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COMMENTS

SCHOOL DESEGREGATION AND THE OFFICE OF EDUCATION GUIDELINES

INTRODUCTION

Fourteen years after the Supreme Court's 1954 ruling in the school segregation cases, school segregation is still with us, North and South. Those optimistic and hopeful individuals who saw a rapid end to segregation in the Court's ruling, in the passage of the 1964 Civil Rights Act, in the 1965 Voting Rights Act, and in other concerted activity designed to end segregation have been disappointed.

In an apparent effort to improve both the quantity and quality of desegregation plans in the public schools, the Department of Health, Education and Welfare has promulgated a set of guidelines to aid in the desegregation of school districts.

THE BROWN DECISIONS

In 1954 the Supreme Court in *Brown v. Board of Education* (*Brown I*),[1] held that racial segregation of children in public schools, even if the schools provided equal physical facilities deprived children of the right to an equal education.[2] While holding that "[s]eparate educational facilities are inherently unequal"[3] the Court delayed the implementation of this constitutional right until it could effectuate the holding in *Brown I*.[4] Approximately one year later, in the second *Brown v. Board of Educ.* (*Brown II*)[5] decision, the Court called for gradual relief whereby a federal district court was to administer desegregation in each case, in a manner "necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."[6] Apparently the Court sought to accommodate varying local situations by adopting this case-by-case procedure rather than a single uniform plan of desegregation.

1. 347 U.S. 483 (1954).

2. *Id.* at 493. The effect of the holding in Brown I was to abandon the "separate but equal" doctrine established in Plessy v. Ferguson, 163 U.S. 537 (1896). Segregation under the "separate but equal" doctrine was sustained by supposedly providing equal facilities for the educational system of the two races. There is some doubt whether the requirement of equal facilities for both races stated in Plessy v. Ferguson was effectively enforced prior to the decision in Brown.

3. 347 U.S. at 495 (1954).

4. For instances where the Supreme Court has delayed the implementation of constitutional rights see Note, *School Desegregation and the Office of Education Guidelines*, 55 GEO. L.J. 325, 326 n.10 (1967).

5. 349 U.S. 294 (1955).

6. *Id.* at 301.

Forms of resistance legislation were enacted with the effect of thwarting, or at least delaying, efforts to implement the ruling in the *School Segregation Cases*.[7] Moreover, various court decisions failed to provide any affirmative duty to integrate the public schools.[8] In short, the case-by-case procedure and the desegregation plans adopted by various school districts resulted in significant desegregation in only a very small percentage of the schools.[9]

THE CIVIL RIGHTS ACT OF 1964

Amidst national concern over the dilemma of the Negro in the United States, Congress passed the Civil Rights Act of 1964.[10] Two titles of the act have emerged as the most controversial encroachments upon school desegregation.[11] Title IV of the act[12] defines desegregation as "the assignment of students to public schools and within such schools without regard to their race, color, religion or national origin. . . ."[13] Title VI[14]

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7. *See generally* Note, *Pupil Placement Laws*, 16 W. RES L. REV. 800 (1965). A list of other resistance statutes is given in 2 U.S. COMM'N ON CIVIL RIGHTS REP. 65 (1961) at 205-208.

8. *See* Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955) wherein the court stated at 777 that the constitution does not require integration but rather merely forbids discrimination. The legislative history of the Fourteenth Amendment was relied upon to indicate that the Amendment was not intended to affect the problem of segregation in public schools. *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955). *See also* Rippy v. Borders, 250 F.2d 690 (5 Cir. 1957) and Avery v. Wichita Falls Independent School District, 241 F.2d 230 (5 Cir. 1957).

9. The case-by-case method was time consuming and expensive, often resulting in a large backlog of court cases involving desegregation. Although the courts have often held that desegregation is the responsibility of school boards and school officials, the freedom of choice method of desegregation adopted by many school districts relies upon the initiative of minority groups to actively seek admittance to segregated schools, thus effectively shifting the burden to such groups. As to the responsibility of school boards and school officials, see Brown II, 349 U.S. 294, 299 (1955); Singleton v. Jackson Municipal Separate School Dist., 348 F.2d 729, 730 (5 Cir. 1965); Wright v. County School Board of Greensville County, Va., 252 F. Supp. 378, 383 (E.D. Va. 1966); Henderson v. Iberia Parish School Board, 245 F. Supp. 419, 421 (W.D. La. 1965).

For the percentages of Negro students going to school with white students in individual states *see*, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTACT OF THE UNITED STATES 1966 at 123. *See also* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 903-905 (5th Cir. 1967) (Appendix B).

10. 78 Stat. 252 (1964), 42 U.S.C. § 2000d-1.

11. For a detailed discussion of Titles IV and VI of the Civil Rights Act of 1964 *see* Note, *School Desegregation and the Office of Education Guidelines*, 55 GEO. L.J. 325 (1967); Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42 (1967).

12. 78 Stat. 246, 42 U.S.C. §§ 2000c to 2000c-9.

13. 78 Stat. 246, 42 U.S.C. § 2000c(b). Title IV adds, however, that " 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." *Id.*

14. 78 Stat. 252, 42 U.S.C. §§ 2000d to 2000d-4.

provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[15]

Therefore, to implement the provisions of Title VI, every federal department or agency dispensing federal aid to any program or activity is authorized to develop and issue, after presidential approval, rules and regulations consonant with objectives of the statute under which the assistance is granted.[16] Pursuant to this directive, the Department of Health, Education, and Welfare in 1965 established minimum desegregation standards for schools seeking federal aid.[17]

THE GUIDELINES

Most southern school districts in the process of desegregation operate under "freedom of choice plans." The 1965 Guidelines incorporated freedom of choice as one acceptable type of desegregation plan, and, therefore, these Guidelines were generally acceptable throughout the South. However, in March 1966 the Office of Education issued a new set of Guidelines which included a test of effectiveness for the freedom of choice plans.[18] The 1966 Guidelines resulted in significant opposition within the South to the new standards.

Each segregated school district was required to submit either a final court order requiring desegregation or a voluntary plan for desegregation acceptable to the Commissioner of HEW.[19] The voluntary plans submitted had to conform to standards established for the desegregation of a school system.[20] Moreover, under the Guidelines, a school district could qualify for federal aid by submitting a court approved plan requiring the school district to desegregate.[21]

In order to insure compliance with the Guidelines, the Office of Education may refuse to grant federal aid to a non-complying school district. Initially the Office of Education must make positive efforts to secure voluntary compliance before any other action can be taken.[22] In the

15. 78 Stat. 252, 42 U.S.C. § 2000d.

16. 78 Stat. 252, 42 U.S.C. § 2000d-1.

17. 30 Fed. Reg. 9981 (1965) (hereinafter cited as 1965 Guidelines).

18. 31 Fed. Reg. 5623 (1966) (hereinafter cited as 1966 Guidelines). *See* Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42 (1967). The author states at 44 that the 1966 Guidelines required that the efforts of school districts to desegregate must result in actual desegregation, thus reopening the issue of whether there is an affirmative duty to desegregate the schools.

19. *See* 1965 Guidelines § 180.2.

20. *Id.* § 180.5.

21. 1965 Guidelines § 180.2. 1966 Guidelines § 181.2.

22. 78 Stat. 255, 42 U.S.C. § 2000e-1.

event efforts to secure voluntary compliance fail, the Commissioner must follow certain procedures including notification of the right to a hearing before administrative proceedings are completed and funds terminated.[23]

One purpose of the Guidelines was to overcome the reluctance of school districts to formulate desegregation plans that work. In September, 1967 the voters of Little Rock, Arkansas turned down a University of Oregon Bureau of Education Research study that proponents said, "could in just two years achieve an integrated high quality educational program for all children."[24] Moreover, a Little Rock School Board member who openly supported the plan was voted out of office during the same election.[25] The unwillingness of school districts to adopt effective desegregation plans that would serve to speed up desegregation has served merely to prolong antagonism between the federal government and recalcitrant school districts. It is within this atmosphere that the Guidelines must act to prevent further delay of desegregation.

Thus, Title VI provided the procedure whereby an administrative agency may terminate federal aid to any program or activity whose purpose is inimical to the provisions of the Civil Rights Act of 1964. In order to implement the provisions of Title VI, HEW issued the Guidelines for the purpose of establishing standards for the effective desegregation of school districts seeking federal aid. However, the Guidelines provided that if a school district submitted a final court order requiring desegregation, the submission of a voluntary plan for desegregation conforming to the Guidelines was not required. Nothing on the face of Title VI itself required the government to make an exception for school districts under a final court order even though a court approved plan might be inconsistent with, and less demanding than, the HEW Guidelines.

THE GUIDELINES AND THE COURT

Therefore, the courts were faced with the possible dichotomy between agency standards concerning school desegregation and judicial standards imposed to give content to the equal protection provision. The court in *Singleton v. Jackson Municipal School Dist.*,[26] recognized the difficulty that would ensue should court standards differ from the Office of Education Guidelines.[27] Apparently respecting agency familiarity with

23. 78 Stat. 252, 42 U.S.C. § 2000d-1.

24. See article by John Egerton, SATURDAY REVIEW, December 16, 1967 at 60, *Little Rock Ten Years Later*. The author stated: "the voters of the Arkansas capital city had a chance to exchange the segregation albatross for a bird of another feather, but by a margin of more than seven to five, they kept the albatross."

25. *Id.* at 61.

26. 348 F.2d 729 (5th Cir. 1965) wherein the court stated at 731, "We attach great weight to the standards established by the Office of Education."

27. *Id.* at 732.

desegregation problems, Judge Wisdom directed the parties and the district court to the Guidelines in order to conform the free choice plans to the agency standards.[28] In *Davis v. Board of School Commissioners*[29] and *Singleton v. Jackson Municipal Separate School District* (*Singleton II*)[30] the court stated that the Guidelines were only minimum standards. The court in *Singleton II* said:

> HEW's Statement of April 1965 establishes only *minimum* standards of general application. In certain school districts and in certain respects, HEW standards may be too low to meet the requirements established by the Supreme Court and by this Court; we doubt that they would ever be too high. (Emphasis in original.)[31]

Again turning to the problem of disparity between agency and judicial standards, Judge Wisdom in *United States v. Jefferson County Board of Education*[32] expanded the concept used in *Singleton II:*

> We summarize the Court's policy as one of encouraging the maximum legally permissible correlation between judicial standards for school desegregation and HEW Guidelines. This policy may be applied without federal courts' abdicating their judicial function. The policy complies with the Supreme Court's increasing emphasis on more speed and less deliberation in school desegregation.[33]

Thus *Jefferson* brought about a more apparent correlation between judicial and agency standards by adopting the HEW Guidelines in full. The court held that the HEW Guidelines comprised the minimum constitutional requirements, were within the scope of the Civil Rights Act, and correspond to the standards it had developed.[34]

The establishing of HEW Guidelines as minimum constitutional requirements makes a school district subject to government requirements in a way Title VI never contemplated. The government requirements in the form of the Guidelines must be complied with whether or not a school district chooses to receive federal aid. Moreover, the agency requirements must be complied with whether the court has reviewed them or not. The minimum standards reflected in the Office of Education

28. *Id.* at 731. See also Price v. Denison Independent School Dist. Board of Education, 348 F.2d 1010 (5th Cir. 1965).

29. 364 F.2d 896, 902-903 (5th Cir. 1966).

30. 355 F.2d 865, 869 (5th Cir. 1966).

31. *Id.*

32. 372 F.2d 836 (5th Cir. 1967); 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3138 (Oct. 9, 1967).

33. *Id.* at 861.

34. *Id.* at 848, 859.

Guidelines will necessarily fluctuate with each issuance. The most logical proposal is that the minimum standards imposed by the Office of Education will become more stringent with each new set of Guidelines.[35] Adoption of future Guidelines without review must be predicated on the assumption that agency standards may incorporate only constitutional requirements. However, agency interpretation of constitutional requirements may be at variance with judicial pronouncements of constitutional standards necessary to effectuate compliance with the equal protection provision.

Prior to the adoption of the Guidelines, school desegregation had proceeded under the holdings in the *Brown* cases. *Brown* gave individuals access to the courts in order to gain the constitutional right granted in the decision. Specifically, *Brown* set forth the constitutional standards which were applied by the courts to desegregate the public schools. However, a school district's failure to comply with HEW Guidelines as minimum constitutional standards as opposed to some other plan not consonant with the Guidelines, may grant individuals further judicial standing upon which to bring about desegregation beyond the constitutional standards espoused in *Brown*. It would appear that the burden of instituting effective desegregation plans is placed heavily upon the individual school districts. Unreasonable delay or the adoption of an unacceptable desegregation plan should give rise to the intervention of the courts in order to speed up reluctant or unwilling school districts.

Courts have long accepted prior cases upon which to formulate decisions. Moreover, legislation has been judicially incorporated into the case law.[36] However, the adoption of administrative agency standards as minimum constitutional requirements represents a novel development in court-made law.

ADMINISTRATIVE EXPERTISE

Confidence or lack of confidence in particular agencies affect the judicial response to agency pronouncements. One justification given in *Jefferson* for the adoption of the Guidelines is the belief in the greater expertise of the Office of Education.[37] Such reliance on the greater expertise of the Office of Education is questionable. Surely the 5th Circuit

35. To some extent this has occurred with the issuance of the 1966 Guidelines. The 1965 Guidelines would apparently accept a freedom of choice plan as evidence of an attempt to desegregate the school system. However, the 1966 Guidelines called for an evaluation of such plans as to whether or not significant desegregation would result from their adoption. See text accompanying n.18 *supra*.

36. *See* Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

37. Judge Wisdom states that "most judges do not have sufficient competence—they are not educators or school administrators—to know the right questions, much less the right answers." United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 855 (5th Cir. 1967).

is the most experienced in the field of desegregation. They have lived with the problem of proper desegregation plans and their content for fourteen years. A thorough reading of the opinion in *Jefferson* discloses a comprehensive understanding of the problem by Judge Wisdom. The lack of understanding and competence to fashion a suitable desegregation decree attributed to most judges (presumably directed at the District Courts) does not logically follow fourteen years of experience in this area. Perhaps, a better understanding of the problems would ensue if certain sociological traditions were finally put to rest.

Many of the problems associated with desegregation are political in nature and it can be argued that the legislative process is more adept at coping with problems arousing emotional and political instincts. However, it is unlikely that any legislation approximating the Office of Education Guidelines in content would emanate from Congress. Thus the task of promulgating standards with which to speed up desegregation under the Civil Rights Act has apparently fallen on the judicial and executive branches of government. As Justice Hugo Black of the Supreme Court recently stated:

> There is a tendency now among some to look to the judiciary to make all major policy decisions of our society under the guise of determining constitutionality. The belief is that the Supreme Court will reach a faster and more desirable resolution of our problems than the legislative or executive branches of the Government. I would much prefer to put my faith in the people and their elected representatives to choose the proper policies, leaving to the courts questions of constitutional interpretation and enforcement.[38]

However, in the area of desegregation, faith in the people and their elected representatives to choose the proper policies under present sociological traditions would produce questionable results.

THE GUIDELINES AND THE ADMINISTRATIVE PROCEDURE ACT

Each administrative agency has numerous powers derived from various statutory provisions, and each is subject to the provisions of the Administrative Procedure Act.[39] Within their specified fields of jurisdiction administrative agencies promulgate general rules and regulations, formulate the specific content of general policy, select and license particular enterprises and perform various other functions. Whatever jurisdiction, power, or authority an administrative agency might possess,

38. Quoted in TIME March 29, 1968 at 76.
39. 60 Stat. 237 (1946), 5 U.S.C. § 1001.

therefore, is derived from enabling statutes providing for the general governing principles.[40]

An agency has power to adopt certain regulations by virtue of a general rulemaking power, using the rulemaking procedure of the Administrative Procedure Act.[41] Rules may be formulated through several means: no participation by the parties affected, consultations and conferences between the agency and the parties, consultation with advisory committees representing parties, written briefs or presentation of written data, speechmaking hearings, and trial type hearings.[42]

Moreover, one proposed advantage of the rulemaking procedure over less formal and comprehensive methods of administrative procedure is uniformity of application. The Federal Trade Commission has emphasized that when a practice is widespread in an industry, a rulemaking proceeding operates evenhandedly to bar that practice on the part of all, while an order directed to only one permits his competitors to gain an unfair advantage.[43] Much of the disparity problem created by the HEW Guidelines was precipitated by the exception for school districts under a final court order. It was feared that the school districts might resort to the courts in the hope of being subjected to less stringent standards in a court desegregation decree. Therefore, perhaps the only prudent course was to adopt the HEW Guidelines (although there is doubt that the Guidelines are "rules") as minimum constitutional standards in order to insure uniform desegregation decrees and to prevent an unfair advantage to those school districts who would seek less stringent decrees from the courts. In addition, the declaration of policy by means of regulations or rules may make more available the process of judicial review.[44] At the same time, however, the threat of review may operate to discourage an agency from taking any steps that would expose a questionable stand to judicial scrutiny.[45]

40. For a compilation of statutes governing such agencies as the Federal Trade Commission, National Labor Relations Board, Federal Communications Commission, and others, *see* Loevinger, *The Administrative Agency as a Paradigm of Government—A Survey of the Administrative Process*, 40 IND. L.J. 287 (1965).

41. Section 4 of the Administrative Procedure Act (hereinafter cited as APA) contains the rulemaking provisions. 60 Stat. 237 (1946), 5 U.S.C. § 1003.

42. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT, § 6.01, at 101 (1959). *See generally*, Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

43. *See*, e.g., El Paso Elec. Co., 8 S.E.C. 366, 377 (1940); Virginia Pub. Serv. Co., 6 S.E.C. 419, 428 (1939).

44. For a discussion of judicial review of agency regulations *see* K. DAVIS, ADMINISTRATIVE LAW TEXT, § 21.01, at 372 (1959).

45. *See generally* Fuchs, *Agency Development of Policy Through Rule-Making*, 59 NW. U.L. REV. 781 (1965). *See also* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965) where the author states at 943, "Nevertheless, there remain a number of areas where virtually no efforts have been

Therefore, the clearest basis for agency authority to issue legally binding regulations is a statute which specifically confers the power or the duty to issue them with respect to a defined subject, and prescribes the effect which they, or violations of them, shall have. Notice of the regulations themselves may be conveyed to all concerned through publication in the Federal Register as well as other channels.[46] Title VI authorizes agencies dispensing federal funds to issue rules, regulations, or orders to implement the provisions of the statute.[47] In response to this directive the HEW Guidelines were issued.

The Administrative Procedure Act while seeking to define "rule" and "rule-making,"[48] and "order" and "adjudication"[49] does not give much information on the status of the Guidelines and their relationship to procedural requirements. Thus apparently revisions of the Guidelines need not follow formal procedures of rule-making since the Guidelines do not appear to be rules, regulations, or orders as those terms are defined in the APA.[50] As noted by the dissent in *Jefferson:*

> When confronted with the fact that the guidelines were not approved by the President as required by the Civil Rights Act of 1964, the opinion then concluded that they do not constitute or purport to be rules or regulations or orders of general applica-

made to issue regulations elaborating the statutory standards, although the agency has accumulated years of experience in the application of those standards in adjudicatory proceedings."

46. Section 3 of the APA requires the publication in the Federal Register of both "substantive rules" and interpretations formulated and adopted for the guidance of the public. A cumulative, government-wide compilation is contained in the Code of Federal Regulations, authorized by statute, 49 Stat. 503 (1935), as amended, 44 U.S.C. § 311 (1958).

47. Section 602 provides in part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

78 Stat. 252, 42 U.S.C. § 2000d-1.

48. 60 Stat. 237 (1946), 5 U.S.C. § 1001(c).

49. 60 Stat. 237 (1946), 5 U.S.C. § 1001(d).

50. The section on rule-making in the APA, § 1003, apparently excludes from the procedural requirements of the Act rules "relating to . . . loans, grants, benefits, or contracts" and general statements of policy." Since the phrase "general statements of policy" is not defined in the Act, there is no real way to decide whether the Guidelines fall within its meaning, although the official title of the Guidelines—Revised Statement of Policies for Desegregation Under the Civil Rights Act of 1964—suggests that they do. In any case, the Guidelines do appear to fall within the first exception, since they "relate to" terminations, continuance, grant and denial of federal financial assistance including loans and grants.

tion. It was then stated that since they were not a rule, regulation or order, they constitute a statement of policy, and while HEW is under no statutory compulsion to issue such statements it was decided that it is "of manifest advantage" to the general public to know the basic considerations which the Commissioner uses in determining whether a school meets the requirements for eligibility to receive financial assistance.[51]

CONCLUSION

Thus it appears that procedurally the HEW Guidelines fall somewhere within the realm of the unknown. The administrative problems that they create are many and varied. Had the HEW promulgated "rules, regulations, or orders" as authorized by Title VI and not procedurally vague policy statements the problems may not have been so apparent. Perhaps policy statements which are eventually destined to become minimum constitutional standards in the area of desegregation should follow a more formal course. This is not to deny the significant contribution Title VI has obviously made to school desegregation. However, in an effort to increase the rate of desegregation we must be careful neither to fracture existing constitutional rights nor to abuse the administrative process. The inherent dangers are self-evident in such a course.

Moreover, a coalition between the judiciary and the executive is certainly desirable in the area of desegregation. However, the courts should not seek to abdicate from the field in deference to executive action. In the area of constitutional rights the impetus should be supplied by the courts when the legislature is reluctant to act.

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51. 380 F.2d 385, 401 (5th Cir. 1967).