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ABSTRACT

In this paper, the Commission on Civil Rights asks government leaders in the Reagan administration to reaffirm the elimination of segregation in elementary and secondary schools as established by the Supreme Court decision of Brown v. Board of Education in 1954. Past actions by the executive and legislative branches are reviewed and the position of the current administration is examined and criticized. Three controversial issues in school desegregation are discussed: (1) quality education, (2) busing, and (3) "white flight." The report stresses that commitment and leadership are needed from political, community, business and labor leaders, as well as from school officials, board members, teachers, support staff, parents and students. (Author/WAM)

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U. S. COMMISSION ON CIVIL RIGHTS

The U. S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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Statement of the U.S. Commission on Civil Rights
on School Desegregation

In 1954 the Supreme Court of the United States held in Brown v. Board of Education ^{1/} that legally compelled segregation of students by race denied equal protection of the laws as guaranteed by the 14th amendment. Brown was to provide the foundation for ending segregation across the country and ensuring that all children receive equality of educational opportunity. Although the decision specifically addressed segregation in the schools, it set the stage for an attack on segregation in other cases. ^{2/} Ensuing decisions of Federal courts consistently supported the holding in Brown, and State-sanctioned segregation was struck down in education and other areas of public life. ^{3/}

^{1/} 347 U.S. 482 (1954).

^{2/} See, Kaughlin McDonald, "The Legal Barriers Crumble," in Just Schools (Institution for Southern Studies, May 1979), p. 25.

^{3/} Ibid.; see also, Jack Bass, Unlikely Heroes (New York, NY: Simon and Schuster, 1981).

The support provided by the Federal Government's executive and legislative branches has never been as consistent.

Moreover, recent statements and actions by the executive and legislative branches signal a heightened attack on school desegregation and the remedies proven effective in its implementation. Accordingly, the Commission at its October 1982 meeting reaffirmed its support for student transportation as an effective remedy in implementing school desegregation and now issues this broader statement reaffirming the Commission's commitment to the holding of Brown and its progeny.* The Commission believes that any retreat in efforts to accomplish the mandate of Brown will seriously impede other civil rights efforts.

Thus, the Commission asks governmental leaders today to recommit our Nation to fulfillment of the letter and spirit of Brown. Executive and legislative branch leaders must signal reaffirmation for rather than retreat from civil rights

*Chairman Clarence M. Pendleton, Jr. supports the Commission's position on school desegregation. He opposes, however, the use of busing as a means for achieving desegregated education.

responsibilities. There is no middle ground. Either we are for desegregation and effective remedies for its implementation, or we are for continued segregation and a system of education that makes a mockery of our Constitution and statutes.

Commitment and leadership are also needed on the local level from political, community, business, and labor leaders; from school officials, whether board members, teachers, or support staff; and from parents and students. When local communities approach the desegregation process with determination to make it effective and successful, the process is beneficial for all--students, parents, and community. Results from school districts across the country have demonstrated that desegregation can work and have positive results for all. What is needed is a commitment to make desegregation work and to make equality of educational opportunity a reality for all students.

School desegregation has occurred in communities throughout the United States despite inconsistent leadership at the Federal level. Although the courts have strongly supported school desegregation, other branches have not been equally steadfast. The Nation would be much closer to the delivery to all children of equality of educational opportunity if the Federal Government had stood firm in support of school

desegregation over time. 4/ The Commission's statement examines past executive and legislative branch action, and examines closely the position of this administration. The statement concludes with an indepth discussion of three controversial issues surrounding school desegregation.

4/ Segregation of black students declined significantly in the United States between 1968 and 1980. However, most of the decline occurred by 1972. In 1968, 76.6 percent of black students were in schools that were predominantly minority (more than 50 percent); in 1972 the percentage was 63.6; and in 1980 the percentage was 62.9. Further, the percentage of blacks in 90-100 percent minority schools decreased from 64.3 percent in 1968, to 38.7 percent in 1972, to 33.2 percent in 1980. Hispanic students have become more segregated as "their numbers have rapidly grown in American society." In 1970 Hispanics were a twentieth of the public school population; in 1980, a twelfth. In 1968, 54.8 percent of Hispanic students attended predominantly minority schools; in 1980 the percentage had increased to 68.1 percent. The percentage of Hispanics in 90-100 percent minority schools increased from 23.1 in 1968 to 28.8 in 1980. Gary Orfield, Desegregation of Black and Hispanic Students From 1968 to 1980 (Washington, D.C.: Joint Center for Political Studies, 1982). The increased segregation of Hispanic students has been overlooked too long by the Federal Government. This issue and the need for bilingual education should be addressed.

ACTIONS BY THE EXECUTIVE AND CONGRESSIONAL BRANCHES

In enacting the Civil Rights Act of 1964, 5/ the legislative branch of our Government provided administrative procedures by which the executive branch could move to end discrimination and to secure implementation of the Brown mandate. In the 5 years after passage of the 1964 Civil Rights Act, the Federal Government made more substantial progress than had been made by litigation in the 10 years after the Brown decision. That progress was undergirded by the Supreme Court's 1968 ruling in Green v. County School Board of New Kent County 6/ that the test of a desegregation plan is its

5/ 42 U.S.C. §§2000d to 2000d-6 (1976 and Supp. IV 1980).

6/ 391 U.S. 430, 439-41 (1968).

effectiveness. The decision reinforced efforts by the Department of Health, Education, and Welfare (HEW) to secure plans that required restructuring of school districts and their transportation systems. In obtaining desegregation plans more comprehensive than freedom of choice, which left dual systems largely intact, the Federal Government threatened and occasionally used the fund termination enforcement mechanism available under Title VI of the 1964 Act to advance the desegregation process. ^{7/}

In 1969 Federal enforcement policy shifted away from the "administrative fund cut off requirements and return[ed] the burden politically as well as actually to the courts for compliance." ^{8/} In apparent response to a 1971 unanimous decision by the Supreme Court finding busing an acceptable

^{7/} See Marion Wright Edelman, "Southern School Desegregation 1954-1973: A Judicial-Political Overview," Blacks and the Law, Annals of the American Academy of Political and Social Science (May 1973) (hereafter cited as Blacks and the Law); see also U.S., Commission on Civil Rights, Twenty Years After Brown (1976).

^{8/} Statement by Robert H. Finch, Secretary of Health, Education, and Welfare, and John N. Mitchell, Attorney General, Press Release, July 3, 1969, p. 8. See also Blacks and the Law, p. 42.

desegregation tool, 9/ legislators introduced numerous antibusing amendments to pending legislation in 1972. In that year, the President also delivered a nationally televised address attacking "massive busing" and announced that he was sending legislation to the Congress designed to curb busing for school desegregation purposes. 10/ In 1974 another President stated at a press conference that he thought the law should be obeyed, but then noted that he had "consistently opposed forced busing to achieve racial balance as a solution to quality education." 11/

Congressional debate about student transportation for school desegregation heightened in 1974. The Esch amendment, introduced by Michigan Representative Marvin Esch and enacted as part of the Education Amendments of 1974, prohibited any Federal agency from ordering the implementation of a desegregation plan that required the transportation of students

9/ 402 U.S. 1 (1971).

10/ Address to the Nation on Equal Educational Opportunity and School Busing, PUB. PAPERS 425-29 (Mar. 16, 1972).

11/ 127 PUB. PAPERS 255 (Oct. 9, 1974).

beyond the schools closest or next closest to their homes that provided the appropriate grade level and type of education for those students. 12/

In 1975 and again in 1976, the Congress adopted an amendment put forward by West Virginia Senator Robert Byrd. The Byrd amendment expanded the provisions of the Esch amendment by forbidding the use of appropriated funds, directly

12/ The Esch amendment was enacted as part of Title II Subchapter I, of the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 517, 20 U.S.C. §§1701-1721 (1976 and Supp. V 1980). In pertinent part the amendment states:

No court, department or agency shall...order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student. Id. §1714(a).

The broad language of the Esch amendment was narrowed, however, by another provision of the 1974 act, which reads:

[T]he provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fairly the Fifth and Fourteenth Amendments to the Constitution of the United States. Id. §1702(b).

or indirectly, to require the transportation of any student to a school other than the one nearest the student's home offering the courses of study pursued by the student. 13/

In January 1977 support for school desegregation came from the new President when he stated:

I'm committed...to complete equality of opportunity in our Nation, to the elimination of discrimination in our schools, and to the rigid enforcement of all Federal laws. There will never be any attempt made while I'm President to weaken the basic provisions or the detailed provisions of the great civil rights acts... 14/

The following month the Secretary of Health, Education, and Welfare spoke of "rekindling the commitment of the Department...to forceful and fair enforcement of the civil rights laws." 15/ He specifically warned schools that "to ensure compliance...we will order fund cutoffs if we

13/ The Byrd amendment was adopted as part of the Labor-HEW Appropriations Act of 1976, Pub: L. No. 94-206 §209, 90 Stat. 22 (1976); and reenacted as Labor-HEW Appropriations Act of 1977, Pub: L. No. 94-439 §208, 90 Stat. 1434 (1976).

14/ 13 Weekly Comp. Pres. Doc. 200, 203 (Feb. 16, 1977).

15/ Joseph A. Califano, Jr., Secretary of Health, Education, and Welfare, HEW News Release, Feb. 17, 1977.

must." 16/ Indeed, the Departments of Justice and Health, Education, and Welfare were to limit the effect of the Byrd amendment through the determination that the amendment allowed HEW "to reject remedial plans not involving 'pairing' or 'clustering' schools." 17/ The amendment was interpreted so that a remedial plan using pairing and clustering could require transportation of students if the school nearest their homes did not offer the appropriate grade level. 18/ This

16/ Ibid.

17/ Citizens Commission on Civil Rights, "There Is No Liberty...": A Report on Congressional Efforts To Curb the Federal Courts and To Undermine the Brown Decision (Washington, D.C.: October 1982), p. 55. Pairing of schools is achieved when attendance areas of two or more schools are merged so that each serves different grade levels for a new larger attendance area. Clustering is similar to the process of pairing, but involves more than two schools.

18/ Ibid.

interpretation allowed HEW to continue withholding funds from segregated districts operating a segregated neighborhood assignment plan. 19/

Congress responded to executive branch initiatives by attaching another antibusing amendment to the fiscal year 1978 appropriation bill for the U.S. Department of Health, Education, and Welfare. The amendment (Eagleton-Biden), which the Congress has enacted every year since 1977, was offered by Senators Thomas Eagleton of Missouri and Joseph Biden of Delaware. It forbids the Department to terminate Federal funds in desegregating school districts where compliance would require transportation of pupils beyond the school nearest

19/ Griffin Bell, Attorney General, letter to Joseph A. Califano, Secretary of HEW, May 25, 1977. See Drew Days III, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, "Memorandum for the Attorney General Re: HEW Interpretation of Byrd Amendment in Proposed Letter to Senator Eagleton," 123 Cong. Rec. S10908 (daily ed. June 28, 1977); see also *Brown v. Califano* 627 F.2d 1221 (D.C. Cir. 1980).

their residence. 20/ Congress has also attempted by amendment to limit the efforts of the Department of Justice to require school desegregation when transportation is required to a school other than the school nearest the student's home. 21/ Initially introduced by Representative James Collins of Texas as an amendment to the Department of Justice appropriation bill

20/ The Eagleton-Biden amendment was initially a provision added by the Senate Committee on Appropriations to H.R. 7555, a bill providing appropriations for the Departments of Labor and HEW for fiscal year 1978. On Nov. 5, 1981, the Senate Appropriations Committee reported out the Labor, Health and Human Services, and Education Departments Appropriations Bill for FY 1982 retaining the Eagleton-Biden amendment. The bill reported out by the House Appropriations Committee also contains the language of Eagleton-Biden. The Continuing Resolutions for FY 1982 and FY 1983 incorporated the Eagleton-Biden amendment. See Brown v. Califano, 627 F.2d 1221 (D.C. Cir. 1980).

21/ 124 Cong. Rec. H7403 (daily ed., July 26, 1978).

for 1979, it has been reintroduced each year since. 22/

Moreover, the Senate on March 2, 1982, passed the Department of Justice authorization bill for fiscal year 1982, with an amendment offered by Senators Jesse Helms of North Carolina and Bennett Johnston of Louisiana. This amendment seeks to impose

22/ H.R. 3462 (Department of Justice Authorization for FY 1982) as passed by the House contains the Collins amendment, which reads:

No part of any sum authorized to be appropriated by this Act shall be used by the Department of Justice to bring any sort of action to require directly or indirectly the transportation of any student to a school other than the school which is nearest the student's home except for a student requiring special education as a result of being mentally or physically handicapped.

127 Cong. Rec. H2796-800 (daily ed. June 9, 1981).

even stricter limits on the ability of the Department of Justice to end segregation and to place limits on student transportation ordered by the courts. 23/

The Position of This Administration

In 1981 the administration established a new direction for the Department of Justice in the area of school desegregation. In May 1981 the Attorney General stated that the Brown decision "implied that a more heterogeneous racial environment in the schools would improve the education achievements of formerly segregated students" 24/ and that this view had "encouraged a jurisprudential emphasis on compulsory busing, which has

23/ The original Helms amendment attached to S.951 (Department of Justice Authorization for Fiscal Year 1982) is similar to the Collins amendment, adding the words "or maintain" after the word "bring" in the Collins amendment. Senator Helms, however, modified his amendment by adding to it the language of the Neighborhood School Act sponsored by Senator Johnston. The act would limit the instances when Federal courts could order student transportation and the distance and time of such transportation in school desegregation cases. Further, two provisions were added to make the limitations on court-ordered busing retroactive and to protect the remainder of the act should any section be found invalid. 128 Cong. Rec. S1336-7 (daily ed. Mar. 2, 1982).

24/ Address of William French Smith, Attorney General, before the American Law Institute (May 22, 1981), p. 7.

neither produced significant educational benefits nor won the support of most Americans." 25/ The Attorney General, therefore, indicated that the Department of Justice would no longer pursue student transportation as a desegregation remedy, but would propose remedies that had the best chance of "both improving the quality of education in the schools and promoting desegregation." 26/

In October 1981 the Assistant Attorney General for Civil Rights amplified the department's position:

The administration is thus clearly and unequivocally on record as opposing the use of mandatory transportation of students to achieve racial balance as an element of relief in future school desegregation cases. 27/

25/ Ibid.

26/ Ibid.

27/ William Bradford Reynolds, Assistant Attorney General for Civil Rights, testimony, School Desegregation: Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 97th Cong., 1st Sess., p 614. (1981) (hereafter cited as House Hearings),

He stated also that the department would emphasize alternative desegregation methods such as magnet schools and voluntary programs. He said that the Department of Justice would work to see that black students in segregated schools are assured equal access to resources and staff. 28/

More than 28 years ago, on May 17, 1954, the Supreme Court of the United States held unanimously that in public schools legally compelled segregation of students by race is a deprivation of the equal protection of the laws guaranteed by the 14th amendment. 29/ The doctrine of "separate but equal" that had been the law of the land since 1896 30/ was held constitutionally impermissible. The Justice Department must not retrace those steps. In actuality, facilities for blacks and whites were "separate and unequal." One tangible and

28/ Ibid., pp. 619-20.

29/ Brown v. Board of Education, 347 U.S. 482 (1954).

30/ Plessy v. Ferguson, 163 U.S. 537 (1896).

obvious result of desegregation was the general strengthening of formerly black school facilities and the provision of adequate supplies to them. 31/ The reassignment of white students to previously black schools caused administrators to correct long existing conditions by providing adequate maintenance of black schools and their grounds. Equalization in educational supplies, textbooks, and classroom furniture also occurred. 32/

What Brown demonstrates is that State-imposed educational separation, in fact, means educational inequality. Measured by all objective criteria, black children segregated from the white majority are afforded unequal educational opportunity. They are educated in schools where facilities, curricula, and

31/ U.S., Commission on Civil Rights, Desegregation of the Nation's Public Schools: Fulfilling the Letter and Spirit of the Law, (hereafter cited as Fulfilling the Letter and Spirit of the Law. (August 1976), p. 120.

32/ Ibid.

teaching are inadequate. 33/ Resources available to a school and staff quality affect the level of education provided and the future for minority students.

Just as equality of tangible school facilities is germane to desegregation, so too are intangible qualities. In the higher education desegregation case of Sweatt v. Painter, 34/ the Court moved from considering tangible qualities to intangible ones when considering the "separate but equal" doctrine. The Court ruled that Texas could not provide black students with equal educational opportunity in a separate law school. The case was not decided on the issue of facilities although the facilities at the University of Texas Law School were clearly superior to those at the black law school. The

33/ U.S., Commission on Civil Rights, Understanding School Desegregation (1971), "Integration and Quality Education," unpaginated (hereafter cited as Understanding School Desegregation).

34/ 339 U.S. 629 (1950).

key factor was the law school's comparative "standing in the community." The court found that the University of Texas "possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school." 35/

Perceptions of the quality of minority and majority schools must also be considered in elementary and secondary education. Racially segregated schools attended by minorities are often perceived to be inferior by the community. Some teachers carry this perception into the schools, and it is passed on to the students. 36/ Put, simply, there is a perception that less is required of black students in black schools because traditionally less has been expected of them. 37/ The view that racially segregated schools are

35/ Id. at 634.

36/ U.S. Commission on Civil Rights, Racial Isolation in the Public Schools, (1967) vol. 1, p. 193. (hereafter cited as Racial Isolation in the Public Schools.)

37/ Understanding School Desegregation, unpaginated.

inferior is often held by college admission officers and employers. Thus, future opportunities for minority students who attend such schools may be limited. 38/ There have been exceptions, of course.

Dunbar High School in Washington, D.C., was an academically elite, all-black, public high school from 1870-1955. 39/ The special conditions that contributed to Dunbar's excellence do not lend themselves to replication, nor should the segregated system that led to the creation of Dunbar be reestablished. 40/ Moreover, there remains a constitutional prohibition against legally sanctioned segregated schools. That this administration would advocate equalization of facilities at segregated schools rather than their elimination is unconscionable.

38/ Racial Isolation in the Public School, p. 204.

39/ Thomas Sowell, "Black Excellence--The Case of Dunbar High School," The Public Interest, no. 35 (Spring 1974), p. 3.

40/ Ibid., pp. 20-21.

Further, an administration opting for an equalization approach appears disingenuous when it relentlessly advocates reduced funding levels for educational programs serving minorities and the disadvantaged, the very programs that would support the so-called "new" direction.

The Department of Education was successful in its efforts to place the Emergency School Aid Act Program (ESAA) in a block grant. ^{41/} It proposed a block grant funding level for fiscal year 1983 that, if distributed evenly across the block grant program, would have resulted in a 53 percent cut in ESAA funding from FY 1980. ^{42/} Fortunately, in the FY 1983 continuing resolution, Congress has maintained the FY 1982

^{41/} 20 U.S.C. §§3191-3207 (Supp. III 1979); 20 U.S.C. §3811 (Supp. 1982).

^{42/} U.S., Department of Education/Foundation for Education Assistance, The Fiscal Year 1983 Budget, attachment A, p. 29 (hereafter cited as The Fiscal Year 1983 Budget).

block grant funding level. 43/ Since its enactment in 1972, ESAA has assisted numerous school districts in the desegregation process and has aided school children to overcome the educational disadvantage of minority group isolation. 44/

Similarly, the Department of Education proposed to rescind totally the FY 1982 funding level for Title IV (civil rights technical assistance and training) and provide no categorical funds for FY 1983, since funding would be discretionary under the block grant. 45/ These funds have been used "to provide direct and indirect technical assistance and training services

43/ In 1981 the block grant programs were funded as categorical programs. The funding level for all programs was \$512 million; ESAA was funded at \$149.2 million. In 1982 the block grant was funded at \$455 million. The President proposed a 1983 funding level of \$406 million, but the FY 1983 continuing resolution maintains the 1982 level of \$455 million. Fiscal Year 1983 Budget, p. 29; Higher Education Daily, vol. 10, no. 205 (Oct. 25, 1982), p. 5.

44/ U.S., Department of Health, Education, and Welfare, A Summary of Federal Aid under the Emergency School Aid Act (April 1977), p. 1.

45/ The Fiscal Year 1983 Budget, p. 7.

to school districts to cope with educational problems occasioned by desegregation." ^{46/} The Education Department also proposed to put into a block grant Title I of the Elementary and Secondary Education Act of 1965, which provides Federal financial assistance to school districts with concentrations of children from low-income families. ^{47/} These funds have accounted for almost one-third of per-pupil expenditures in some of the Nation's poorest school districts. Nationwide, approximately 46 percent of the students served are

^{46/} Civil Rights Act of 1964, Title IV, Sec. 403, 404, 405; Pub. L. No. 88-352, 42 U.S.C. 2000c, 2-4 (1976); U.S., Executive Office of the President, Office of Management and Budget, Catalog of Federal Domestic Assistance (1981), p. 235.

^{47/} Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 ("Title I" was originally designated "Title II" but was renumbered "Title I" by Pub. L. No. 90-247 §108(a)(2), 110, 81 Stat. 786, 787 (1968)); the entire Title was amended by Pub. L. No. 95-561, 92 Stat. 2143 (1978), codified at 20 U.S.C. §§2701-1854 (Supp. III 1979).

minority. ^{48/} Further, the positive effects of this program on achievement in reading and mathematics have been demonstrated clearly. ^{49/} The Commission's Statement on the Fiscal Year 1983 Education Budget addresses these programs in detail and the effects such proposed cuts would have on the students they benefit.

In Brown, the Supreme Court specifically considered the question:

Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may

^{48/} U.S., Department of Health, Education, and Welfare, National Institute of Education, The Compensatory Education Study: Executive Summary (1978), pp. 1, 4; and Evaluating Compensatory Education, An Interim Report (1976), table III-8, p. III-26.

^{49/} See Education Commission of the States, Three National Assessments of Reading: Changes in Performance 1970-1980 (Denver, Colo.: April 1981); Children's Defense Fund, A Children's Defense Budget: An Analysis of the President's Budget and Children (Washington D.C.: 1982), p. 117; U.S., Department of Education, Office of Planning, Budget and Evaluation, The Annual Evaluation Report, vol. II, Fiscal Year 1981.

be equal, deprive the children of the minority group of equal educational opportunities? 50/

The Court found that it did: "in the field of public education the doctrine of 'separate but equal' has no place" 51/ and deprives those segregated "of the equal protection of the laws guaranteed by the Fourteenth Amendment." Thus, the Department of Justice should emphasize the desegregation of "separate" schools rather than the equalization of resources. 52/

Further, the President supported a tuition tax credit bill (S.2673, companion bill H.R. 6701) that would have allowed taxpayers a 50 percent tax credit (not to exceed \$100 in 1983; \$300 in 1984 and \$500 in 1985) for tuition expenses for dependents under the age of 20. 53/ The Office of Tax

50/ 347 U.S. 493 (1954).

51/ Id.

52/ Id.

53/ S.2673, Educational Opportunity and Equity Act of 1982, introduced June 23, 1982 by Mr. Dole (for himself, Mr. Roth, and Mr. D'Amato) and was referred to the Committee on Finance. The bill was marked up by the Senate Finance Committee on Sept. 15-16, 1982, with a number of amendments.

Analysis in the Department of the Treasury estimated that the administration's bill, if enacted as introduced, would have resulted in lost resources of \$32 million in 1983, \$373 million in 1984, and \$854 million in 1986. 54/ Thus, the availability of Federal funds to support public education presumably would have been cut further.55/

The Department of Justice also supports voluntary methods of desegregation as an alternative to busing of students. Voluntary desegregation methods tried over time have, virtually

54/ U.S., Library of Congress, Congressional Research Service, Robert F. Lyke, Tuition Tax Credits (September 1982), p. 11.

55/ S. 2673 is currently pending on the Senate calendar. H.R. 6701 was referred to the House Ways and Means Committee, and no further action was taken. As amended in the Senate Finance Committee, S.2673 provides for a tuition tax credit of 50 percent of private educational expenses not to exceed \$100 in 1982, \$200 in 1984, and \$300 in 1985 for each dependent student. The amended bill also provides for a phaseout of the credit for taxpayers whose adjusted gross income exceeds \$40,000. Further, educational institutions would be required to file an annual nondiscrimination statement. The Senate Finance Committee substituted S.2673, as marked up, for a House-passed tax bill, H.R. 1635, since tax bills must originate in the House.

without exception demonstrated their ineffectiveness. For example, under freedom of choice, a few minority students elect to attend predominantly white schools while the system remains almost entirely segregated. 56/ The Green decision made clear that freedom of choice, implemented in one form or another from 1955 to 1968, left a dual system largely intact. 57/ To recommend such an approach would cause reversion to rejected standards of the early 1950s. Such a stance raises the question of whether the Nation is to go through another 28 years without ending segregation.

The administration's support for magnet schools in isolation is also questionable. Magnet schools, which offer specialized curricula and teaching, are often used to attract

56/ Laughlin McDonald, "The Legal Barriers Crumble," Just Schools (Institute for Southern Studies, May 1979), p. 26; U.S. Commission on Civil Rights, Southern School Desegregation 1966-67 (July 1967) (hereafter cited as Southern School Desegregation).

57/ Green v. County School Board of New Kent County, 391 U.S. 430 (1968). See also, U.S., Commission on Civil Rights, Survey of School Desegregation in the Southern and Border States 1965-66; and, Southern School Desegregation 1966-67.

white students to desegregated schools. 58/ School districts use magnet schools to try innovative curricula and as a means for providing students alternative programs in integrated settings. Although magnet schools may provide broad educational opportunities for students, some education authorities have criticized their use as an "escape route for whites assigned to predominantly black schools." 59/ They have also been described as "a new type of dual structure with unequal educational opportunities" 60/ that drain resources from other schools in the system. Magnet schools have a particularly deleterious effect when they are used as the only device for reassigning students in a desegregating district. 61/ Magnet schools are effective when instituted as

58/ Gordon Foster, "Desegregating Urban Schools: A Review of Techniques," Harvard Educational Review, vol. 43, no. 1 (February 1973), p. 19.

59/ Ibid.

60/ Ibid.

61/ Ibid.

one component of a comprehensive desegregation plan. Further, since magnet schools usually draw students from the entire school system, busing is often required.

This administration has continuously stated that it supports school desegregation, but it does not support one of the proven means of achieving school desegregation--transportation of students. To the extent that a school desegregation plan can accomplish desegregation without the use of busing, it is constitutionally permissible. But if a school desegregation plan requires transportation of students for effectiveness, then busing is required. To speak against busing in these circumstances is to speak against school desegregation. A right without a remedy simply is illusory.

Other actions by the Department in desegregation enforcement also support the conclusion that the Justice Department is retreating from a commitment to school desegregation. These include:

In Chicago, the Department approved a plan that it had rejected earlier as totally inadequate to desegregate the Chicago school system. The accepted plan is based primarily on voluntary techniques that already had been tried in the Chicago schools with little success. Further, the plan defines as desegregated a 70 percent white school, despite the fact that the school district is only 20 percent white.^{62/}

The Department reversed its position in Washington v. Seattle School District in which it initially had intervened in support of local school boards challenging the constitutionality of a State initiative establishing a neighborhood school policy. The Supreme

^{62/} Response of the United States to the Desegregation Plan and Supporting Documents Filed by the Board of Education of the City of Chicago and Joint Statement of the United States and the Chicago Board of Education, Aug. 28, 1981, in U.S. v. Board of Education of the City of Chicago, No. 80-C-5124 (N.D. Ill.).

Court subsequently rejected the Government's argument and ruled that the State's antibusing statute was unconstitutional. 63/

In East Baton Rouge, Louisiana, the Department has urged the court to reconsider a desegregation plan already in effect that requires student transportation. The Department had intervened in the case--Davis v. East Baton Rouge Parish School Board--in 1979 advocating more extensive busing than the court eventually ordered. 64/

63/ Seattle School District v. State of Washington, 473 F. Supp. 996 (W.D. Wash. 1979), aff'd, 633 F.2d 1338 (9th Cir. 1980), aff'd, Washington v. Seattle School District, 102 S. Ct. 3187 (1982).

64/ 514 F. Supp. 869 (E.D. La. 1981), modified, 533 F. Supp. 1161 (E.D. La. 1982), app. pending. Brief for the United States in Davis.

In a brief filed in Metropolitan County Board of Education of Nashville and Davidson County, Tenn. v. Kelley, the Department asserts that the Sixth Circuit Court of Appeals "adopted too restrictive an interpretation of Swann" in requiring extensive mandatory transportation in the school district. 65/

These statements and actions reflect an unparalleled assault on the mandate of Brown and stand in stark conflict with established case law. Such an assault, if left to continue unchecked, threatens to halt and in some instances reverse the progress that has been made in desegregating the Nation's public schools.

Opponents of school desegregation continually suggest that the Nation should turn away from the pursuit of desegregation because (1) the process has negatively affected the quality of

65/ Brief for the United States as Amicus Curiae in Support of Petitioners, Metropolitan County Bd. of Educ. v. Kelley, 463 F.2d 732 (6th Cir. 1972), petition for cert. filed, 51 U.S.L.W. 3341 (U.S. Oct. 22, 1982) (No. 82-702).

education, (2) children should not be forced to attend schools other than neighborhood schools or to ride the bus to the new school, and (3) desegregation causes whites to flee school districts.

The debate about such issues should not obscure the fact that desegregation of the Nation's schools is the law of the land and must be pursued. Nevertheless, given the controversy surrounding these areas it is appropriate to examine the facts.

Quality Education

The Commission has found that many school districts as they desegregate often simultaneously reevaluate their educational programs and services and, as a result, improve them for all students. 66/ In fact, general improvement of the school system is perceived as more easily accomplished during the school desegregation process, since "a new agenda is being set and external resources and pressures for change exist." 67/

66/ Fulfilling the Letter and Spirit of the Law, p. 112.

67/ Center for Education and Human Development Policy, Assessment of Current Knowledge about the Effectiveness of School Desegregation Strategies, vol. 1, A Synthesis of Findings (Vanderbilt University: April 1981), p. 29.

"Enriching or improving curricula throughout a school system" is viewed as a way to bring about effective desegregation. 68/ School districts have implemented various programs to improve basic skills in reading and mathematics. These programs have benefited both minority and white students who previously had achieved below their potential. Many desegregated school districts have also attempted to identify gifted students and provide programs that fully develop their talents and abilities.

In Williamsburg, South Carolina, the school system introduced an upgraded, individualized, sequential plan for the development of basic skills and added courses in black history and literature. 69/ In Colorado Springs, Colorado, as a result of desegregation, the school system added a number of

68/ Ibid. Vol. VI, A Review of Qualitative Literature and Expert Opinion on School Desegregation, p. 39.

69/ Fulfilling the Letter and Spirit, p. 113.

multicultural courses, including social history, American history in the Spanish language, Spanish for Spanish speakers, and bilingual-bicultural education programs. 70/

Further, research evidence clearly demonstrates that school desegregation results in improvements in achievement for minority students and white students hold their own academically. No study has shown a drop in achievement for white students. 71/ It is notable that the age of the students

70/ U.S., Commission on Civil Rights, Staff Report, School Desegregation in Colorado Springs, Colorado (February 1977), p. 8.

71/ See, for example, Nancy St. John, School Desegregation Outcomes for Children (New York: John Wiley and Sons, 1975); Meyer Weinberg, "The Relationship Between School Desegregation and Academic Achievement: A Review of the Research," Law and Contemporary Problems, vol. 39, no. 2 (Spring 1975); Robert L. Crain and Rita E. Mahard, "Desegregation and Black Achievement: A Review of the Research," Law and Contemporary Problems, vol. 42, no. 3 (Summer 1978).

is critical to the desegregation process. 72/ A recent review of desegregation research found that every sample of students desegregated at kindergarten showed positive achievement gains. 73/ The same review found that desegregation enhances IQ test scores as much as or more than achievement test scores and that metropolitan-wide plans show stronger achievement effects than those limited to city or suburban districts. 74/

72/ Robert L. Crain and Rita E. Mahard, Some Policy Implications of the Desegregation Minority Achievement Literature (Johns Hopkins University: Center for the Social Organization of Schools, April 1981) p. 10 (hereafter cited as Minority Achievement Literature); Robert L. Crain and Rita E. Mahard, Desegregation Plans that Raise Black Achievement: A Review of the Research (Rand Note, June 1982).

73/ Minority Achievement Literature, pp. 20, 26.

74/ Ibid.

Of course, quality education cannot be measured solely by reference to test scores. The school is the most important public institution bearing on the child's development as an informed, educated person and as a human being. 75/ Former President Nixon made the point in another way when he stated:

desegregation is vital to quality education--not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the standpoint of helping all children achieve the broad-based human understanding that increasingly is essential in today's world. 76/

Recent research also clearly shows that both whites and blacks who experience desegregated schools are more likely to experience desegregated environments later in life. They are more likely to live in desegregated neighborhoods, to attend

75/ See *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

76/ Special Message to the Congress Proposing the Emergency School Aid Act of 1970, 156 PUB. PAPER 449 (May 21, 1970).

desegregated colleges, to have close friends of the other race, to have children in desegregated schools, and to be employed in desegregated job settings than are adults of both races who attended segregated schools. 77/ Research also provides evidence that blacks who have experienced desegregation have a more positive outlook on the availability of occupational opportunities, are more confident in interacting and succeeding in interracial situations, and have more access to informal sources of information about employment opportunities. All are important considerations for adult occupational success. 78/

77/ James McPartland, Center for Social Organization of Schools, Johns Hopkins University, testimony, House Hearings, p. 435; the Commission found similar results as early as 1967, Racial Isolation in the Public Schools, pp. 73-144.

78/ Robert L. Crain and Carol Weisman, Discrimination, Personality, and Achievement (New York: Seminar Press, 1972), pp. 133-53; William W. Falk, "School Desegregation and the Educational Attainment Press: Some Results from Texas Schools," Sociology of Education, vol. 51, no. 4 (1978), pp. 282-88 (hereafter cited as School Desegregation and the Educational Attainment Press).

Policies that "continue and expand the opportunities for students to pursue their education in desegregated schools can be expected to result in more naturally desegregated neighborhoods, labor markets, and schools in the future." 79/ Thus, more positive gain will result from concentrating on what occurs within a desegregated school than from opposing the mode of transportation to it.

The Busing Issue

In recent years, the transportation of students for purposes of school desegregation has created controversy and unrest. Yet, the school bus has been an integral aspect of the American public school system for much of this century. Nationally, slightly more than 50 percent of all school children ride buses to school. 80/ These include city,

79/ James McPartland, testimony, House Hearings, p. 435.

80/ U.S., Department of Health, Education, and Welfare, National Institute of Education, Summary of Statistics on School Desegregation Issues (April 1976), pp. 1-2 (hereafter cited as Summary of Statistics on School Desegregation); David Soule, U.S. Department of Transportation, telephone interview, Mar. 12, 1981, Mr. Soule indicated that the percentages have remained the same since 1976 (hereafter cited as Soule Interview).

suburban and rural children who ride for reasons of safety or distance, 81/ handicapped children who attend schools with special facilities, and gifted children who attend schools with special or advanced curricula. Despite the fact that prior to Brown busing was used to maintain segregation, the school bus now has come to symbolize "forced integration." Yet, less than 7 percent of all students who are bused to school are bused for school desegregation. 82/

The efficacy of requiring the transportation of students for desegregation purposes was addressed by the Supreme Court in Swann v. Charlotte-Mecklenburg Board of Education. 83/ The

81/ E. Edmond Reutter, Jr., and Roberto R. Hamilton, The Law of Public Education (Wineolo, N.Y.: The Foundation in Press, Inc., 1970), pp. 223-26 (hereafter cited as The Law of Public Education).

82/ Summary of Statistics on School Desegregation Issues, pp. 1-2; Soule Interview.

83/ 402 U.S. 1 (1971).

Charlotte-Mecklenburg school system, encompassing 550 square miles, was operating under an ineffective desegregation plan based upon geographic zoning with a voluntary transfer provision. In light of the Supreme Court decision in Green v. County School Board of New Kent County, which required school boards to "come forward with a plan that promises realistically to work...now...until it is clear that State imposed segregation has been completely removed," 84/ the plaintiffs sought an effective desegregation plan. The Supreme Court upheld the lower court conclusion that assignment of children to the school nearest their home would not effectively dismantle the dual system and that the remedial technique of requiring bus transportation as a tool of school desegregation was within the court's power to provide equitable relief. 85/ The Court noted "the importance of bus transportation as a

84/ 430 U.S. 431, 439 (1968).

85/ Id. at 30.

normal and accepted tool of educational policy" 86/ and that "desegregation plans cannot be limited to the walk in school." 87/

Opponents of busing fail to consider the real issue, namely, the constitutional mandate to eliminate by whatever means necessary segregated public schools established and maintained by State action. The courts have required desegregation only when there has been a judicial determination that government officials have violated the equal protection guarantees of the Constitution; moreover, they have required the mandatory reassignment of students and busing only when other school desegregation methods have proven inadequate to dismantle the dual system.

The argument against busing focuses on the perceived "right to attend the neighborhood school" and the "inconvenience that busing places on parents and students." A study of public education law shows that students do not have a vested right to attend a particular school and that school boards have the

86/ Id. at 29.

87/ Id. at 30.

authority to assign students to specific schools. 88/ In cases challenging this authority, the courts generally have not substituted their judgment for that of the school boards. 89/ The Court in Swann weighed the issue of inconvenience:

All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some, but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

Further, the Court has ruled in other cases that the constitutional rights of black children to attend school on a nonsegregated basis cannot be abridged because of public

88/ The Law of Public Education, p. 118.

89/ See, for example, State ex rel Lewis v. Board of Education of Wilmington School Dist., 28 N.E. 2d 496 (1940), Hiers v. Brownell, 136 N.W. 2d 10 (1965).

reaction or opposition to desegregation.^{90/} The mandatory reassignment and transportation of students is an effective and appropriate remedy to eliminate unconstitutional segregation.

White Flight

School desegregation is often charged with causing withdrawal by white students from the public schools to private all-white schools or to school systems that remain segregated. This movement has been termed "white flight." The concept was originally used to describe the movement of the white middle class from city to suburb following World War II. This movement continues today due to "pull" factors such as "suburban space, greenery, and (until recently) lower cost family housing, lower tax rates, federal housing loan policies, and changes in production and transportation patterns."^{91/}

^{90/} See *Cooper v. Aaron*, 358 U.S. 1 (1958), *U.S. v. Scotland Neck City Board of Education*, 407 U.S. 484 (1972).

^{91/} Christine H. Rossell, professor, Boston University, statement, House Hearings, p. 217.

Research on suburbanization has not shown schools to be a central factor in the process. 92/ The drop in the white student population in some school districts also has been affected by a significant decline in the birth rate. This decline has affected all races, but the effect has been greatest among whites. 93/ Thus, there simply have been fewer white children to enroll in school.

In addition, significant cuts in education budgets have contributed to white student loss in central city schools. 94/ Concomitant declines in educational programs have caused some parents to question the quality of public school education and to opt for private schooling.

92/ Gary Orfield, professor, University of Illinois, statement, House Hearings, p. 160.

93/ Diana M. Pearce, director of research, Center for National Policy Review, and Christine H. Rossell, statements, House Hearings, pp. 193, 217.

94/ Gary Orfield, statement, House Hearings, pp. 160-161.

It is difficult to determine to what extent school desegregation serves as a "push" factor in the exodus of whites from central city schools. Researchers have noted, for example, that northern central city school districts can be expected to have a "normal" decline in white enrollment of at least 4 to 8 percent annually with no desegregation. 95/ Chicago, often cited as an example of "white flight," has lost 10 to 15 percent of its white enrollment a year in the absence of any desegregation plan. 96/ In Cleveland, Ohio, a recent study found that changes in population and the decline in the birth rate, not school desegregation, were the causes of the

95/ School Desegregation, Report of the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 97th Congress, 2nd Session, March 1982, p. 16.

96/ Diana M. Pearce, statement, House Hearings, p. 193.

decline in public school enrollment. 97/ Researchers agree that, to the extent school desegregation has affected the decline in white student attendance, it is greatest during the first year of a desegregation plan. Further, this decline is most evident in large cities with sizable minority student populations, surrounded by suburbs that are not included in the desegregation plan. 98/ The drop in white student enrollment declines sharply after the first year of plan implementation, and suburban and countywide school districts may "make up their implementation year loss by the fourth or fifth year." 99/ Since the greatest white flight occurs during the first year of implementation, a relevant point is that those leaving the

97/ Between 1970 and 1982, the Cleveland public schools lost 42,000 white students and 34,000 black students. The enrollment decline began 11 years before court-ordered desegregation. The study also found enrollment declines in other public and parochial schools in the Cleveland metropolitan area. Schools and Civil Rights News, vol. 6, no. 21, p. 10.

98/ Gary Orfield, statement, House Hearings, p. 160.

99/ Christine Rossell, statement, House Hearings, p. 218.

schools have not experienced desegregation. Rather, they are responding to fears, often transmitted by a nervous community, about racial conflicts, disruptions, and safety. Media coverage highlighting positive aspects of school desegregation might help lessen the flight. It is significant to note that among whites who have experienced busing, 85 percent found it very or partly satisfactory. 100/

Another relevant point concerning white flight is that school desegregation plans that include the entire district, and particularly metropolitan-wide plans that include the entire housing market and make all schools equal participants in the process, produce stable desegregation. 101/ White

100/ Gary Orfield and Diana M. Pearce, statements, House Hearings, pp. 165, 192. Pearce cited the Louis Harris Poll (March 1981) which found "that of those whites who have experienced busing, 85 percent found it very or partly satisfactory." Orfield also cited Louis Harris surveys in 1978 and 1981 which "found that a majority of whites whose children were bused for desegregation said that it was working out successfully."

101/ Gary Orfield, and Diana M. Pearce, statements, House Hearings, pp. 160, 193.

flight is less an issue because the option of departing for the suburbs is not available. A recent study found that cities with metropolitan-wide school desegregation experienced greater reductions in housing segregation than other cities without similar desegregation plans. ^{102/} Moreover, the study found that metropolitan-wide desegregation appeared to promote stable housing desegregation. Thus, metropolitan-wide plans eventually could result in limiting student transportation to achieve school desegregation. Riverside, California, the sample city in the study with the longest experience with metropolitan-wide desegregation (15 years), in 1980 required busing for only 4 of its 21 elementary schools to achieve racial desegregation. ^{103/} Metropolitan-wide plans have proved

^{102/} Diana M. Pearce, Breaking Down Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns (Washington D.C.: Center for National Policy Review, November 1980).

^{103/} *Ibid.*, pp. 26, 50-52.

to be quite stable, and the concern about white flight from public education is eliminated because all schools and neighborhoods within a wide area participate equally in the process. 104/

Accordingly, Secretary of Education Terrel H. Bell stated in September 1982 that he supports metropolitan-wide plans that combine inner-city and suburban districts. 105/ The Secretary's comments were supported by a former Director of HEW's Office for Civil Rights who stated:

Metropolitan school district plans are the most rational way to accomplish stable desegregation. Where they have been tried they have been generally stable, with less white flight than city-only desegregation plans. [Emphasis added] 106/

104/ U.S., Commission on Civil Rights, Statement on Metropolitan School Desegregation (February 1977), pp. 42, 56-57.

105/ Washington Post, Sept. 13, 1982, p. A3.

106/ Ibid.

Regardless of the causes of white flight, it is not a constitutionally permissible basis for denying students equal protection of the laws. The Supreme Court has stated that the vitality of constitutional principles cannot be allowed to yield simply because of disagreement with them. 107/ In discussing white flight specifically, the Supreme Court in United States v. Scotland Neck City Board of Education said:

while [white flight] may be cause for deep concern to the [school board], it cannot...be accepted as a reason for achieving anything less than complete uprooting of the dual public school systems. 108/

"Even school districts such as Boston which have experienced massive white flight have a proportion white in the average black child's school which is almost twice as great as it would have been if the school district had not desegregated." 109/

107/ Cooper v. Aaron, 358 U.S. 1, 6 (1958).

108/ 407 U.S. 484, 491 (1972).

109/ Christine Rossell, statement, House Hearings, p. 219.

To let people stay in a city in illegally segregated schools deliberately to keep them from leaving to seek segregated schools would be constitutional negligence.

During the last 28 years much has been done to eradicate the effects of segregation in this country. Armed with the Supreme Court's decision in Brown that in public education legally compelled segregation of students by race is a deprivation of the equal protection of the laws guaranteed by the 14th amendment, the Federal judiciary has consistently chipped away at segregation in education. Moreover, Brown has provided the foundation for the courts to prohibit officially sanctioned racial discrimination in almost every aspect of American life. During the few years (1965-69) when the other two branches of the Federal Government provided strong leadership, the Federal Government was to prove an invincible opponent for those opposing equality of educational opportunity. In 1964, 1.2 percent of black students in the South attended schools with whites. By 1968 that figure had risen to 32 percent.

Unfortunately, for the remainder of the 28 years, the courts have stood virtually alone in pursuit of the promise of Brown. History has demonstrated that more is needed than court

decisions. Strong leadership also is needed from the executive and legislative branches. Much of what occurs on the local level is influenced by the tone set in Washington. Statements by national leaders expressing opposition to school desegregation and to the methods proven effective in its implementation give local school officials reason to think (albeit incorrectly) that they need not pursue school desegregation or that opposing it in the courts will prove successful. Again, history has shown this not to be the case. Desegregation litigation is typically a lengthy and costly process often spanning a decade, encompassing numerous judicial opinions, and costing many thousands of dollars. 110/ And, in the end, plaintiffs have prevailed in virtually all school desegregation cases. 111/ The time, energy, and public funds spent opposing school desegregation should be

110/ Charles D. Moody and Jeffry D. Ross, "Cost of Implementing Court-Ordered Desegregation," Breakthrough, vol. 9, no. 1 (Fall 1980) p. 217.

111/ Ibid.; Northcross v. Board of Education of the Memphis City Schools, 611 F.2d 624, 639 (6th Cir. Nov. 23, 1979), cert. denied, 100 S. Ct. 2999 (June 9, 1980).

spent implementing an effective school desegregation plan and educationally enriching programs. By so doing, all children would be more likely to receive the best education possible.

Although this administration expresses support for school desegregation, its statements and actions indicate otherwise. A Department of Justice that opposes the most effective remedy for desegregating the public schools--the mandatory reassignment of students--and the most effective tool for implementing this remedy--student transportation--actually stands in opposition to school desegregation. A Department of Justice that supports voluntary methods of desegregation which over time have proved ineffective would have the Nation return to pre-1954 standards. A Department of Justice that appears to stress "quality segregated education" would have the Nation revert to the "separate and unequal" blot that has stained our Nation's credo of equal justice under law.

The Nation must not repeat its mistakes, but, rather, must move forward armed with the knowledge gained over the last three decades. A renewal of the Nation's commitment to equal protection of the laws is needed so that the promise of Brown will not long remain unfulfilled.