DOCUMENT RESUME

ED 033 979 UD 008 336

TITLE Racial Imbalance in the Public Schools: The Current Status of Federal and New York Law.

INSTITUTION New York State Bar Association, Albany. Committee on Civil Rights.

Pub Date 20 Oct 64

Note 13p.

EDRS Price EDRS Price MF-$0.25 HC-$0.75

Descriptors Board of Education Role, Defacto Segregation, *Federal Laws, Housing Patterns, *Integration Litigation, Integration Methods, *Public Schools, Racially Balanced Schools, Racial Segregation, *School Integration, School Segregation, *State Laws

Identifiers New York

Abstract

Reviewed are the New York State Statutes (up to 1964) relevant to school integration and segregation. On the whole, the issue of segregation in New York is defacto rather than dejure, so that racial imbalance stems from discriminatory residential patterns. The document discusses the applicable legal cases under such headings as forbidden discrimination, permissible corrective action, and required corrective action. The general legal principles involved in the question of school integration in New York are simple--school boards are forbidden "to take action designed to segregate schools on the basis of race"; in the absence of discriminatory intent, school officials may take "reasonable corrective action" to reduce racial imbalance, and, moreover, an affirmative duty is emerging whereby officials are required "to alleviate extreme racial imbalance." (NH)

NEW YORK STATE BAR ASSOCIATION

Racial Imbalance In the Public Schools: The Current Status of Federal and New York Law

A Report by the Committee on Civil Rights

OCTOBER 20, 1964

RACIAL IMBALANCE IN THE PUBLIC SCHOOLS: THE CURRENT STATUS OF FEDERAL AND NEW YORK LAW

A Report by the Committee on Civil Rights

In the current struggle for full Negro equality no single issue has aroused more controversy than that of the extent to which public schools must or may take action to reduce racial imbalance. On the one hand, some have hotly contested the right of a school board to take the factor of race into account at all in pupil assignment, arguing that so to do is to violate the "right" of pupils to attend their neighborhood school, and indeed is to engage in "reverse discrimination." Others, on the contrary, contend with equal vigor that whenever racial imbalance exists in a school district, the school board must take affirmative action to achieve approximate racial balance in each school, insisting that not to do so is to deny pupils their "right" to an integrated education. Between, in varying attitudes of militancy and/or conciliation, stand the proponents of other viewpoints.

The result has been a considerable apprehension—and more than a little misapprehension—on the part of the general public concerning the proper role of government in this sensitive area. It is believed that much of the difficulty may stem from a lack of understanding of the fundamental legal principles involved, and in particular from a failure to distinguish between what is *forbidden*, what is *permissible*, and what may be *required* under the law. It is also believed that members of the bar have a particular responsibility to aid in the resolution of the controversy by clarifying, to the extent possible, these legal principles and these distinctions. It is hoped that this memorandum, analyzing the recent Federal and New York State decisions in this area, may be of assistance for this purpose.

I. Forbidden Discrimination

Since 1954 it has been clear beyond doubt that racially motivated discrimination in the assignment of pupils in the public schools, whether by gerrymandering or otherwise, is prohibited by the equal protection and due process clauses of the United States Constitution. *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Bolling* v. *Sharpe*, 347 U. S. 497 (1954); *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 (1961). See also New York State Const., Art. I, § 11. Long before the *Brown* decision, such "de jure dis-

crimination" had been forbidden in New York State by express statutory provision. Section 3201 of the New York Education Law provides:

> **"No person shall be refused admission into or excluded from any public school in the state of New York on account of race, creed, color or national origin."**

The rationale of the Constitutional decisions on segregation is composed of two basic elements: (1) that, as stated by the Court in *Brown,* segregation based solely on race is "inherently unequal" and harmful to the minority group children, materially impairing their motivation to learn and generating "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," and (2) that state-imposed racial segregation is not reasonably related to a proper governmental purpose such as would justify the burden thus placed on the minority group. *Brown* v. *Board of Education, supra,* at 494, 495; *Bolling* v. *Sharpe, supra,* at 500. While apparently assuming that the former element—the educational harm caused by racial separation—may exist whether the separation is deliberately imposed by the state for racial reasons or results from other factors not chargeable to state action, *Brown* and its progeny to date have generally been regarded as requiring the additional ingredient of *racially motivated* action [1] by the governmental body as a necessary element to the establishment of a Constitutional violation, as of course it is to a violation of Section 3201. Where a discriminatory intent exists, the degree of imbalance appears to be irrelevant, except perhaps to the extent to which it may be probative of the issue of intent; the exclusion of even one child for the purpose of separating the races is prohibited.

II. Permissible Corrective Action

The principal battleground in the state, however, relates not to "de jure segregation," which by and large does not exist in New York, but to so-called "de facto segregation," that is, racial imbalance re-

[1] Under certain circumstances, it seems clear, inaction may equal "action," as, for example, the maintenance by a board, with deliberate exclusionary intent, of existing geographical lines, however innocently established originally, after the racial composition of a school has so changed as a result of population shifts that such adherence results in extreme racial imbalance. See *Blocker* v. *Board of Education,* 226 F.Supp. 208 (E.D.N.Y. 1964). The *Blocker* decision and another District Court decision, *Branche* v. *Board of Education,* 204 F.Supp. 150 (E.D.N.Y. 1962), appear also to stand for a broader proposition, that under certain circumstances the Constitution may require correction of racial imbalance even where no discriminatory intent exists. These and related questions, leading to the frontier of existing Constitutional law, and perhaps somewhat beyond, are reserved for discussion in III below.

sulting from factors other than deliberate school board action. Typically the imbalance stems from "ghetto" housing patterns, which themselves are frequently the result of discrimination by private individuals, rather than of any "state action." [2]

In many communities across the nation, school boards have in recent years begun to take action voluntarily to reduce this imbalance, in the belief that the quality of education of the minority group children will thereby be improved. In New York State this effort was given impetus by the adoption, on January 28, 1960, of a policy statement by the State Board of Regents. Calling for reexamination of the schools by all citizens to determine whether they truly conform to the standard of equal educational opportunity for all, the Regents declared:

> **"Modern psychological knowledge indicates that schools enrolling students largely of homogeneous ethnic origin, may damage the personality of minority group children. Such schools decrease their motivation and thus impair the ability to learn. Public education in such a setting is socially unrealistic, blocks the attainment of the goals of democratic education, and is wasteful of manpower and talent, *whether this situation occurs by law or by fact.*" (Emphasis supplied.)**

This policy statement is a most important one, and, together with similar statements by other educators and educational officials,[3] provides both an educational and a legal underpinning for the numerous efforts being made by local boards to remedy the imbalance.[4]

These efforts have met with considerable resistance, particularly from white parents whose children either would be required to travel further to school (usually by bus) than formerly or, although their school remains the same, would encounter substantially larger

[2] The degree to which such imbalance has existed in New York State generally, not merely in New York City, is indicated by the racial census released by the State Education Department in July, 1962, showing that 103 elementary schools outside New York City had enrollments in which Negro pupils constituted 31 percent or more of the total. Twenty of such schools had over 90 percent Negro pupils and 46 schools more than 50 percent. N.Y. Times, July 31, 1962, p. 1, col. 3.

[3] See, *e.g.*, opinion of the New Jersey State Education Commissioner in *Fisher* v. *Board of Education of Orange*, decided May 15, 1963, and regulations adopted by the California State Board of Education, Cal. Admin. Code, Tit. 5, § 2010, 2011.

[4] These efforts have included, among others, (1) redrawing district lines (2) "open enrollment" plans permitting pupils to transfer, within the limits of capacity, from one school to another (3) compulsory transfers of pupils from one school to another (4) adoption of variations of the "Princeton Plan," under which all children in certain grades within a school district go to one school, and all children in other grades go to another school (*e.g.*, "school pairing" in New York City). In this State these efforts have been undertaken principally by local school boards, but in one instance (in Malverne, Long Island) were by direct order of the State Commissioner of Education.

percentages of Negroes as their classmates, to the alleged detriment of the quality of education owing to factors of economic and cultural deprivation.

To the extent that this resistance has taken the form of legal action, such action has been based principally on the contention that consideration of factors of race for the purpose of alleviating racial imbalance violates the Federal Constitution and/or the State education laws, if such consideration involves (as it obviously may) admitting or excluding children because of race.

The Constitutional argument has been that such consideration denies to white children the equal protection of the laws. For this argument to succeed, it would seem necessary to establish that the school board acted arbitrarily and unreasonably in taking race into account. In view of the statements of educational authorities, referred to above, as to the harmful effects of racial separation, whether occurring by law or in fact, it is not surprising that the courts, both in this state and elsewhere, have generally concluded that this factor may reasonably be considered along with other proper educational concerns. *Balaban* v. *Rubin,* 20 App. Div.2d 438 (2d Dep't 1964), aff'd, 14 N.Y.2d 193 (1964), cert. denied, 33 U.S.L. Week 3141 (October 19, 1964); *Strippoli* v. *Bickal,* 21 App. Div.2d 365 (4th Dep't 1964); *Addabbo* v. *Donovan,* N.Y.L.J., p. 10, col. 3, July 15, 1964; *Hayes* v. *Donovan,* N.Y.L.J., p. 7, col. 5, July 22, 1964; *Morean* v. *Board of Education,* 42 N.J. 237, 200 A.2d 97 (1964); *Jackson* v. *Pasadena City School District,* 31 Cal. Rptr. 606, 382 P.2d 878 (1963).[5] A concise statement of the Constitutional considerations appears in the *Morean* case, which involved an attack on the Montclair School Board's closing of a predominantly Negro school and its reassignment of students to other schools. The New Jersey Supreme Court disposed of the Constitutional issue as follows:

> **"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**

[5] But see *Di Sano* v. *Storandt,* 43 Misc.2d 272 (Sup. Ct. Monroe County 1964), upholding the contention of white petitioners that the implementation of an "open enrollment" plan by transferring Negro pupils into the school attended by petitioners' children is an unconstitutional exercise of school board power. The court stated that "the children attending a public school have a constitutional right to attend the school nearest their homes, and may not be compelled or arbitrarily forced to join a different ethnic group living miles away." 43 Misc.2d at 279. The decision appears to be inconsistent with the other New York cases cited above, and indeed the New York Supreme Court decision in the *Strippoli* case, principally relied on by the court, has since been reversed by the Appellate Division. Accordingly, it is believed likely that the *Di Sano* decision, now on appeal in the same Department, will be reversed.

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." 200 A.2d at 100.

Using like reasoning, the New York courts (after some initial uncertainty in lower court decisions) have rejected the rather ironic contention that Section 3201 of the Education Law, *supra* (prohibiting the refusal of admission or exclusion of children in schools on account of race), which was enacted to prevent segregation,[6] precludes efforts to correct racial imbalance. As pointed out by the courts, were this statute to be given the meaning contended for "then Section 3201 becomes a segregation statute mandating continuation in schools of racial imbalance and making *de jure* that which is now merely *de facto*. . . ."—and hence it would itself be unconstitutional. *Vetere* v. *Mitchell,* 21 App. Div.2d 561, 563–64 (3d Dep't 1964); *Balaban* v. *Rubin, supra.*

While it is thus clear that race may be taken into account, the question remains as to what remedial action may then be taken. As to this, no hard and fast rules can be formulated: the reasonableness of a particular action designed to improve racial balance will necessarily be determined by the facts of the particular case. Certain general guidelines, however, do exist:

1. School authorities will ordinarily be afforded considerable latitude in their determination, and their action overturned only upon a showing that they were arbitrary, capricious and unreasonable. CPLR § 7803, subd. 3; *Balaban* v. *Rubin, supra,* 20 App. Div.2d at 450, 14 N.Y.2d at 199.

2. However, other factors (*e.g.*, purely educational considerations, safety, cost, or even convenience) may in a given situation be so overriding as to justify a finding of unreasonableness. Thus, in a recent State Supreme Court decision involving an Article 78 proceeding brought to annul a community zoning program for pupil reassignment to improve racial balance, the Court held it arbitrary and unreasonable to compel the transfer of elementary school children from a school across the street from their home to a school nearly a mile away, requiring four trips a day, totalling almost four miles, across a number of hazardous intersections. *Matter of Blumberg,* N.Y.L.J., p. 10, col. 7, July 13, 1964.

3. The extremity of the racial imbalance in relation to the difficulty of remedying the situation will also affect the result. "For example,

[6] This statute, originally adopted in 1900, within two months after a decision by the New York Court of Appeals that an 1894 statute, authorizing separate schools for Negroes, was Constitutional under the "separate but equal" Constitutional doctrine then obtaining, was enacted for the express purpose of overriding that doctrine within the state. See *Balaban* v. *Rubin,* 20 App. Div.2d 438 (2d Dep't 1964), aff'd 14 N.Y.2d 193 (1964), cert. denied, 33 U.S.L. Week 3141 (Oct. 19, 1964).

consideration should be given, on the one hand, to the degree of racial imbalance in the particular school . . . 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." *Jackson* v. *Pasadena City School District*, *supra*, 382 P.2d at 882, quoted with approval in *Balaban* v. *Rubin*, 20 App. Div.2d at 448.

4. The thorny issue of busing thus is to be resolved, we believe, on the factors of each case, and not on any *a priori* basis. It would appear that the busing currently being undertaken by the New York City School Board, involving distances of little more than a mile and travel time of only about ten minutes, is well within the Board's discretion, the additional cost and inconvenience being relatively minor. On the other hand, wholesale long distance busing, in effect converting school children into commuters and sacrificing substantial time which might otherwise be devoted to educational and extracurricular pursuits, may well be regarded as an abuse of discretion, although no such case has yet arisen.[7] Again, the degree of imbalance may affect the outcome of a particular case.

III. Required Corrective Action

There remains the question whether an affirmative duty exists, either under the Constitution or as a state requirement, for New York School Boards to take corrective action to alleviate racial imbalance resulting not from deliberate Board action but from residential

[7] It has been suggested that children have a statutory right in New York to attend the school nearest their home. In a paragraph of the Appellate Division opinion in the *Balaban* case, which was neither repeated nor referred to by the Court of Appeals, it was stated that:

> "The board of education has the statutory power to select the site for the erection of a new school (Education Law, § 2556), and to determine the school which each pupil shall attend (Education Law, § 2503, subd. 4-d). Consistent with the exercise of such power by the board, each child has the right to attend only the public school in the zone or district in which he resides (Education Law, § 3202, subd. 1); and in our opinion, this means the school nearest to his home." 20 App. Div.2d at 443.

The meaning of this dictum is far from clear. Section 3202, the only authority cited by the Court for this proposition, simply provides that a child is entitled "to attend the public schools maintained in the district or city in which such person resides without the payment of tuition." And, in fact, Section 2503, subd. 4-d, cited by the Court in the immediately preceding sentence, specifically provides that the Board "shall determine the school where each pupil shall attend."

It seems unlikely that any such absolute requirement that pupils attend the school closest to their homes will ultimately be found to exist, inasmuch as it would in most cases prevent the Board from taking the only available means of improving racial balance—which, as the courts have decided, it is entitled to seek to do so by reasonable means. On the other hand, the obvious advantages of a neighborhood school, particularly for young children, make this a factor to be weighed in determining the reasonableness of the Board's decision.

patterns. It seems clear that no Constitutional duty exists requiring school boards to achieve mathematical balance among the races. See *Blocker* v. *Board of Education, supra,* at 230; *Jackson* v. *Pasadena City School District, supra,* 382 P.2d at 610. Indeed, a number of cases contain specific language indicating that in the absence of a discriminatory intent, there is no Constitutional requirement to redress imbalance. "The Constitution, in other words, does not require integration. It merely forbids discrimination." See, *e.g., Briggs* v. *Elliot,* 132 F.Supp. 776, 777 (E.D.S.C. 1955); *Bell* v. *School City of Gary, Indiana,* 213 F.Supp. 819 (N.D. Ind.) aff'd, 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964). In the *Bell* case, characterizing the arguments of plaintiffs as "grounded on their fundamental theory that their right to be integrated in school is such an over-riding purpose that little, if any, consideration need to be given to the safety of the children, convenience of pupils and their parents, and costs of the operation of the school systems," the Court concluded:

> **"Plaintiffs are unable to point to any court decision which has laid down the principle which justifies their claim that there is an affirmative duty on the Gary School System to recast or realign school districts or areas for the purpose of mixing or blending Negroes and whites in a particular school."**

Several other cases, however, have indicated the existence, in some circumstances, of an affirmative duty at least to give consideration to racial composition as one factor in establishing or maintaining attendance lines. *Branche* v. *Board of Education,* 204 F.Supp. 150 (E.D.N.Y. 1962); *Blocker* v. *Board of Education, supra; Jackson* v. *Pasadena City School District, supra; Balaban* v. *Rubin, supra.* Thus, in a dictum in *Balaban* the Appellate Division stated:

> **"The opinion of the majority is that, in drawing attendance lines for a school, it is not only within the power of the board to take into consideration the ethnic composition of the children therein, but that under the decisions 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." 20 A.D.2d at 440**

And in the *Branche* case, Judge Dooling, in denying the school board motion for summary judgment based on the fact that the segregation resulted solely from the residential patterns of the district, stated that a like duty may exist to mitigate racial imbalance resulting from population shifts after the adoption of particular district lines:

> **". . . 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. . . .

". . . The effort to mitigate the consequent educational inadequacy has not been made and to forego that effort to deal with the inadequacy is to impose it in the absence of a conclusive demonstration that no circumstantially possible effort can effect any significant mitigation. What is involved here is not convenience but constitutional interests. It cannot be said at this stage that the 1949 adoption of the geographical rule of school attendance was necessarily free of an unpermitted effect on constitutional interests or that adherence to it in changing circumstances that perhaps increased segregation has not become an infringement of constitutional interests. . . ." 204 F.Supp. at 153.

It is too early to say whether these cases may herald the establishment of such an affirmative Constitutional requirement. But it seems likely that if such a duty does exist, it is a duty which (a) arises only in cases of extreme racial imbalance and (b) requires consideration of race as only one—albeit a very important one—of a number of factors.

Seen in this context, *Bell* and *Blocker,* the two most recent Federal cases in this area, which are often cited as being in conflict, may in fact be reconcilable and together may roughly delineate the particular Constitutional boundary. In *Blocker,* two of the three elementary schools in Manhasset were 100 percent white and the third was 94 percent Negro—a separation resulting from population shifts and segregated housing patterns. In the face of this, the Manhasset School Board maintained a "rigid no-transfer policy" in all three elementary schools. Thus, there was virtually total separation of the races—a factor much stressed by the Court. Stopping short of finding a deliberate exclusionary intent on the part of the Board (although not making a finding to the contrary), this Court nonetheless found a Constitutional violation. In *Bell,* on the other hand, there were a number of schools with a substantial degree of integration, although certain individual schools were predominantly white or Negro because of their location in particular geographic areas of the City of Gary, Indiana. Hence, looking at the district as a whole, there was no extreme racial imbalance. Another factor of significance is that in Manhasset (with an elementary school population of some 1,500, of whom only 10 percent were Negroes), the situation was remediable with relative ease, whereas in Gary, corrective action would be far more difficult.[8]

[8] "Nor are there present here the complicated problems present in Gary, Indiana, with a public school population of over 43,000 of which 53.5 percent are Negroes, or in large metropolitan areas—New York City for example. There are, no doubt, situations in which no alternative may be feasible. No such insurmountable obstacle appears to be present here." *Blocker* v. *Board of Education, supra,* at 229.

Thus, despite the broad language of the decision, the Court of Appeals ruling in *Bell* that no duty existed to take corrective action may be limited to the particular facts, and inapplicable to situations involving more total separation of the races.

But in New York State, this Constitutional debate, although lively, is somewhat academic. For it appears that, under applicable State law, an affirmative requirement already exists for school boards to consider the racial factor, and, where feasible, to take reasonable corrective action in cases of substantial imbalance. As noted above, the Board of Regents, whose "legislative functions" include full power to determine the educational policies of the state, (N. Y. Education Law, § 207), have officially stated that the fundamental policy of equal educational opportunity is not effectuated in "schools enrolling students largely of homogeneous ethnic origin," whether this results "by law or by fact." Policy statement of Board of Regents, January 28, 1960.

The State Commissioner of Education has acted in both his administrative and judicial capacities[9] to call for positive action to eliminate imbalance in New York State schools. In his administrative capacity, in a message to all schools in the State on June 18, 1963, he called for the submission of plans for the elimination of racial imbalance in each district where it exists (such imbalance being defined, for such purpose only, as 50 percent or more Negro enrollment in a particular school). While this message presumably does not in itself csonstitute a binding order requiring school boards to integrate schools, his simultaneous action in an appeal before him in his judicial capacity involving the Malverne School System makes it clear that, in practical effect, school boards are required to use all reasonable efforts to correct substantial racial imbalance whenever it exists. *Mitchell* v. *Board of Education,* 2 Education Department Reports 501 (1963).

The order of the Commissioner in that case required the institution of a "Princeton Plan" in Malverne. Initially struck down on the

[9] The Commissioner of Education has a dual role in New York State. As chief administrative officer of the Education Department, he is charged with executing educational policies of the Regents, N. Y. Education Law, § 305. In his judicial capacity he is charged with reviewing and deciding appeals by aggrieved citizens from actions of local school boards. He may also institute and decide such proceedings on his own motion. N. Y. Education Law, § 310. In either case, Section 310 provides that his decision is "final and conclusive, and not subject to question or review in any place or court whatever." Despite this sweeping language recourse to the courts may be had in cases of arbitrary or capricious action by the Commissioner. However, his rulings may only be overturned if without a rational basis. *O'Brien* v. *Commissioner of Education,* 3 App. Div.2d 321 (3d Dep't 1957), app. dism'd, 4 N.Y.2d 140 (1958).

ground that it conflicted with Section 3201 of the State Education Law, discussed above, the action of the Commissioner was recently unanimously upheld by the Appellate Division. *Vetere* v. *Mitchell, supra.* The Court held, as noted above, that no violation of Section 3201 was involved, and that the Commissioner's decision, being "neither arbitrary or capricious," would not be overturned. Said the Court:

> **"Where there is found to be a rational basis for the administrative determination the judicial function is exhausted and the administrative agency, not the court, is the final arbiter. The court cannot substitute some other judgment for the judgment of the Commissioner that correction of racial imbalance is an educational aid to a minority group in attaining the skills and level of education which others have had for generations and that compulsory education should be designed for the greatest good of all." 21 App. Div.2d at 564.**

While a further appeal has been filed and the Court of Appeals has not yet spoken, the available precedents indicate that the Commissioner's action in the *Malverne* case will ultimately be upheld. Accordingly, it would appear that there presently exists in New York State an affirmative requirement to correct racial imbalance and that failure of local boards to do so will be grounds for action by the Commissioner where the imbalance is substantial. No precise guidelines have been laid down as to the circumstances in which corrective action will or will not be required, but it appears that a school board having a school with 50 percent or even less Negro enrollment has at least a duty to consider the possibilities for alleviating the concentration.

IV. Conclusion

Despite the educational, social and practical complexities which abound, the general legal principles involved in this area are relatively few and relatively simple:

1. *A school board is forbidden, both Constitutionally and by state law, to take action designed to segregate school children on the basis of race.* This prohibition exists whether the "action" takes the form of gerrymandering or (so long as the forebidden racial motivation exists) of simply perpetuating existing attendance zones where racial segregation results.

2. *Where no discriminatory intent exists, school officials are permitted to take reasonable corrective action aimed at reducing racial imbalance, even in the absence of any Constitutional or state law requirement for such action.* The harm that many educational authorities believe is done by racial separation is a most important factor in assessing the reasonableness of the corrective action, but this must be balanced with other educational values, safety, costs and other administrative concerns. School officials have a wide area of discretion in

weighing the various factors, and their decisions will not be overturned by the courts unless arbitrary and unreasonable.

3. *There appears to be emerging an affirmative duty requiring school authorities, even in the absence of discrimination, to take reasonable corrective action to alleviate extreme racial imbalance.* Whether such a duty ever exists as a Constitutional requirement remains in doubt, but the present New York authorities indicate that such a requirement exists in any event under State law as implemented by the Board of Regents and the Commissioner of Education.

These necessarily general principles are, of course, frequently extremely difficult for school boards to apply to particular situations. Additional difficulty in achieving solutions results from the emotional response and counter-response so often engendered in communities where these issues are raised.

Indeed, we believe it important to point out that the very generality of these principles, with the wide latitude thus afforded for dispute as to their proper application, imposes on all concerned a special obligation not to look only to the legalities. Rather it is necessary to come to grips with specific problems in the spirit of conciliation, cooperation and compromise that is a requirement not merely for the practicing lawyer, but for leaders in all fields.

Thus, we believe it behooves school administrators, in determining how best to invoke their broad authority in this area, to take into account the existence of various facets of the problem beyond the purely legal, or, indeed, the purely educational. For example, there must be borne in mind the frustration of Negro parents who see themselves as asked in the name of "patience" to give up forever the chance of their children now in school for equal educational opportunity. At the same time there must be considered the honestly-held anxieties of white parents that they may be confronted with demands to make what they consider to be sacrifices in their children's welfare to remedy a situation not of their making.

Above all, these same white parents must somehow be brought to a recognition of the conviction of educators and psychologists, now adopted as official policy in the State of New York, that racially separated education is inferior education. For if this premise is once accepted, even provisionally, we believe that few parents indeed, in this state, would wish to stand in the way of reasonable efforts thus to improve the educational opportunities of all.[10]

Dated: October 20, 1964.

[10] The foregoing report was prepared by a subcommittee of which Eastman Birkett was Chairman and Irving I. Waxman and Calvin C. Cobb were members. Gerald M. Levin, Esq., of the New York Bar provided additional research and editorial assistance.

Respectfully submitted,

ORRIN G. JUDD, *Chairman*, New York City

EASTMAN BIRKETT, N.Y.C.
PAUL I. BIRZON, Buffalo
ALBERT E. BOND, Geneva
CALVIN C. COBB, Amityville
HAROLD L. COWIN, Brooklyn
S. SANFORD ENGEL, Syracuse
ROBERT B. FLEMING, Buffalo
ROGER A. FORTUNA, Ilion
ARTHUR K. GARFINKEL, N.Y.C.
BENJAMIN GRESHIN, Smithtown
MAURICE G. HENRY, JR., Mt. Kisco
E. JAMES HICKEY, Rochester
RALPH H. KRESS, Long Island City
ROBERT F. MCDERMOTT, Oneida
ROBERT B. MCKAY, N.Y.C.
THOMAS F. MOORE, JR., N.Y.C.
IRVING I. WAXMAN, Albany
MARK F. WELCH, Geneseo