APPENDIX E

DESEGREGATION: APPROACHING THE 21ST CENTURY

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Magnet Schools of America

13th Annual International Conference
"Bridges to the 21st Century"

Wednesday, May 3, 1995

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DESEGREGATION: APPROACHING THE 21st CENTURY

A. The New Challenge -- Diversity and Differing Needs

The United States Supreme Court's 1954 decision in Brown v. Board of Education of Topeka[1] is well-known for its unequivocal ruling that "separate is not equal." While the simple question before that Court was the constitutionality of state laws creating separate "black" and "white" schools, the situation facing school districts today is no longer, figuratively or literally, one of simple "black" and "white." Brown I required that students be afforded an "equal" opportunity; courts and school districts have from that time forward struggled over how that goal is to be met. As a result of "white flight" and other demographic changes, white students are the actual "minority" in many school districts, while the majority is composed of students of many "minorities," including African-American, Hispanic and Asian. Given this mix, "integration" is no simple matter.

Further complicating desegregation issues is the question of "special needs students" -- those requiring special education due to disabilities and those requiring English-language or bilingual instruction due to limited English ability; additionally, accommodations must be made for those who are especially gifted and who require advanced or accelerated courses.

Similarly, it is not clear why "student achievement" -- measured in terms of grades, graduation, drop-out/suspension/expulsion rates and standardized test scores -- is not equal across the racial spectrum. While students of certain ethnic backgrounds tend to be grouped in lower track, less academically challenging and special education classes, other ethnicities dominate the advanced level courses and are significantly underrepresented in discipline and drop-out statistics.

A further wrinkle in the "achievement" realm is the fear held by some education experts that students entering school with limited English ability do not always "catch up" with their English-speaking peers, and often excel neither in English nor their native language, let alone in their mastery of core courses, such as math, history or science.

The Brown I Court observed that, "today, education is perhaps the most important function of state and local governments,"[2] and that, "in these days, it is doubtful that

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1 347 U.S. 483 (1954) (hereinafter "Brown I").

2 347 U.S. 483, 492 (1954).

any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[3] As education practitioners well know, however, a great many factors influence learning, and it is not always possible to draw a clear line between those factors which are and are not within the control of school officials. Although the conclusion in Brown is arguably even more valid today than when it was written, no easy answers exist for districts attempting to successfully meet the diverse needs of their students.

B. The Brown Framework

The Supreme Court realized from the beginning that "full implementation of [the] constitutional principles [enunciated in Brown I] may require solution of varied school problems.[4] The Brown II Court established the framework by which desegregation cases were to be litigated and supervised over time. While school districts themselves have the primary responsibility for achieving desegregation within their schools, they are overseen by federal district courts.

The powers of the court, in ruling on desegregation plans, are necessarily flexible. As the Brown II Court emphasized, the federal district courts, "in fashioning and effectuating the decrees . . . [are to] be guided by equitable principles," such as "a practical flexibility in shaping . . . remedies" and "a facility for adjusting and reconciling public and private needs."[5] Students may criticize their school's desegregation plan, and the court will evaluate whether or not the plan and the school district's actions in relation to it constitute a "good faith implementation of the governing constitutional principles."[6]

C. The Green Factors and the Requirement that School Boards Take an Active Role in Ending Segregation

Many school systems originally responded to the Brown mandate as though it required only that school districts allow equal access to all schools by children of all races, a system commonly referred to as a "freedom of choice" plan. However, when

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3 Id. at 493.

4 Brown v. Bd. of Educ. of Topeka, 349 U.S. 294, 299 (1955) (hereinafter "Brown II").

5 Id. at 300.

6 Id. at 299.

called upon to evaluate these "freedom" plans, the Supreme Court decided that whether a district "has taken steps adequate to abolish its dual segregated system" begins, rather than ends, with the opening of school doors equally to both races.[7] The problem, of course, was that most students did not elect to change schools, even when they were given the opportunity to do so. Hence, in Green, the Supreme Court charged school boards with taking an active, rather than a passive, role in desegregation efforts.

In Green, the facts indicated that no residential segregation existed, yet there were two schools at each level, one of which was "black" and one "white," with the routes of school buses picking up children crisscrossing back and forth. Under the "freedom" plan adopted by the New Kent District, no children of either race applied for admission to the opposite race school. The Court concluded that the plan clearly was not working towards ending segregation and that, based on these facts, a new plan must be developed. The Court did concede, however, that under differing circumstances a similar "freedom" plan may be appropriate.

Green stated that a district is "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[8] The Court emphasized that "the burden on a school board today is to come forward with a plan that promises realistically to work, and promises to work now."[9] Further, the Court pragmatically concluded that "there is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available at each instance."[10]

The importance of Green is not limited, however, to its requirement that school boards actively work towards desegregation; it is also famous for espousing what are now known as the "Green factors."[11] In reviewing the facts of the case, the Green Court observed that the "racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools, but to every facet of

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7 Green v. County Sch. Bd. of New Kent Co., Va., 391 U.S. 430, 437 (1968).

8 Id. at 437 - 38 (emphasis added).

9 Id. at 439 (emphasis added).

10 Id.

11 Id. at 435.

school operations -- faculty, staff, transportation, extracurricular activities and facilities."[12] Although it does not appear to have been the Court's explicit intention, these six "factors" have since been transformed into a talisman known as the "Green factors," used in every instance of desegregation litigation.

D. "Vestiges of Discrimination"

In addition to the Green factors, another important concept in desegregation litigation is that of "vestiges of discrimination." In Swann v. Charlotte-Mecklenburg Board of Education, the Supreme Court stated that "the objective today remains to eliminate from the public schools all vestiges of state imposed segregation."[13] The general rule today is that, in order to be declared unitary and become free of court control, a district needs to make two showings: (1) that it has "complied in good faith with the desegregation decree since it was entered," and (2) that "the vestiges of past discrimination [have] been eliminated to the extent practicable."[14]

The issue of "vestiges" is normally addressed when determining whether the remedy imposed has fully corrected the original harm; Swann states the basic requirement that "the nature of the violation determines the scope of the remedy."[15] Since the violation is defined as intentional segregation, one might assume that a district could claim to have remedied the violation simply by urging that it had abandoned its intent to segregate. The Court, however, has made it clear that a school board must "do more than abandon its prior discriminatory purpose."[16]

The "vestiges" question now being asked is not simply whether any statistical disparity in the Green factors creates an initial showing of discrimination. Rather, the current question is whether the idea of "vestiges of discrimination" should be limited only to the enumerated Green factors, or whether it should be expanded to include factors such as "student achievement."

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[12] Id. (emphasis added).

[13] 402 U.S. 1, 15 (1971) (emphasis added).

[14] Bd. of Educ. Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237 (1991).

[15] Swann, 402 U.S. at 16.

[16] Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 538 (1977).

The issue of the possible expansion of "vestiges of discrimination" to include disparate achievement by minority students is particularly topical in light of the recent fall into disfavor among educational theorists of the pedagogical practice of "achievement grouping." While "achievement" or "ability" grouping (also disparagingly referred to as "tracking") was widely used in the American educational system long before Brown was decided, it has become an important vehicle by which plaintiffs in desegregation litigation unearth "continuing discrimination against minority students." The argument is that, even if a district claims that race is not a factor in its grouping system, if its result is a statistical disparity in classrooms, then unconstitutional segregation is present.

Neither the Ninth Circuit Court of Appeals nor the United States Supreme Court has definitively addressed how far the concept of "vestiges" will apply in the context of whether a school district has obtained "unitary status." Plaintiffs will argue that the Supreme Court has approved the expansion of "vestiges" beyond the Green factors on the basis of Freeman v. Pitts.[17] However, the Freeman court addressed "quality of education" only indirectly, so that its comments on the issue are dicta. The Court did not definitively rule that if a district's students of all races are not receiving roughly equal test scores that a vestige perforce exists.[18] The Court's holding on quality of education as a factor affecting unitary status appears to be limited to a finding that the district court properly exercised its discretion when it identified factors beyond those identified in Green as appropriate for analysis in this case. Both parties agreed that quality of education was a relevant factor, and neither party challenged this aspect of the district court's decision. Thus, the propriety of considering quality of education as a relevant factor on a petition for unitary status was not at issue in the case.

Nevertheless, the Court appears to approve the approach taken by the district court, including its identification of new and different factors, in addition to the Green factors, as appropriate for consideration, depending upon the circumstances of each case. This approval opens the door for plaintiffs to argue in future cases that quality of education is an appropriate factor to be considered in any given case and, further, to

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[17] 503 U.S. 467 (1992).

[18] One district court has, however, made such a finding, and has cited to Freeman as precedent. In United States v. Yonkers, 833 F. Supp. 214 (S.D.N.Y. 1993), the court found race to be a "statistically significant factor" in lower math and reading test scores among African-American and Hispanic students, and that this lower "achievement" was a result of a "vestige of discrimination" which required active attention from the district.

argue that other new factors that they may identify are relevant and ought to be considered by the Court.[19]

In evaluating ability grouping practices in districts which are not yet unitary (i.e., one still under a court order to desegregate), courts require the districts to defend their grouping practices by proving that their assignment methods are not based on the "present results of past segregation or will remedy such results through better educational opportunities."[20] In approving the use of grouping, some courts have found that lower achievement by minority students did not necessarily implicate race or evidence racial discrimination on the part of the district.[21] However, if a court finds that the grouping practices in question have a substantial segregative effect and are discriminatory, the district will be ordered to implement a new method of assigning students to classrooms before the district may be found to be unitary.[22]

D. Another Approach to Remedying Vestiges and Unequal Achievement -- Milliken and the San Jose Unified School District

As discussed above, many school districts now find that they are comprised almost entirely of minority students. In addition, certain minority groups lag far behind whites and other minorities in achievement levels. Different methods to remedy these problems have been, and currently are being, explored.

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[19] Missouri v. Jenkins, No. 93-1823, is currently pending before the United States Supreme Court. One issue raised is whether a remedial desegregation program must remain in effect because student achievement throughout the school district, as measured by results on standardized test scores, has not risen to some unspecified level designed to achieve comparability to the results in surrounding suburban school districts. Petitioner's Brief at p. 2, Missouri v. Jenkins (No. 93-1823). Hopefully, therefore, this issue will soon be resolved.

[20] McNeal v. Tate, 508 F.2d 1017, 1020 (5th Cir. 1975).

[21] See, e.g., Montgomery v. Starkville Mun. Separate Sch. Dist., 854 F.2d 127, 130 (5th Cir. 1988) (court found grouping practices non-discriminatory and accepted expert testimony that the presence of a university in the district and the socioeconomic background of children, rather than their race, determined achievement group distribution). See also Quarles v. Oxford Muni. Separate Sch. Dist., 868 F.2d 750 (5th Cir. 1988) and Georgia State Conf. of Br. of NAACP v. Georgia, 775 F.2d 1403, 1419 (11th Cir. 1985) (court accepted that rather than race and segregation, "family background" and "hard work" had the "most powerful and consistent relationship to school success."). See also Tasby v. Woolery, 869 F. Supp. 454 (N.D. Tex. 1994) (relying on Freeman as precedent, court found district unitary after considering student achievement and finding that the achievement gap is not a vestige of the prior segregated school system).

[22] See, e.g., United States v. Gadsen County Sch. Dist., 572 F.2d 1049 (5th Cir. 1978).

One example of an almost entirely minority district is that of the Detroit school system, which came before the Supreme Court in Milliken v. Bradley.[23] That case presented a situation where one inner-city district was composed almost entirely of African-American students, while the surrounding suburban districts were composed of almost entirely white students. The issue before the district court was "whether a federal court may impose a multi-district area-wide remedy to a single-district de jure segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their District."[24] The district court reasoned that an "intra-city" plan, involving only the Detroit District and not the outlying suburban districts, "would make the Detroit school system more identifiably Black," and, therefore, "would not accomplish desegregation."[25] Hence, since "school district lines are simply matters of political convenience and may not be used to deny constitutional rights," the court decided that it "must look beyond the limits of the Detroit school district for a solution to the problem."[26]

The Supreme Court, however, disagreed with the district court's conclusion, ruling that, "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."[27] Moreover, "to approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in Brown I and II or any holding of this Court."[28]

Thus, the problem remained -- how can a district comprised almost entirely of minority students become "integrated" and accord its students their constitutional rights under Brown? In Milliken II,[29] heard three years after Milliken I, the Supreme Court

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23 418 U.S. 717 (1974) (hereinafter "Milliken I").

24 Id. at 721.

25 Id. at 733.

26 Id.

27 Id.

28 Id. at 746.

29 Milliken v. Bradley, 433 U.S. 267 (1977) (hereinafter "Milliken II").

approved two aspects of the Detroit District's alternative plan. The first was quite conventional and required that the district shift its roughly 70%/30% black-white student population to assure "that every school within the district reflected, within 15 percentage points, the racial ratio of the school district as a whole."[30] The second aspect called for a more novel approach, namely the implementation of thirteen "remedial or compensatory educational programs," including extra training for teachers and administrators, as well as guidance and counseling programs.[31] The Court upheld this plan and the compensatory programs, and required the State to pay some of the costs. Thus, while concluding that "pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation . . . [because] the consequences linger and can be dealt with only by independent measures,"[32] the Court approved of "compensating" minority students who continued to attend essentially one-race schools by "independent measures."[33]

A more recent example of a school district's adoption of "independent, compensatory measures" on behalf of its minority students is the Consent Decree recently adopted for implementation in the San Jose Unified School District ("SJUSD"). The SJUSD recently entered into the decree which superseded the existing remedial order, first entered by the court in 1985, in its entirety.[34] The Vasquez plaintiffs and the SJUSD agreed in the Consent Decree that "the areas of significant concern of the consent decree [are] bilingual education, classroom integration and access to the full range of educational programs available within the curriculum."[35] The SJUSD is composed mainly of Hispanic students, but its demographic mix and physical boundaries make it difficult to spread out even the few white students remaining in the district.

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[30] Id. at 273.

[31] Id.

[32] Id. at 287.

[33] Id. at 282, 283.

[34] See Vasquez v. San Jose Unified Sch. Dist., Case No. 71-2130 RMW (SJ), Stipulated Modified Remedial Order (N.D. Cal. 1994) (hereinafter "Consent Decree"). The SJUSD was found to be segregated in 1985. See Diaz v. San Jose Unified Sch. Dist., 733 F.2d 660 (9th Cir. 1984), cert. denied, 471 U.S. 1065 (1985).

[35] Consent Decree, Section XI(C), p. 40.

As in Milliken II, the San Jose Consent Decree does provide some numerical requirements relating to racial balancing. However, the Consent Decree also creates several specific requirements for improving the educational opportunities of its Hispanic students. For example, it makes significant revision to its bilingual education programs (including increased staff training and parental outreach and involvement), with the proviso that "because placement of LEP [Limited English Proficient] students in bilingual programs has an inherently segregative effect, any resulting classroom segregation is educationally justifiable only if the District's bilingual education programs serve to advance the dual goal of acquiring English language proficiency and fostering academic skills in the content areas."[36] This standard is similar to the one applied by courts for "ability grouping."[37]

The Consent Decree eliminates "ability grouping" altogether, concluding that "the complete and effective desegregation of the District requires the District to use practicable measures to eliminate segregation within the District's classrooms and educational programs."[38] Desegregation at the school level alone no longer suffices; the District must go much further. For example, the SJUSD is required, among other things, to make its elementary classes "desegregated and mixed-ability," to assign middle school students without taking into account "students' perceived abilities," and, in high schools, to "eliminate all . . . prerequisites, except for bona fide course sequencing prerequisites."[39] Gifted and Talented ("GATE") programs may no longer be offered in "self-contained classrooms."[40]

Moreover, the District is required to increase Hispanic participation in advanced courses, and will be held accountable if this does not occur. In order that students at all levels receive a "multicultural education," the District must revise its curriculum to

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[36] Consent Decree, Section III, p. 4 (emphasis added).

[37] See McNeal, 508 F.2d 1017.

[38] Consent Decree, Section IV(A), p. 25 (emphasis added).

[39] Consent Decree, Sections IV(c)(3)(a) and (b), p. 29.

[40] Consent Decree, Sections IV(C)(1), p. 27; IV(C)(2)(b), p. 28.

include "materials dealing with minority groups and inter-ethnic relationships, in history, social studies, English, literature, science and other subjects."[41]

E. Conclusion

The SJUSD Consent Decree represents an exhaustive effort to examine, and begin to eradicate, all forms of inequality in the educational experience received by San Jose students. Whether or not it will actually succeed in raising Hispanic students' achievement in the District remains to be seen. Yet, that is the ambitious goal of districts seeking to "desegregate" as we approach the 21st century. The road which districts have traveled in the wake of Brown has been long, but their success promises great rewards, both for their students and for our society as a whole.

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[41] Consent Decree, Sections IV(c)(4)(a), p. 31.