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THE FIFTIETH ANNIVERSARY OF BROWN: DESEGREGATION 1954-2004

Overview

It is hard to believe that fifty years have past since the United States Supreme Court handed down its landmark Brown v Board of Education (1954) (hereafter referred to as Brown 1) decision. A class action, Brown 1 involved the joinder of four separate court cases from the States of Kansas, South Carolina, Virginia, and Delaware. In a unanimous opinion written by Chief Justice Earl Warren (and handed down on May 17, 1954), the high court declared unconstitutional the segregation of public school students solely on the basis of their race. In doing so, the Court overturned the case hardened “separate but equal doctrine” established in Plessy v Ferguson (1896).

Brown 1 is significant on two levels. First, and foremost, it declared unconstitutional the *de jure* (by law) segregation of public students on the basis of race. Second, the impact of the decision went far beyond issues of racial segregation of students. Over the years, Brown 1 emerged as the “right to education” decision. Subsequent applications of the case (e.g., student ability grouping and tracking, public school finance, special education) extended Equal Protection Clause guarantees to all children of school age. As one author has summarized, Brown 1 “is arguably the Supreme Court’s most important case involving K-12 education, if not of all time.” (Russo, 2004)

More than a decade ago, my colleague H.C. Hudgins, Jr., and I were fortunate to have published in West’s Education Law Reporter an article briefly summarizing the path taken by public school racial desegregation in the years following Brown 1. In that piece, we also looked to the future and made some predictions as to where we thought desegregation would go as public education moved into the new millennium. (Vacca and Hudgins, 1992) On the fiftieth anniversary of Brown 1 my intent in this commentary is to revisit and very briefly restate and summarize some of our decade-old research findings and predictions. What did the courts say post-Brown 1? What has been the path of student desegregation over the past decade? What are the implications for educational policy 2004?

Charting a New Course. When the Supreme Court ruled in Brown 1 (1954) that “separate but equal is inherently unequal,” it sought to end racial segregation in the four states involved in the case and, more broadly, to end racial segregation in public schools wherever it existed. The Court’s intent was to create equal access to

educational opportunities for all children of school age absent discrimination based solely on their race or ethnic background. What followed, however, was an era of frustration, confusion, mixed messages, and resistance not envisioned by the Court. As a result, state and local educational policy decisions were very inconsistent.

All Deliberate Speed. In 1955, when the Supreme Court ordered that school desegregation must proceed with “all deliberate speed,” Brown 2 (1955), it sent out mixed messages and created confusion among educational policy makers. Instead of establishing specific criteria to be followed in merging previously separate schools in the four states involved in Brown 1, the Court identified a number of local problems that might impede progress. Among these problems areas were school administration and personnel, physical facilities, transportation, revision of school district attendance zones, and local control. As a result, the desegregation process did not gain much momentum.

A Decade of Patience and Resistance. In the years immediately following Brown 2 (1955), the Supreme Court remained steadfast in its desire to see unitary schools immediately replace racially segregated schools, Cooper v Aaron, 1958). At the same time, however, it continued to give deference to the age-old practice of “local control” of public education. Thus, between 1955 and 1964, the high court exhibited an attitude of patience. While some state and local educational policymakers interpreted the “all deliberate speed” standard as a signal to proceed as quickly as possible, to others it opened the way to delay and massive resistance.

The Pace Accelerates. Ten years after Brown 1, the Supreme Court’s patience began to wear thin as “all deliberate speed” had run its course with little to no positive results. In a Virginia case the Court abandoned the “wait and see attitude” and assumed a more activist role. In Griffin v Prince Edward County School Board (1964) it denounced delays used to resist desegregation and ordered state and local school officials to promptly implement a desegregation process. One year later, in Rogers v Paul (1965), the Court ruled that desegregation at the rate of one grade per year was too slow. Three years later, the Court held that “freedom of choice plans” which did not accelerate public school desegregation could not be approved. In Green v School Board of New Kent County (1968), Justice Brennan found unacceptable the school board’s freedom of choice plan (which had been in effect for three years), because he did not see “prompt and meaningful progress made toward establishing a unitary school system.” In his words, “delays are no longer tolerable....” The Supreme Court in Green articulated *six criteria* to apply in analyzing whether or not a school system has achieved unitary status and these were: (1) student population, (2) faculty, (3) staff, (4) transportation, (5) extracurricular activities, and (6) facilities. One year later, the high court held, that “dual school systems must be terminated at once.” Alexander v Holmes (1969)

The pace of desegregation continued to accelerate in the 1970’s. It is important to note that the Supreme Court’s ruling in Brown 1 also acted as a catalyst in moving forward the quest for equal rights that went beyond matters of public school desegregation. For example, the 1970’s saw the:

- Implementation of the *Civil Rights Act of 1964* (which prohibits the denial of benefits and discrimination in federally funded programs on grounds of race, color, or national origin).
- Increased availability of *federal funding* with accompanying *federal guidelines* requiring desegregation as a precondition of receipt of federal funds.
- Passage of the *Rehabilitation Act of 1973, Section 504*; the *Education Amendments of 1972, Title 9*; and, the *Education of All Handicapped Children Act of 1975*.
- Emergence of new lines of case law involving challenges to *state public school finance structures* post-Rodriguez (1973); *student ability grouping and tracking* post-Hobson v Hansen (1967); and *student discipline* post-Goss v Lopez (1975).

It also is important to note that membership on the United States Supreme Court changed in the early 1970's. Chief Justice Warren E. Burger was appointed in 1969, followed by Harry A. Blackmun (1970), Lewis F. Powell (1972), and William H. Rehnquist (1972). With such Justices as William O. Douglas and Hugo Black gone, the era of the Warren Court had come to an end. (Vacca and Hudgins, 1991)

School Busing. In 1971, the Supreme Court charted a different judicial course in school desegregation when it ruled that using school buses to transport students from one school to another within a local school district, in an effort to achieve "racial balance," was a legitimate remedial tool. In fact, said the Court, district court judges "are within their power in requiring it." The Court clearly stated that state-imposed segregation in public schools must be eliminated "root and branch." Swann v Charlotte-Mecklenburg Board of Education (1971)

A long line of "school busing" cases followed where federal district court judges actively exercised their equitable powers and decreed changes in local educational policy making once reserved for local school boards. Bradley v School Board of City of Richmond, Va. (1972) In other words local educational policy-making, once solely reserved for local school boards, became a legitimate prerogative of federal judges through the enforcement of court ordered busing decrees.

The Path of Desegregation Widens. Beginning in the early 1970's, the Supreme Court widened the path of school desegregation when it decided a case involving Denver Colorado. Keyes v School District No. 1 (1971) raised issues that existed in the form of *de facto* not *de jure* segregation. In Keyes segregation in public schools did not exist because of a state constitutional or statutory mandate. It existed in fact because of where people work, live, and raise their children. As the Court said in Keyes, "what is or is not a segregated school will necessarily depend on the facts of each particular case." Courts must look for, in each case, the intent of local educational policy-makers to gerrymander student attendance zones as a means to establishing and maintaining racially separate schools. Where school officials deliberately and purposefully draw and maintain racially discriminatory school attendance zone lines, federal district courts can order school desegregation. Where the intent of school officials to create segregation of students is absent, judges cannot act. Milliken v Bradley (1974)

The late 1970's and the 1980's produced a flurry of new and unforeseen constitutional, legal, and policy questions. Because no two public school systems were exactly alike in every characteristic, and the social demographics of communities rapidly changed, federal judges were once again frustrated. In fact some federal judges expressed an attitude that an equitable solution to racially identifiable and isolated schools "may not be attainable in the context of the demographic, geographic and sociological complexities of modern urban communities." Pitts v Freeman (1989)

The Rehnquist Court and Local Control. During the period from 1983 and 1991, the United States Supreme Court did not hand down a substantive opinion on public school desegregation. It was not until January 15, 1991, that the Supreme Court spoke. In Dowell v Board of Education of Oklahoma City (1991), by a vote of 5 to 3, the high court expressed a desire to change the judicial analysis applied to public school desegregation issues. As Chief Justice Rehnquist opined, "...federal supervision of local school systems was intended as a temporary measure to remedy past discrimination.... Dissolving a desegregation decree after local authorities have operated in compliance with it for a reasonable period of time properly recognizes that necessary concern for the important values of local control of public school systems." He then added that court ordered desegregation decrees "are not intended to operate in perpetuity." (Dowell, 1991)

In essence, the Court's majority in Dowell told the courts below that old desegregation issues must be laid to rest after a reasonable period of "good faith efforts to remedy the past." Moreover, the work of future boards of education should not be impeded by the problems faced by past boards. Today's educational policy-makers must be free to move local school systems into the future as necessitated by changing internal and external needs. Local public school systems and their surrounding communities had changed over time and were different from what they were when Brown I was handed down. (Vacca and Hudgins, 1992)

Emerging Issues

In the post-Dowell period (1992 through 2000) the path was open for educational policy-makers to fashion new remedies to tackle several emerging legal and socio-economic issues plaguing public school systems, especially those located in urban and rural communities. School busing had outlived its usefulness and federal judges evidenced a willingness to accept new proposals and plans intended to remedy existing problems. It was an era when existing court desegregation decrees were swallowed up by massive statewide efforts to reform and restructure public education, and by efforts (federal and state) to provide for and accommodate swelling populations of students with special needs; especially students with educational disabilities, and students who were not English language proficient.

What follows is a partial list of programs and proposals made as a part of school reform and restructuring efforts. Each item in the list contains the potential to produce future legal and constitutional issues related to the lingering effects of past public school segregation.

- Renewed emphasis on parental choice, both intra- and inter-school district.
- Renewed interest in school voucher programs (including private schools).

- Establishment of charter schools in local communities.
- Establishment of charter colleges and universities.
- Privatization of public schools, especially schools labeled "failing," or "under-performing."
- Popular election of local school boards in states where school boards had been appointed.
- Implementation of intra-district plans to close some schools and consolidate others because of shrinking and shifting enrollments.
- Establishment of special interest schools for selected students (e.g., engineering and technology, art and drama, science and mathematics, leadership).

- Establishment of single-sex classes and schools.
- Establishment of single-race classes and schools
- Establishment of special schools for students with severe disciplinary problems.
- Establishment of special schools for students with autism.
- Implementation of new methods of identifying, tracking, and grouping students in the elementary grades, especially those who need extensive social and academic remediation.
- Implementation of statewide student academic testing as a precondition of promotion from grade-to-grade.
- Implementation of high school exit examinations as a precondition for graduation.

Case Law

As public education entered the post-Dowell era (1992-2004), Brown v Board of Education (1954) had undergone a metamorphosis. While Brown had become the foundation decision in a broad-based civil rights movement in public education, and the primary focus of the Court's initial ruling remained in tact (*i.e.*, removing *racial segregation* of public school students "root and branch"), the attitudes of federal judges toward the application of the Brown 1 analysis had changed. What follow are five examples of case law from that period.

One year after Dowell the Rehnquist Court decided Freeman v Pitts (1992). By a vote of 8 to 0 (Justice Thomas did not participate), the Court said that federal judges have the authority to relinquish their control of existing desegregation orders and allow "incremental withdrawal" of their supervision of local school district efforts to desegregate. At the same time, the Court reduced the application of all six Green criteria; keeping only the criteria of faculty assignment and allocation of resources under federal court scrutiny. Finally, the Court in Freeman suggested that a specific time limit should be placed on a public school system's efforts to desegregate, especially as "community demographics rapidly change.

People Who Care v Rockford Board of Education (2001), involved a motion filed by a local school board to dissolve a fifteen-year old court desegregation order. School officials argued that they had complied fully with the order and that existing inequalities in student achievement (achievement of minority students lagged behind that of white students) were caused by factors beyond the school system's control. The court held that the school board had no legal duty to "remove vestiges of societal discrimination for which it was not responsible." In the court's view, the school board had carried out its desegregation efforts in good faith, and the remaining inequities were likely the result of such factors as poverty, education levels and employment status of parents, and peer pressure.

In Little Rock School District v Pulaski County (2002), a federal district court judge declared a public school system unitary since it had satisfied compliance in five of six areas of the court approved desegregation plan. Finding compliance in good faith efforts to desegregate, student discipline, extracurricular activities, advanced placement courses, and guidance and counseling, the court held that judicial supervision and monitoring in each of these areas would be terminated.

Tasby v Moses (2003), shows the willingness of a federal judge in Texas to terminate supervision of desegregation of a school district, because the district made sufficient progress in creating equal educational opportunities for all students; opportunities not available at the outset of the desegregation case. The court was impressed that the achievement gap existing between Anglo, African-American, and Latino students had narrowed; magnet schools and learning centers were available; bilingual programs had been implemented; and new early childhood education programs now operated.

In Hoots v Pennsylvania (2003), a federal district court granted a public school district's motion to be declared unitary and terminate judicial supervision and monitoring. In reminding school officials that unitary status indicates more than simply integrating the student population, the court saw as convincing evidence the fact that school officials had in good faith complied with the desegregation order in such areas as staff development, remedial and compensatory education, and guidance and counseling.

Implications for Policy

On May 17, 2004, our nation will celebrate the fiftieth birthday of Brown v Board of Education. As the above commentary demonstrates, Brown's journey has been very interesting and in some ways unpredictable. As

some authors have summarized the desegregation process post-Brown, “No other area of school law has involved such volatile debate, obligated such a large percentage of a school district’s budget, or resulted in greater political and social turmoil than desegregation.” (Cambron-McCabe, et al., 2004) On the other hand, however, within the last three decades (1) students and faculty have been assigned to desegregated schools, (2) programs of study have been developed to be more responsive to children of various racial and ethnic backgrounds, (3) considerable progress has been made in converting formerly dual school systems into unitary school systems, (4) academic standards and expectations for all students have been established and implemented, and (5) efforts have continued to remove the lingering effects past racial discrimination.

Today, fifty years after Brown 1, each state remains legally responsible for education within its boundaries, and each public school system within a state remains unique in many respects. As public school systems move through the second half of the current decade, much work still remains to be done. Good faith efforts must be made to remedy any residual effects of the past. School board policy must continue, in the spirit of Brown 1, to clearly state that:

- The school system does not discriminate against any student, parent, teacher, or staff member on the basis of race, ethnicity, or socio-economic condition.
- The school system guarantees all students equal access to all schools, programs, and activities (including extracurricular activities) sponsored by and offered within the school system.
- The school system strives to create and implement expanded curricular and extracurricular opportunities (including parent choice, theme schools, free student transfer, and transportation for students) open to all students within the school district, especially those who may live in racially and/or socio-economically isolated areas.
- The school system expects all students to achieve both academically (i.e., meet statewide standards) and non-academically (e.g., socially).
- The school system maintains extensive programs to provide all students with equal access to remedial help, especially in mathematics, reading, language development, and social skills.
- The school system’s disciplinary policies, rules, regulations, and procedures are consistently and equally applied to all students.
- The school system implements a program of staff development (for both professional and support staff) that includes methods and techniques in effectively working with racially, ethnically, and culturally diverse student populations.

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Note: The views expressed in this commentary are those of the author.