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ABSTRACT

The Brown v. Board of Education decision upheld a civil rights ideal that was based on the personal interests of the students; it made no requirement for a perfect racial balance in all classrooms throughout the offending school district. Yet the ensuing, forced desegregation plans that involved long-distance busing, and other measures based on percentages, actually produced racial isolation on a broader scale. The consequent flight of economically able parents from urban public schools contributed to the erosion of the municipal tax bases, which in turn directly affected the ability of many school systems to provide quality public education to their students--whether white or black. Fortunately, the experiment with forced busing is largely over. The present administration has premised its remedial approach on consensus, not conflict. Centering on magnet schools and other curriculum enhancement programs, its approach provides all children with educational incentives and leaves the choice of school up to each of them--with a full range of transfer options. Thus the use of racial percentages and classroom proportionality are no longer used as measurements of equal opportunity. Nonetheless, two court-related issues bear watching. First, the Supreme Court is about to rule on the scope of relief that can be awarded in a desegregation suit. The Justice Department is arguing that Federal courts lack the power to make States responsible for all transfer costs resulting from interdistrict student transfers. Second, courts should not be slow to declare unitariness when a school district has clearly exhibited good faith in attempting to comply with court desegregation decrees. (KH)

Department of Justice

STATEMENT

OF

WM. BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE

THE

NATIONAL ASSOCIATION of NEIGHBORHOOD SCHOOLS
THE HARLEY HOTEL

PITTSBURGH, PENNSYLVANIA
AUGUST 10, 1984

It is a particular pleasure to have this opportunity to share this evening with you. The National Association of Neighborhood Schools has long been an organization that holds the abiding respect of many of us for the courageous and principled position it has staked out and defended in the area of school desegregation. I and a majority of Americans -- black and white, brown and red, old and young -- applaud you for daring to place our children's education needs ahead of our courts' transportation preferences. Largely through your untiring efforts, neighborhood public schools are today beginning to experience a welcome revival. All I can say is don't let up now that we are seeing some progress; there is no more important struggle than the one you are fighting to ensure for the next generation of students, and generations to come, an enhanced educational environment in our public schools that provides to all those of school-age an equal opportunity to attend the school of their choice, free from racial discrimination.

This evening I would like to take a few minutes to review the desegregation efforts of this Administration, focusing briefly on the initiatives we have taken, and why; the progress that has been made; and what, as I see it, the future holds.

We can all feel a degree of satisfaction, I think, that the experiment with forced busing as the principal -- indeed, in many instances, the sole -- remedial tool to desegregate a public

school district is largely over. I am not so naive as to believe that court-ordered transportation of young students to distant schools far removed from home, parents, and neighborhood has ended entirely, but I can state with full conviction that often times tragic consequences of this tool of social engineering have been exposed, and, the ranks of its proponents are woefully depleted and in disarray.

I do not need to spend much time explaining to this group why a broad national consensus has gathered in opposition to forced busing. In many respects, forced busing was the prescription for its own destruction. It rested, in the first instance, on a most precarious foundation -- that is, the misguided notion that the desegregation command in Brown v. Board of Education required a perfect racial balance in all classrooms throughout the offending school district. Brown, of course, contained no such requirement. Indeed, quite to the contrary, Brown II explicitly underscored that "maximum integration" of schoolrooms is not the principal concern of the law; rather, the Supreme Court stated, "[at] stake [was] the personal interest of the plaintiffs in admission to public schools . . . on a [racially] nondiscriminatory basis." 349 U.S. at 300.

As we all know, in the early 1970's the civil rights issue of racial neutrality in student assignments was consumed by the social issue of racial proportionality in the classroom. Blame cannot properly be laid entirely at the doorstep of the

Supreme Court. To be sure, it ruled in 1971, in Swann v. Charlotte-Mecklenberg Board of Education, that race-conscious pupil assignments and mandatory student transportation are available remedial tools of school desegregation. But nowhere has the Court said -- in Swann or elsewhere -- that forced busing is constitutionally required. Rather, as made clear in Swann, it is but one of a number of remedial devices, to be used, if at all, only when "practicable," "reasonable," "feasible," "workable," and "realistic." 402 U.S. at 16. And, even at that, the Swann majority cautioned against reading into its acceptance of busing as an available desegregation remedy any "substantive right [to a] particular degree of racial balance." Id. at 24.

Nonetheless, lower federal courts throughout the 1970's largely ignored the Swann admonition. Modest use of a transportation remedy where "practicable" to assist the desegregation effort was, regrettably, misread as a judicial license to bus large numbers of children long distances to remote schools to achieve racial proportionality in all the classrooms.

Rather than achieving racial balance, however, this preoccupation with mandatory busing has generally produced racial isolation on a broader scale. In case after case, economically able parents have refused to permit their children to travel unnecessary distances to attend public schools, choosing instead to enroll them in private schools or to move beyond the reach of the desegregation decree. Justice Powell has commented on this phenomenon in the following terms:

> This pursuit of racial balance at any cost . . . is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one-race schools, courts may produce one-race school systems. 1/

After more than a decade of court-ordered busing, the evidence is overwhelming that the effort to desegregate through wholesale reliance on race-conscious student assignment plans has failed. The damage to public education wrought by mandatory busing is evident in city after city: Boston, Cleveland, Detroit, Wilmington, Memphis, Denver, and Los Angeles are but a few of the larger and thus more celebrated examples. Nor is it difficult to understand why. The flight from urban public schools contributes to the erosion of the municipal tax base which in turn has a direct bearing on the growing inability of many school systems to provide a quality public education to their students -- whether black or white. Similarly, the loss of parental support and involvement -- which often comes with the abandonment of a neighborhood school policy -- has robbed many public school systems of a critical component of successful educational programs.

Tragically, those who suffer the most are the very ones that the proponents of mandatory busing intended to be the greatest beneficiaries -- that is, the blacks and other minorities left within the inner city public school systems. It is they who, from

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1/ Estes v. Metropolitan Branches of the Dallas N.A.A.C.P., 444 U.S. 437, 450 (1980) (Powell, Jr., joined by Stewart and Rehnquist, J. J., dissenting from dismissal of certiorari as improvidently granted).

most accounts, have little to show educationally as a result of the past decade of court-imposed student assignment plans. Although findings are not absolutely conclusive in this regard, a major study released by the National Institute of Education in May of this year strongly indicates that racial-balance desegregation remedies have been ineffective in providing a better education for minority students. As David J. Armor, a noted desegregation expert, states in the report:

> The very best studies available demonstrate no significant and consistent effects of desegregation on Black achievement. There is virtually no effect whatsoever for math achievement, and for reading achievement the very best that can be said is that only a handful of grade levels from the 19 best available studies show substantial positive effects, while the large majority of grade levels show small and inconsistent effects that average out to about 0.

Small wonder, then, that this Administration committed itself to the pursuit of a different remedial approach to achieve the desegregation ideal announced in Brown -- one premised on consensus, not conflict. Our focus turned away from forced transportation and concentrated instead on desegregating dual school systems through an emphasis on voluntary student transfer techniques and expanded educational opportunities designed to attract students to the public school, not drive them away. Our remedial program has as its centerpiece special magnet schools and other curriculum enhancement programs that provide educational incentives to all children in the system. And, as the Constitution demands, the choice of schools is left to each student -- with a

full range of transfer options -- not to some preconceived assignment plan superimposed on the public school system by well-intentioned judges who misperceive racial percentages and classroom proportionality as a measurement of equal opportunity.

It is a bit too early to declare the magnet program a complete desegregation success. There are, however, a number of encouraging indicators and very few discouraging ones. The Justice Department has utilized its new remedial approach -- one could call it: "desegregation through reinvigorated education" -- in a variety of situations: from a large metropolitan area like Chicago to a small rural school district like Port Arthur, Texas. One of the best (or at least one of the most comprehensive) magnet programs was put in place late last year in Bakersfield, California. As expected, we are finding that magnet schools do indeed attract students, and -- when strategically placed and carefully designed -- can provide the needed incentive for white and black pupils to attend the same schools by choice, not by coercion.

In fact, a recent Department of Education survey of some 45 magnet programs in 15 school districts provided encouraging confirmation that "urban school districts can desegregate quite comprehensively by relying heavily on magnets. . . ." As that report observes:

> Citizens have been subjected to thirty years of political rhetoric about "forced busing," destruction of "the neighborhood school," and coercive intrusion into local control over education. As the imperative to desegregate takes hold in a community, therefore, residents brace for the worst to happen. The rhetoric leads voters toward the equivalent of a man-made disaster. Against the backdrop of this vision, magnets appear to be urgently desirable. A magnet can be designed to be receptive, hospitable, safe, educative, and desegregatively lawful.

We certainly are finding that to be the case. And, if one needs further evidence of the viability of this alternative remedial approach, consider this my friends: even the NAACP has just recently, in the Cincinnati school desegregation case, embraced the magnet school concept as an acceptable desegregation option.

In short, the Federal courts are, with increasing regularity, turning to the magnet alternative (in lieu of forced busing) to desegregate dual school systems; the most avid proponents of mandatory student assignments are beginning to rely on voluntary transfer measures that utilize educational enhancements as the principal incentive factor; and both Houses of Congress have voiced a strong preference for accomplishing the desegregation objective through means other than forced busing.. Against this backdrop, it is just a matter of time -- and not much time, at that -- before communities will be permitted to return the neighborhood public schools to their neighborhoods, with sufficient flexibility in attendance requirements to ensure that all children in the system, without regard to race, creed or national origin,

will be accorded the full range of educational opportunities in a desegregated school environment.

That is essentially the status, as I see it, of the busing question today. Before closing, let me quickly allude to what the future holds. One of the important issues currently being litigated in cases around the country concerns the scope of relief that can be awarded in a desegregation suit. The Supreme Court has spoken on several occasions on the limits of judicial authority in fashioning relief in a school case. 2/ Generally speaking, an intradistrict violation -- that is, a violation limited in extent to the boundaries of a single district -- requires intradistrict relief. In a recent case, however, that is currently pending in the Supreme Court on a petition for certiorari, Leggett v. Liddell, Nos. 83-1386, 83-1721 and 83-1838, the district court and the Eighth Circuit Court of Appeals, held the State responsible for all transfer costs resulting from students electing to commute daily from any of 23 suburban school districts into the city, and vice versa -- i.e., interdistrict transfers -- notwithstanding that the State was found responsible for an intradistrict violation only. The Supreme Court's response bears watching. The Justice Department is arguing in Liddell

2/ Milliken v. Bradley, 418 U.S. 717 (1974) (Milliken I); Milliken v. Bradley, 433 U.S. 267 (1977) (Milliken II); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977).

that the Supreme Court should adhere to its earlier pronouncements in the school desegregation area and hold that the Federal courts lack the remedial power to order such a result.

One last issue deserves special mention. One of the most troublesome features of school desegregation decrees is that they never seem to come to an end. For reasons that have never been altogether clear, there appears to be a general reluctance among district court judges who have fashioned relief in a school case to acknowledge many years -- in some cases decades -- later that the terms of the decree have long since been satisfied and that it is time to return the administration of the public schools to the elected officials who sit on the school board. As you know, the term of art that is used to signify the point at which the segregated, or dual, system has been dismantled is "unitariness" -- the segregated (or dual) school district has become desegregated (or unitary) in accordance with the court-ordered plan.

I have stated on a number of occasions, and will repeat here, that one of the most important issues for the 1980's in the field of school desegregation is, in my opinion, when, and under what circumstances, a school district under court order is entitled to a judicial declaration of unitariness, thereby releasing it from the court's jurisdiction. That issue is squarely before the district court in Colorado, where the Denver school board in the much-celebrated Keyes desegregation litigation is asking the court, some eight years after implementation of the court-ordered plan, for a declaration of unitariness.

We have joined in the Denver school board's request, urging the court to measure unitariness, not in terms of rigid racial percentages or the degree of racial balance throughout the school system, but rather in terms of the school board's good faith efforts to comply, to the fullest extent practicable, with the desegregation requirements imposed by the decree. If, the school officials have fully and faithfully complied with the terms of a comprehensive desegregation plan, we argue that a declaration of unitariness should follow -- even if some schools in the system due to factors such as demographic shifts, beyond the school board's control, may never have attained (or, even if attained, not continued to maintain) the precise racial percentages for student enrollment contemplated in the court-ordered plan.

It is high-time that our Federal courts released their hold on school districts that have been in compliance for some time with comprehensive desegregation decrees. Our public schools far better serve the educational needs of our youth if run by those who are answerable to the electorate for the decisions made than if left under the supervision of the Judiciary beyond the time necessary to cure fully the constitutional violation. There is, I sense, a growing unease among educators that, in the name of desegregation, we have in many instances surrendered to the courts the day-to-day responsibility of operating our public schools -- all too often with disappointing results. I therefore anticipate that the unitariness issue will begin to be joined with greater intensity in the months ahead.

I have, I am sure, gone on too long. Let me conclude by returning to my opening remarks. School desegregation is as critical an issue on the civil rights agenda as any we face today. Discrimination on account of race, whether it occurs in the admissions office, the schoolyard, or the classroom is intolerable and must be eradicated in its entirety wherever it occurs. At the same time, however, we cannot lose sight of the fact that the desegregation effort affects in a most crucial way the lives, aspirations and opportunities of our children. It serves no useful purpose to claim a racial-balance victory if in the process we have effectively destroyed -- or even seriously hindered -- educational potential of an entire generation of public school students. Regrettably the preoccupation with forced busing has left just such a legacy in too many jurisdictions.

Now, through your efforts and those of many others, the country appears to have altered its course, and returned to the ideals reflected in Brown v. Board of Education, where equal education, not transportation, is the predominant theme, and where the purpose is to afford all public school students, without regard to race, color or ethnic origin, an enhanced educational experience in a desegregated school environment free from unlawful discrimination. Your organization has been instrumental in helping to reshape public attitudes and policies along these lines, and I thank you for allowing me to share this time with you.