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Can a ‘Unitary’ District Choose Neighborhood Schools?

By Neal Devins

Since the U. S. Supreme Court declared segregated schools unconstitutional in 1954, the movement toward desegregating our urban school systems has been plodding and often painful. At present, more than 30 years after Brown v. Board of Education, many school systems around the nation are still operating under court-ordered busing and other plans designed to eradicate the effects of past governmentally fostered discrimination.

Today, a small number of school systems have been declared "unitary," or desegregated, by the courts. The current situation in one of those systems, the Norfolk, Va., schools, offers an interesting and instructive perspective on what happens when a school system, deemed desegregated, starts to make its own decisions. A lawsuit has developed in Norfolk over what some civil-rights advocates, and the press, have characterized as an example of the Reagan Administration's anti-busing posture. In fact, the case merely concerns the limits of court authority over school systems that have fulfilled their legal obligations under desegregation orders.

Prior to the Plessy v. Ferguson, Board of Education decision, Norfolk had a dual, segregated school system as mandated by Virginia state law. After the decision, a class action was filed to desegregate Norfolk schools. Desegregation moved slowly. Once the Supreme Court approved the use of busing in 1971, the Norfolk School Board developed a plan that included the pairing and clustering of schools as well as mandatory cross-town busing to help eliminate any vestiges of the dual system. By 1976, a federal district court declared in Richmond v. Board of Education that "racial discrimination through official action has been eliminated from the Norfolk system" and thus the board was relieved of its obligation to continue desegregation activities.

The Norfolk School Board, however, continued to use mandatory busing to promote racial balance. By 1983, the board decided that busing was no longer effective; in fact, it found that the busing was actually making matters worse by promoting "white flight" to the suburbs.

Norfolk's attempt to eliminate cross-town busing has led civil-rights advocates to challenge the city's decision in court. In order to understand why those challenging Norfolk's decision may be in error, it is important to understand the obligations facing a school system ordered to desegregate. School systems guilty of illegal discrimination do not turn over their decision-making responsibility to the courts. Instead, affected school systems must "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," according to the 1968 opinion in Green v. County School Board. Although busing is a permissible (and sometimes necessary) remedy, once school officials make a good-faith effort to desegregate their schools, according to the 1976 case, Pasadena Board of Education v. Spangler, they need not make "year-to-year adjustments of the racial composition" of those schools for "there is no substantive right to a particular degree of racial balance or mixing."

In other words, school districts subject to desegregation obligations are not required to maintain a certain racial balance among schools. Rather, those districts are required only to eliminate all vestiges of past discrimination. Consequently, there could be substantial racial imbalance within a school system if governmentally fostered segregation had not contributed to that imbalance.

In the Norfolk case, the racial imbalance and the elimination of prior illegal discrimination is confined by court-approved plans, represented by the N.A.A.C.P. Legal Defense and Educational Fund. Ignoring the district court's 1976 declaration that Norfolk's schools are desegregated, the Legal Defense Fund argues that the Norfolk board's attempt to return to neighborhood schools is unconstitutional because such action "will perpetuate the effects of the prior dual system." Under this view, a school district can get locked indefinitely into a busing plan—"for any deviation from forced busing that might result in racial imbalance is impermissible."

But school systems guilty of prior illegal discrimination are obligated only to undo the effects of that discrimination. Once a system has met this obligation, courts are without authority to force continued maintenance of a school-desegregation plan. Unless the 1975 Norfolk ruling is upset, the only legal issue raised in that case is whether or not the school board's decision to return to neighborhood schools is itself discriminatory.

The Norfolk School Board claims that its decision is based on its belief that continued forced busing would resegregate the school system. In reaching this decision, the board investigated other school systems, held public hearings, and commissioned a study on the effects of, and community perceptions toward, busing. Although one can question the accuracy of the board's conclusions, there is no evidence to prove that it intended to conceal racially discriminatory motivations.

With this said, why the big fuss over Norfolk's decision to return to neighborhood schools? One explanation is that Norfolk may well be the first school district previously subject to a busing order that returns to neighborhood schools. Also, the Reagan Administration's Justice Department has filed court papers in support of the school district's position. Although the Administration categorically opposes the use of busing in all circumstances (thus creating the appearance that Norfolk's is a test case challenging the principle of busing), this contention is not even raised in the Administration's filings in Norfolk. Instead, the Justice Department—referring to earlier cases—argues that judicial authority "is extinguished when a desegregation plan judicially determined to be adequate to eliminate the...violation has been fully implemented in good faith."

The controversy over Norfolk's schools involves the line that separates desegregation responsibilities from local control. Despite its antibusing policies, the Justice Department is yet to use the Norfolk case as a vehicle to question the appropriateness of busing. Instead, the government claims that federal courts are constrained in the demands that they can place on local school systems. On the other side, however, the Legal Defense Fund has taken an absolutist—"busing is education"—approach in Norfolk, namely: Once subject to a busing order, a school system has limited authority to deviate from that order.

This Legal Defense Fund position would improperly have the courts function as "super school boards." Wary of this prospect, the Supreme Court has recognized that "public education in our nation is committed to the control of state and local authorities." If this principle is followed, Norfolk—regardless of the efficacy of busing—will be able to return to neighborhood schools.

Neal Devins is a lawyer with the U. S. Commission on Civil Rights. The views expressed are solely those of the author.