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ABSTRACT

Since the early 1970s the courts, the Federal Government, local governments, and school systems have wrestled with the difficulties that arise as race desegregation is implemented in school systems with substantial enrollments of national origin minority (NOM) students. Desegregating school systems generally produce plans to guide racial desegregation that involve only the use of strategies and measures aimed at correcting the harm endured by black students. It is argued that school desegregation planning and implementation need not infringe on the continuation and implementation of bilingual programs. Suggestions are given for addressing issues that arise in the following areas: (1) identification and definition of NOM students and staff; (2) setting fixed ratios for students or staff; (3) applying state and federal regulations affecting desegregation; (4) overall desegregation planning; (5) settling other logistics of desegregation implementation; (6) assignment of NOM students; (7) special education programming; (8) funding; and (9) monitoring deseg-egation plans. Desegregation planners can use this list of issues as a checklist of matters to consider in protecting the interests of NOM students during school desegregation. Nine court cases with a bearing on these issues are listed. (Contains 5 references.) (SLD)

# *PROTECTING THE RIGHTS OF NATIONAL ORIGIN LANGUAGE MINORITY STUDENTS DURING THE IMPLEMENTATION OF RACE DESEGREGATION PLANS*

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# Protecting the Rights of National Origin Language Minority Students During the Implementation of Race Desegregation Plans

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Since early in the 1970's the courts, federal and state officials, local school officials, and school desegregation planners have struggled with the difficulties that arise as race desegregation is to be implemented in school systems with substantial enrollments[1] of national origin minority (NOM)[2] students. This has been especially the case in school districts with substantial representation of Hispanics students.

Although desegregation mandates have been generally the outcome of legal complaints brought before the federal and state courts and government agencies by Black parents, historically, Hispanics have also appeared before the courts to break the patterns of *de jure segregation* that afflicted them (Roos, 1979). Yet, desegregating school systems continue to produce *educational plans* to guide racial desegregation which generally involve only the use of strategies and measures aimed at correcting the harm endured by Black students.

As long as complaints are initiated by Blacks, educational plans may continue to favor the interests and needs of Black students only. This practice received legal support in the past in cases like Keyes v. School District # 1,[3] where a desegregation court advanced the notion that

> ... Bilingual Education is not a substitute for desegregation. Although bilingual instruction may be required to prevent the isolation of minority (NOM) students in a predominantly Anglo school system...such instruction must be subordinate to a plan of school desegregation.[4]

However, there have been some exceptions. One federal appeals court cautioned desegregationists and school systems that they had a responsibility to ensure equal treatment for all students when it declared that

> No remedy for the dual system can be acceptable if it operates to deprive members of a third ethnic group of the benefit of equal educational opportunity."[5]

The same court found that the defendants' desegregation plan operated not only "to the detriment of Mexican Americans in theory, but also in practice." [6]

Several other federal courts (in cases involving school districts with a combined and substantial Black and Hispanic student enrollment) have also required the development of *educational plans* or *remedies* which protect the language rights of Hispanic and other language minority students.[7]

In 1974 the Supreme Court's decision in Lau v. Nichols[8] offered specific guidance on the matter of language rights for NOM students. Its intent was later codified by Congress into legislation establishing that

> No State shall deny equal educational opportunity to an individual on account of his her race, color, sex, or national origin, by--
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.[9]

This cumulative body of law has helped to define the right of language minority students to "understandable instruction"[10] and, occasionally, to "transitional" bilingual education.[11] It has also strengthened the argument that the rights of NOM students must be respected regardless of the structural and educational changes occurring within a school system. School district race desegregation plans must guarantee that these rights will be observed.

This notwithstanding, there is still considerable discussion among education practitioners on how best to achieve, in practice, concurrent compliance with both desegregation and national origin legal mandates. This is the case because many still believe that race desegregation and bilingual education (or the provision of other language services to NOM students) are mutually exclusive processes.

Other observers have argued that they can be made compatible. After all, both mandates are attempts at providing equal educational opportunity and equal benefits from the schooling experience for Black and NOM student populations.

In light of this ambivalence, it should be no surprise to hear of opposition to desegregation from some segments of the Hispanic community which view desegregation as having the potential to dismantle and disperse bilingual programs in the name of racial balancing in the public schools (Roos, 1979).

I will argue in this paper that school desegregation planning and implementation need not infringe upon the continuation and/or implementation of bilingual programs. A race desegregation plan need not be exclusive of measures which protect NOM student's rights, nor should it jeopardize or curtail educational programs designed for them. In fact, the desegregation process could work to enhance both bilingual services and other culturally relevant programs aimed at NOM student populations. The apparent conflict between the observance of both sets of rights (i.e., race and national origin desegregation rights) is, unfortunately, more a case of poor planning and/or bad faith implementation of race desegregation by school officials. These obstacles can be overcome. There is hope for the relative successful interface of both efforts.[12]

In the pages which follow, I will delineate conflict or problem areas that may arise as race desegregation is planned and implemented in school districts with multi-ethnic student populations. Hopefully, these points will assist school officials and others involved in the desegregation process in avoiding actions which may put them in conflict with NOM student populations and their respective communities. They may also serve to prevent the violation of the educational rights of NOM students and the equity rights of bilingual staff during the implementation of race desegregation plans. No attempt is made at comprehensiveness. I have merely drawn from personal involvement in race and national origin educational planning,[13] from the record of litigation in bilingual education and desegregation, and from the experiences of school districts implementing desegregation plans where NOM student populations are in substantial numbers.

The issues and practices hereforth identified are not in any particular order of importance. They have been organized under the given subheadings to facilitate their consideration during the various phases of development of a race desegregation plan.

## Identification/Definition of NOM Student and Staff

School districts with substantial NOM enrollments should take the following into consideration:

1. Fully identify and count NOM students and staff.

2. Fully assess the educational and language needs of NOM students. Such an assessment should result in the identification of those students eligible for bilingual services and those in need of other educational assistance. No assignment or re-assignment of NOM students ought to take place without this data. For instance, Judge Garrity's student desegregation assignment plan in Boston made these provisions to ensure ease of Hispanic involvement and the protection of bilingual services during the implementation of their school desegregation plan.[14]

3. Ensure that the authorities involve (the state, the court, etc.) have clearly defined the status of NOM students and staff in the desegregation process. Considerable conflict has surfaced when Hispanics have been defined as non-Black or "White" for purposes of desegregation, rather than affording them status as an "identifiable ethnic language minority" (see Cisneros, Keyes, and U.S. v. Texas). School districts can set policy to this effect regardless of the actions of the court. This was the case in Milwaukee's desegregation case.[15]

4. Avoid the tendency to describe all inter-group relations in Black and White terms only. This has led Whites to feel that if they can understand Blacks, they can understand other minorities (Fernández and Guskin, 1978). Lumping all minorities together with no regard for the particular educational needs of non-Black minorities can lead to the violation of their educational rights.

5. Eliminate the practice of declaring NOM students *eligible* for bilingual services under state law or OCR mandates as members of a "minority group," while classifying non-bilingually eligible NOM students as "Whites" with the intent to use them to desegregate predominantly Black schools (Báez et al, 1980).

6. Avoid the classification of NOM staff as "non-Black." Afford them status as "minority" and/or specialized bilingual staff.

## Setting of Fixed Ratios

Courts of law, state education agencies, and school systems often establish fixed racial ratios as parameters to define a desegregated school system. However, desegregation advocates and planners can persuade such agencies and institutions to:

1. Avoid the imposition of fixed student ratios set to define desegregated schools along Black and White lines only. No ratio ought to be set without consider-

ation of demographic data on NOM students and an adequate projection of population data on the future growth of such groups. (See Morgan v. Kerrigan, Keyes, U.S. v. Texas (1981) and Báez et al, (1980).

2. Avoid the imposition of fixed staff ratios which may function to prevent the assignment of NOM and bilingual personnel to schools or programs where they are needed.

## State and Federal Regulations Affecting Desegregation

In some cases race desegregation activity may be affected by the existence of state and federal regulations which define school desegregation (e.g., Illinois and Massachusett's racial balance regulations) or which establish criteria for the funding of desegregation efforts (e.g., Emergency School Aid Act regulations). Desegregation planners:

1. Should ensure that such regulations are not invoked to prevent creative ways to ensure equal and fair treatment of NOM students during the desegregation process. None that I know of prevent a school district from implementing desegregation related activities intended to enhance equal educational opportunities for NOM students.

2. Assessed whether these regulations may operate to prevent a desegregation plan from inclusion of NOM students in federally and state funded innovative educational programs (e.g., "Magnet" and "Specialty" schools). If they do, they should ask the court to modify or strike them from state codes as violative of the rights of NOM students.

## Overall Desegregation Planning

Planning for the implementation of a desegregation plan is the stage of the overall desegregation process where input can be sought from all interested and affected parties. Regardless of who initiated the action, in school districts with multi-ethnic populations, the involvement of national origin minority communities must be facilitated.[16] consequently, race desegregation planners should ensure that:

1. The *actors* in the planning process involve NOM individuals, leadership and staff at all levels of the process;

2. In preparation for the designing of the plan, data-gathering practices should include data on NOM students comparable to that collected for others [For example, when collecting data on student achievement, suspensions, drop-outs, school violence, special educational needs, staff needs, etc., school districts should also collect this data on NOM students];

3. When preparing local communities for involvement in the desegregation processes, information as well as training should also reach language minority parents, staff, and community members [Adequate and understandable translations of informational material must be available in the language of the larger NOM groups represented in the school system. Generally, in school district with substantial Hispanic populations, this is a must. Parents of NOM students ought to receive training on desegregation processes in a language they understand];

4. Parents and representatives from NOM communities are involved in citizen's committees and/or other organizations or entities charged with planning race desegregation approaches [Too often these entities have only involved Blacks and Whites]; and that

5. There is involvement of NOM administrative and instructional staff in the overall process of planning desegregation, and in writing/designing the desegregation plan.

## Other Logistics of Desegregation Implementation

Implementation of the desegregation plan(s) is perhaps the most conflict generating and the most emotionally charged phase of the overall process. It is also the phase where the most negligible acts are committed against the rights of NOM students and staff performed. Thus, courts of law, school officials, and desegregation planners should be cautious to avoid:

1. The closing of combined minority (Black and NOM) schools with no regard for the distinct educational needs of NOM students and the preservation and/or continuance of community supported language- and culturally-based programs intended for NOM students.

2. The unnecessary closing of predominantly NOM populated schools as a means to force NOM student involvement in a race desegregation effort.

3. The selection by school districts of sites for the placement of bilingual education programs which may further segregate NOM students and programs aimed at said students in already predominantly Black and/or minority schools.

4. The establishment of other NOM students oriented programs, e.g., cultural/ethnic programs, in predominantly Black and/or minority schools only. This can lead to more segregative abuses in the future.

5. The creation of "magnet", "specialty schools" or "vocational schools" that exclude both Limited English Proficient (LEP) and non bilingual-eligible NOM students. Such programs deny NOM students equal access and participation. A good example of this practice is the establishment of "magnet" schools where

student ratios are set for Black and White participants only, to the exclusion of Hispanics and other ethnic language groups.

6. The absence in the desegregation plan, and in desegregation guidelines, of components or measures that specifically address the educational needs of NOM student populations (both bilingual and non-bilingual needs). (See generally: U.S. v. Texas (1972), Morgan v. Kerrigan; Evans v. Buchannan; U.S. v. Texas (1981). [Desegregation plans often fail to make any mention of legal and educational mandates school officials have to comply with as it regards language programming for Hispanic and other ethnic language group students. They also often also fail to make reference to educational plans they may should institute for Hispanic students not participating in bilingual programs. This must be avoided.]

7. The failure to continue or expand specialized English language instructional programs legally required for NOM English dominant students identified as "under-achievers," and whom may have been re-assigned to other schools to meet racial balancing criteria.

8. The failure by school districts to hire or promote NOM staff to key administrative positions during race desegregation implementation (e.g., during administrative reorganization of a district caused by race desegregation mandates, few, if any, Hispanic are promoted to central administrative post as compared to Blacks or Whites).

9. The lack of policy on the assignment and utilization of NOM staff during concurrent implementation of race and NOM desegregation.

10. The failure by school districts to define the status of NOM instructional and supportive staff (aides, counselors, etc.) in relationship to seniority rules, and the retention of bilingual staff during overall staff cut-backs or reductions. [Districts rarely negotiate with teachers unions "contractual clauses" to guarantee the retention of bilingual staff at a time of declining student enrollment (See generally Cintron v. Brentwood).]

11. The pairing of schools during desegregation with no regard to the bilingual education needs of NOM students assigned to the paired schools.

12. The changing of school feeder patterns with no regard for the effect this may have on NOM bilingual program participants.

13. The exemption of predominantly NOM schools with bilingual programs from participation in race desegregation implementation. [This practice can have serious consequences for future planning of educational services to NOM students, and it may contribute to further isolation of NOM identifiable schools (Báez et al 1980).

14. The designing of desegregation "Human Relations" programs which exclude consideration of NOM students in the school system; the absence of NOM staff from the administration of such programs; the failure by such programs to sensitize all groups (Black, White, Hispanic, and other ethnic groups) as to the race desegregation plan and its impact on NOM programs/students; and the failure to provide "Human Relations" inservice to NOM students/staff moved or reassigned during desegregation implementation.

## Issues Relative to the Assignment of NOM Students

The Student Assignment component of a race desegregation plan tends to be the heart of the overall desegregation process, and often the most controversial part of the desegregation plan. If carefully designed, this component can play a major role in the acceptability of the plan. Thus, courts of law, school officials and other desegregation planners must ensure:

1. That the student assignment plan makes provisions for the assignment of NOM students in a manner that will guarantee access to bilingual programs and other language services, as well as their access to culturally relevant curriculum. Morgan v. Kerrigan, made a significant contribution to the student assignment of Hispanic and other NOM students by requiring that they be identified, assessed for their educational needs, and assigned first to programs designed to meet their needs.

2. That there be sufficient "clustering" of NOM students to facilitate the implementation of viable bilingual services and other culturally relevant programs.

3. That no arbitrary dispersal of NOM students not eligible for bilingual services be made in the name of racial balance. For example, in districts with substantial numbers of Hispanic students, often less than twenty-five percent of these are involved in bilingual programming. The rest are often viewed as subject to the same type of movement as White and Black students. While this may appear to be a fair practice, caution must be taken to facilitate some clustering of these students and to prevent their isolation in predominantly Black and White majority schools.

## Special Education Programming

Precautions must be taken to ensure that the rights of NOM disabled/handicapped students to special programming are respected, such as the right to bilingual special education services in the "least restrictive environment." A sub-plan for the treatment of these students should be developed that includes special procedures for their assessment and assignment, provisions for the placement of bilingual special education programs in schools with bilingual programs and with clusters of NOM

students/staff, and provisions for the hiring and retention of bilingual special education personnel.

## Funding Considerations

Desegregation planners should ensure that specific and distinct budgetary allocations are made for the provision of services to NOM students during the desegregation process in ways that will prevent conflict with monetary allocations made to meet the desegregation needs of Black students.

## Monitoring of Desegregation Plans

Monitoring the desegregation process has become a major aspect of desegregation activity. Courts, state education agencies, and school systems are engaged in sophisticated and comprehensive monitoring. However, in most school systems, such efforts have failed to involve NOM parents and community representatives, as well as NOM professional expertise. For example, in school systems with substantial populations, where the implementation of desegregation is bound to have an impact on Hispanic students, there should be no excuse for the absence of Hispanics in task forces and other entities charged with monitoring responsibilities.

## CONCLUSION

Again, this is not a comprehensive listing of all issues and problems that may arise in the school desegregation process. However, desegregation planners can make use of this document as a "checklist" of matters to considered.

Desegregation planners should also take care to review the experiences of school systems with multi-ethnic populations which underwent, or are presently engaged in desegregation implementation. The legal and educational precedents established by their experiences may prove crucial in avoiding implementation problems and the alienation of Hispanic and other NOM populations during desegregation process.

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## LIST OF SELECTED CASES

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Cintron v. Brentwood Union Free School District 455 F. Supp. 57 (1978).

Cisneros v. Corpus Christi Independent School District, 467 F. 2d 142 (1972).

Evans v. Buchannan (W...ington) 416 F. Supp. 328 (1976).

Keyes v. School District No. 1, "Memorandum Opinion and Order." 380 F. Supp. 673; 421 F. 2d 465, 480 (1975); and 413 U.S. 189 (1973). Also, most recently, see Keyes v. School District No. 1, 576 F. Supp. 1503 (D.Colorado, 1983).

Morgan v. Kerrigan, 401 F. Supp. 216 (1975).

U.S. v. Texas (San Felipe del Rio), 342 F. Supp. 24 (1971).

U.S. v. Texas (Austin), 467 F. 2d 848 (1972).

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# NOTES

1. See, Pottinger, Stanley J. Director, Office for Civil Rights, U.S. Department of Health, Education and Welfare, Memorandum, May 25, 1970 (35 fed. Reg. 11595): "School Districts With More Than Five Percent National Origin-Minority Group Children Regarding Identification of Discrimination and Denial of Services on the Basis of National Origin." In this memo the U.S. Office for Civil Rights declares that school districts with at least 5% or more national origin students must take steps to provide them with appropriate instruction. Throughout this paper I will use the 5% standard as suggesting a *substantial* NOM student enrollment.

2. As used throughout this paper, "national origin minority" students or staff are those individuals whom, by reason of their ethnic/national background and their use of a language other than English, are considered an ethnically identifiable group and have so been designated by government agencies and institutions.

3. (Denver) 521 F. 2d 465 (10th Cir. 1975).

4. Id. at 480.

5. U.S. v. Texas Education Agency, 467 F. 2d 848, 869 (5th Cir., 1972)

6. Id. at 869, footnote # 33.

7. Several court decisions have specifically involved the desegregation of NOM students and the provision of specialized educational services to these students as a means to remediate past discriminatory practices. Among these, the most significant have been: Cisneros v. Corpus Christi, 324 F. Supp. 599 (S.D. Tex. 1970); U.S. v. Texas, (San Felipe Del Rio), 342 F. Supp. 24 (1971); Keyes v. School District #1 (Denver), 413 U.S. 189 (1973); Morgan v. Kerrigan (Boston), 401 F. Supp. 216 (1975); Bradley v. Milliken (Detroit), 402 F. Supp. 1096 (1975); U.S. v. Texas, 506 F. Supp. 405 (1981); and, most recently, Keyes v. School District No. 1, 576 F. Supp. 1503 (D.Colorado, 1983).

8. 414 U.S. 563 (1974).

9. Equal Educational Opportunities Act of 1974, 20 U.S.C. subsection 1703(f).

10. See, again, Lau v. Nichols, 414 U.S. 563 (1974).

11. See, again, Keyes v. School District No. 1, 576 F. Supp. 1503 (D.Colorado, 1983).

12. I direct the reader to my work and that of two other colleagues on the Milwaukee case: Tony Baez, Ricardo Fernandez, and Judy Guskin, Desegregation and Hispanic Students: A Community Perspective. Rosslyn, Virginia: National Clearinghouse for Bilingual Education, 1980. This is a case study of a district where race desegregation implementation did not adversely affect bilingual education. Rather, it worked to expand for Hispanic students and others.

13. The author has done extensive work and consultation on issues relative to bilingual education and race desegregation. Most important was his coordination of a two-day gathering of national bilingual and desegregation experts held in Chicago (June 23-25, 1980), where issues and problem areas relative to the interface of these mandates were extensively discussed.

14. See Judge Garrity's Student Assignment Plan in Morgan v. Kerrigan, 401, F. Supp. 216 (1975).

15. See Armstrong et al. v. O'Connell et al. Civ. Action No. 65-C-173, Order of March 17, 1977 (U.S. Dist. Court Easter District of Wisconsin), and Armstrong v. O'Connell, 451 F. Supp. 817 (E.D. Wis. 1978). On October 5, 1976 the Milwaukee School Board adopted a policy statement declaring that Hispanic students would be treated as a distinct national origin group during the desegregation process titled: "Major Issues, Assurances, and Legal Principles Affecting the Hispanic Pupil During Desegregation Efforts." Also see the 1979 final out-of-court settlement in this case.

16. See, again, U.S. v. Texas Education Agency, 467 F. 2d 848, 869 (5th Cir., 1972).