac{(x_{i,j,k} - \bar{x})}{s_x}$$

$$b = r \frac{s_y}{s_x}$$

i = 1, 2

j = 1 - 4, 6, 8 - 11

$$n = \sum_{i,j} n_{i,j} = 417$$

The variance about the regression line of E (y) is

$$s_{y/x}^2 = s_y (1-r^2) \frac{n-1}{n-2}$$

Degrees of freedom
f = 415

Numerically

$$E(y) = 65.954 + 0.69949\ (x - 103.880)$$

$$s^2_{y/x} = 83.5409 \qquad f = 415$$

The formulation of the expected y is the common information in the x and y. The actual y - E(y) is the independent information in the y or reading test expressed as

$$d_{i,j,k} = y_{i,j,k} - E(y_{i,j,k})$$

There were 417 d's whose actual frequency distribution must be consistent to a theoretical frequency distribution for this model. Assume the theoretical normal frequency distribution first and test for the distribution of the d's. The method of test is a 20 x 2 contingency table of the chi^2 test. The actual chi^2 is 5.57 with 12 degrees of freedom. The theoretical chi^2 for 12 degrees of freedom is 21.0. Therefore, the data of the d's is normally distributed. The data of the d's is then ready for variance analysis (Ref. 2, Chapters 23 and 24).

Up to this point, there had been no differentiation of Negro, non-Negro pupils nor of the schools. It is now necessary to classify by the 9 sub-classes for the schools and the 2 sub-classes for Negro and non-Negro pupils. The means of the d's of the sub-classes are given below.

School	Number of Negro Pupils	Number of Negro d's	Number of non-Negro Pupils	Mean of non-Negro d's
1	8	+3.419	33	+1.933
2	8	-0.943	10	+0.011
3	3	-4.340	72	+2.987
4	12	-2.866	20	-0.371
6	41	-1.675	14	-1.647
8	24	-0.135	28	-0.201
9	20	-0.696	13	+1.759
10	54	-4.509	3	+9.171
11	11	-5.674	43	+2.955
	181		236	417

$$\text{grand mean} = \frac{+0.747}{417} = 0.002$$

The method of variance analysis of unequal numbers in sub-classes is the method in Ref. 2, p. 220. Multiplying the variance about the regression by the degrees of freedom gives the sum of the squares for the total.

$$SS = 415\, s^2_{y/x} = 34{,}669.5$$

The table below is self-explanatory for the unbiased error

	sum of squares	degrees of freedom	mean squares	F
between sub-classes	3,307.17	17	194.539	2.469
error	31,362.33	398	78.800	
Total	34,669.5	415		

This table shows, by the F of 2.469, that there is a differentiation between the 18 sub-classes.

Concerning the classification of only the schools and disregarding the Negro, non-Negro composition of the schools, the following table was developed.

	sum of squares	degrees of freedom	mean squares	F
schools	500.563	8	62.570	0.794
error	31,362.33	398	78.800	

This F number of 0.794 shows that there is no differentiation of the schools <u>regardless</u> of the Negro, non-Negro composition of the schools.

Concerning the classification of Negro, non-Negro pupils and <u>disregarding</u> the schools, the following table was developed.

	sum of squares	degrees of freedom	mean squares	F
Negro, non-Negro	710.982	1	710.982	9.022
error	31,362.33	398	78.800	

The F number of 9.022 (and the table of the means for variance before) regardless of the schools shows that the non-Negro pupil reads better than the Negro pupil at the same general ability. The word "better" is only qualitative since the F number is significant, but not with decisive assurance (Type II).

Since there is a difference in the sub-classes of Negro, non-Negro pupils, to complete the analysis a 20 x 2 contingency table for the chi^2 test was calculated to prove the consistency of the data of the two sub-classes to the theoretical normal distribution.

	Negro Pupils	non-Negro Pupils
degrees of freedom	11	13
actual chi^2	12.97	10.09
theoretical chi^2	19.7	22.4

Both the Negro and non-Negro sub-classes are normally distributed and the variances are equal using the data from the groupings in the chi^2 tests.

Since there seems to be a difference between the Negro and the non-Negro pupils <u>regardless</u> of the school, the pupils of the 9 schools were separated into two sub-classes, Negro and non-Negro. Two linear regressions were calculated exactly as for the total group. Numerically, the expected y for the Negro is

$$E(y_1) = 59.381 + 0.51396\ (x_1 - 97.796)$$

$$s^2_{y_1/x_1} = 36.033 \qquad f = 179 \qquad n = 181$$

The expected y for the non-Negro is

$$E(y)_2 = 70.995 + 0.70621\ (x_2 - 108.547)$$

$$s^2_{y_2/x_2} = 109.48 \qquad f = 234 \qquad n = 236$$

Comparing the two regressions, the method in Ref. 1, p. 571 was used. While the two slopes were significant (Type I) this difference was not decisive (Type II using the approximately normal variate as the lower bound). Therefore, the slopes can be pooled. The two regressions are then

Negro $\quad E(y)_1 = 59.381 + 0.57422\ (x_1 - 97.796)$

non-Negro $\quad E(y)_2 = 70.995 + 0.57422\ (x_2 - 108.547)$

Since the distribution of the d's of the original regression is normally distributed for the two sub-classes of Negro and non-Negro, and since the slope of the two regressions (Negro, non-Negro) are not significant from the original slope, then the d's of these two regressions are also normally distributed.

These two equations are graphically represented in Figure 3.

The difference between $E(y_2) - E(y_1)$ where $x_2 = x_1$ is 5.401. The square root of the variance of the difference is

$$s = 0.88014$$

This difference can be compared by a t test. The t calculated is 6.18 which is significant (Type I) and with decisive assurance (Type II using a normal variate).

Since the slopes of the regressions are comparable, and since the previous analysis (variance analysis) showed no difference among the schools, we are forced to the conclusion that, on the average, the Negro pupil is 5.4 months behind the non-Negro pupil of equal general ability in the sixth grade in 1961-1962 in the Plainfield Public Schools.

Up to this point, the pupils in the sixth grades at Cook and Evergreen Schools were not included in the analysis, since they were entirely non-Negro. Calculate the least squares expected value of y for the linear regression. Numerically, this is

$$E(y_{5,7}) = 76.333 + 0.75978\,(x_{5,7} - 112.932)$$

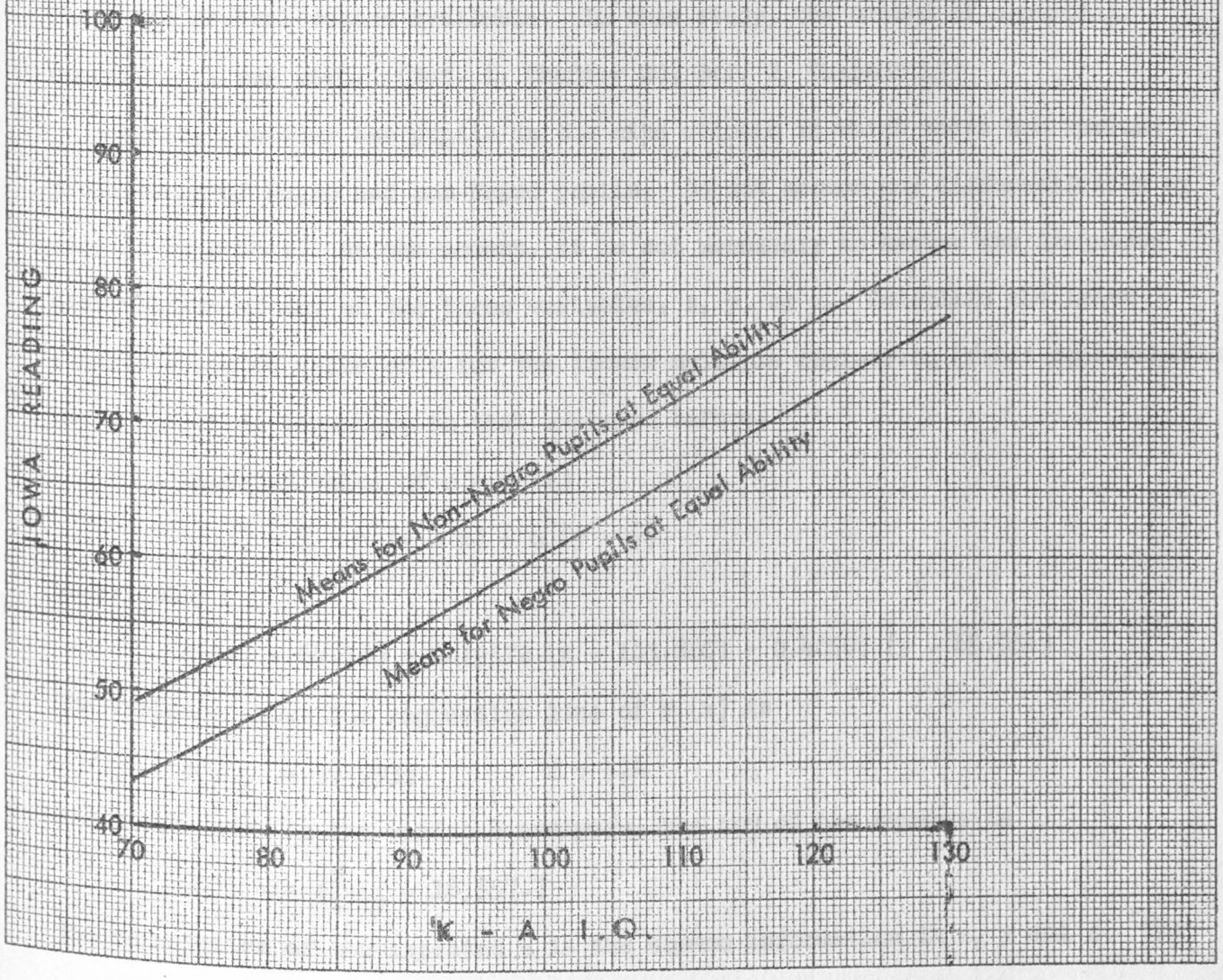
$$s^2_{y/x} = 181.169 \qquad f = 115 \qquad n = 117$$

The d's of this regression were tested by a 10 x 2 contingency table for the chi^2 test for consistency to the theoretical normal distribution. The actual chi^2 was 11.03 with 5 degrees of freedom. This chi^2 is less than the theoretical chi^2 of 11.1 for 5 degrees of freedom. Therefore, the distribution of the d's of this regression is consistent to the theoretical normal distribution.

Comparing this regression $E(y_{5,7})$ to the non-Negro regression $E(y_2)$ of the other nine schools, and using the same method in Ref. 1 shows these two regressions are identical.

Figure 3.

READING ACHIEVEMENT REGARDLESS OF THE SCHOOLS



The general conclusion is that all the non-Negro pupils of equal general ability have the same reading achievement regardless of the elementary school.

* * * * * * * * * *

Consider the relationship in arithmetic achievement (z) between the general ability (x) and the reading achievement (y). Again, all tests are partly culture biased. However, there is more information contained in these tests than the culture bias. The three tests have some information in common which can be discovered by the multiple correlations. Arithmetic achievement (z) is related, in part, to the general ability (x) and, in part, to the reading (y), and reading achievement, as well, is related, in part, to general ability. The problem is then to eliminate the general ability and the reading achievement with their culture bias, so that the arithmetic achievement will be independent (orthogonal). There are several routes available. In this study, the method of n-partial correlations was used. (Ref. 1, Chapter 20; Ref. 2, Chapter 15)

Again, consider the pupils in the nine schools in which there are varying proportions of Negro and non-Negro pupils. Do not assume any differentiation by race or by school. At the moment, it is not necessary to assume the frequency distribution of any of the three variables, z, y, or x. Calculate the least squares expected value of z for the linear multiple regression (first approximation using a similar technique to that employed before.

Expected value of z = E (z)

$$E(z) = \bar{z} + b(x - \bar{x}) + c(y - \bar{y})$$

Numerically

$$E(z) = 64.580 + 0.19372\,(x - 103.880) + 0.40507\,(y - 65.954)$$

The variance about the regression line of E (z) is

$$s^2_{z/xy} = 39.9933 \qquad f + 414$$

For future work in the variance analysis, the sum of the squares is

$$SS = 414\, s^2_{z/xy} = 16{,}557.7$$

The formulation of the expected z is the common information in x, y and z. The actual z minus the expected z is the independent information in the z, or

arithmetic test, expressed as

$$d_{ijk} = z_{ijk} - E(z_{ijk})$$

Again, there were 417 d's. Assume, for the moment, that the frequency distribution of the d's is normal.

Up to this point, there has been no differentiation of Negro, non-Negro pupils nor of the schools. It is now necessary to classify by the 9 sub-classes for the schools and by the two sub-classes for the Negro and non-Negro pupils. The means of the d's of the 18 sub-classes are given below.

School	Number of Negro Pupils	Mean of Negro d's	Number of Non-Negro Pupils	Mean of Non-Negro d's
1	8	-1.595	33	-0.250
2	8	+1.408	10	+2.651
3	3	+7.188	72	+0.493
4	12	+0.343	20	+2.082
6	41	-5.105	14	-2.381
8	24	-1.297	28	-0.195
9	20	-1.626	13	+1.429
10	54	+0.312	3	-4.287
11	11	+5.389	43	+2.571

$$\text{grand mean} \quad + \frac{0.229}{417} = 0.001$$

The method of variance analysis of unequal numbers in sub-classes is the same as before. Multiplying the variance about the regression by the degrees of freedom gives the sum of the squares for the total

$$SS = 16,557.7$$

The table below is self-explanatory for the unbiased error.

	sum of squares	degrees of freedom	mean squares	F
between sub-classes	2,302.0	17	135.412	3.77
error	14,255.7	397	35.908	
Total	16,557.7	414		

This table shows, by the F number of 3.77, that there is a differentiation between the 18 sub-classes.

Concerning the classification of Negro and non-Negro pupils and disregarding the schools, the following table was developed.

	sum of squares	degrees of freedom	mean squares	F
Negro, non-Negro	5.176	1	5.176	0.144
error	14,255.7	397	35.908	

This F of 0.144 shows that there is no differentiation of the Negro, non-Negro pupils over all 9 schools.

Since there is no differentiation between the Negro and the non-Negro pupils in the nine schools, this analysis was terminated and the data of the eleven schools was pooled for the variance analysis for the single classification of the eleven schools.

A linear regression was calculated for the eleven schools for 534 pupils exactly as before.

Numerically,

$$E(z) = 66.732 + 0.12865\,(x - 105.863) + 0.55136\,(y - 68.228)$$

$$s^2_{z/xy} = 32.5601 \qquad f = 531$$

For future work in the variance analysis, the sum of the squares is

$$SS = 531\ s^2_{z/xy} = 17,289.4$$

The consistency of the parent frequency distribution of the d's to a normal frequency distribution was checked by a 20 x 2 chi ^{2} contingency table. The results are reported below.

All Schools

total pupils	534
degrees of freedom	9
actual chi^2	7.39
theoretical chi^2	16.9

Similarly, the frequency distributions of the individual eleven schools were checked for consistency to a theoretical normal frequency distribution by a 10 x 2 chi^2 contingency table. These results are reported below.

School	1	2	3	4	5	6	7	8	9	10	11
Total pupils	41	18	75	32	59	55	58	52	33	57	54
degrees of freedom	2	2	5	1	4	2	4	3	2	3	3
actual chi^2	3.49	3.30	7.33	4.54	5.97	5.51	2.06	1.07	6.03	1.08	6.81
theoretical chi^2	5.99	5.99	11.1	3.8	9.49	5.99	9.49	7.81	5.99	7.81	7.81

All eleven frequency distributions were, at least, approximately normal. A Bartlett test (Ref. 1, p. 291) was calculated. The actual chi^2 of 9.21 with 10 degrees of freedom is less than the theoretical chi^2 of 19.3 for equal-variances with 10 degrees of freedom. Therefore, the schools are consistent to equal-variances.

Straightforward variance analysis was performed. The results are shown in the following table.

	sum of squares	degrees of freedom	mean squares	F
schools	2,397.4	10	239.74	8.389
error	14,892.0	521	28.58	
Total	17,289.4	531		

The F number of 8.389 shows that there are significant differences and with decisive assurance among the schools without regard to the Negro, nom-Negro composition of the schools.

The following table shows the range in grade equivalents, by school, of the average of arithmetic achievement for pupils of equal ability. This table also shows the percentage of Negro pupils in each school which confirms the non-relevancy of the racial composition.

School	Average of arithmetic minus expected arithmetic in grade equivalents	% of Negro Pupils
Evergreen	+0.28	0
Woodland	+0.21	21
Cook	+0.18	0
Bryant	+0.17	44
Clinton	+0.09	38
Washington	+0.02	95
Cedarbrook	-0.06	4
Stillman	-0.09	61
Jefferson	-0.12	46
Barlow	-0.15	20
Emerson	-0.47	74

Taking the table above, by relating the Evergreen School to each other school by a t test (Ref. 1, p. 428), it was found that only three schools (Jefferson, Barlow, and Emerson) are decisively different (Type II) from the Evergreen School. Similarly, by relating the Emerson School to each other school by a t test, it was found that only Barlow, Jefferson and Stillman Schools are similar. All the other schools are decisively different (Type II) from the Emerson School. Therefore, two rational groupings can be constructed from the data with the Stillman School in both groupings.

Each of the two groupings shows quite a broad spectrum of racial composition, i.e., in the schools similar to Evergreen, the racial composition varies from

0 to 95% Negro; in the schools similar to Emerson, the racial composition varies from 20 to 74% Negro.

Conclusions

In this study of reading and arithmetic achievement in 1961-1962 sixth grades in the Plainfield Public Schools, the analyses of the data yields the following findings:

1. The reading achievement of pupils of equal general ability shows no differentiation among the eleven schools. This means that the reading achievement of pupils of equal general ability is the same regardless of the racial composition of the school that he attends.
2. The Negro pupils' reading achievement is lower by 5 months than the reading achievement of non-Negro pupils of the same general ability regardless of the school. There are apparently outside factors not connected with the Plainfield Public Schools which have a depressing effect upon the reading achievement of the Negro pupils.
3. The arithmetic achievement of pupils of equal general ability and of equal reading achievement shows no differentiation between the Negro and the on-Negro pupils regardless of the school.
4. The arithmetic achievement of pupils of equal general ability and of equal reading achievement shows two rational groupings of schools which differ from each other in arithmetic achievement. However, these two rational groupings are not connected with the racial composition of the schools.

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APPENDIX A

KUHLMANN-ANDERSON INTELLIGENCE TESTS, by F. Kuhlmann and Rose G. Anderson. Sixth Edition. Published now by Ginn and Co.

The Kuhlmann-Anderson Tests have as their purpose the measurement of the mental development of school-age children and young people. Although this purpose is served in a large part by administration of the tests to groups of children in school in order to estimate their capacities for learning, the tests are useful also to psychologists and others who seek to help children by knowing them better.

There are thirty-nine tests in the Kuhlmann-Anderson scale, each with from six to twenty-four items or trials. These thirty-nine tests are numbered and arranged generally in the order of difficulty that children have in passing half of the trials and no more.

IOWA TESTS OF BASIC SKILLS, prepared at the State University of Iowa, by E. F. Lindquist and A. E. Heironymus. Published by Houghton Mifflin Co., Boston, Mass.

Quotations from critical reviews in THE FOURTH MENTAL MEASUREMENTS YEARBOOK, Oscar Krisen Buros, Editor. The Gryphon Press, Highland Park, N. J. 1953.

"The tests are designed to measure and evaluate the pupil's functional mastery of a wide variety of critical skills involved in reading, work-study, language, and arithmetic. A detailed study of the tests gives the impression that, in general, the skills in each of these areas have been expertly analyzed and that those that are crucial to total educational growth quite thoroughly sampled.

The norms accompanying these tests are probably the most extensive provided for achievement batteries at the elementary school level. The norms are based on a total of 196,851 pupils in 350 different school systems.

.....In the terms of their objectives, the tests appear to be quite valid. In the opinion of the reviewer, the scores are, with some exceptions, sufficiently reliable for judicious use in individual diagnosis.

The test content is of generally high quality, and the individual items are, on the whole, skillfully written and judiciously selected."

Miriam M. Bryan, Assistant Editor, Silver Burdett Co.,N.Y.

"Taken as a whole, the Iowa Every-Pupil Tests of Basic Skills represent one of the best series available for measuring many fundamental skills. They deserve careful consideration in any school system which is planning a systematic evaluation program."

Anton Thompson, Supervisor of Research, Long Beach Public Schools, Long Beach California

APPENDIX B

BASIC DATA FOR THE SIXTH GRADE 1961-1962

PLAINFIELD PUBLIC SCHOOLS

School	Ethnic Group	n	M x	M x^2	M y	M y^2	Mz	M z^2	M xy	M xz	Myz
1	1	8	741	69,847	492	31,736	472	28,398	46,498	44,066	29,807
1	2	23	3502	374,802	2292	163,030	2184	147,830	245,727	233,674	153,882
2	1	8	758	73,370	469	28,487	490	30,486	45,665	47,178	29,350
2	2	10	1015	103,251	643	42,591	661	44,113	65,321	67,144	42,957
3	1	3	299	29,963	176	10,370	204	13,886	17,482	20,378	11,956
3	2	72	8049	908,537	5362	410,230	5044	357,848	604,372	567,276	379,913
4	1	12	1175	117,263	707	42,891	731	45,109	69,965	72,158	43,493
4	2	20	2239	253,035	1424	106,188	1407	101,045	162,012	159,273	102,663
5	1	0	0	0	0	0	0	0	0	0	0
5	2	59	6600	744,786	4297	326,639	4241	309,427	486,151	478,295	314,806
6	1	41	4197	435,549	2592	161,716	2381	141,251	269,273	245,719	152,399
6	2	14	1401	143,783	863	55,967	836	51,588	88,552	85,276	53,312
7	1	0	0	0	0	0	0	0	0	0	0
7	2	58	6613	758,219	4634	382,186	4464	347,816	530,677	511,002	362,061
8	1	24	2272	218,014	1425	85,807	1412	84,128	135,619	134,678	84,185
8	2	28	2960	317,768	1877	129,349	1825	120,633	201,519	194,988	123,655
9	1	20	1953	193,377	1218	76,176	1194	72,206	120,366	117,230	73,555
9	2	13	1270	126,132	824	54,776	829	54,223	81,984	82,365	54,025
10	1	54	5162	498,656	3005	173,321	3192	190,680	289,742	306,417	179,420
10	2	3	364	44,534	262	22,990	217	15,785	31,595	26,222	18,989
11	1	11	1144	120,644	664	40,938	745	51,203	69,655	78,280	45,406
11	2	43	4817	544,315	3208	247,746	3106	227,586	362,700	349,974	235,542

RESPONDENT'S EXHIBIT FIVE
(STIPULATION EXHIBIT 12)

PLAINFIELD BOARD OF EDUCATION'S ANALYSIS OF PAGES C-1 TO C-9 OF THE WOLFF REPORT

Page C-1 - October 30, 1962

Dr. Wolff sets 7 goals to be accomplished by his proposals. Examination of these proposals indicates that he achieved only Goal 1 - "To Achieve Good Racial Balance," and Goal 3 - "To Close Bryant School." Five other goals as set by Dr. Wolff were not achieved as the following indicates:

Goal #2 - "Good Utilization of each Building"

Page C-4 - Table C-1 indicates that Woodland, Cedarbrook, Evergreen and Cook would be over utilized immediately under Plan 1. Using Plan 2, Cedarbrook is over utilized. This would result in large size classes or the use of rooms reserved for coordinate instruction.

The Evergreen school enrollment in Plan 1 would be increased by three hundred seven (307) pupils which would result in an enrollment of eight hundred twenty-eight (828). This exceeds capacity by one hundred eight (108) and does not allow flexibility for any uneven distribution among grades.

The Wolff report does not take into consideration the effect pre-school children have on future school enrollments. The Evergreen zone is increased by two hundred sixty-nine (269) pre-school children under Plan 1, thereby continuing over utilization for some time to come.

The number of pre-school children residing in the Evergreen/Stillman zone and the Jefferson zone, two hundred (200) and one hundred fifteen (115) respectively, will soon lead to over utilization of these buildings under Plan 2.

Goal #4 - "Retain Walking Distances To School Equivalent To Those Presently In Use"

While it is true that the longest distance presently walked (1.3 miles) is exceeded only at the revised Cook zone Plan 1, the number of students traveling such distance would be greatly increased.

Goal #4 (continued) 2.

Present Zoning	161 Students one mile or more
Wolff Plan I	690 Students one mile or more
Wolff Plan II	1070 Students one mile or more

Goal #5 - "Rezone As Few Children As Possible To Achieve These Purposes"

One thousand six hundred twenty-three (1623) students are rezoned under Plan I.

Plan 2 has two types of rezoning. First an actual zoning change for five hundred seventy-eight (578) pupils and second, under the "sister school" plan, approximately sixteen hundred (1600) students would be immediately transferred to a more distant sister school that is paired with the school presently serving their zone. In the course of a complete elementary school cycle, this would result in approximately three thousand (3000) students attending schools outside their present zone.

Goal #6 - "Avoid Additional Cost"

The Traffic and Safety Division of the Plainfield Police Department was consulted concerning the proposed changes. They estimated that due to additional hazardous crossings, a minimum of twelve (12) additional crossing guards would be needed for Plan 1 and seventeen (17) for Plan 2. The annual cost would be $10,211 and $14,466 respectively.

Large numbers of students traveling more than one mile to school require lunchroom facilities equipped to serve wholesome lunches at reasonable cost. None of our elementary school buildings are so equipped. The cost of equipping, staffing, and maintaining ten elementary school cafeterias would be considerable.

Goal #7 - "Provide For Future Growth"

The utilization problems commented on under Goal 2 are equally appropriate here.

Plan 1 does not allow for future growth at Woodland, Cedarbrook, Evergreen, Cook or Stillman.

Goal #7 (continued) 3.

Future growth at the Cedarbrook/Washington, and the Jefferson Schools has not been provided for under Plan 2.

The Wolff proposals used only present elementary school students as a basis for their plans. These data can be very useful for projecting enrollments for Grades 1 through 6 for one school year, but leave Kindergarten and future growth to be determined by estimation. This is not generally regarded as a sound method of zoning.

In planning elementary school zones, the number of pre-school children living within the proposed zone is of primary importance if a degree of stability in the proposed zone is desired. By carefully enumerating pre-school children, enrollments can be predicted quite accurately for a period of five years.

Page C-2 -

The illustrations used to demonstrate a method of rezoning (Plan I) oversimplifies the problem in Plainfield. The map for Plan I shows that Dr. Wolff used this principle only in the Cedarbrook and Washington zones to any degree. The location of the elementary school buildings in relation to municipal boundaries and the areas of school age population densities make this principle of zoning impractical in Plainfield.

Page C-3 - Advantages of Plan I

Five of the six advantages credited to Plan I were not accomplished.

Advantage #2 - The neighborhood school concept is destroyed by the greatly increased distances that many more children would have to walk to and from school.

Advantage #3 - Evergreen School would be overcrowded.

Advantage #4 - Six hundred ninety (690) elementary school students would have to walk one mile or more to and from school as compared to the one hundred sixty-one (161) who presently walk one mile or more.

Advantage #5 - One thousand six hundred twenty-three (1623) students would have to be rezoned. Total elementary school enrollment in June, 1962 was five thousand one hundred seven (5107).

Advantage #6 - Costs of providing lunchroom facilities, staff for lunch time supervision, and additional crossing guards have not been considered.

Page C-4 - Paragraph 2 -

The Plainfield Board of Education owns and operates one 22-passenger bus and one 34-passenger bus. These two buses are scheduled to transport mentally and physically handicapped children to school each morning and afternoon. The time of these runs conflicts with the scheduled opening and closing time of the elementary schools.

Page C-7 and C-8 - Advantages of Plan 2

Six of the eight advantages credited to Plan 2 were not accomplished.

Advantage #3 - Present utilization with one school exceeding capacity and one at approximate capacity is better than the proposal which would have one exceeding capacity, one at capacity, and three others at approximate capacity.

Advantage #4 - Primary grade teachers would have to be transferred to intermediate grades on a wholesale basis under this plan. This would create serious problems involving certification, experience, and desirable placement of elementary school teachers.

Advantage #5 - The K-3 form of organization has disadvantages in that it tends to curtail a well-rounded elementary school program.

Advantage #6 - Stability of this plan is doubtful in the light of the Wolff Report utilization figures and the pre-school census enumeration.

Advantage #7 - Additional cost would be involved for lunchroom facilities and crossing guards. This plan would have the largest number of pupils traveling the longest distances to school

Advantage #8 - There are only slight differences in the facilities needed for primary and elementary grades. Libraries, science demonstration equipment, art, music and physical education facilities are needed in all elementary grades.

Page C-9 - Paragraph 2 10

This paragraph reveals that racial integration was the overriding factor considered in proposals 1 and 2. The other criteria were not given equal consideration in developing the plans.

RESPONDENT'S EXHIBIT SIX
(STIPULATION EXHIBIT 13)

PUBLIC STATEMENT OF DR. RICHARD F. CLASH, SCHOOL COMMITTEE CHAIRMAN,

PLAINFIELD BOARD OF EDUCATION

July 31, 1962

Before presenting the Optional Pupil Registration Plan for the Board's consideration, I'd like to make a few comments.

We believe that the Optional Pupil Registration Plan is a step in the program to improve the racial balance of our neighborhood elementary schools. From a practical point of view it's about as much as can be undertaken for the school year starting this September without throwing the entire school system into a state of turmoil which would detract from our educational program. I emphasize our Optional Pupil Registration Plan is a practical step for this September and one which adds flexibility to our basic neighborhood school zone policy.

The Optional Pupil Registration Plan can be a successful step if it is supported by our entire community. This means that youngsters and their families in large numbers must apply for this special type of non-neighborhood enrollment, and must put up with the transportation problems and inconvenience this will entail. It means that each neighborhood school must welcome in a genuine way each youngster who transfers. I think there are some families who may be genuinely concerned about the welcome their youngsters will receive. The community must act so as to allay these understandable concerns and fears.

I have indicated that we will welcome a large number of applications for the Optional Pupil Registration Plan. Excluding the Washington School and within the frame-work of our proposed policy there are estimated to be 500 possible openings in our elementary schools.

There is a second step which would begin and could gain momentum as the coming school year goes along. This has to do with our education program and philosophy. Up to now the Board of Education and its Administration has

earnestly and energetically tried to provide, and, we believe successfully, for equal educational opportunity for all the youngsters in the Plainfield Public Schools. As a result of the questions raised, and in our opinion treated superficially, by the Wolff Report, section B, a study in greater depth is required. This we propose to undertake. It would appear that we will have to go beyond the current philosophy of "equal educational opportunity for all" and to provide special education to youngsters who have motivational, family, environmental, or other problems which affect adversely their response to education. The Plainfield Board of Education recognizes its responsibility to study and to provide leadership for our community in this area. 10

A 64 SEP.T. 1964

Superior Court of New Jersey

Appellate Division

Docket No. A-662-63

CHARLES B. BOOKER, et al.,
Petitioners-Appellants,

v.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,
Respondent-Appellee.

Civil Action on Appeal from Decision of State Board of Education of New Jersey.

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Statement of Question Involved

The question before the court is whether a board of education has a duty to eliminate racially imbalanced schools under the Fourteenth Amendment to the Federal Constitution and under Article I, Paragraph 5 of the New Jersey Constitution.

Statement

Petitioners-appellants bring an appeal from the decision of the State Board of Education of February 5, 1964, affirming an order of the Commissioner of Education of June 26, 1963, allowing the Plainfield Board of Education to institute the Sixth Grade Plan, which purportedly eliminates *de facto* segregation in the Plainfield school system. Petitioners challenge the plan as insufficient to accomplish the Board's constitutional obligation to eliminate *de facto* segregated schools. The facts leading to the present controversy are as follows.

Subsequent to protests against racial imbalance by various individuals in the Plainfield community, the Board of Education decided on September 27, 1961, that a professional study of the school system should be conducted, and appointed a lay advisory committee consisting of 14 members, later increased to 17, to organize the study (App. 27a).[1] On the recommendation of that committee, the Board contracted with Dr. Max Wolff on April 17, 1962, to conduct a study—with the assistance of a team of specialists—to determine the racial composition of the Plainfield elementary schools, with particular emphasis on the educational impact on the children who attended so-called segregated schools (App. 28a). (The study team was not to concern itself with the underlying cause of the segregation.) A report of its findings and proposals was to be submitted to the Board and lay committee by July 15, 1962.

There are 11 elementary schools in Plainfield, excluding the Lincoln School, which is a special school for retarded

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[1] Materials not included in the Appendix will be referred to by the exhibit number, as contained in the record. The Wolff report, which is included as a part of the Appendix under separate cover will be referred to by the letter W, followed by alphabet and page number, identical to that of the report itself. All other references will be made to the Appendix.

children (W. Table A-1, page A-2). Negroes constitute 37% of the elementary school population. At the time of the study, it was found that of the 11 schools, the percentage of Negroes in each ranged from zero to 95.1% with four schools having in excess of 50% (W. A-6). The study team concluded, after an examination of various data submitted by the Board of Education that the Washington School's high concentration of Negro students was reflected in its lower rank, as far as physical characteristics, school facilities, administration and pupil achievement were concerned (W. B-27, B-33-35). It had the lowest pupil achievement of any school in the system.

Although the report was primarily concerned with schools having a concentration of Negroes of 90 percent or more (Washington being the only one in this category), it may be seen from the information contained in the report that there is a gradation of achievement, rising from those schools having the largest percentage of Negroes to those having lower proportions of Negroes (W. B-29-32). Two proposals were offered to countermand the effects of racially segregated schools, both of which would have substantially reduced racial imbalance—one entailing a general rezoning from north-south, instead of as was the practice from east-west, thereby integrating the predominantly Negro northern area with the preponderantly white south (W. C-2-4). The alternative and preferred plan proposed by the study team—denominated the Sister-School Plan or Paired School Plan—entailed combining two bordering school zones into one (W. C-5-9). One school was to be used as a kindergarten to grade 3 school (K-3), while the other would also serve kindergarten and grades 4-6 children, with some modifications in particular instances. The plan allowed for three such pairs of schools to compensate for the anticipated closing of the Bryant School.

A majority of the Lay Advisory Committee accepted the findings of the Wolff team (Appellants' Ex. C). Although

it did not accept the specific proposals offered by the study team, the committee urged the Board to reduce racial imbalance in all the predominately Negro schools, and to effect a Higher Horizons Program, which is outlined in Appellants' Ex. C. A minority report accepted the findings and preferred proposal of the Wolff team (Appellants' Ex. C).

On July 27, 1962, the Board commented on its failure to implement any of the proposals offered (Respondent's Ex. 1). Specifically, among the factors listed as preventing the implementation of the majority proposals were those of safety and convenience to the students as well as the fact that rezoning to eliminate the racial imbalance in the Washington School might be interpreted as gerrymandering to achieve racial balance. Generally, it stated that none of the proposals took into consideration the multiple factors affecting the educational welfare of all the children of Plainfield. It promised to study the data pertaining to the Higher Horizons proposal.

Failure to accept a minority proposal that the preferred proposal of the Wolff team be put in effect was purportedly because neither plan achieved most of the goals set out by the Wolff report, referring to maintaining good utilization of each building; current walking distances for most students; minimum rezoning, avoiding additional cost and providing for future growth.

For the fall of 1962, the Board proposed a modification of its neighborhood school policy, which allowed the voluntary transfer of students, excluding kindergarten children, to other schools where the class size would not be exceeded (Appellants' Ex. E). Transportation had to be provided by the parents. Petitioners appealed to the Commissioner on September 4, 1962, asserting that the failure of the Board to correct the existing racial imbalance infringed their legal and constitutional rights under N. J. S. A. 18:6-17, 18 and 19; 18:6-38 and 47; 18:11-1, Article I,

Paragraph 5 of the Constitution of the State of New Jersey, and under Title 42, United States Code, Section 1891, and the Fourteenth Amendment of the United States Constitution. On June 13, 1963, the parties stipulated facts to be heard before the Commissioner (App. 27a). Respondent at this time offered to effect the Sixth Grade Plan by July 1, 1963, if the Commissioner approved it (App. 42a). This plan required the centralization of all sixth grade classes of the Plainfield system in the Washington school, whose grades K-5 pupils would be sent to other schools.

On June 26, 1963, the Commissioner rendered his decision that compulsory attendance of Negro students at the 95.1% Negro Washington School engendered feelings detrimental to learning and constituted a deprivation of equal educational opportunity under the New Jersey Constitution, Art. I, Section 5, and Rev. Stat. 18:11-1. He ordered the implementation of one of the three plans (Wolff's two proposals or the Sixth Grade Plan). He concluded that all three proposals were reasonable, practical, and consistent with educational policy and that any one would effectively reduce the racial imbalance in the Washington school (App. 58a). On June 28, 1963, the Board made known its intention to implement the Sixth Grade Plan (App. 47a).

In July, petitioners appealed to the State Board of Education on the grounds that the Sixth Grade Plan was an effort on the part of the Board to perform only partially its duty to eliminate racial imbalance and that while reducing it in one school allowed it to be maintained in others. The effect of the Sixth Grade Plan as of October, 1963, was to reduce the percentage of Negroes to 36.6% in Washington School but to maintain it or increase it in other schools (App. 48a). At that date, the Emerson School had a student enrollment of 76.4% Negro; the Bryant School, 67.1% Negro; Clinton, 66.1% Negro; Stillman, 65.2%; and the Jefferson School, 52.1% (App. 48a).

On February 5, 1964, the State Board of Education affirmed the decision of the Commissioner and upheld the Board's adoption of the Sixth Grade Plan as consistent with that decision (App. 46a-52a). The State Board held that the Commissioner determined that only the extreme concentration of Negroes in the Washington School was invidious segregation. Other racially imbalanced schools were not instances of invidious segregation. Moreover, the State Board concluded, there was no clear duty under the 14th Amendment to correct *de facto* segregated education.

Petitioners now bring the suit to be heard by the Superior Court of New Jersey. Petitioners maintain that there is a duty imposed by the Fourteenth Amendment on the Board to eliminate racially imbalanced schools. Petitioners further maintain that the Sixth Grade Plan on its face fails to comply with this constitutional mandate.

ARGUMENT

The Board of Education has a Duty to Eliminate Racially Imbalanced Schools under the Fourteenth Amendment to the Federal Constitution and under Article I, Paragraph 5 of the New Jersey Constitution.

A. Boards of education are constitutionally required to eliminate segregated education. *Brown* v. *Board of Education,* 347 U. S. 483; *Bolling* v. *Sharpe,* 347 U. S. 497; *Cooper* v. *Aaron,* 358 U. S. 1; *Taylor* v. *Board of Education,* 191 F. Supp. 181 (S. D. N. Y. 1961), aff'd 294 F. 2d 36 (2d Cir., 1961), cert. denied 368 U. S. 940; *Blocker* v. *Board of Education,* 226 F. Supp. 208 (E. D. N. Y. 1964); *Fuller* v. *Volk,* Superior Court of New Jersey, decided August 26, 1963; *Branche* v. *Board of Education,* 204 F. Supp. 150 (E. D. N. Y. 1962); *Jackson* v. *Pasadena,* 382 P. 2d 878.

The duty derives from the infringement of the right of equal educational opportunity; for separate education is inherently unequal. *Brown* v. *Board of Education, supra; Bolling* v. *Sharpe, supra; Cooper* v. *Aaron, supra; Taylor*

v. *Board of Education, supra; Blocker* v. *Board of Education, supra; Fuller* v. *Volk, supra; Branche* v. *Board of Education, supra.* The apartheid not only fosters feelings of inferiority detrimental to learning but also negates the very meaning of education in a democratic society. *Brown* v. *Board of Education, supra; Taylor* v. *Board of Education, supra; Blocker* v. *Board of Education, supra; Jackson* v. *Pasadena City School District, supra.*

In *Bell* v. *School City of Gary,* 213 F. Supp. 819 (N. D. Ind., 1963), aff'd, 324 F. 2d 209 (7th Cir., 1963), cert. denied — U. S. —, where the Board was relieved of the duty to eliminate racial imbalance, the Court construed *Brown* to have condemned only that segregation which is deliberately imposed by the state. Impliedly, the psychological damage to children and perversion of the educational function in a democratic society—said to result from separation in *Brown*—are miraculously absent when the segregation derives from a Board's policy honestly and conscientiously conceived. The *Bell* case runs counter to a number of decisions. That the Board of Education did not intend to infringe the right of equal educational opportunity is immaterial; it is enough that the right is infringed and would not have been infringed but for the Board. *Blocker* v. *Board of Education, supra; Jackson* v. *Pasadena City School District, supra; Branche* v. *Board of Education, supra; Fuller* v. *Volk, supra.*

In *Blocker* v. *Board of Education, supra,* the mere fact that a predominantly Negro school was situated in a predominantly Negro residential area did not relieve the Board of the duty to correct the racial imbalance. In view of existing alternatives, the obdurate application of the neighborhood policy to a segregated residential situation operated to produce segregated schools. At page 226, the court made clear the nature of the intention necessary to create the constitutional obligation.

The defendants deny that the continuance of the rigid neighborhood school policy, permitting no

> transfers under any circumstances, discriminates against the Negro elementary school student population. . . .
>
> * * *
>
> On the facts of this case, the separation of the Negro elementary school children is segregation. It is segregation by law—the law of the School Board. In the light of the existing facts, the continuance of the defendant Board's impenetrable attendance lines amounts to nothing less than state imposed segregation.

In *Jackson* v. *Pasadena, supra,* page 881, the court pointed out the duty of the School Board to eliminate racial imbalance, absent the intention to segregate.

> Although it is alleged that the board was guilty of intentional discriminatory action, it should be pointed out that even in the absence of gerrymandering or other affirmative discriminatory conduct by a school board, a student under some circumstances would be entitled to relief where, by reason of residential segregation, substantial racial imbalance exists in his school. So long as large numbers of Negroes live in segregated areas, school authorities will be confronted with difficult problems in providing Negro children with the kind of education they are entitled to have. Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior. Where such segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause.

Fuller v. *Volk, supra,* although not a decision on the merits, further illuminates the scope of *Brown.* Petitioner

in that case sought to enjoin the Board of Education from expending funds in implementation of a plan designed to alleviate *de facto* segregation. In refusing the injunction, the court said:

> It is our opinion that the decisions of the United States Supreme Court and the courts, constitution and statutes of this state require us to deny appellants' motion. Besides the above authority and the fact that appellants have shown no right to the relief requested on purely equitable grounds, we subscribe to those federal opinions which require affirmative action on the part of states to avoid the consequences of *de facto* segregation.

The opinion in *Branche* v. *Board of Education, supra, page* 153, reiterates the thesis that the segregation itself is the source of the duty—and not the intention to impose it.

> The central constitutional fact is the inadequacy of segregated education. That it is not coerced by direct action of an arm of the state cannot, alone, be decisive of the issue of deprivation of constitutional right . . . The educational system that is thus compulsory and publicly afforded must deal with the inadequacy arising from adventitious segregation; it cannot accept and indurate segregation on the ground that it is not coerced or planned but accepted.
>
> * * *
>
> Failure to deal with a condition as really inflicts it as does any grosser imposition of it.

Nor does nominal integration obviate separation, since the duty springs from the fact that the students are segregated and not from the fact that they are totally segregated. *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, *supra; Taylor* v. *Board of Education, supra; Jackson* v. *Pasadena, supra; Blocker* v. *Board of Education, supra; Branche* v. *Board of Education, supra.* In *McLaurin* v. *Oklahoma State Regents, supra,* a Negro student secured

admission to the graduate school of a formerly all-white university. In compliance with a statute providing that instruction given at white schools "shall be given at such colleges or institutions of higher education upon a segregated basis," the Negro was by university regulation required to set apart from other students in the classroom, library and cafeteria. The court said at page 639:

> It is said that the separations imposed by the State in this case are in form merely nominal. McLaurin uses the same classroom, library and cafeteria as students of other races; there is no indication that the seats to which he is assigned in these rooms have any disadvantage of location. He may wait in line in the cafeteria and there stand and talk with his fellow students, but while he eats he must remain apart.
>
> . . . The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.
>
> * * *
>
> The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits.

In the converse of the situation above in *Taylor* v. *Board of Education*, where a small percentage of whites attended a predominantly Negro school, the court drew attention to the meaning of desegregation within the intent of *Brown*:

> The Court further emphasized the necessity of giving these minority-group children the opportunity for extensive contact with other children at an early stage in their educational experience, finding such contact to be indispensable if children of all races and creeds were to become inculcated with a mean-

> ingful understanding of the essentials of our democratic way of life. . . .
>
> In a community such as New Rochelle, the presence of some 29 white children certainly does not afford the 454 Negro children in the school the educational and social contacts and interaction envisioned by *Brown* (page 37).

Likewise, the court in *Blocker* and *Branche*, distinguished between token integration and desegration.

Although primarily concerned with the power of a board of education to create an integrated school, *Balaban* v. *Rubin*, N. Y. L. J., Vol. 151, #50 (App. Div., Second Department, decided March 10, 1964), is consistent with *McLaurin, Blocker, Branche* and *Taylor*. Here the Board of Education sought to effect a zoning plan for a newly built junior high school that would result in an integrated school, having only 35.5% Negro students in modification of the proposal of the Superintendent which would have resulted in a student body of 52% Negro pupils. The court said:

> The opinion of the majority is that, in drawing attendance lines for a school, it is not within the power of the Board to take into consideration the ethnic composition of the children therein, but that under the decision of the Supreme Court of the United States it is the Board's responsibility so to do in order to prevent the creation of a segregated public school.

The instant case encompasses that situation where *de facto* segregated schools result from the application of the neighborhood school policy to preponderantly Negro residential areas. As of April 1, 1962, the school system was comprised of 11 elementary schools (excluding the special school for retarded children, Lincoln) of which the Washington school was 96.2% Negro; Emerson, 72%; Stillman, 67.6%; Bryant, 65.5%; Clinton, 58.9%; Jefferson, 44.9%. The Sixth Grade Plan was adopted in the fall of 1963 and

required that the K-5 grade students attending Washington be dispersed to other elementary schools (excluding Emerson, Bryant, Clinton and Stillman Schools), while all sixth grade students throughout the system were required to attend Washington. The effect of the Sixth Grade Plan, as given by enrollment figures as of October, 1963, is to reduce the number of Negroes at the Washington and Stillman Schools to 36.5% and 65.2%, respectively, while raising it at Emerson, Bryant, Clinton and Jefferson to 76.4%, 67.1%, 66.1% and 52.1%, respectively. The net result is that there are still five racially imbalanced schools in the Plainfield school system, the racial imbalance in four of them having been aggravated by the adoption of the Sixth Grade Plan.

As in *Blocker, Jackson, Branche* and *Fuller,* the Board of Education in the instant case does not escape the duty to eliminate racially imbalanced schools because there was no intention to create the harm, nor because the segregation is not total. Likewise, an effort arbitrarily to treat schools with a Negro enrollment ranging from 50% and over as qualitatively different from one 95% Negro is not to be tolerated.

The Department of Education's decision (App. 51a) determined that:

> . . . racial imbalance (*i.e.,* more than 50% of one race over the other) is not to be equated to invidious segregation as condemned by the Commissioner below and by this Board in *Volpe* v. *The Board of Education of the City of Englewood* (opinion filed September 25, 1963). The argument of the amicus curiae is that the "Sixth Grade Plan" results in "segregation." This begs the question—What *is* segregation, in the invidious sense? If a concentration of Negro children of 99% is such, is 90%, 85% or 76% also to be condemned? We repeat that we do not wish to, nor do we feel that we can, draw such a line . . .

Petitioners contend that the question needing resolution here is not what constitutes invidious segregation, but

rather what aggregate of Negro students does not constitute invidious segregation, given the reality of the Negro's minority position in America.

When we consider the generations who have suffered irretrievably because separate education was not in fact equal, we cannot afford to await a precise determination that a "50% and over" Negro school is harmful while one with less than that percentage is not. Neither is it constitutional for the Board to "study the effects of the 'Sixth Grade Plan' and, if experience determines that it is detrimental to the educational opportunities of the pupils it will adopt such remedial measures as may be required" (App. 52a). It is tragic to watch those who control and operate such schools, awaiting further documentation that one plan in effect deprives students of educational opportunities when it has readily at hand alternative plans, the Rezoning Plan and Sister School plan, designed to alleviate the harm.

The effect of further study is not clear. The Commissioner in his opinion expressly found and determined (App. 59a):

> 1. That the enrollment in the Washington School in the City of Plainfield is comprised almost exclusively of pupils of the Negro race;
>
> 2. That such an extreme concentration of Negro pupils in a school, enforced by compulsory assignment, engenders feelings and attitudes which tend to interfere with successful learning;
>
> 3. That reasonable and practicable means consistent with sound educational and administrative practice do exist to eliminate the extreme concentration of Negro pupils in the Washington School.

The source of the Commissioner's conviction of the truth of the inadequacy of education in a 96.2% Negro school need not be probed. It is sufficient that the facts confronting us fail to make possible a rigid distinction between

a 50% Negro school population and that of one 96.2% Negro. Although the Wolff report was primarily concerned with the defects of "90% or over" *de facto* segregated school, the comparative data contained from pages W. B-1 to B-36 reflect how nearly the three "50% and over" Negro schools (Emerson, Stillman and Bryant at the time of the report, see W. A-6) approximate the Washington School in its almost consistently low ranking.

This is especially true where achievement is concerned (W. Tables B-14 to B-17, pages B-29-32). The predominantly Negro schools not only lagged far behind the predominantly white schools but fell below the national average as well. Significant differences arise only in the qualifications and turnover of teachers (W. Table B-8 and B-9, pages B-20-21). And even there, although the "50% and over" schools had less of a problem in turnover of teachers, the degree qualification of their instructors was lower than Washington's.

Dr. Wolff outlined the effect of segregated education on the Negro child in the context of his total experience (W. B-2-4).

> In most urban communities in the North, lines of separation of the white and Negro citizenry have been drawn in such vital areas as where they live, where they work, where they shop, and where they go to school. This separation is enforced by legal means or by social practice.
>
> "Negro" was made synonymous with "inferior." This identification extended to the Negro home, the Negro place of employment, the Negro restaurant, the Negro neighborhood, and the Negro school. The alienation of the Negro led to the development of a culture within the culture of the majority group. This culture has values in part identical and in part different from the values of the majority group, fitting the special conditions of the life of the Negro. Such cultural variation can enrich or impoverish our communities to the extent that variation is accepted or denied, respected or looked down upon.

For many years now, the Negro has sought a path to equal status wherever he could discover or build such roads. Examples are the Negro's role in American sport, in which he has succeeded in making an important place for himself.

Early in life, the Negro child is made aware of the equating by the larger world of "Negro" and "inferior". He learns about "his place" in the community.* It is at this point in his life that school exercises a decisive influence on his growth. If his school is a "Negro school" it adds to his feelings of lesser worth the burden of attending a school held in generally low esteem by the community. The dilemma of reduced opportunity creates lower motivation and ambition. The educators and the teachers in the segregated school are similarly influenced by the considerations of the more meager opportunities open to their pupils. Such considerations do not obtain in the integrated school, where a broader horizon is visible.

Equality of education and of educational opportunity, stimulation and motivation of each child to strive for a better education in order to qualify for the kinds of jobs that modern industry has to offer, are practical, democratic goals. Such motivation and such opportunities cannot be provided by a school that is "inherently unequal."

In an effort to combat the problem of racially imbalanced schools in Plainfield, Dr. Wolff proposed two alternative plans (W. C-1-10). Plan 1, referred to as the Rezoning Plan, entailed drawing boundaries north-south instead of east-west. Since the Negro population was in the preponderance in the north and the white to the south, it contemplated an across-the-board reduction of racial imbalance. Only the Stillman School would have had an over 49% Negro student body. The disadvantages of the plan were cited as the recurring need to adjust zoning lines and the

* See Clark, Kenneth, *Prejudice and Your Child,* Boston, Beacon Press, 1955.

fact that one school would have more than 49% Negroes, one less than 24% and that about 75 students at the Cook School would have to walk in excess of the maximum 1.3 mile distance than the rule.

The second plan, Sister-School or Paired-School Plan, contemplated combining two adjacent school zones into one; students from K-2 would have attended one of the schools, while those in grades K, 4-6 would have attended the other. Only six schools would have been paired, forming three sister-school zones. The remaining schools not paired were rezoned to compensate for the closing of the Bryant School. The advantage and disadvantage of the plan are set out on page C-7 to C-9.

This is not a case where the fulfillment of the duty to eliminate racially imbalanced schools would create chaos. The proposals offered by Dr. Wolff to foreclose the existence of racially imbalanced schools were in the words of the Commissioner both "reasonable, practicable, and consistent with educational practice" (App. 58a). The Sixth Grade Plan offends the constitutional mandate of the Fourteenth Amendment. We petition the court to order the Board to fully perform its duty to eliminate racial imbalance.

B. There is another constitutional reason, equally persuasive, why the appellee may not maintain racially imbalanced schools. The Board's extrapolation of a Negro school ghetto from a Negro housing ghetto is in derogation of the right of freedom of association, given to assure the ventilation of the individual's political, economic and cultural views.

Freedom of association is a right cognate to other First Amendment rights. *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449; *Bates* v. *Little Rock,* 361 U. S. 516; *Shelton* v. *Tucker,* 364 U. S. 479; *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S. 539; *NAACP* v. *Button,* 371 U. S. 415. Freedom of association means not only the

right to group together for the espousal of various causes, but also encompasses the right not to be grouped together in curtailment of the individual's liberty. *International Association of Machinists* v. *Street,* 367 U. S. 740. State delimitation of these rights is allowed only where the state interest is compelling. *Bates* v. *Little Rock, supra; NAACP* v. *Button, supra; Lathrop* v. *Donohue,* 367 U. S. 820; *Railway Employees Department, A.F. of L.* v. *Hanson,* 351 U. S. 225; *Thomas* v. *Collins,* 323 U. S. 516.

Compulsory education laws are in themselves a limitation on the right of association, justifiable only on the basis of the state's exercise of its police powers to achieve an end, without which achievement our society could not long exist. Therefore, such a fundamental right as a parent's control over children has been subordinated to the state's interest in educating its citizenry. See *Stephens* v. *Bongart,* 189 A. 131. However, where education provided defendants' children has been unequal because of discriminatory teacher placement practices and lack of adequate facilities, conviction for non-compliance with compulsory education laws has been reversed. *In re Skipwith,* 180 N. Y. S. 2d 852.

A number of cases have held that the state's control over education is not so absolute as to allow arbitrary infringement of constitutionally guaranteed rights. A state's efforts to delete foreign languages from the curriculum of public schools below the 9th grade level has been held to be antithetical to the end for which education is made compulsory and a denial of due process. *Meyers* v. *Nebraska,* 262 U. S. 390. See also *Bartels* v. *State of Iowa,* 262 U. S. 405. A statute not only making education compulsory but also endeavoring to centralize all educational facilities in the state to the exclusion of private schools has likewise been struck down as a denial of due process. *Pierce* v. *Society of Sisters,* 268 U. S. 510. Moreover, the Supreme Court has made clear that although a child may be compelled to attend school, he may not be compelled to

affirm beliefs contrary to his own convictions. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624.

That compelled association may not be the occasion for interfering with the right of the individual beyond the specific purpose for the initial compulsion has been held in *International Association of Machinists* v. *Street, supra.* In that case, union members, railway employees, objected to the use of union dues for supporting political activity. They contended that Section 2, Eleventh of the Railway Labor Act, which provides for a union shop, impliedly permitted the use of union dues for political purposes; as a consequence, it was unconstitutional as applied to them, since it permitted a forced association in violation of freedoms of association and speech. A majority of the court held that the Act itself did not contemplate the use of union dues for political activities. Reviewing the history of the legislation, the court determined that its purpose in authorizing the union shop was to stabilize labor-management relations by use of collective bargaining, since the use of other methods such as compulsory arbitration had failed in practice. Union membership was exacted as the price for individual workers deriving benefits from collective bargaining. However, since union association was compelled only for that purpose, to the extent that purpose was exceeded by the union such actions were illegal.

A similar result is implied by the court in *Lathrop* v. *Donohue, supra,* where the court refused to countenance plaintiff's argument that compelled association under the Wisconsin law requiring an integrated bar was infringement of freedom of association, in view of the state's interest in the administration of justice and in securing high standards of conduct in the legal profession. However, the court intimated that the use of dues to advocate legislation contrary to the convictions of plaintiff would be in violation of First Amendment rights.

Appellants here suffer a double compulsion. Initially, they are compelled to attend school for the attainment of an end which is beneficial to them and society. Not only does it afford an opportunity for academic knowledge, but it theoretically simulates the real world, providing the opportunity for social adjustment and preparation to fulfill the role of responsible citizens. As was said in *Stephens* v. *Bongart, supra,* at page 136, the public school system "provides such social groups and lays emphasis on its development—and stresses the adjustment of the child to group life and group activity and a course of living, that he will be required to follow and meet as he goes out into the world."

In addition, appellants suffer a second compulsion which is not only detrimental but gravitates against the avowed purpose of the compulsory education law. By the application of school policies, Negro children are not only compelled to attend school but are virtually compelled to limit their associations within the school to Negro children, in a way that distorts the reality of the future role to be practiced by the Negro as a citizen. Making the Negro an artificial majority when he is in fact a minority in the world of political influence, compels him to limit his contact to the minority and thus lose the opportunity for persuasion at the most formative stages in life. This is manifestly unconstitutional where alternative methods of zoning attendance areas exist and are reasonable. In *McLaurin* v. *Oklahoma State Regents, supra,* the court recognized the necessity of creating a situation which would give the individual the fullest scope to affect the attitudes of the majority by persuasive confrontation.

Further, the state forcing the Negro to limit his association to the Negro is as much a prior restraint of speech as if the state had enacted an ordinance which said explicitly that Negro students might not communicate with white students within schools. Laws which explicitly or

by application limit a racial minority's right to associate with others to express and impress on the majority its views, are proscribed unless there is some overriding state interest. *NAACP* v. *Alabama ex rel. Patterson, supra; NAACP* v. *Button, supra; Shelton* v. *Tucker, supra; Gibson* v. *Florida, supra; Bates* v. *Little Rock, supra.* In actuality, the imposition of the ghetto school on the Negro is a more effective means of prior restraint since the opportunity to communicate is dispensed with.

There is no overriding state interest in denying Negro students the right to associate and interact with the students of the majority race, who are the persons with whom they compete for scholarships and employment. Negroes have been more or less rigorously separated from the majority in all aspects of life—housing, schools, public accommodation and employment. Thus, the very attitudes which purportedly cannot be legislated away, also cannot in practice be altered by the most logical and effective method of change—face to face contact.

The duty to eliminate racial imbalance extends farther than the mere conversion of a totally segregated school system into one which reflects token integration.

Conclusion

For the reason given herein, petitioners-appellants respectfully submit that the decision of the State Board of Education be reversed and that the Board of Education of Plainfield be ordered to institute a plan eliminating racial imbalance in the school system.

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