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De-Facto Segregation

Paul Auster

DE-FACTO SEGREGATION

INTRODUCTION

De-facto segregation in public schools refers to a situation in which schools are attended predominantly by one race, due to the racial composition of the neighborhoods served by those schools. How the courts have dealt with the problem of de-facto segregation and the views of educators and other competent parties on the subject, will be subject of this paper.

CURRENT CASES

When the Supreme Court decided in *Brown v. Board of Education*[1] that the maintenance of separate but equal educational facilities was unconstitutional, it based its decision, in part, on psychological data[2] that tended to show that these facilities produced ". . . a feeling of inferiority" [3] in the student who was compelled to attend these facilities. The court further held that under these conditions the education received by a Negro student was not equal to that received by a white student.[4]

Although many areas of the country were not faced with this type of educational problem, they were faced with another type, de-facto segregation. Negro leaders in these areas held the belief that where a school is attended predominantly by the Negro race, despite the cause, the ill effects the Supreme Court spoke of in deciding *Brown* were still produced. They therefore concluded that the due process and equal protection clauses of the fourteenth amendment,[5] as interpreted in *Brown*, compelled the integration of the public schools to correct de-facto segregation.

One of the first cases in which a court was confronted with this contention was *Taylor v. Board of Education of New Rochelle.*[6] Al-

1. Brown v. Board of Education of Topeka et al. 347 U.S. 483, (1954).
2. 347 U.S. 483, 494 (1954).
3. 347 U.S. 483, 494 (1954).
4. 347 U.S. 483, 495 (1954).
5. ". . . [N]or shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
6. 191 F. Supp. 181 (S.D.N.Y. 1961); 195 F. Supp. 231 (S.D.N.Y. 1961); *aff'd* 294 F.2d 36 (2d Cir. 1961); applied in part 221 F. Supp. 275 (S.D.N.Y. 1963); *cert. denied* 368 U.S. 940 (1961).

though the court, in *Taylor*, found *Brown* applicable and allowed the Negro plaintiffs to attend integrated schools outside their normal school district,[7] this result and the broad language used by the court in its decision[8] must be read in light of the court's factual finding,[9] that districts were so drawn and its transfer policy so administered that Negro pupils were confined to one school and whites excluded from this school.[10]

Thus, *Brown* was applicable to *Taylor* not because it held the Constitution requires integration, but that in both cases affirmative acts toward the establishment of a segregated school system were found. As the court said:

> I see no basis to draw a distinction legally or, morally, between segregation established by the formal establishment of a dual system of education, as in Brown, and that created by gerrymandering school district lines and transferring of white children in the instant case. The result is the same in each case: the conduct of responsible school officials has operated to deny to Negro children the opportunity for a full and meaningful educational experience guaranteed them by the 14th Amendment. . . . Having created a segregated school system the constitution imposed upon the Board the duty to end segregation, in good faith and with all deliberate speed.[11]

A situation similar to *Taylor* was before the court when it decided *Jackson v. Pasadena School Board*.[12] Negro, plaintiff, sought a transfer

7. 294 F.2d 36, 39 (2d Cir. 1961).

8. See for example 191 F. Supp. 181 at 195, where the court states, "But, inability to find a perfect answer is hardly justification for refusal to do anything. Alternatives have been proposed by experts and prominent civic organizations while not perfect, they contained much merit and offered a decided improvement over the boards' policy of inertia."

9. On this point it is interesting to note a comment made by a court in deciding a recent case, "And apparently the case [Taylor] would not have been decided by the courts as it was had they not [found] this testimony [that the school districts were deliberately gerrymandered to achieve a segregated school system true]." Jackson v. School Board of Lynchburg, Virginia, 203 F. Supp. 701, 705 (W.D. Va. 1962).

10. 191 F. Supp. 181, 184-7 (S.D.N.Y. 1961).

11. 191 F. Supp. 181, 192-3 (S.D.N.Y. 1961), and see also Taylor v. Board of Education, 294 F.2d 36, 39 (2nd Cir. 1961).

12. 31 Cal. Rptr. 606, 382 P.2d 878 (1963). California Administrative Code, Title 5, section 2010, provided: "STATE BOARD POLICY. It is the declared policy of the State Board of Education that persons or agencies responsible for the establishment of school attendance centers or the assignment of pupils thereto shall exert all effort to avoid and eliminate segregation of children on account of race or color."

California Administrative Code, Title 5, section 2011, provides: "ESTABLISHMENT

to a school outside his normal attendance district. Although plaintiff's district had not been gerrymandered, as was the case in *Taylor*, the surrounding districts were. As a result, white students from neighboring districts were allowed to attend predominantly white schools instead of attending school in plaintiff's district that was predominantly Negro.[13] The fact that plaintiff's district was predominantly Negro before the gerrymandering does not appear to have been given any consideration by the court in reaching the result it did.

The court, relying on *Brown* in part, granted plaintiff his transfer.[14] Then, by way of dicta, the court stated that even in the absence of an affirmative act, school boards are under a duty to correct the racial imbalance that results from de-facto segregation. This is where *Jackson's* importance may be found. Speaking on this, the court said:

> Although it is alleged that the board was guilty of intentional discriminatory action, it should be pointed out that even in the absence of gerrymandering or other affirmative discriminatory conduct by a school board, a student under some circumstances would be entitled to relief, where, by reason of residential segregation, substantial racial imbalance exists in his school. So long as large numbers of Negroes live in segregated areas, school authorities will be confronted with difficult problems in providing Negro children with the kind of education they are entitled to have. Residential segregation, in itself, is an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior. Where such segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in

OF SCHOOL ATTENDANCE AREAS AND SCHOOL ATTENDANCE PRACTICES IN SCHOOL DISTRICTS. For the purpose of avoiding, insofar as practicable, the establishment of attendance areas and attendance practices which in practical effect discriminate upon an ethnic basis against pupils or their families or which in practical effect tend to establish or maintain segregation on an ethnic basis, the governing board of a school district in establishing attendance areas and attendance practices in the district shall include among the factors considered the following: (a) The ethnic composition of the residents in the immediate area of the school. (b) The ethnic composition of the residents in the territory peripheral to the immediate area of the school. (c) The effect on the ethnic composition of the student body of the school based upon alternate plans for establishing the attendance area or attendance practice. (d) The effect on the ethnic composition of the student body of adjacent schools based upon alternate plans for establishing an attendance area or an attendance practice. (3) The effect on the ethnic composition of the student body of the school and of adjacent schools of the use of transportation presently necessary and provided either by a parent or the district."

13. 31 Cal. Rptr. 606, 608; 382 P.2d 878 (1963).

14. *Id.* at 610.

> the classroom if school attendance is determined on a geographical basis without corrective measures. The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps insofar as reasonably feasible to alleviate racial imbalance in schools regardless of its cause.[15]

Although the court does not directly state that they base the above on *Brown*, the language they use closely parallels that used by the Supreme Court in deciding *Brown*. In *Brown*, the Supreme Court spoke of the "feeling of inferiority" that deliberate segregation caused; the *Jackson* court held that, "[r]esidential segregation in itself is an evil which tends to frustrate youth in the area . . ." [16] Just as the Supreme Court, in the second *Brown* decision, stated that its ruling that schools should be integrated "with all deliberate speed" be determined in light of such factors as, ". . . administration, arising from the physical conditions of the school plant, the school transportation system, personnel . . . ," [17] the court, in the instant case, states that in correcting racial imbalance, ". . . the school [may give] consideration . . . to the various factors in each case, including the practical necessities of given operations . . . to the degree of racial imbalance in the particular school . . . [and] the difficulty and effectiveness of revising school boundaries so as to eliminate segregation and the availability of other facilities to which students could be transferred." [18] By adopting this approach, the court is able to hold, by implication, that *Brown* requires local school boards to integrate their schools to correct racial imbalance, but avoids the issue directly by not citing *Brown* to support their holding.

In two recent cases, the courts were directly confronted with the issue that *Jackson* passed on by way of dicta. It appears that these were the first courts so confronted. In *Bell v. School Board of Gary Indiana*,[19] Negro plaintiffs, in a class action, sought a declaratory judgment, alleging that defendant school board had deliberately gerrymandered its

15. *Supra*, note 13. See Bunche v. Board of Education of the Town of Hempstead, 204 F. Supp. 150 (E.D.N.Y. 1962) at 153, where the court states, "So here it is not enough to show that residence accounts for the facts of segregation and to contend that therefore the segregation is ineluctible." See also Blocker v. Board of Education of Manhasset, N. Y., 226 F. Supp. 208 (E.D.N.Y. 1964).

16. *Supra*, note 13 at 609.

17. 349 U.S. 300 (1955).

18. *Supra*, note 13 at 610.

19. 213 F. Supp. 819 (N.D. Ind. 1963). The suit was primarily concerned with two schools in the city of Gary that had been affected by redistricting.

school attendance areas to achieve a segregated school system and thus compel plaintiffs to attend inferior segregated schools in violation of their constitutional rights.[20] Plaintiffs further alleged that they had a "constitutional right" to attend integrated schools.[21] The District Court, finding that the predominance of one race in certain school districts was caused by the housing patterns in those districts,[22] and not by the affirmative acts of the defendant,[23] denied plaintiff's motion.[24] On appeal, the United States Court of Appeals for the 7th Circuit affirmed the lower court's ruling.[25] The Supreme Court denied certiorari.[26]

Bell is the first Court of Appeals case dealing directly with the problem.[27] *Bell's* importance is further realized when one notes that it was decided under conditions that typify de-facto segregation, *i.e.* concentration of Negro population in one area[28] and many schools being attended predominantly by one race,[29] without any administrative action being taken to achieve these results. It was for these reasons that one

20. 213 F. Supp. 819, 820 (N.D. Ind. 1963).

21. 213 F. Supp. 819, 820 (N.D. Ind. 1963).

22. 213 F. Supp. 819, 827 (N.D. Ind. 1963).

23. 213 F. Supp. 819, 826 (N.D. Ind. 1963). On this point the court noted, "From time to time protests have been made to the School Board by Negro groups concerning the construction of contemplated buildings on the grounds that the planned location would create a racial imbalance in the school. The evidence indicates that attention was given to all of these protests and that on one or more occasions the construction of schools already planned for a certain location was held up or cancelled because of the protests."

24. 213 F. Supp. 819, 831 (N.D. Ind. 1963).

25. 324 F.2d 209 (7th Cir. 1963).

26. 84 S. Ct. 1223 (1964).

27. N. Y. Times, Nov. 2, 1963, p. 12, col. 3. Although not directly confronted with this issue courts have ruled in accord with *Gary* by way of dicta. See for example, Evans v. Buchanan, 207 F. Supp. 820, 823-4 (D. Del. 1963); Borden v. Ripley 247 F.2d 268, 271 (3rd Cir. 1957); Jeffers v. Whitely, 309 F.2d 621, 629 (4th Cir. 1962); Thompson v. School Board of Arlington County Virginia, 204 F. Supp. 620, 625 (E.D. Va. 1962); Brown v. Board of Education of Topeka, Kansas, 139 F. Supp. 468, 470 (D. Kans. 1955) and Briggs v. Elliott 132 F. Supp. 776, 777 (E.D. So. Car. 1955). It therefore appears that the majority of cases that dealt with the issue by way of dicta are also contra to Jackson.

28. 213 F. Supp. 819, 822 (N.D. Ind. 1963). The court stating, "The Negro population in Gary is concentrated in what is generally called the 'Central District' . . ."

29. 213 F. Supp. 819, 820. "In the school year 1961-62, 10,710 of the students enrolled in the Gary school system attended fourteen schools which were 100% white; 16,242 students attended twelve schools which were populated from 99-100% by Negroes; 6,981 students attended five schools which were from 77-95% Negro; 4,066 attended four schools which had a range from 13-37% Negro; 5,465 attended five schools which had a Negro population from 1-5%." A detailed chart of the racial composition of each school is presented at 821.

hoped that the Supreme Court would grant certiorari and decide the issue presented in *Bell*.[30]

In support of these allegations, plaintiffs had argued that defendants were under an affirmative duty to correct the "racial imbalance" in the Gary school system, under the law established in *Brown*.[31] The court rejected this argument by showing that students were assigned and boundary lines drawn upon criteria other than race[32] and therefore *Brown* was not applicable to the case before it because students were not separated "solely because of their race," [33] the practice that existed when the court decided *Brown*.

Plaintiffs further attempted to support their allegations by citing *Taylor*.[34] Here again the court distinguished the factual finding in the case before it and that presented in the case cited by plaintiffs. It pointed out that in *Taylor*, ". . . the board had deliberately drawn the district lines" to achieve a segregated school system, whereas in the case before it, no "intent and purpose" to achieve a segregated school system was shown on the part of the defendant board.[35]

Bell thus clearly points out why these two often-cited cases are not applicable to a situation of pure de-facto segregation. However, the court in the instant case rejected *Brown* and *Taylor* on a factual and not a legal basis. The legal criteria established by the three cases is

30. 347 U.S. 483 (1954). It had appeared that the Supreme Court might be in accord with the above interpretation of *Taylor* as applied to de-facto segregation. In denying the New Rochelle School Board's suit, to stay the Court of Appeals order requiring Negro students to attend integrated schools the court said: "The petitioners argue in their formal application that there is presented a question 'as to whether there is an obligation on a school district whenever the Negro attendance in a school reaches a high percentage to abandon a rule of law based on residence and to establish a racial quota system.' However, the District Court found that the petitioners had deliberately created and maintained the Lincoln Elementary School as a racially segregated school. 191 F. Supp. 181. Upon its own examination of the evidence, the Court of Appeals concluded that this crucial finding is . . . supported by the record. 294 F.2d 38. Therefore, the question which the petitioner claims is presented by the case (as to which question, and its importance, I intimate no view) could be before this court only if the court overturned the factual findings concurred in by the two lower courts. The petitioners have not suggested reasons for believing that these findings would be held to be clearly erroneous." 82 S.Ct. 10 (1961).

31. 213 F. Supp. 819, 823-24 (N.D. Ind. 1963).

32. 247 U.S. 483, 494 (1954).

33. 101 F. Supp. 181 (S.D.N.Y. 1961); 195 F. Supp. 231 (S.D.N.Y. 1961); *aff'd*, 294 F.2d 36 (2nd Cir. 1961); applied in part, 221 F. Supp. 275 (S.D.N.Y. 1963), *cert. denied*, 368 U.S. 940 (1961).

34. 213 F. Supp. 819, 828 (N.D. Ind. 1963). See 191 F. Supp. 181, 192, 3 and 294 F.2d 36, 39.

35. 213 F. Supp. 819, 826 (N.D. Ind. 1963).

the same, *i.e.*, if an affirmative act to achieve segregation is shown, then the board is under a duty to desegregate its schools.

Balaban v. Rubin[36] presented the court with a somewhat different situation, in that white parents were opposing the Board of Education's rezoning a new junior high school in order to correct racial imbalance. The criteria established by the court to determine the legality of the Board's zoning was unique in the area of de-facto segregation.

Plaintiffs brought suit on behalf of their children and others similarly situated to annul a Board of Education ruling that transferred their children[37] to a new junior high school,[38] outside their former attendance area.[39] The school to which the Board sought to transfer plaintiffs' children had its boundaries so drawn that its enrollment was 35.2% Negro, 33.5% Puerto Rican, and 31.2% white.[40]

The Supreme Court,[41] finding that race was a prime consideration in determining the attendance areas for the new junior high school,[42] held that a New York Education Law was violated[43] and granted plaintiffs the relief sought. On appeal the Appellate Division[44] viewing the

36. 242 N.Y.S.2d 973 (1963); 243 N.Y.S.2d 472 (1963); *rev'd;* 248 N.Y.S.2d 574 (1964); 14 N.Y.2d 193 (1964), *cert. denied* 85 S. Ct. 148 (1964). This suit was only concerned with a specified 12 block area of J.H.S. 275's attendance area.

37. "Subject to the provisions of this chapter, the board of education: Shall . . . regulate the admissions of pupils and their transfer from one class, or grade to another as their scholarship shall warrant; and shall determine the school where each pupil shall attend." EDUCATION LAW § 2503 SUBD. 4 PAR. D. REPORTED IN 16 MCKENNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED 80 PT. 2.

38. "A board of education is authorized and it shall have power . . . to construct new buildings . . ." EDUCATION LAW § 2556 SUBD. 1. Reported in 16 MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED 143 PT. 2.

39. 242 N.Y.S.2d 973 (1963). "A person over five and under twenty-one years of age is entitled to attend the public schools maintained in the district or city in which such person resides. . ." Education Law § 3201 subd. 1. Reported in 16 MCKINNEYS CONSOLIDATED LAW OF NEW YORK ANNOTATED 324 pt. 2. The court, in the instant case interpreted this to mean the school nearest the pupil's home.

40. 242 N.Y.S.2d 973, 975 (1963). It should be noted that the board rejected a zoning proposal that would have produced a student body that was 52% Negro, 34% Puerto Rican, and 14% white.

41. 242 N.Y.S.2d 973 (1963).

42. 242 N.Y.S.2d 973, 974 (1963).

43. "No person shall be refused admission into or be excluded from any public school in the State of New York on account of race, creed, color or national origins." Education Law § 3201. Reported in 16 MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED 323 pt. 2. On this point, see Cooper v. Aaron, 358 U.S. 1, 17 (1958). Where the court states: "In short the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this court in *Brown* can neither be nullified openly and directly by state [officials], nor nullified indirectly by them. . ."

44. 248 N.Y.S.2d 574 (1964).

statute differently[45] held that in the situation presented, race may be a factor considered in determining the attendance areas for the new school to prevent segregated schools,[46] reversing the Supreme Court. The Court of Appeals,[47] finding that the Board's acts were neither "arbitrary, capricious, or unreasonable," [48] affirmed the Appellate Division's ruling. Both the Appellate Division and the Court of Appeals emphasized that no child would have to walk farther to the new school than to the old and that bussing was not involved,[49] certiorari being denied by the Supreme Court.[50]

In reaching its decision, the Appellate Division may appear to be inconsistent in its language. Adhering to the view that the Constitution does not require integration,[51] the court states:

> A school system developed on the neighborhood school plan, honestly and conscientiously contructed, need not be destroyed or abandoned because the resulting effect is to have a racial imbalance in certain schools where the district is populated almost entirely by Negro or white.[52]

However, the court is then quick to note that although integration is not required, it "does not mean that integration is prohibited or not permitted." [53]

One feels that the court in using this language meant to draw a careful distinction between the integration of new schools and established schools. Thus, in the instant case, those students who were previously attending another junior high school were not transferred to J. H. S. 275 while only those students who were just entering J. H. S. were designated to attend J. H. S. 275.[54] This distinction, between the

45. 248 N.Y.S.2d 574, 580, 583 (1964). "It is thus conclusive from the history of section 3201 that its sole purpose was to vitiate the effects of the *Cisco* decision allowing separate schools for Negroes and to prevent segregation in the school system. . . It is also our opinion that, in any event, if Section 3201 of the Education Law can be utilized to defeat efforts to desegregate schools, then, in the light of the Brown decisions by the Supreme Court, the statute would have to be declared unconstitutional."

46. 248 N.Y.S.2d 574, 580 (1964).

47. 14 N.Y.2d 193 (1964).

48. 14 N.Y.2d 193, 196 (1964).

49. 14 N.Y.2d 193, 196 (1964); 248 N.Y.S.2d 574, 577 (1964).

50. N.Y.T. (Oct. 20, 1964) p. 1, col. 1.

51. 248 N.Y.S.2d 574, 581 (1964).

52. *Ibid.*

53. *Id.* at 582.

54. 242 N.Y.S.2d 574, 584 (1964).

new and the established school, appears to be continued by the court in answering plaintiff's allegations that racial quotas[55] were used in determining the disputed attendance areas. The court views the predetermined racial composition of the new J. H. S. as being only temporary:

> Once the geographic boundaries (or zone) for attendance at J. H. S. 275 are prescribed, every child residing in that zone, if he has the necessary educational qualifications, may go to that J. H. S. regardless of race or color and without any limit as to percentage or number of qualified pupils of his own or any other race or color.[56]

To support its position that race may be a factor in determining attendance zones, the Appellate Court cited four cases[57] upholding race as a factor in pupil placement. However, one notes that in each of the cases cited the court was faced with deliberate acts of segregation by school boards,[58] a factor not present in the instant case. Thus, one does not feel that the Appellate Court supported its decision with adequate judicial precedent.

In upholding the Board's determination of the new attendance areas,[59] the Court of Appeals applied somewhat different criteria than the Appellate Division. The higher court judged the Board's acts as an administrative decision[60] and although race was a factor considered by the Board,[61] held that the Board did not exceed its statutory powers to

55. 242 N.Y.S.2d 574, 584 (1964). The court defining a quota system as, "the establishment of a fixed immutable ratio in order to achieve and thereafter to *maintain* and *preserve* the same racial composition."

56. 242 N.Y.S.2d 574, 584 (1964). On this point the court is consistent with prior statements. Once the first class enters the schools the school would then be viewed as an established school and as the court previously noted on pages 580-581 will not be disturbed despite the resulting racial composition.

57. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); 349 U.S. 294 (1955); Taylor v. Board of Education of New Rochelle, 191 F. Supp. 181 (S.D.N.Y. 1961); 195 F. Supp. 231 (S.D.N.Y. 1961); *aff'd* 294 F.2d 36 (2d Cir. 1961); *cert. denied* 368 U.S. 940 (1961); applied in part, 221 F. Supp. 275 (S.D.N.Y. 1963); Clemons v. Board of Education of Hillsboro, Ohio, 248 F.2d 853 *cert. denied* 350 U.S. 1006 (1956); Jackson v. Pasadena City School District, 59 Cal.2d 876, 382 P.2d 378 (1963).

58. See previous sections of this paper that contain the cases cited by the court.

59. 14 N.Y.S.2d 193 (1964).

60. C.P.L.R. SECT. 7803 SUBD. 3.

61. For decisions in other jurisdictions upholding race as a criterion in drawing school attendance zones where no deliberate acts of segregation were shown, see Fuller v. Volk, 230 F. Supp. 25 (D.N.J. 1964); Morean v. Board of Education of Montclair, 42 N.J. 237, 200 A.2d 97 (1964) where the court declares at page 100: "Nor need it [a school board] close its eyes to racial imbalance in its schools which though fortuitous

assign pupils[62] or to determine the site of new schools.[63] Thus, the Board's acts were not "arbitrary, capricious or unreasonable." [64] This appears to be the first case in which a Board of Education's acts to correct de-facto segregation were decided by these criteria.[65]

Had the Court of Appeals upheld the lower court's decision, it would have, in effect, eliminated all the methods advocated by Negro groups to correct de-facto segregation. School attendance areas could not be drawn and schools built to achieve a more favorable racial balance, the court impliedly holding that bussing would not be an acceptable method while allowing the above mentioned methods. *Balaban* gains importance when one notes that the methods upheld by the court to correct racial imbalance *i.e.* the building of schools in "fringe areas" and the redistricting of attendance areas for new schools, are the basis of a multi-million dollar program by the New York City Board of Education to correct de-facto segregation in that city.[66]

The court's approach in *Balaban* is perhaps the most acceptable method of achieving integration. It provides a starting point for integration that does not disturb those already attending school but as the following illustrates allows these pupils to become part of the integration program at a later stage. It also does not inconvenience pupil or parent through bussing. By allowing the construction of schools in "fringe areas" the board will be able to correct racial imbalance where it is most prevalent.

Applying *Balaban* to the elementary and high school levels one may be able to see how the integration of all pupils in an area might be achieved. Assume that a new elementary school and high school are built to serve

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in origin presents the same disadvantages as are presented by segregated schools." The court further noting on the same page: "Constitutional color blindness may be wholly apt when the frame of reference is an attack on official efforts toward segregation; it is not generally apt when the attack is an official effort toward the avoidance of segregation." For a brief background of the *Morean* case seen the New York Times of September 8, 1961 at p. 20 and November 4, 1962, p. 30.

62. EDUCATION LAW § 2503 SUBD. 4, PAR. d.

63. EDUCATION LAW § 2556 SUBD. 1.

64. 14 N.Y.2d 193, 195 (1964).

65. The only reference the higher court may be deemed to have made to constitutional issues is when it states: "Therefore we hold section 3201 of the Education Law is in no way violated by this plan *nor was there any other legal impediment to its adoption.*" [*Italics* added.] The lose dissent from the court of appeals decision viewed the boards acts as violating the equal protection clause of the Federal and New York State Constitutions.

66. N.Y.T. (Sept. 5, 1964), p. 34, col. 6; N.Y.T. (Aug. 26, 1963), p. 1, col. 1.

a similar area as J. H. S. 275 and meet the criteria established[67] by the court in the instant case. Since the students entering the elementary school and high school had not attended an elementary school or high school previously, they would be in the same position as plaintiffs in *Balaban*. Thus, the junior high school students who resided in J. H. S. 275's attendance area who were not transferred would, upon entering high school, attend the new high school with its initial racial composition being predetermined. Barring large population shifts, all schools in an area would have a favorable racial composition.

Balaban did not decide all the important areas of the de-facto segregation problem. It did not rule on the validity of the "Princeton Plan" [68] nor did it rule on redistricting of schools without the division required by the "Princeton Plan." However, it appears that these issues will be confronting the court in the near future.[69]

Despite what appear to be the court's motives in upholding the Board's acts, the use of race as a factor in drawing school attendance areas, where no deliberate acts of segregation have been done, appears to violate the true intent and spirit of *Brown* as well as numerous decisions dealing with the validity of race as a criterion.[70]

In studying the decisions in the area of de-facto segregation there emerges a pattern of an ever-widening development of the application of decisions that concerned segregation, pure and simple, to de-facto

67. 248 N.Y.S.2d 574, 577 (1964).

68. For a case citing *Balaban* as allowing this method and thereby expanding *Balaban* see Fuller v. Volk, 230 F. Supp. 25 (1964). There the local school board in order to alleviate the concentration of Negroes in the Lincoln School (98% Negro) established a city wide 6th grade school and assigned the Lincoln students grades one through five to other elementary schools in the city. The Lincoln School remaining a kindergarten. *Fuller* represents the end of a de-facto segregation dispute that appears to have started shortly after the first *Brown* decision was handed down. For further background on the *Fuller* case in Englewood see the following issues of the New York Times: Sept. 4, 1954, p. 13; May 21, 1955, p. 19; Feb. 13, 1962, p. 31; June 20, 1962, p. 31; July 13, 1962, p. 10; Aug. 1, 1962, p. 63; Sept. 7, 1962, p. 1; Sept. 10, 1962, p. 21; Nov. 7, 1962, p. 19; Sept. 13, 1962, p. 41.

69. N.Y. Herald Tribune (Sept. 10, 1964), p. 19, col. 1. See also Vetere v. Mitchell, 245 N.Y.S. 2d 480, modified, 257 N.Y.S.2d 480 (1964); Addabbo v. Donovan, 251 N.Y.S.2d 856 (1964); Strippoli v. Bickal, 248 N.Y.S.2d 588, *rev'd*, 250 N.Y.S.2d 969 (1964); Schnepp v. Donovan, 252 N.Y.S.2d 543 (1964).

70. For the cases and areas they relate to see the following: Watson v. City of Memphis, 83 S.Ct. 1314 (1963); public parks; Johnson v. Virginia, 373 U.S. 61 (1963), seating in court rooms; Boyten v. Commonwealth of Virginia, 364 U.S. 454 (1960), bus terminals; Shelly v. Kraemer, 334 U.S. 1 (1948), state enforcement of restrictive racial covenants; Smith v. Allwright, 321 U.S. 649 (1944), voting; Strauder v. West Virginia, 100 U.S. 303 (1879), juries; Goss v. Board of Education of City of Knoxville, Tenn., 83 S.Ct. 1405 (1963), pupil assignment.

segregation. This leaves a wide area of disagreement as to what constitutes de-facto segregation among the various courts. The Supreme Court has yet to decide the issue of de-facto segregation and until it does the present uncertainty must continue.

CURRENT PROGRAMS

One of the earliest programs developed to help children from culturally deprived areas was the Demonstration Guidance Project, started in 1958. The project was conducted at George Washington High School in New York City.[71] The students who participated in the project normally would have attended this high school as their neighborhood school.

Increased numbers of guidance counsellors, remedial workers, specialists and teachers were added to the staff as part of the project. The budget of the school was increased to help the program and the people conducting it. A report was issued when the first Guidance Project class graduated:

> . . . Out of a class of 148 junior high school graduates three years ago, 87 received diplomas last June and 8 others graduated last month. Six of the graduates are going on with higher education . . . [Also] . . . 39 per cent more pupils finished high school than before, two and a half times as many completed the academic course of study and three and a half times as many went on to higher education.[72]

Other accomplishments were:

1. I.Q. Levels were raised.
2. Reading skills and math level were increased.
3. "At the completion of three years at the high school, project students ranked first, fourth and sixth in a graduating class of more than 900." [73]

The principal of the high school in which the project took place, commented on the results and what was required to achieve them:

> In the three years we found no substitute for sound educational procedures that would enable young people to prepare themselves for college and careers. Whatever was accomplished came as the result of

71. N.Y. Times (Feb. 9, 1961), p. 28, col. 1.
72. *Ibid.*
73. *Ibid.*

> hard, unceasing day-in and day-out work by teachers, counsellors and supervisors as well as by the students themselves.[74]

At the end of five years a second report was issued with as commendable results:

> The project students were compared with the students who graduated from Junior High School 43 in the three years before the project:
>
> a. Two and a half times as many students earned academic diplomas as had in the past.
> b. More than three and half times as many students went on to higher education, with 89 per cent of the academic graduates entering higher institutions and 43 per cent of those with general diplomas continuing their studies.
> c. Drop out rate declines. "In each graduating class project students took highest honors at the top of classes of 899-900 students."[75]

Speaking on the overall program, Henry T. Hillson, Principal of the George Washington High School had these comments:

> There must be more than equality of education if there is to be equality of opportunity, 'for children of culturally deprived areas . . .' Occupying seats in an integrated classroom is not enough; nor is it enough for the disadvantaged pupil to have the same teacher or counselor or extracurricular activities as his fellow students. [The student must receive] help to compensate for his background.[76]

Demonstrative Guidance is still being conducted.

A second program that has proven successful is the Higher Horizons Program. It was similar to Demonstrative Guidance in that it emphasized the need for increased staff and funds for it to achieve its goals.

Besides helping the student at school, the project sought to have the parents of the pupil take a greater interest in the child and program. By taking parents on field trips and keeping them informed about their child's overall development, the program was able to gain the parents' cooperation and aid in their conduct of Higher Horizons.[77]

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74. *Ibid.*

75. N.Y. Times (June 12, 1963), p. 29, col. 1.

76. *Ibid.*

77. N.Y. Times (Feb. 23, 1961), p. 24, col. 1.

One of the earliest reports on the progress of Higher Horizons showed the following results:

1. Reading levels and technique were improved.
2. "The number of school suspensions" due to "extreme misbehavior" was decreased.
3. School attendance and "interest in school work" were raised.
4. "Students gained in facility in the use of English—both written and oral—and grew in good work habits, in ability to work independently and in self-discipline." [78]

Higher Horizons has been regarded by many as the correct approach. As the *N. Y. Times* commented, "Higher Horizons must, without delay, be made every pupil's horizon." [79] Because of its success the program is being expanded to cover more schools throughout New York City. It is hoped that this expanded program will receive the same planning and thought that was given to the original but smaller program. If it does not receive this thought and planning, students will be hindered rather than benefited.

Another program that has been utilized in aiding students from inadequate backgrounds is Special Service Schools. Providing the student with a more specialized faculty, the Special Service Schools have smaller classes and thereby allow the student to receive more individual attention. An average size class is approximately thirty-five students. But Special Service classes contain only twenty-five students. A special music teacher and librarian are on the full-time staff. Usually the regular classroom teacher serves in these capacities.

The program also consists of hot lunches served to the pupils without cost. The quality of these lunches, in most cases, is superior to that the the student would receive at home. Free milk and cookies are provided for mid-morning snacks.

Students at these schools receive tickets to plays and other events and are conducted on field trips. In most schools bus fares for these activities is anywhere from $1.25 to $2.00. However, in the Special Service Schools there is no charge. All the buses are the newest available to the Board of Education.

It is interesting to note that there are many Negro teachers on the staffs of Special Service Schools. The majority of the Special Service Schools are located in predominately Negro and Puerto Rican areas.

78. *Ibid.*

79. N.Y. Times (Feb. 27, 1961), p. 26, col. 2.

One notes that Negro and Puerto Rican pupils who would profit from the special programs offered by these schools have been transferred to alleviate racial imbalance. When this is done, the purpose of the Special Service School is defeated.

A new type of program dealing with the difficulties of pupils from culturally deprived backgrounds is the Early Childhood Enrichment Program, conducted by the Institute of Developing Studies, a division of the New York Medical College.

This program is directed at the pre-school and kindergarten age child. It hopes to do away with certain "social disabilities" that form in children, before age six, from culturally deprived areas. Parents are contacted to increase their interest and understanding of the problems confronting the school and the child. Courses are made available to teachers to prepare them to instruct pupils they may have in their classes from this form of background. The teacher must be able to make any adjustments for environmental difference that may exist between the home and school. The concentration on courses for teachers is the new area this program is emphasizing.[80]

Another method is the transporting of pupils to schools outside their district to reduce racial imbalance.[81] In some instances, schools that receive these pupils divide their remedial classes according to ability. Unfortunately those pupils who have been transferred out of their neighborhood schools are in the same group but in a different location. As of this writing, no constructive academic results have been shown by merely transporting pupils outside their district to correct de-facto segregation.

A new program, advocated by the New York City Board of Education, presents a comprehensive program attempting to incorporate many

80. *State Policies against Racial Imbalance*, CIVIL RIGHTS 1963 (Government Printing Office). See also N.Y. Times (Oct. 3, 1964), p. 25, col. 6.

81. It is interesting to note at this point what one individual found to be the feelings of Negro and Puerto Rican parents in a 40 block area of the upper west side of Manhattan: "In my interviews over the past 10 months with low income Negro and Puerto Rican parents in the area, never once has the question of racial percentage been raised as a concern. The parents' interests have been in the type of teachers the children have . . . and the various facilities the school has to offer. All this leads me to feel that there is a considerable gap between the concerns of the low income Negro families in my area and the avowed aims of various organizational leaders who presume to speak for them. Reported in the New York Times July 18, 1963." In an editorial the same day the *Times* commented: ". . . the novel idea was thus presented that parents are more interested in good teachers for their children than in color quotas. It is to their credit that they do. The best thing the city can do for them is to make the schools better."

of the successful methods of dealing with de-facto segregation and its related problems.[82]

At this point an evaluation of these programs by educators and other competent parties in the field of education would be helpful.

Speaking on the transporting of pupils to schools outside their normal attendance areas to correct de-facto segregation, former President of Harvard University and a man who has conducted many studies on the American Educational system, James B. Conant, commented, "Clearly a complicated arrangement for moving large groups of young children around a city for the sake of mixing all the elementary schools is hardly worth discussing." [83] Another authority has stated, "Psychological injury from segregation is far less than forced integration to both the white and colored races." [84]

In an article written in 1958 Agnes E. Meyer took a sound and realistic view when she wrote:

> Even under the most favorable conditions, . . . the . . . Negro child confronted for the first time with a strange environment, high achievement standards and new social or cultural values is hard to bear for all but the most courageous and talented.
>
> The teacher and the Negro parents are keenly aware of these psychological problems but the leaders of the N.A.A.C.P. ignore them in their policies.[85]

The *New York Times*, in a recent editorial, after supporting the "Open Enrollment Program" as a means of correcting de-facto segregation commented:

> . . . But any effort to turn the public schools into a vast reshuffling mechanism with masses of children being transported out of their neighborhood each morning and returned to them in the afternoon, will in the long run damage the processes of both education and integration.[86]

In a detailed study of the effects of attempting to mix whites and

82. N.Y. Times (Aug. 26, 1963), p. 1, col. 1.

83. Conant, *School and Jobs in the Big Cities*, SLUMS AND SUBURBS 30 (1961).

84. Remark of Dr. Ernest van de Haag, as reported in the N.Y. Times (May 11, 1963), p. 10, col. 3.

85. Meyer, *Race and the Schools: A Crisis North and South*, THE ATLANTIC 30 (1958).

86. N. Y. Times (June 21, 1963), p. 28, col. 1. See also N.Y. Times (June 23, 1963), section IV, p. 7, col. 2.

Negroes the authors conclude, "[B]ut setting up mixed groups simply for the appearance of 'integration' is likely to defeat the intended aim." [87]

In surveying the programs that have proven themselves successful in correcting the ills created by de-facto segregation, one notes that they go beyond the mere achievement of a favorable racial balance. They have enabled the student to benefit from the progress made toward the achievement of equal opportunities in housing and employment. In this way these programs can lead to the proper correction of de-facto.

CONCLUSION

In summarizing the problem of de-facto segregation it becomes painfully clear that the roots of the problem spread into many areas of social activity. Specifically, discriminatory practices in housing and employment have forced the Negro to live in congested, substandard areas. Out of these evils emerges a vicious cycle of poor jobs, poor housing and poor education. The programs discussed in the previous section present a concrete and successful method of overcoming the stagnation at the educational level of the cycle. Bussing is hardly the answer to the problem. On the contrary, the ill-will created among the racial groups and the fact that the child has to return to his disadvantaged environment both combine to vitiate whatever benefits are claimed for bussing. The fundamental base on which the future progress of the Negro rests is better education.

The subject of de-facto segregation is charged with emotional and political bias. The long-frustrated Negro is hardly ready to listen to cold reason and judicial decisions. These judicial decisions reflect the turbulent crosscurrents of the times, yet it is these same judicial decisions that will guide future developments in this area.

Paul Auster

87. Sellitz and Cook, *The Effects of Personnel Contact on Intergroup Relations*, 11 THEORY INTO PRACTICE 25 (1963).