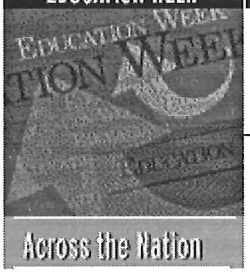
APRIL 30, 1997 EDUCATION WEEK on the WEB



Without Court Orders, Schools Ponder How To Pursue Diversity

By Caroline Hendrie

For background, previous articles, and related Web links, please see our Issues Page on Desegregation.

As desegregation cases wind down in a growing number of school districts, educators face a vexing question: How far can they go to promote racial and ethnic integration without explicit demands from a court that they do so?

Recent legal battles touching on the issue of race-conscious school policies have yielded no clear consensus. As a result, many desegregation experts expect disputes over such policies to become more common in the years ahead.

See our story, "As Desegregation Changes, So Must Educators, Law Experts Say," from April 24, 1996.

"This is going to be a big issue, and how courts are going to deal with it is unclear," said William R. Yeomans, an acting deputy assistant attorney general in the civil rights division of the U.S. Department of Justice. "A district shouldn't have to undo accomplishments that may have taken 30 or 40 years."

A crucial issue, most experts agree, is whether the courts will view the goal of public school diversity as an overriding interest that justifies drawing distinctions on the basis of race or ethnicity.

To critics of race-conscious policies, such distinctions are uncalled for unless a district is clearly righting specific wrongs.

See our story, "Districts View Desegregation in a New Light," Dec. 13, 1995.

"Race is basically like plutonium," said K. Lee Adams, a lawyer representing parents in Troup County, Ga., who are challenging the district's student-assignment plan. "It's too dangerous to use unless there's something there to fix."

But many educators and civil rights advocates believe there are valid reasons for schools to go to considerable lengths to pursue integration.

"There are some things kids just need to be taught that it's not easy to teach in a monochromatic environment," said Henry Dinger, a lawyer who defended the Boston school board last year in a challenge to admissions procedures at its most prestigious high school.

In our "Beyond Busing," package from Feb. 7, 1996, four writers offer their opinions about desegregation.

Still, Mr. Dinger and others agree that the parameters of what is permissible remain in flux. "The extent to which racial diversity itself may be pursued as an educational goal is up in the air," he said.

Race Seen as 'Problematic'

That uncertainty will become more pressing in the years ahead as more and more districts are declared unitary, a legal term meaning that they have remedied the effects of past racial segregation and can be freed from

judicial scrutiny.

Sizable school systems declared unitary in recent years include Buffalo, N.Y.; Broward County, Fla.; DeKalb County, Ga.; Denver; and Wilmington, Del. And in many more districts, including Dallas, Duval County, Fla., and the Missouri districts of Kansas City and St. Louis, efforts to achieve unitary status are pending.

"Once you're unitary, you fall under a different category," said David J. Armor, a desegregation expert and a professor at George Mason University in Fairfax, Va. "The problem is: When you're unitary, can you use race? I think it's up for grabs."

Cases Part of Trend

In this climate, lawyers are advising districts to approach race-conscious policies with caution. Such policies can involve admissions criteria to special schools or magnet programs, assignment programs such as "controlled choice," and rules on student and faculty transfers.

"They need to be thoughtful about how they go about doing it because there are some folks out there who believe that any consideration of race is problematic," said John W. Borkowski, a New Orleans-based partner in Hogan & Hartson, a Washington law firm that often represents school districts in desegregation cases.

The folks Mr. Borkowski has in mind include those who have challenged student-assignment policies in such far-flung locales as Akron, Ohio; Boston; San Francisco; and Troup County, Ga.

In the latest such challenge, two white students sued the Houston school district last week claiming their children were illegally denied admission to a magnet program because of their race. (See "Racial Preferences Challenged in Houston," in This Week's News.)

The case seeks to apply the principles set forth in a federal appellate court ruling in March 1996 that struck down admission preferences for blacks and Mexican-Americans at a Texas law school. ("Court Rejects Race-Based Admissions at Law School," March 27, 1996, and "Supreme Court Refuses To Weigh Race-Based College Admissions," July 10, 1996.)

These cases have arisen at a time of greater resistance among judges to racial preferences across the board.

Recent evidence of this trend includes a federal appellate ruling this month overturning strict racial quotas and other race-conscious measures in the public schools of Rockford, Ill. (See "Racial Quotas in Desegregation Case Rejected," in This Week's News.)

In California, an appellate ruling this month upheld an anti-affirmative action initiative approved by voters last year. Among the uncertainties surrounding the initiative, known as Proposition 209, is whether it will affect voluntary desegregation efforts in districts across the state.

"Courts have increasingly looked askance at these kinds of remedial schemes," said Roger Pilon, an expert on constitutional law at the Cato

Institute, a libertarian think tank in Washington.

While Mr. Pilon welcomes that trend, it is fueling concern among integration advocates.

"The reason people are conscious of it is that there's been a concerted attack on consideration of race," Mr. Yeomans of the Justice Department said.

Akron Policy Struck Down

An example of such an attack came in a little-noticed case in Akron last year. A group of parents sued the 33,000-student district after the school board barred white students from transferring to nearby suburban districts while continuing to allow African-American youngsters to do so.

The board initially had a race-blind transfer policy, under a 1993 state law that allowed students to enroll in districts other than their own. It imposed the ban after it became clear that nearly all the students transferring out were white, a pattern that officials feared could quickly turn Akron into a majority-black district.

In August, U.S. District Judge Sam H. Bell ordered the district to stop enforcing its policy against transfers of white students.

The judge said he based his ruling on the principle that "to create racial preferences or regulations--even for the most admirable and benign of purposes--is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege, and race hatred."

The district, whose student body is about 48.5 percent nonwhite, responded to the injunction by forbidding students of any color to transfer, except those already attending the suburban schools. District officials are negotiating with the plaintiffs in hopes of settling the case.

Mergers Bring Headaches

Another case raising related issues is unfolding in Troup County, an 11,000-student district in west-central Georgia. The recent troubles started when three small-city school systems merged with the county district between 1986 and 1994, creating the district now known as Troup County.

All three of the small systems had substantially higher African-American enrollments than the original county district, which was roughly 87 percent white. After the mergers, some schools departed dramatically from the racial balance of the consolidated system as a whole, which is about 58 percent white.

Concerned by what it saw as a slide toward resegregation, the Justice Department pressed the district to address the imbalances.

In response, the district adopted a controlled-choice system last fall. Under such plans, students may choose which schools they would prefer to attend. But whether they are permitted to enroll in a school depends on how they would affect its racial balance.

A group of both white and black parents has challenged the new

controlled-choice plan, arguing that the district has no grounds for assigning students on the basis of race.

The parents' group says that all four of the districts desegregated a generation ago. They contend that court supervision of the districts ended in 1973 when a judge declared them unitary.

But the Justice Department and the district point to part of that 1973 ruling as evidence that the schools remain under court order and cannot be construed as having attained full unitary status. That section of the ruling directed the districts to do nothing in the future that would tend to resegregate the schools.

In the Justice Department's eyes, the imbalances that resulted from the mergers constitute a violation of the 1973 order. And John M. Taylor, a lawyer from LaGrange, Ga., who represents the district, said school officials feel obligated to correct those imbalances even though the original district had no power to prevent the mergers that caused them.

"We are kind of caught between a rock and a hard place," he said.

Admissions Rules Challenged

Two broadly debated setbacks for race-conscious school policies occurred during the past year when both Boston and San Francisco changed admissions procedures at their most selective high schools in response to legal challenges over racial quotas. ("In Boston, New Admissions Policy Stresses Scores," Jan. 15, 1997.)

In the Massachusetts case, the challenge came from a white student who was denied entry to the selective Boston Latin School despite scoring higher in the admissions screening process than blacks and Hispanics who got in. The same judge who had approved the school's racial set-asides in 1976 found last year that they ran afoul of legal principles enunciated by the U.S. Supreme Court since then.

In San Francisco, a group of Chinese-American plaintiffs denied admission to Lowell High School mounted a similar lawsuit, prompting the district to alter its policy even though the case has yet to result in a ruling.

Laying Legal Groundwork

To help districts justify their use of race in the years ahead, civil rights lawyers hope to establish the legal principle that the desire for diversity is a sufficiently compelling reason for schools to use racial and ethnic classifications.

Harvard University law professor Christopher Edley Jr., for example, plans to use the fledgling Civil Rights Project he has started with Harvard desegregation expert Gary Orfield to help lawyers achieve that aim.

Mr. Edley said his work would seek to identify "the strong arguments that could be used in a judicial context to hold on to diversity."

Critics, however, say diversity advocates have a tough row to hoe.

"Frankly, I don't think they're going to do it," said Mr. Pilon of the Cato

Institute. "I don't think it will fly with this Supreme Court, and it certainly isn't flying in the political arena."

Still, Mr. Yeomans of the Justice Department said he would welcome any help that advocates or academics such as Mr. Edley might provide.

"We don't have the empirical basis we would need to show the benefits of diversity," Mr. Yeomans said. "That's got to be developed. Until then, we're sort of in a holding pattern."

On the Web

Read *Brown* v. *Board of Education.* Text of the landmark 1954 U.S. Supreme Court decision. It states that the "separate but equal" doctrine adopted in *Plessy* v. *Ferguson* "has no place in the field of public education."

Read The Changing Face of Racial Isolation and Desegregation in Urban Schools. This 1993 digest from the ERIC Clearinghouse on Urban Education focuses on several current issues in school desegregation that stem from recent changes in demography, policy, and research.