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The Brown Decisions and the Advisory Opinion

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Today, industrialization is taking place at the fastest rate in the history of the state. If the state does not in fact need a comprehensive labor relations statute, it is at least the duty of the legislature to make a thorough study of the law governing labor disputes in Kentucky and demonstrate that fact.

James Park, Jr.

AUTHOR'S NOTE

After this note reached the printer's, the Supreme Court decided the case of International Brotherhood of Teamsters v. Vogt, Inc., ... U.S. ....., 77 S.Ct. 1166 (1957). This decision constitutes the latest statement by the Supreme Court on the relation of picketing and the freedom of speech.

THE BROWN DECISIONS AND THE ADVISORY OPINION

According to a recent survey[1] made by the State Board of Education, integration in Kentucky is proceeding in an orderly and reasonable manner, indicating that there has been a good faith implementation of those constitutional principles set forth in the *Brown* decisions.[2] The results of the survey show that integration has begun or a plan of integration has been adopted in 108 of the 177 school districts which contain Negroes of school age.[3] These 108 districts contain about 75 percent of the Negro population. Complete integration has been effected in 18 to 20 percent of these districts.[4] The report further states,

> As seen from the following tabulation of all local school districts, there still remain about 69 districts with about 25 percent of the Negro population that have taken no steps toward complying with the decision. No doubt many of these districts had once thought of following the informal plan of integration when Negro pupils applied for entrance in formerly all white schools. This is not legal procedure according to an opinion of the Attorney General. At the close of the school year, two school terms will have passed since the final decision and these school districts should proceed immediately to move toward the adoption of a plan. In some districts this plan may not be more than a simple order of the board of education while in others it may require much study and preparation before the plan is finally adopted by the board. The important thing to do now is to *take steps* and proceed in *good faith* toward the building of a total school service for all people of the district.[5]

[1] Report on Integration, School Year 1956-57, published by the Department of Education, Frankfort, Kentucky.

[2] Brown v. Board of Education, 347 U.S. 483 (1954), designated herein as the Brown decision; Brown v. Board of Education, 349 U.S. 294 (1955), designated herein as the Brown decree.

[3] Supra note 1 at page 2.

[4] Id. at page 2.

[5] Id. at page 3.

A. *The Advisory Opinion*

The "legal procedure" to which the survey refers is that set forth in an advisory opinion[6] handed down by the Attorney General's office on September 13, 1956 upon the request of the superintendent of Webster County Schools where integration had begun at Clay. The request arose from this sequence of events: Negro children had been enrolled at Clay elementary school at the beginning of the school term and had attended classes. Local white opposition arose as a consequence of this integration and the situation became highly sensitive. The National Guard was moved into the town to keep the peace and escort the Negro children to and from school. A similar situation had arisen shortly before at Sturgis where the National Guard was already in use. The Webster County superintendent telephoned the Attorney General's office for assistance in resolving the matter. This resulted in the advisory opinion stating, in essence, that the Negro children were illegally enrolled in the school until there had been some action taken by the school board toward integration. On September 17, 1956 the Negro children at Clay were read an order by the Webster County school board denying them admittance upon the basis of the advisory opinion. Two days later, the superintendent at Sturgis paralleled this action upon advice by the Attorney General that the opinion was also applicable to that school.[7]

Of particular significance are two paragraphs of the opinion:

> It is apparent that the Supreme Court desired to establish an orderly process for accomplishing its purposes. It logically places this responsibility upon the local agency in charge of the schools. The corollary of this principle is that an individual parent has no right to enroll his child in a school without some sort of action having been taken by the school board. If he had such right, the orderly process would be completely destroyed.
>
> If the school board has failed in its responsibility under the Supreme Court decision, a parent or group of parents may make application to a court having jurisdiction to compel action by the school board. It is plain, however, as we say again, that action towards integration must be taken by the board itself, either voluntarily or upon orders of a court, before integration begins.[7a]

[6] See Appendix A.

[7] There has been no success in attempts to clarify what would appear to be a misapplication of the effect of the advisory opinion to the situation at Sturgis. According to the Louisville Courier-Journal, Vol. 204, Number 76, page 1, September 14, 1956, the Union County Board of Education had an official plan for integration consisting of an order abolishing compulsory segregation with Negro pupils having a choice of attending white or Negro schools. It was according to this plan that the Negro pupils elected to attend the white school at Sturgis, rather than the Negro school in Morganfield, twenty-two miles away. Since such an order was sufficient to bestow upon the Negro a legal right to be in the Sturgis school, it would seem that the Attorney General contradicts his opinion in saying it is applicable to this situation.

[7a] See Appendix A at page 693.

B. *The Right Given the Negro*

Unlike the "immediate" and "personal" right given in *State of Missouri ex rel Gaines* v. *Canada*,[8] the right of the Kentucky Negro school pupil, as construed in the advisory opinion, is one that arises only after the school board has acted, voluntarily or under court order. It is submitted that this is substantially what the Supreme Court meant in saying that "school authorities" have "the primary responsibility" and the duty of making only a "prompt and reasonable start"[9] toward complying with the integration decision. Postponement of the Negro's admission by the authorities must be predicated, of course, upon the existence of certain factors[10] which would make integration "impracticable". When it appears to the Negro that the school board has not been acting promptly and reasonably to implement the integration principle he may go into court to obtain a judicial review of the school board's conduct. If the behavior of the school board in delaying integration is not justifiable, the court may enter a decree enjoining further segregation, and recognize the Negro's right to immediate admission. When the school board has voluntarily allowed immediate enrollment of Negro pupils, no further action by any agency is needed. When the school board has taken no action, or acted negatively, further progress depends upon the institution of judicial proceedings by or on behalf of the rejected Negro and thereafter progress depends upon the judgment of the court which might either decree that integration begin at a specified time or permit indefinite delay. So the maturation of any right given the Negro by the *Brown* decision (and recognized by the Attorney General's opinion) involves action or inaction by one or more of three agencies—the school board, the rejected Negro and the court.

Further evidence that the right to admission is not immediate is forthcoming from the question of damages. Since the Negro has a right to have the school authorities[11] make a prompt and reasonable

[8] 305 U.S. 337 (1938).
[9] Supra note 2, 349 U.S. at 300.
[10] Ibid.
"To that end, courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems."
[11] Ky. Rev. Stat. 160.160 (hereinafter known as KRS):
"Each school district shall be under the management and control of a board of education consisting of five members, to be known as the

start toward integration, then, in an action for damages against the members of the school board for failure to make such a start, the Negro should be entitled to an instruction that he could recover if the defendants had failed to make a prompt and reasonable start. It is highly unlikely, however, that a court would recognize this right to a "prompt and reasonable" start and allow damages for its breach, nor would a court allow an assessment of damages against the school board at the same time that it enjoined segregation and specified a date at which integration would commence.[12] This conclusion is

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'Board of Education of . . . Kentucky.' Each board of education shall be a body politic and corporate with perpetual succession. It may sue and be sued; make contracts; purchase, receive, hold and sell property; issue its bonds to build and construct improvements; and do all things necessary to accomplish the purposes for which it is created."

Although Kentucky cases have held that the words "to sue and be sued" do not embrace an action for tort committed by its officers and agents in performing a public duty for which they receive no compensation or advantage, Wallace v. Laurel County Board of Education, 287 Ky. 454, 153 S.W. 2d 915 (1941), these officers and agents may be liable under the Civil Rights Acts, see note 10, infra.

[12] For a consideration of the nature of the "right" given the Negro see (a) the article, Legal Sanctions to Enforce Desegregation in the Public Schools, 65 Yale L.J. 630 at 632 (1956) and (b) Pomeroy, 4 Equity Jurisprudence, 935-6 (5th ed. 1941).

(a) The law journal article recognizes three possible interpretations of the "right":

(1) An immediate right to attend an integrated school, a denial of which would give the Negro child an immediate action for damages even though his right to admittance would be postponed in the manner outlined by the Brown decree.

(2) An immediate right to have the local school board make a prompt and reasonable start towards integration. The right would mature only when sufficient time had elapsed for the elimination of the logistical factors listed in the Brown decree and the plaintiff seeking damages would have to prove that the school board's delay was unjustified.

(3) An immediate right to have the district court acting in a quasi-administrative capacity generate the desegregation process with the Negro child acquiring a right to the benefit of what has been ordered.

(b) Mr. Pomeroy writes,

> In determining whether an injunction will be issued to protect any right of property, to enforce any obligation, or to prevent any wrong, there is one fundamental principle of the utmost importance which furnishes the answer to any questions, the solution to any difficulties which may arise. This principle is both affirmative and negative, and the affirmative aspect of it should never be lost sight of, any more than the negative side. The general principle may be stated as follows: Wherever a right exists or is created, by contract, by the ownership of property or otherwise, cognizable by law, *a violation of that right will be prohibited,* unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy. *The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognized by the law, and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limit its exercise.*

Should the right be one of immediate entry into a white school, and recognized as such by the law courts, the plaintiff may have an action for damages (under

reached because (1) if the Negro had to bring suit to protect his interests, it is evident that public antipathy had prevented the school board from acting voluntarily and the jury, drawn from that public, would be wholeheartedly adverse to allowing the Negro damages, and (2) should damages be given the Negro for the school board's breach of duty in an area where public opposition is intense, such an award may well result in pronounced action directed against the Negro taking the form of economical and bodily persecution[13] and (3) in an action by the Negro seeking an injunction and damages, the court may consider the right to admission as the ultimate objective and deny damages despite the fact that the Negro has been prevented from obtaining an equal education for a year or more due to the school board's failure to make a "prompt and reasonable" start.

If the court should decree an end to segregation either as of the date of the decree or as of some specified future date, there would be a clear recognition that any Negro rejected after the date specified in the decree had an immediate right in the sense that he would be entitled to a judgment for damages against the defendant who rejected him. And a decree approving a plan for gradual accomplishment of integration would also be recognition that, at specified stages, any Negro rejected in violation of the prescriptions of the plan would have an immediate right in this sense.

As a consequence, both the right to have the school board make a "prompt and reasonable" start toward desegregation and the right to admission are not rights in the sense that they are remediable at law in an action for damages. They stand as authority for the Negro's petition for an injunction against segregation or for his suit requesting that the school board make a "prompt and reasonable" start toward integration.

C. *Factors in Desegregation*

The factors which militate against immediate desegregation fall into two categories:

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the Civil Rights Act, 42 U.S.C., secs. 1981 to 1986) (1952) yet be denied equitable assistance in enforcing the right to admission by a court refusing to enter an injunction against the local school board because of the existence of those problems listed by the Brown decree, supra note 10. This is considered by Professor Gilliam in his Comment on a Review, 45 Ky. L.J. 386 (1956-57).

If the right is not immediate but should be that right described in (a) (2), it would not be cognizable at law until the school board has ordered integration to begin or a court has handed down a decree ordering its initiation. Since the right would arise from the decree, a damage action could arise only subsequent to this decree.

[13] Infra note 24. The trial court here has a delicate responsibility. On the one hand, it has a duty to press for complete implementation of the rights declared by the *Brown* decision. On the other hand, the interests of society as a whole must be considered.

(1) Logistical matters recognized by the Court[14] and
(2) Local antagonism, which the court did not mention.

If it is incumbent upon school authorities to make the primary step toward integration, may their considerations of the problems which face them properly encompass both of these categories? Does public hostility fall into the category of "varied local school problems"[15] whose solution is the responsibility of school authorities? The language of the decree itself would seem to place the consideration of this factor squarely upon the courts reviewing the actions of the school authorities and not upon the school boards themselves.[16] In Texas a judge denied integration because the school board had not been able to develop a plan.[17] The decision was reversed by the Circuit Court of Appeals[18] whose examination of the testimony in the lower court indicated that community dissatisfaction was the real reason the school board had made no effort to integrate. The court said,

> We think it clear that, upon the plainest principles governing cases of this kind, the decision appealed from was wrong in refusing to declare the constitutional rights of plaintiffs to have the school board, acting promptly, and completely uninfluenced by private and public opinion as to the desirability of desegregation in the community, proceed with deliberate speed consistent with administration to abolish segregation in Mansfield's only high school and to put into effect desegregation there.[19]

But there are statements which reflect the attitude of some courts who believe that this element is one to be evaluated and included in the thinking of the school boards. In *Bush* v. *Orleans Parish School Board*[20] the court enjoined segregation in schools within the Orleans Parish, but said,

> The granting of a temporary injunction in this case does not mean that the public schools in the Parish of Orleans would be ordered completely desegregated overnight, or even in a year or more. The Supreme Court, in ordering equitable relief in these cases, has decreed that the varied local school problems be considered in each case. The problems attendant desegregation in the deep South are considerably more serious than generally appreciated in some sections of our country. The problem of changing a people's mores, particularly those with an emotional overlay, is not to be taken lightly. . . .[21]

[14] Supra note 10.
[15] "Full implementation of these constitutional principles may require solution of varied local *school* problems.", supra note 2, 349 U.S. at 299.
[16] "Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner.", Id. at 300.
[17] Jackson v. Rawdon, 135 F. Supp. 936 (ND Texas, 1955).
[18] Jackson v. Rawdon, 235 F. 2d 93 (CA 5, 1956).
[19] Id. at 96.
[20] 138 F. Supp. 337 (ED La., 1956).
[21] Id. at 341; see Aaron v. Cooper, 143 F. Supp. at 855, (ED Ark. 1956)

In Prince Edward County in Virginia, an elected Board of Supervisors controlled appropriations for white and negro schools. They publicly declared that integration would mean closing all schools in that no money would be allocated for the operation of integrated schools. In *Davis* v. *County Board of Prince Edward County*[22] the district judge was called upon for final disposition of this case, one of the original segregation cases before the Supreme Court in 1954. The Negro plaintiffs had asked for a decree setting a time limit for an order complying with the Supreme Court mandate in the *Brown* decree. The motion was refused on grounds that integration would mean closing the schools with the disadvantages of an interrupted education for both white and colored pupils, risks of juvenile delinquency would be increased and school teachers would be deprived of a means of income during the period the schools were closed. The court felt that these results would be more undesirable than the "social inferiority" inherent in segregated education. Here, local opposition was buttressed by state legislation, legislation which, if its validity is sustained, will nullify the efficacy of the *Brown* decree. School boards have frequently assumed that local sentiment is to be considered in deciding how and when integration shall be accomplished.[23] This is also apparent in the reports of advisory committees appointed to study integration.[24]

The language of the *Brown* decree reveals the Court's cognizance of objections to integration arising from sociological beliefs but indicates that desegregation should proceed despite such objections.[25]

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where the court said, in speaking of problems which school authorities shall consider.

> "During the period of transition from a segregated to a non-segregated system, the school authorities must exercise good faith. They must consider the personal rights of all qualified persons to be admitted to the free public schools as soon as practicable on a nondiscriminatory basis. The public interest must be considered along with all the facts and conditions prevalent in the school district. . . ."

[22] 149 F. Supp. 431 (ED Va. 1957); and see 4 Race Relations Law Reporter 780 (1956).

[23] See Moore v. Board of Education of Harford County, 146 F. Supp. 91 at 93, 95 (DC Md. 1956); statement of the Chattanooga Board of Education, 3 Race Relations Law Reporter 607 (1956) and the plan of integration of the Hopkins County (Ky.) Board of Education, 5 Race Relations Law Reporter 966 (1956); this plan was disapproved in Mitchell v. Pollock, 6 Race Relations Law Reporter 1038 (1956).

[24] See the Report of the Legal and Legislative Subcommittee of the Texas Advisory Committee on Segregation in the Public Schools, 6 Race Relations Law Reporter 1077 (1956).

[25] "Courts of equity may properly take into acount the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them," Supra note 2, 349 U.S. at 300.

Jackson v. *Rawdon*[26] is an instance of a court meeting this issue head-on and may reflect the approach which the majority of courts will take in denying to school boards the liberty of gauging public opinion in formulating their plans of integration. The Supreme Court listed those specific factors which equity courts could take into consideration in allowing school authorities more time before integrating[27] and the element of public sentiment was absent from this list.

There is a manifest disadvantage in allowing school boards permission to make their integration plans dependent upon the subsidence of community opposition or in permitting this problem to be included within the analysis of the school board. Any school board is susceptible to public pressure and this vulnerability could encourage instances of clothing resolutions to maintain segregation in the garb of logistical problems that resist solution when the real reason for the delay would be purely local opposition. This, in effect, would require the courts to act in a quasi-administrative capacity leading to long and involved inquiries into school system operation and create additional delays in giving relief to the plaintiff. There is, on the other hand, much to be said for permitting this local authority, whose fingers are close to the pulse of the public, to weigh the advisability of desegregating at a time when the Negro may gain his right to an integrated education but would stand subject to the retributive activities of the community.[28] When local antagonism rises to such extreme degrees as to cause the school board to take no action whatsoever toward integration, the Negro may react in a similar manner and decide that the risk involved in bringing a suit is not worth the advantages of integration.[29]

D. *Who Takes the Action: the Superintendent or the School Board?*

The advisory opinion says that action determinative of the integration process must be taken by the school *board*, meaning that such action must arise as a majority result of a *group* and negating the possibility that the integration plan may be initiated by the *superintendent* or *principal* of the school. The inference is drawn that any Negro child who was enrolled in school without school *board* sanction prior

[26] Supra note 16.
[27] Supra note 10.
[28] See U.S. News and World Report 29-30 (Oct. 29, 1954).
[29] The Negro may be reluctant to take advantage of his right to an integrated education or may be opposed to integration in general, at least this is the conclusion reached by the Texas Advisory Committee (Supra note 20) on the basis of a referendum vote which indicated that maintaining segregation was heavily favored in those areas predominantly Negro, 6 Race Relations Law Reporter at 1081 (1956).

to such enrollment was there illegally. The strength of this inference is diluted by a second opinion delivered on September 28, 1956 which modifies in part the language of the first. White pupils had boycotted integrated schools in Henderson County, Kentucky and, as a consequence, the school superintendent asked the Attorney General four questions, the first and second dealing with integration procedure:

> 1. Is the formal adoption of a plan necessary before a district begins complying with the Supreme Court decision?
>
> Answer: A formal adoption in the sense of a stereotyped procedure is not, we believe, contemplated as a necessity for compliance. However, a school board, as we have pointed out in earlier opinions, acts only through its duly authenticated minutes and, except in the case of ratification as discussed in our answer to your second question, it must take some action to begin desegregation . . . The excerpts from the minutes of the Henderson County School Board meeting of August 11, 1956, is adequate for the adoption of integration plans in your school system, in our opinion.
>
> 2. May the superintendent, the executive officer of the board of education, at the direction and agreement of the board and in keeping with the policy of the board, either oral or written, proceed to enroll pupils without regard to race?
>
> Answer: The superintendent, being the executive officer of the school board, can proceed to enroll pupils under the direction and policy formulated by the school board. The correct procedure in this regard would be for the school board to formulate the policy and plans for enrollment of pupils and related matters in a properly called meeting and have such plans spread upon the minute books of the meeting, duly authenticated by the secretary or chairman of the board. However, in the absence of this procedure, we can envision a situation wherein the school board, after action by the superintendent, ratifies that action. This could take place by formal ratification at a duly called meeting or approval of related matters indicating a ratification of the conduct of the superintendent.

The third question asked if the school board had a right to stop integration once it was started, and was answered in the negative by the Attorney General. The fourth question dealt with conspiracy actions being brought against individuals or organizations advocating violation of the school attendance laws.[30]

Thus, the "action" of the school board referred to in the first opinion is interpreted as

> (1) a motion adopted by the school board to
> (a) begin integration, or
> (b) to initiate a plan of integration,
> or

[30] The boycott of Henderson County Schools was allegedly abetted by an organization known as the "Citizens Council" who decided to pursue their aims and objective through "legal and legislative channels" after the second opinion was delivered, Louisville Courier-Journal, Volume 204, Number 91, page 1, September 29, 1956.

(2) ratification of the superintendent's action of enrolling Negro school children which was done without prior school board sanction.

An extended discussion of what the Supreme Court meant when it used the term "authorities" may be of doubtful utility. The language of the decree says,

> Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems. . . .[31]

It seems likely that a decision of such magnitude was not intended to be subjected to the harassment of minute technicality; the court may have been content to erect the skeleton and let the subsequent case decisions supply the substance matter. As the word "authorities" is one of all-embracing latitude, the court may have assumed that state statutes would describe the roles of those persons in executive capacities whose functions are organic to the school system.

E. *The Superintendent: Should He Act Alone?*

Since the right given the Negro by the *Brown* decision is so completely foreign to the policy heretofore followed in segregated school system operation, it is doubtful whether the school superintendent, as chief executive of the school board, would have the sole authority in making the integration move.[32] His responsibilities and spheres of policy-making have been prescribed through statute,[33] local regulations and powers acquired through custom under the "separate but equal" theory and extension of those areas to include the prerogative to begin desegregation would be totally dependent upon the delegation of power he may have from the local school board or from state statute.

It is suggested that the school superintendent is a less desirable source of authority from which the integration decision should come.

[31] Supra note 2, 349 U.S. at 299.

[32] Would the Negro who has been admitted by the superintendent and subsequently expelled by the school board that had adopted no plan and did not ratify the action of the superintendent have an action for damages? Not according to the advisory opinion since the Negro was not legally enrolled. This is supported in part by the decision in Steiner v. Simmons, Del. , 111 A. 2d 574 (1955), where the Supreme Court of Delaware reversed a lower court holding that the Negro children had a legal status quo existing prior to their expulsion. The Supreme Court decided the case before the "procedural" Brown decree was handed down. The reversal was based on the contention that the Supreme Court had granted time to permit school officials an opportunity to work out a plan to desegregate.

[33] KRS 160.370 describes the superintendent as the executive agent of the school board with the responsibility of carrying into effect the policies of the state and local board. His general supervision of the schools is subject to the control and approval of the school board.

Vesting such authority in one man would result in a detriment or benefit to the Negro according to the superintendent's personal predilections. If school boards should be susceptible to public opposition, even more so the possibility that one individual could be swayed with greater ease. Additionally, the action of the board, in prescribing the commencement of integration, could overrule and nullify the efforts of a superintendent who wished to delay integration, merely in deference to local opinion.

F. *Summary*

Since the advisory opinion warns the school boards that they must comply with the good faith requirement of the *Brown* decree, it appears that there has been no extreme derogation of the Negro's right. The Attorney General has interpreted it as one whose immediacy is partially dependent upon the local school boards with ultimate judicial review. This is consistent with the examinations of the courts. To those who feel that there should be a rapid movement in destroying the stigma of "second class citizenship," it seems unnecessary that the Negro must bring suit to fulfill that which has been given him. But there can be no dispute that the complexities of integration, discounting the involved sociological objections, demand time-consuming processes of reconciliation. The Supreme Court has placed the burden on the courts of first instance in seeing that the delay is necessitated by the local factors.

There is little actual difference between the *Brown* decree and the advisory opinion. The Attorney General has made more definite the procedure by which integration is to begin in Kentucky school districts with the stipulation that the school board, not the principal, must make the decision. Although this was its legal effect, it was popularly interpreted as a victory for the segregationists after the State had demonstrated that military force would be used to prevent the jeopardization of civil rights. The approbation of the opinion varied with the personal evaluation of what the school superintendent at Clay had attempted and what the local opponents of desegregation accomplished.

In those areas in Kentucky where local opposition to integration is present, the school boards have a delicate task in making integration plans. The public and private considerations of taxpayer and pupil must, however, be subordinated to the court's command. The school boards' primary obligation now rests in the protection of the personal interests of the Negro in admission to public schools as soon as it is possible to do so.

Paul Saad

APPENDIX A

September 13, 1956

Mr. Wilbur Collins
Superintendent, Webster County Schools
Dixon, Kentucky.

Dear Mr. Collins:

In our telephone conversations of yesterday and today, and in your telegram of this date, you have described the official actions taken by the Board of Education of Webster County to implement the decisions of the Supreme Court of the United States in Brown vs. Board of Education of Topeka, 347 U.S. 483, 98 L.Ed. 873, 38 A.L.R. (2d) 1180, and 349 U.S. 294, 99 L.Ed. 1083. The action of your Board has been limited to the appointment of a committee of colored and white citizens to study the proper procedure for desegregation in your county. This committee was appointed last year but has not yet made its report.

You now ask whether two Negro pupils who have presented themselves for enrollment at the school at Clay (heretofore attended solely by white children) are entitled to enrollment without action by your Board of Education. They have previously attended an independent district school under a contract with the County Board.

The first opinion handed down on May 17, 1954, in the case of Brown vs. Board of Education of Topeka, supra, reversed the previous line of opinions establishing the "separate but equal" doctrine, and declared that the segregation of pupils in public schools on the sole basis of racial origins was unconstitutional. That opinion, however, reserved the matter of procedure in desegregation for further argument. The Supreme Court, among other questions, specifically asked for argument on the following matters:

> 4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
>
> (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
>
> (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinction?
>
> 5. On the assumption on which questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),
>
> (a) should this Court formulate detailed decrees in these cases:
>
> (b) if so, what specific issues should the decrees reach;

> (c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;
>
> (d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

The arguments were made, and the questions were finally determined by the Supreme Court, in the second or "procedural" opinion handed down in May of 1955. Mr. Chief Justice Warren, speaking for the Court, chose to answer questions 4 (b) and 5 (d) in the affirmative, thereby permitting "an effective gradual adjustment to be brought about from existing segregated systems" and returning all of the five cases to the courts of origin. It is to be noted in particular that, of the five cases, the one involving the State of Delaware, came from the Supreme Court of Delaware, which had held segregation unconstitutional in that state. Despite the fact that the Delaware case was not reversed, it was returned to the court of origin for further procedure in line with the "gradualist" concept.

The Supreme Court made it plain that the defendant school boards were required to make a prompt and reasonable start towards good faith compliance with its ruling at the earliest practicable date. However, the Court said: "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.

The Board of Education of Webster County therefore has the primary responsibility for proceeding with integration at "deliberate speed." It must assume this responsibility, for it does not take action, or if it has not taken action with proper speed, any court having jurisdiction, state or federal, may require it to act upon proper application being made to such court.

It is apparent that the Supreme Court desired to establish an orderly process for accomplishing its purposes. It logically places this responsibility upon the local agency in charge of the schools. The corollary of this principle is that an individual parent has no right to enroll his child in a school without some sort of action having been taken by the school board. If he had such right, the orderly process would be completely destroyed.

If the school board has failed in its responsibility under the Supreme Court decision, a parent or group of parents may make application to a court having jurisdiction to compel action by the school board. It is

plain, however, as we say again, that action towards integration must be taken by the board itself, either voluntarily or upon orders of a court, before integration begins.

The only case which has arisen in Kentucky since the Supreme Court decision is Willis vs. Walker, 136 F. Supp. 177. In that case the United States District Court for the Western District of Kentucky recognizes the principles which we have just set out. Upon application of a group of Negro parents, and upon the basis of facts set out concerning the school system in the particular county involved, the Court ordered the integration of the high schools of Adair County in February, 1956, and the integration of the grade schools of that county in August or September, 1956. This case, and the cases in other states which we have examined, indicate very strongly that the courts will require a rather speedy compliance in most areas of Kentucky. It may be that when this matter is taken to court, if it is, the court will find that Webster County has not acted with the "deliberate speed" required by the Supreme Court. It seems to us that good faith compliance is more likely to be attributed to a school system which has come up with a definite plan, though gradual in its nature, than to a school system which has not adopted any plan at all.

This opinion has been written by the undersigned in collaboration with Assistant Attorneys General M. B. Holifield, Robert L. Matthews, Jr., and David Sebree.

Yours truly,

Jo M. Ferguson
Attorney General

JMF:ch
cc: Dr. Robert R. Martin
Superintendent of Public Instruction