APPENDIX C

OBLIGATION OF THE BERKELEY UNIFIED SCHOOL DISTRICT FOR ALLEVIATING RACIAL DESEGREGATION

Kronick, Moskovitz, Tiedemann & Girard

APPENDIX C

OBLIGATION OF BERKELEY UNIFIED SCHOOL DISTRICT FOR ALLEVIATING RACIAL SEGREGATION

I. INTRODUCTION.

The purpose of this summary is to identify the obligation of the Berkeley Unified School District ("District") for alleviating racial segregation. Both the federal and state constitutions prohibit racial segregation of students in the public schools. (Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution; Equal Protection Clause of Article 1, Section 7(a) of the California Constitution.) Emphasis will be on California law which is the primary source of the District's responsibilities.

II. FEDERAL LAW.

A. Background.

Since the decision in Brown v. Board of Education 349 U. S. 294 (1955), in which the United State Supreme Court held that states may not deliberately segregate students based on race, school districts have been under an obligation to eliminate state-mandated segregated school system "with all deliberate speed." The Brown edict was expanded to encompass states where dual school systems based on race were not legally imposed. Under federal law the test for determining whether a school district had a federal constitutional obligation to alleviate racial segregation depended upon whether the existing segregation was "de jure" or "de facto" in origin.

"De jure" segregation generally results from intentionally discriminatory state action. (Keyes v. School District No. 1 413 U.S. 189, 205 (1973).) "De facto" segregation, on the other hand, arises due to "factors, such as residential housing patterns, which are beyond the control of state officials." (NAACP v. Lansing Board of Education 559 F.d 1042, 1045 (6th Car. 1977.) Unfortunately, the distinction between "de jure" and "de facto" segregation based on "intentional action" is not always clear and intent is often inferred from actions.

B. Requirements of "Affirmative Duty."

School districts found to be engaged in de jure segregation under federal law have an affirmative duty to take all steps necessary to convert to a unitary school system, and to eliminate the effects of past discrimination. (Green v. County School Board 391 U.S. 430 (1968).) The court in Green identified several areas which should be addressed in order to achieve the goal. Districts must address

the existence of segregation as reflected in several factors such as student and staff assignments.

III. CALIFORNIA LAW.

A. Background.

California law imposes stricter requirements upon school districts than does the federal Constitution. These more stringent requirements are the primary source of the District's obligations to address racial segregation because there has not been any determination that Berkeley Unified School District has engaged in de jure segregation.

There exists a significant line of California court cases which hold that California school boards bear a constitutional obligation to undertake "reasonably feasible steps" to alleviate racial segregation in the public schools, regardless of the cause of the segregation. (Jackson v. Pasadena City School District (1963) 59 Cal.2d 876, 881; Crawford v. Board of Education (1976) 17 Cal.3d 280, 303; hereafter "Crawford I;" NAACP v. San Bernadino City Unified School District (1976) 17 Cal.3d 311; McKinny v. Board of Trustees (1982) 31 Cal.3d 79.) Thus, California law has erased the federal "de jure/de facto" distinction, eliminating intent to segregate as the operative factor in determining a school district's obligation to eliminate racial and ethnic segregation. Under California law, the existence of racial segregation is sufficient to make out a constitutional violation.

B. Affirmative Duty.

As discussed above, California law requires school boards to undertake "reasonably feasible steps" to alleviate racial segregation in the public schools. Accordingly, this duty requires school district to engage in a two-part inquiry. First, is there racial segregation in the District? If so, what steps must be taken in order to address that racial segregation?

1. Determining Whether a Particular School is Segregated.

In 1976, the California Supreme Court in Crawford I defined what constitutes a "segregated" school under California law, and generally outlined those procedures which the school board must follow in fulfilling its duty to desegregate. In 1977, the State Department of Education ("SDE") responded to Crawford I by enacting California Code of Regulations, title 5, sections 90-101. These regulations were generally upheld in McKinny v. Board of Trustees, supra. However, the SDE repealed the regulations in 1991. While the regulations are not longer in effect, they do provide useful guidance as to the criteria used and steps to be followed in enacting a plan to alleviate racial and ethnic isolation.

Accordingly, we believe that a District can continue to rely on the repealed regulations for guidance as well as on the underlying case law.

Crawford I defined segregated schools as "..schools in which the minority student involvement is so disproportionate as to realistically isolate minority students from other students and thus deprive minority students of an integrated educational experience." (Crawford I, supra at p. 303; 5 C.C.R. S92(d).) Title 5, California Code of Regulations, section 93, delineates certain factors for a school district to consider in determining whether or not a school district is segregated. These factors are based upon the federal factors announced in the Green case as areas which must be addressed in order to alleviate social and ethnic isolation and are not exclusive. The factors include:

> (1) The racial and ethnic composition of each school in the district by numbers and percentages, including changes which have occurred in the racial and ethnic composition of each school in the preceding five years, as compared with such data for the district as a whole. The governing board may determine that a school is segregated when the minority composition of such school exceeds a specified percentage, exceeds a specified percentage in excess of the percentage of that minority in the district, or may utilize other criteria.
>
> (2) Data on the racial and ethnic composition of the administrative, certificated and classified staff at each school.
>
> (3) The attitudes of the community, administration and staff as to whether each school is a "minority" or "non-minority" school.
>
> (4) The quality of the buildings and equipment.
>
> (5) The organization of, and participation in, extracurricular activities.

It must be emphasized that while racial and ethnic composition of the students in each school is a factor identified under the regulations for determining the existence of segregation, it is not conclusive. Moreover, a particular racial mix or percentage is not required. The California Supreme Court has unequivocally stated that although racial imbalance may be the primary indicator of segregation, it is not the only element to be considered; local boards are obligated to weight a number of factors in

determining the existence of segregation. (McKinny v. Board of Trustees, supra, 31 Cal.3d at p. 95.)

2. Action Required Upon Determination of Existence of Racial Isolation.

Crawford I and the SDE Regulations require school districts to take reasonably feasible steps to alleviate segregation and its accompanying harm. This mandate requires school boards to implement a program which promises to achieve "meaningful progress" in eliminating segregation. (Crawford I, supra, 17 Cal.3d at p. 286.) Where such plans have been developed and implemented by local school boards, working with community leaders and affected citizens, a court will not substitute its judgment, even if it believes that alternative techniques might lead to more rapid desegregation. (Ibid.)

3. Permitted Voluntary Steps and Limitations.

As discussed above, California school districts are permitted, and in fact required, to take voluntary action to alleviate racial and ethnic segregation of students, regardless of the cause. Potential techniques of achieving progress towards elimination of racial and ethnic isolation include, but are not limited to: use of busing, student assignments, mandatory reassignment of faculty and staff, implementation of educational programs, magnet schools, majority to minority transfers, redrawing of boundary lines, and pairing and clustering of schools. However, while a variety of methods are available to school districts to be used to achieve racial and ethnic integration, they are not without certain limits.

A. Proposition 1.

Confusion may exist about the impact of Proposition 1, enacted in 1979, upon the methods available for school districts voluntarily seeking to alleviate racial and ethnic isolation. Proposition 1 amended California's Equal Protection Clause (Cal. Const., art I, S 7) to provide that state courts cannot order mandatory pupil reassignment or pupil transportation unless a federal court would be

permitted to do so based upon a finding of de jure segregation. The constitutionality of Proposition 1 was upheld in Crawford v. Board of Education (1982) 458 U.S. 527 (1982) ("Crawford II").

The fact that California state courts cannot order pupil reassignment or transportation absent a federal constitutional violation does not mean that school districts are prohibited from voluntarily adopting pupil reassignment or transportation plans. School districts may still use reassignment or busing as a "reasonably feasible methods" of obtaining meaningful progress towards desegregation. (Crawford II, supra, at pp. 535-536.) Only state courts are barred from ordering such action under Proposition 1.

B. Richmond v. Croson.

Finally, a recent decision by the United State Supreme Court has called into question the ability of government entities to make certain kinds of race-conscious decisions. In City of Richmond v. Croson 109 S.Ct. 706 (1989), the Supreme Court set aside a city ordinance requiring city contractors to subcontract 30 percent of their required needs to minority subcontractors. The court found the race-conscious requirement to be unconstitutional in light of the insufficient evidence of past discrimination, and because the plan was not narrowly tailored to address the needs of the persons who had actually suffered past discrimination. The impact of Richmond upon the decision of a school district to use race-conscious methods is uncertain. Richmond does not appear to directly impact earlier federal court decisions which hold that the educational benefits of racial and ethnic diversity constitute an important governmental goal which school district can pursue on a voluntary basis. Therefore, although there are no recent cases directly on point, voluntary student assignment plans which take race into account in order to promote racial diversity appear to be permitted. This conclusion is further supported by Mr. Justice Steven's concurring opinion in Richmond which specifically suggests that school districts should be able to voluntarily take race into account.

A school district adopting a voluntary plan should carefully spell out the legally acceptable reasons for the plan's adoption, such as the educational benefits to students resulting from racial diversity. In addition, methods enacted as "reasonably feasible steps" should be narrowly focused in order to accomplish the specified goals and should not unnecessarily trammel upon the rights of either minority or non-minority students. For example, a city cannot recognize that Hispanics have been subject to past discrimination and enact an ordinance on that basis which provides for greater minority opportunities for Hispanics and Eskimos. In sum, while not entirely free from doubt, the District appears to enjoy substantial flexibility to act voluntarily to alleviate racial and ethnic isolation.

IV. RACIAL AND ETHNIC INTEGRATION AT BERKELEY UNIFIED SCHOOL DISTRICT

A. Background.

Over the past approximately 25 years, the District has consistently led the field in its efforts to address and eliminate racial segregation. In 1964, the District's governing board adopted a secondary-school desegregation plan which called for the reorganization of three junior high schools, and the redrawing of the boundary lines for two others. In 1966, the Berkeley Unified School District began busing elementary students in an effort to further interracial education, and in 1968 adopted a K-3, 4-6 plan which called for busing, student transfers, and improvement of the instructional program. These efforts to achieve desegregation have continued over the past years, and are highlighted by the recent adoption of the "Master Plan for Schools of Excellence" ("Plan") in 1990, to be implemented in the Fall of 1991.

The Plan addresses many of the areas delineated by Crawford I and the SDE Regulations which are used to identify a racially segregated school, and specifically sets forth the steps taken to alleviate racial and ethnic isolation. Specifically, the plan sets forth voluntary goals:

1. To establish attendance zones for schools which approximate the District-wide racial proportions within zone boundaries;

2. To establish a systems of magnet schools, and to make them attractive to parents and students from throughout the city;

3. To provide resource allocations to make schools equally attractive;

4. To provide within the racially-balance zones, student enrollment at each school that reflects the District-wide racial composition within plus or minus 5% deviation;

5. To ensure that all K-8 classes are racially mixed with consideration for each student's social and educational benefits;

6. To ensure that at the high school classes shall not be constituted on the basis of race, color, sex, handicap or national origin;

7. To develop and implement strategies at the high school to minimize racial isolation in classrooms.

V. EXTENT OF AFFIRMATIVE DUTY.

Unfortunately, unlike federal law, California does not provide a standard for determining when a school district's obligation to eliminate racial isolation ends. (See Board of Education of Oklahoma City v. Dowell (1991) 111 S.Ct. 630.) No case appears to have been decided which sets forth a standard for determining when a district has fulfilled its obligation to alleviate racial and ethnic isolation. Presumably, the duty to continue the efforts to alleviate racial isolation is ongoing in California. As long as segregation exists, and no distinction is made as to the extent of a school's duties on the basis of de jure/de facto grounds, then a district has a duty to take "reasonably feasible steps" to achieve "meaningful progress" towards the alleviation of that segregation.

Does this mean that a school district cannot change its' methodology in seeking to achieve this meaningful progress? Not necessarily. While California school districts are subject to the mandate to eliminate racial isolation, they also have some discretion in choosing the means by which this isolation will be eliminated. Thus, where a school board initiates reasonably feasible steps to alleviate school segregation, and these steps produce meaningful progress, courts will not intervene even if alternative techniques exist which would promise faster progress.

VI. CONCLUSION

In light of the absence of a determination that the District has engaged in de jure segregation, the District's sole obligation in regards to eliminating racial isolation results from California law. California requires school districts which have been identified as having racially isolated students to implement reasonably feasible steps in order to achieve meaningful progress towards alleviating that problem. As the court stated in Crawford I, supra, plans developed and implemented by local school boards, working with community leaders and affected citizens, hold the most promising hope for the attainment of integrated public schools in our state. However, those methods should (1) be used for a legally acceptable purpose; and, (2) be narrowly tailored to achieve that purpose.

Prepared by Kronick, Moskovitz, Tiedmann & Girard on 1/8/93