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BUSING AND THE LOWER FEDERAL COURTS

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BUSING AND THE LOWER FEDERAL COURTS

For more than a decade after the Brown decisions, the issue of student busing was not considered in detail by the courts, largely because of near universal judicial acceptance of "freedom of choice" as a desegregation remedy. The only references to busing concerned the State's responsibility to make transportation facilities available on a nondiscriminatory basis to all students who voluntarily chose to attend school outside their residential neighborhood. For example, in Willis v. Walker,[1/] a 1955 decision by the District Court for the Western District of Kentucky, Judge Swinford stated:

> The defendants, by their answers, plead overcrowding of existing school buildings and the inadequacy of transportation facilities. I think that these conditions are to be taken into consideration by the court in fixing a date for integration, but I do not think that any of them are excuse for unlimited delay.

Similarly, Broussard v. Houston Independent School District[2/] involved

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1/ 136 F. Supp. 177, 181 (W.D.Ky. 1955).

2/ 262 F. Supp. 262, 266 (S.D. Tex. 1966); In addition, Judge Haney found that the neighborhood school policy maintained by the Houston school board was supported by "a host of reasonable and compelling" considerations:

(Continued)

a freedom of choice plan providing for separate buses to serve students attending one black and one white school in the district. In approving the plan, the district court observed, "In this manner the children will be able to select the school they wish to attend by the bus they ride." The Fourth Circuit Court of Appeals in Gilliam v. School Board of the City of Hopewell[3/] held in 1965 that "[t]he constitution does not require abandonment of neighborhood schools and the transportation of pupils from one area to another solely for the purpose of mixing the races in the schools." Judge Haynsworth found in Gilliam that the boundaries the school board used in making assignments were in accordance with natural geographical features and were not grounded in racial factors.

Much of the initial impetus behind the use by the lower Federal courts of student busing as a desegregation technique derived from Supreme Court rulings in the last decade. As observed, the Supreme Court in the

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(2 Continued)

> Clear present need and other relevant factors such as accessibility of the facility, the safety and physical convenience of the student, the minimal exposure of the younger students to nonsupervision, the home and family and community advantages of a nearby school, a due regard for prevailing traffic arteries and patterns, and the general feasibility characterize the local school building project rather than the suggestion of intended racial discrimination. 262 F. Supp. at 270.

3/ 345 F. 2d 325, 328 (5th Cir. 1965).

1968 Green case held that freedom of choice or any other "racially neutral" student assignment policy is not a constitutional end in itself; rather, any plan has to be judged by its "effectiveness" and school officials have an "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." However, neither Green nor any other Supreme Court ruling has held that student busing is a necessary adjunct to constitutionally adequate desegregation in all cases. The Green Court itself recognized that "there is no universal answer to the complex problem of desegregation; there is obviously no one plan that will do the job in every case." While the Court in Swann approved the use of racial "ratios" and judicially enforced transportation schemes, provided that they did not exceed certain limits (i.e. that "the time or distance of travel is [not] so great as to risk the health of the children or significantly impinge on the educational process"),[4/] it also acknowledged the potential of other forms of relief--such as the construction of new schools and the closing of old ones, remedial altering of

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4/ The "Finger Plan" affirmed by Swann required that as many schools as practicable reflect the 71/29 percent white/black student ratio of the district as a whole and resulted in the busing of approximately 30,000 of the system's 84,500 students in the first year of its implementation. The trips for elementary school students averaged about seven miles one way and the district court found that they would take "not over 35 minutes at most." This, in the Court's view, compared "favorably" with the transportation plan previously operated in the the Charlotte-Mecklenburg system under which each day 23,600 students in all grade levels were transported an average of 15 miles one way for an average trip requiring over an hour. "In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to walk-in schools."

attendance zones--which may or may not involve additional transportation of students. As in other equity cases, the lower Federal courts were vested with "broad discretion" to determine, in the first instance, what specific measures may or may not be necessary to achieve "the greatest possible degree of actual desegregation" in a given case.

Without more specific guidance from the Supreme Court,[5/] lower courts in the post-Swann era have taken varying approaches with regard to the extent of busing that will be required. For example, the Fifth Circuit in Mannings v. Board of Public Instruction of Hillsborough Co., 427 F.2d 874 (5th Cir. 1971) approved a plan to desegregate the Tampa, Florida school system which required the busing of 52,000 students in 1971-72, an increase of some 20,000 students over the previous school year. Total rides averaged 45 minutes to 1 1/2 hours one way. On the other hand, a Federal district court in Memphis--where total desegregation could have

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5/ In his ruling on application for a stay order in Winston-Salem/Forsyth County Board of Education v. Scott, 404 U.S. 1221 (1971), Chief Justice Burger, sitting as Circuit Justice, offered some additional indication of the limits imposed by Swann on student busing. The Chief Justice found "disturbing" the district court's apparent agreement with the school board that Swann required that each school have a proportion of blacks and whites corresponding to the proportion prevailing in the system as a whole. He denied the stay application, but only after chastising the board for being vague in its reference to "one hour average travel time" and indicated, "by way of illustration," that three hours would be "patently offensive" when school facilities are available at a lesser distance. He also stressed that he would be disposed to grant the stay if it had been made earlier and more accurately and seemed especially concerned that the court's order called for 16,000 more students to be transported in 157 more buses, nearly double the number before adoption of the plan.

been accomplished by a plan involving bus rides up to 60 minutes--accepted a plan which left some 25,000 black students in 25 all-black schools, but which reduced the average bus ride to 38 minutes.[6/] The final plan required the busing of 38,000 pupils, with no rides over 45 minutes long, even though it left untouched two all-black high schools, four all-black junior high schools and 19 all or predominantly black elementary schools. Northcross v. Board of Education, 341 F. Supp. 583 (W.D. Tenn. 1972), aff'd 489 F. 2d 15 (6th Cir. 1973), cert. denied 416 U.S. 962 (1974). The Sixth Circuit affirmed the district court's consideration of the "practicalities" involved in busing, and quoted with approval from the decision below:

> The lesser degree of desegregation in [the plan adopted] is based primarily upon four factors pertaining to effectiveness, feasibility, and pedagogical soundness. Those factors are time and distance traveled on buses, cost of transportation, preservation of desegregation already accomplished, and adaptability. 489 F. 2d at 17.

Although it had on a previous appeal rejected expert testimony that busing itself was undesireable, the Sixth Circuit apparently approved

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6/ Plans I and III, as presented to the district court, would have placed 97% of all students in desegregated units; 48,000 children would have been bused, and a majority of those (75% to 80%) would have had a bus ride of 31 to 45 minutes each way. Of those bused, 9,700 students would have a 46 to 60 minute ride each way, and most of these would have been elementary students. Plan II, which the court adopted, left 25 all-black or predominantly black units (19 elementary schools, 4 junior high schools, and 2 high schools), 83% of the students would attend school in desegregated units, 38,000 children would be bused, and 44% of those would have a 31 to 45 minute bus ride each way, with no ride being over 45 minutes.

the use of such evidence in determining how much busing to use, noting that "[t]he one psychological expert was of the opinion that a shortening of the time or distances of transportation would inure to the benefit of many school children, especially the younger ones."[7/]

In Thompson v. School Board, 498 F. 2d 195 (4th Cir. 1974), the Fourth Circuit Court of Appeals affirmed a finding by the district court that a desegregation plan for Newport News, Virginia which would have involved bus rides of up to two and one half hours of travel time a day for first and second graders was not "feasible." The plan had been prepared by an "expert" who was unfamiliar with the situation in Newport News and who testified that the time and distance to be traveled had not entered into his consideration when preparing the plan. Without remanding for consideration of alternatives, however, the appeals court affirmed a neighborhood school plan based on three factors--"(1) the transportation problems within the city, (2) the educational process, and (3) the health and ages of the very young children who would be

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7/ The weight of authority appears to the contrary on the relevance of sociological evidence to the issue of the propriety of busing as a remedy in school desegregation cases. In United States v. Board of School Commissioners, Indianapolis, Ind., 503 F. 2d 68, 84 (7th Cir. 1974), the Seventh Circuit ruled that the district court had properly excluded the testimony of two expert sociologists that "mandatory busing programs could result in adverse sociological and psychological effects on the children involved. . ., that prejudice, racial solidarity and the desire for separatism was usually enhanced rather than diminished, and that over the short run busing for purposes of integration did not lead to significant gains in student achievement or interracial harmony." See, also, Mapp v. Board of Education, 477 F. 2d 851 (6th Cir.), cert. denied 414 U.S. 1022 (1973).

transported." This drew the dissent of three judges on the appellate tribunal who felt that "busing within workable parameters may facilitate integration of a number of classes in grades 1 and 2." 498 F. 2d at 201.

Short of the presumptive upper limit of three hours suggested by the Chief Justice in the Winston-Salem/Forsyth case, and the broad health and safety limitations noted in Swann, there appear no hard and fast rules as to the time or distance of travel that will be permitted, but the courts in several cases have observed that the extent of required busing compared favorably with that in Swann.[8/] Besides the time and distance of travel, the courts have recognized a host of other factors, including the age of the students involved, in determining how much busing is proper, and taken into account traffic hazards or other complexities of transportation in approving a plan of desegregation.

8/ See, e.g. Vaughn v. Board of Education of Prince George's County, 355 F. Supp. 1051 (D. Md. 1972), aff'd 468 F. 2d 894 (4th Cir. 1973) (maximum busing time of 35 minutes per pupil, with mean average of 14 minutes per one-way bus trip compared with 35 minute maximum in Swann though that represented a reduction in maximum one-way bus trips prior to desegregation in that case); Brewer v. School Board of City of Norfolk, Va., 456 F. 2d 943 (4th Cir.), cert. denied 406 U.S. 905 (1972) ("30 minutes each way" not "substantially different" from that required by Swann); Moss v. Stamford Board of Education, 356 F. Supp. 675 (D. Conn. 1973) (plan provided "maximum time to be spent on the buses by any child is 34 minutes--slightly less than the maximum time in the Swann case and there found acceptable"); Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), aff'd 530 F. 2d 401 (1st Cir. 1976) (under final plan approved for Boston schools "the average distance from home to school will not exceed 2.5 miles, and the longest possible trip will be shorter than 5 miles" with travel time averaging "between 10 and 15 minutes each way, and the longest trip will be less than 25 minutes").

The district court in United States v. School District of Omaha, 418 F. Supp. 22 (D. Neb. 1976), aff'd 241 F. 2d 708 (8th Cir.), vacated on other grounds 423 U.S. 946 (1976) particularly stressed the age factor when it excluded all first grade school children from the mandatory student assignment portion of a desegregation plan for the Omaha public schools.[9/] In another ruling, Medley v. School Board of Danville, Virginia, 350 F. Supp. 34, 51 (W.D. Va. 1972) the court excepted grades one through four from its order mandating a prescribed racial ratio in each the district's schools. Judge Widener stated that "unless compelling circumstance

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9/ Judge Shatz observed in his Omaha ruling that:

> The evidence in this case is persuasive, and common sense dictates, that children who are attending a full day of school for the first time are subject to a high risk of failure (or retention). These youngsters are in a transitional period from a home and neighborhood environment into a structured and well-ordered public type of environment. At the first grade age, such pupils are not yet, on a comparative basis, physicially as strong as the children in the higher grades and are subject to periods of frequent illness. Because it is their first year of full-day school involvment, these children tend to be immature and easily frustrated. It is during the first year that these children learn to read, which alone is a difficult undertaking, and which first establishes their learning patterns for the remainder of their lives. For these reasons, it is the opinion of this court that the interests of the students in question, from an educational and psychological standpoint, are best served by minimizing, wherever possible, all of the circumstances which may tend to make more difficult, rather than enhance, their first formative year. 418 F. Supp. at 25.

require otherwise, the youngest elementary students should [not] be bused for the sole purpose of achieving mathematical precision." Taking a contrary position, however, is the Fifth Circuit Court of Appeals which has ruled that the "vague, conclusory, and unsupported assertion that children under 10 years old should not be bused for the purpose of desegregation" did not justify the failure of Austin, Texas school officials, who submitted a desegregation plan for the sixth grade, to desegregate grades K to 5. United States v. Texas Education Agency, 532 F. 2d 380 (5th Cir. 1976). Similarly, the Eight Circuit in Haycroft v. Board of Education of Jefferson County, Ky., 585 F. 2d 803 (6th Cir. 1978), reversed a district court order which exempted first grade students from a plan requiring one way bus trips of "at least 45 minutes." "We find no justification for the non-inclusion of first grade students. They are part of the normal curriculum of the district and entitled to a full and equal integrated education."[10/]

Another practicality the courts will consider in determining the appropriate scope of student busing orders is the existence of geographical barriers or traffic conditions that may make transportation hazardous or exceedingly difficult to implement. In Stout v. Jefferson County Board of

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10/ 585 F. 2d at 806. See also, Flax v. Potts, 464 F. 2d 865 (5th Cir. 1972); Clark v. Board of Education of Little Rock School District, 465 F. 2d 1044 (8th Cir. 1972); Penick v. Columbus Board of Education, 583 F. 2d 787, (6th Cir. 1978), aff'd No. 78-610, 47 U.S.L.W. 4924 (7/2/79); NAACP v. Lansing Board of Education, 581 F. 2d 115 (6th Cir. 1978).

Education, 537 F. 2d 800 (5th Cir. 1978), the United States challenged a desegregation plan that left intact two all-black and one all-white neighborhood schools in a system approximately 80 percent white. To effectively desegregate these facilities, district court found, would require pairing them with schools some 9 to 13 miles away in an adjoining student attendance zone. This would have resulted in transportation times of 20-23 and 33-41 minutes, one way, for students transferred between zones. Although the Fifth Circuit found that "these factors, standing alone, would not seem prohibitive," it "reluctantly" affirmed the trial court refusal to order busing because of "a substantial chain of hills or small mountains" dividing the two zones. Describing the natural barriers, the appeals court stated:

> Shades Mountain, a chain of substantial hills or small mountains, rises along the western boundary of the Berry zone, presenting an almost sheer bluff between Wenonah [the other zone]. Only two roads across Shades mountain are suitable for transporting students between the zones. One is a major truck route which, as it descends the mountain, has produced more accidents than any other segment of road of similar length in Alabama. The other is steep and winding and carries a heavy volume of automobile traffic during morning school hours.

These considerations, "together with those of time and distance," were sufficient to sustain the district court finding that busing between the two zones was "dangerous and infeasible." 537 F. 2d 801.

But another recent Fifth Circuit ruling indicates that school officials have a substantial burden of justification for the exclusion of racially identifiable schools from a comprehensive plan because of the

geographical features of the school district. Tasby v. Estes, 572 F. 2d 1010 (5th Cir. 1978), cert. gr. No. 78-253, 47 U.S.L.W. 3554 (2/10/79). That case involves efforts to desegregate the Dallas Independent School District (DISD), an enormous school system both from the standpoint of geography and student population (138,000). The heart of the Dallas plan was the division of the district into six subdistricts; four of these subdistricts were zoned to achieve a student racial mix approximating the district as a whole, two others containing a predominant ethnic group. Seagoville was predominantly Anglo-American and East Oak Cliff, bounded by the Trinity River bottom on one side and I-35 on the other, was about 98 percent black. The district court, Judge Taylor, concluded, in light of the natural boundaries and "white flight," that this was the only "feasible" division of the district and that no "practicable" means existed for desegregating Seagoville and East Oak Cliff.

A three judge panel of the Fifth Circuit rejected this conclusion, however, because the district court had not made an adequate inquiry as to whether more extensive usage of the desegregation tools described in Swann, including school pairings and busing, would in fact remove the racial identifiability of Seagoville and East Oak Cliff districts. The key language of the opinion is

> The DISD acknowledges that the creation of the all black East Oak Cliff subdistrict and the existence of a substantial number of one-race schools militates against the finding of a unitary school system. It contends, however, that this is the only feasible

> plan in light of natural boundaries and "white flight." The district court was instructed in the opinion of the prior panel to consider the techniques for desegregation approved by the Supreme Court in Swann v. Charlotte-Mecklenburg Board of Education [citation omitted]. We cannot properly review any student assignment plan that leaves many schools in a system one race without specific findings by the district court as to the feasibility of these techniques. [citations omitted]. There are no adequate time or distance studies in the record in this case. Consequently, we have no means of determining whether the natural boundaries and traffic considerations preclude either the pairing and clustering of schools or the use of transportation to eliminate the large number of one-race schools still existing.
> 572 F. 2d at 1014.

A number of early post-Swann decisions implied that the courts would be more inclined to utilize busing remedies where the school district has provided transportation services to its students in the past and the desegregation plan requires only a "moderate increase in transportation to eliminate all vestiges of the longstanding dual school system in affected schools." Tillman v. Board of Public Instruction, 430 F. 2d 309 (5th Cir. 1971). Thus, in rejecting a school board's contention that the plan approved by the district court was "excessive" and "unreasonable," the Fourth Circuit in Eaton v. New Hanover County Board of Education, 459 F. 2d 684 (4th Cir. 1972) emphasized that

> During the 1970-71 school year the Board transported approximately seventy-five hundred students on seventy-eight buses. The plan directed by the district court will add only some twenty-six hundred students to the total of those to be transported and requires only an additional thirty-eight

> buses. There is nothing to support the contention that the proposed busing program involves time or distance of travel that would be so great as to risk the health of the children or otherwise significantly impinge on the educational process. 429 F. 2d at 686.

Similarly, the Eight Circuit in United States v. Watson Chapel School District No. 24, 446 F. 2d 933 (8th Cir. 1971) sustained a HEW plan which the school board charged would double the number of students bused on the basis of the fact that the school district was already engaged in busing over 1,200 students. In so doing, however, the court accepted HEW's assertion that the plan would require only "the rerouting of present buses and if there were to be an increase it would be very slight" and that it could be fully implemented with the addition of two buses to the district fleet.

But it now appears that the magnitude of the administrative burden thrust on the school system, either in terms of the aggregate increase in the number of students bused or the additional transportation costs to the district, will not per se defeat a plan deemed by the courts essential to achieving constitutional compliance. 11/ According to a recent

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11/ In its discussion of the various equitable remedies available to the Federal courts once an equal protection violation has been established, Swann itself pointed out that "[t]he remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems." 402 U.S. at 28. It is likewise clear that neither the Tenth nor Eleventh Amendment precludes a monetary award against the State or local officials to support a prospective plan "designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system." Milliken v. Bradley, 433 U.S. 267 (1977).

study,[12] Charlotte, North Carolina by the 1975-76 school year had doubled its bus riding student population to accomodate desegregation at a total annual cost of $612,128. Dallas, Texas has had two orders; one requiring 7,000 students to be transported for desegregation,[13] the other 18,000.[14] The total cost of student transportation to achieve desegregation has been estimated at about $500,000 per year. In Jefferson County, Kentucky, the merger with Louisville schools for purposes of desegregation involved the transportation of 19,000 more students.[15] According to Van Fleet, the number of miles traveled nearly doubled from 27,000 to 53,000 daily. Before desegregation and merger the district operated 572 buses for a total cost of $3.5 million; thereafter, 629 buses were used at a cost of $7.25 million. In Denver, Colorado, almost 15,000 more students were transported to school the first year of desegregation and another 1,000 the second year.[16]

12/ Van Fleet, Alanson A., "Student Transportation Cost Following Desegregation," Integrated Education, vol. 15, pp. 75-77 (Nov.-Dec. 1977). Van Fleet estimates that nationally, 21.3 million students (51.5 percent) were transported to school in the school year 1973-74, only 7 percent for desegregation purposes, at a cost of $1.85 billion, or $87 per pupil transported. This 7 percent figure is supported by recent government estimates. The Department of Health, Education, and Welfare late last year estimated "that 48.2 million students will attend school from kindergarten through high school [in 1978-79]. At least 40 million of them are eligible to ride buses, and between 5 and 8 percent--roughly 2 million--are being transported in an effort to stop racial segregation at the schools they attend." Washington Post, p. A 14 (September 3, 1978).

13/ Tasby v. Estes, 342 F. Supp. 945 (N.D. Tex. 1971).

14/ Tasby v. Estes, 412 F. Supp. 1192 (N.D. Tex. 1976).

15/ Newburg Area Council, Inc. v. Board of Education of Jefferson County, Ky., 510 F. 2d 1358 (6th Cir. 1974), cert. denied 429 U.S. 1074 (1977).

16/ Keyes v. School District No. 1, 380 F. Supp. 673 (D. Colo. 1974).

During the two year period the cost for transportation increased $2.6 million. The desegregation plan implemented in the 1970-71 school year in Pasadena, California resulted in the busing of about 60% of the elementary school students (8,000), 50% of the junior high students (3,600), and 278 of the senior high students (1,900), at a total transportation cost of $1,240,868.[17/] In Prince George's County, Maryland, the plan approved by the district court in 1973 required the transportation of an additional 12,000 students and 43 new buses at a cost of about $325,000, with about $1 million annually for increased drivers' salaries and bus maintenance.[18/] Judge Demascio, in the Detroit case,[19/] ordered the State of Michigan to purchase 150 additional buses to transport 21,853 students reassigned by the final plan in that case.[20/] Finally, the Boston Plan affected some 80,000 students, with 21,000 of these being bused.[21/]

In 1974, Congress itself sought to provide the courts with

17/ Spangler v. Pasadena City Board of Education, 311 F. Supp. 501 (C.D. Cal. 1970).

18/ Vaughn v. Board of Education of Prince George's County, Md., 355 F. Supp. 1034 (D.Md. 1972).

19/ Bradley v. Milliken, 519 F. 2d 679 (6th Cir. 1975), modifying and aff'g Order, Bradley v. Michigan, Civ. No. 35257 (E.D. Mich., May 21, 1975). The Court of Appeals modified Judge Demascio's order to direct the State to pay 75% of the cost of the buses on the same formula and payment schedule applied to districts routinely receiving State transportation assistance.

20/ Memorandum and Order (Nov. 4, 1975).

21/ Morgan v. Kerrigan, 530 F. 2d 401 (1st Cir. 1976), cert. denied sub nom. McDonough v. Morgan, 426 U.S. 935 (1976).

guidance in this area by prescribing alternative remedies for segregated schools, in effect declaring, as a matter of legislative policy, that student busing should be a remedy of last resort in school desegregation cases. Title II of the Education Amendments of 1974, captioned "Equal Educational Opportunities and Transportation of Students," specifies practices which are to be considered denials of due process and equal protection of the laws[22/] and delineates a hierarchy of relief, ranging from the more preferred to the less preferred and even prohibited.[23/] In

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22/ 20 U.S.C. 1703.

23/ Section 214 of the act establishes a "priority of remedies" which is to be applied in order until compliance with desegregation is achieved. 20 U.S.C. 1713. The courts are to consider and make specific findings with regard to the efficacy of the following remedies before requiring implementation of a busing plan:

> (a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;
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> (b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;
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> (c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;
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> (d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 1714 of this title;
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> (e) the construction of new schools or the closing of inferior schools;
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> (f) the construction or establishment of magnet schools; or
>
> (g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 1714 and 1715 of this title.

addition, § 215 of the act imposes certain restrictions on the amount of busing that may be required to enforce school desegregation orders.[24/] The most important is § 215(a) which purports to prohibit the courts and Federal agencies from ordering a plan "that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student."[25/] However, this latter limitation has been held not to bind judicial authority in cases involving constitutional violations, that is, those where there has been a finding of de jure segregation. This has resulted largely from the court's interpretation of a statement in the congressional findings preceding the act which declares that nothing in Title II "is intended to modify or diminish the power of the courts of the United States to enforce fully the Fifth and Fourteenth Amendments to the Constitution of the United States."[26/]

24/ 20 U.S.C. 1714.

25/ 20 U.S.C. 1714(a) (emphasis added).

26/ 20 U.S.C. 1702(b); In Dayton Board of Education v. Brinkman, 518 F. 2d 853 (6th Cir. 1975), cert. denied 423 U.S. 1000 (1976), the Sixth Circuit pointed to this language in refusing to adhere to the "closest or next closest school" limitation and ruled that the 1974 Act, taken as a whole, restricted "neither the nature nor scope of the remedy for constitutional violations in the instant case." See, also, Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), aff'd 530 F. 2d 401 (1st Cir.), cert. denied 426 U.S. 935 (1976); Hart v. Community School Board, 512 F. 2d 37 (2d Cir. 1975); Evans v. Buchanan, 415 F. Supp. 328 (D. Del. 1976), aff'd 555 F. 2d 373 (3d Cir. 1977); Newburg Area Council, Inc. v. Gordon, 521 F. 2d 578 (6th Cir. 1975).

Nonetheless, the Federal courts in several recent cases involving major urban school districts appear to have accorded some recognition to the Congressional policy set forth in the 1974 act by endeavoring to conform their remedial decrees to the priorities set forth in § 214 to avoid excessive or unnecessary busing. Referring to the act, the district court in Newburg Area Council, Inc. v. Board of Education of Jefferson County, Ky., No. 704 (W.D. Ky. 1975) (unreported decision), aff'd 541 F. 2d 538 (6th Cir. 1976) observed that in issuing its order to desegregate the newly consolidated Jefferson County/Louisville Kentucky school system, it had

> scrupulously attempted to follow [the act] to the extent that. . .it complies with the Constitution as interpreted by the current decisions of the federal courts, including the Supreme Court of the United States. Accordingly, the Court, in formulating a remedy to correct the denial of equal educational opportunity or a denial of equal protection of the laws which the Supreme Court found to exist in this case, has considered and hereby makes specific findings that Section 214 dealing with the priorities of remedies has been considered and followed by the court to the best of its ability and the priorities therein delineated have been meticulously followed as well as the other provisions of the amendments adopted by Congress in 1974.

The plan approved by the court in the Louisville case incorporated to a substantial degree certain of the remedial alternatives spelled out in the act, primarily the use of school closings and remedial altering of attendance zones. With respect to the assignment of students, the plan consisted of essentially three components. First, it provided for the closing of twelve schools which the court found were then being underutilized

because of declining student enrollments. Second, the court found that 28 other schools in the county could be adequately desegregated without resort to any other remedial tool than redistricting and the creation of new school attendance boundaries. Only after exhausting these approaches, which required no additional transportation of students, did the court order the pairing or clustering of black and white schools, and the transfer of students between them, to achieve the appropriate level of desegregation.

The district court in Morgan v. Kerrigan, 401 F. Supp. 216, 263 (D. Mass. 1975), aff'd 530 F. 2d 401 (1st Cir. 1976) also relied on the remedial alternatives specified in § 214 of the act when it ordered into effect a comprehensive plan to desegregate the Boston schools, stating the "[r]evision of attendance zones and grade structures, construction of new schools and closing of old schools, a controlled transfer policy with limited exceptions and the creation of magnet schools have been used in the formulation of the plan here adopted to minimize mandatory transportation." Perhaps the most notable aspect of Judge Garrity's order in the Boston case was the extensive use made of the "magnet school" concept to achieve desegregation with minimum busing. The final plan established 22 such schools, offering specialized courses of study, to be attended on a voluntary basis by students throughout the city. The court further ruled, however, that some busing in excess of the limits imposed by the 1974 act was necessary to eliminate the dual school system in Boston.

Other courts have eschewed the use of massive busing, particularly where, because of a large preponderance of black students in the district, it appeared either that the plan would have little appreciable effect in alleviating segregation in the schools, or might, in fact, aggravate existing conditions and lead to possible resegregation of the system by encouraging "white flight." In the Detroit case, for instance, Judge DeMascio rejected as too "inflexible" plans submitted by the school board, and another by the NAACP, indicating that "transporting children is an extraordinary remedy to be employed only when appreciable results may be accomplished thereby and then only when other alternatives have been exhausted." Bradley v. Milliken, 402 F. Supp. 1096, 1133 (E.D. Mich. 1975). The plaintiffs' plan would have essentially involved the pairing and coupling of schools, and the busing of some 80,000 students, so that each school within the district would reflect the racial ratio of the city as a whole. The board plan, which made more extensive use of magnet schools and "parttime integration" by use of special biracial programs, limited student busing to that necessary to eliminate identifiably white schools in the district by imposing a requirement that all such schools be made 40% to 60% black in student composition.

Observing that the Detroit school system was 71% black in student population, and that recent demographic trends indicated a continuing increase, the court characterized the plans of the parties as too "inflexible" or "rigid" in that they "failed to take account of the practicalities at

hand, such as demographic trends, financial limitations, existing grade structures and naturally integrated neighborhoods." Specifically, the court criticized the plans as

> rely[ing] exclusively on transportation to reassign students without exploring alternative techniques. In the final analysis, it is because both plans are inattentive to such practicalities that both plans must be rejected. Because both plans ignore the 'practicalities' both plans require transportation that is, at least to some degree, unnecessary to achieve integration. 402 F. Supp. at 1132.

The court went on to issue guidelines for formulation of a new plan, adopting the school board's approach insofar as it was limited to elimination of all-white schools but rejecting the "rigid adherence" to racial quotas and massive busing. Instead the court called on the board to give greater consideration to the alteration of attendance zones to avoid unnecessary busing. "Rezoning is prefereable to busing because it reduces unnecessary transportation, permits walk-in schools and serves biracial communities." 402 F. Supp. at 1129. The final plan approved by the district court required transportation of about 22,000 of Detroit's 247,000 students, all of whom were bused to increase black enrollment in 56 schools with more than 70% white enrollment.[27/]

27/ The plan further mandated the use of other components, not directly involving the busing of students, to desegregate the Detroit schools. These included the closing of antiquated or obsolete school facilities throughout the city; the conversion of various schools to "open enrollment" or voluntary attendance basis; the establishment of four "vocational education centers" and two technical high schools modelled after the

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A similar reluctance to order massive student busing where other alternatives appeared to effectively accomplish whatever desegregation was realistically possible under the circumstances is evident in a 1975 ruling by the Fifth Circuit in the Atlanta Case. Calhoun v. Cook, 522 F. 2d 717 (5th Cir. 1975). Like Detroit, Atlanta presented the court with a somewhat extraordinary factual situation--at the time of the ruling, blacks constituted an overwhelming majority of the student population,

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(27 Continued) magnet school concept to be operated on a racially integrated basis; and the implementation of an array of compensatory education programs, e.g. remedial reading courses, in-service training for teachers and staff to deal more effectively with problems of desegregation, career counseling and guidance, and a bilingual/multiethnic study program, all designed to overcome the educational disadvantages suffered by blacks as a consequence of past discrimination. These educational components were affirmed by the court of appeals, 540 F. 2d 229, 241-2 (6th Cir. 1976), and the Supreme Court, 433 U.S. 267 (1977).

However, the Sixth Circuit, "though recognizing the absence of alternatives," remanded for further consideration of three black portions of the city excluded from the busing provisions of the plan and affirmed the pupil reassignment plan with respect to the remaining regions.

> Even though we do not approve of that part of the District Court's plan which fails to take any action with respect to schools in Regions 1, 5 and 8, this court finds itself unable to give any direction to the District Court which would accomplish the desegregation of the present racial composition of Detroit. 540 F. 2d at 239.

On remand, the district court reiterated that "when racial proportions are so extreme that adequate interaction of children of both races cannot be accomplished, further desegregation is not possible and it is unwise to distrub assignment pattern which effectively desegregate schools in other regions." 460 F. Supp. 299, 309 (E.D. Mich. 1978). It thus adhered to its earlier finding that no further desegregation could be achieved in the three regions collectively but modified its order to require some additional busing between Region 1 and an adjoining region.

about 90%. Consequently, the district court had approved a compromise plan arrived at by the parties aimed at eliminating identifiably white schools in the district, leaving unaffected 92 schools in the district with student bodies over 90% black. Given the extreme racial disproportion of the system as a whole, the district court found it "unnecessary to distribute the remaining minority whites pro-rata throughout the system" and entered an order limited to achieving desegregation of white schools, by means of voluntary transfers of black students (majority to minority transfers), and faculty and staff desegregation.

Plaintiffs appealed the district court order as constitutionally inadequate. They urged that reasonably available techniques to achieve further desegregation of black schools, particularly the transportation, zoning and pairing of white students into predominantly black schools were not utilized. They also emphasized that such desegregation as was accomplished under the approved plan had been effected entirely by the transportation of black pupils to predominantly white schools. In short, they contended that existing precedent precluded affirmance of the lower court adjudication of unitary status to a school district which had never used noncontiguous pairing, had never bused white children into predominantly black schools, and in which over 60% of its schools are all-or substantially all-black.

Characterizing the Atlanta case as "unique," the court of appeals rejected these contentions, stating that "features of this district distinguish every prior school case pronouncement." 522 F. 2d at 719. The court

pointed to the fact that blacks held nearly two thirds of the administrative and faculty positions in the system as militating against a finding of discrimination in current school board policies and practices. It also affirmed the lower court finding that Atlanta's remaining one race schools were the product of its predominant majority of black students rather than a vestige of past discrimination. Accordingly, the Court of Appeals concluded by saying:

> The aim of the Fourteenth Amendment guarantee of equal protection on which this litigation is based is to assure that state supported educational opportunity is afforded without regard to race; it is not to achieve racial integration in the public schools ...Conditions in most school districts have frequently caused courts to treat these aims as identical. In Atlanta, where white students now comprise a small minority and black citizens can control school policy, administration and staffing, they no longer are. . .Plaintiff-appellants criticize the Majority to Minority Transfer Plan which the district court ordered implemented because the movement involved is entirely of black students. However, participation in this program is solely on a voluntary basis. In ultimate analysis it requires no more or less from pupils than the standard majority to minority provision we have traditionally required be incorporated in all school desegregation orders in this circuit. 522 F.2d at 719-20.

The Fifth Circuit therefore refused to disturb the district court's approval of the plan, "because based on live, present reality it is free of racial discrimination and it wears no proscribed badge of the past." 522 F. 2d at 720.

Other recent court decisions have also ruled that although constitutionally required in some circumstance, "pairing and associated

compulsory busing are not remedies of first resort."[28/] The Second Circuit ruling in Hart v. Community School Board of Education, 512 F. 2d 37 (2d Cir. 1975) affirmed a district court ruling to desegregate Mark Twain Junior High School in Brooklyn, New York. The plaintiffs in Hart had proposed a comprehensive plan utilizing traditional remedies of school pairing and student transportation to desegregate Mark Twain. The district court, however, opted for a plan more limited in scope which established Mark Twain as a magnet school for gifted and talented children operated as an integrated facility with attendance on a voluntary and selective basis. The order further provided, however, for a "backup plan" to be implemented in the event that the magnet school concept did not prove effective within specified time limits. This backup or "Model II" plan focused on the use of busing to equalize utilization of all junior high schools in the district and to bring the ratio of white to minority students into general alignment with the ratio in the district as a whole.

Plaintiffs appealed this order, charging, among other things, that the district court plan was unacceptable as nothing more than freedom of choice and would not work because white parents would not voluntarily choose to send their children to a formerly black school.

28/ Smiley v. Vollert, 435 F. Supp. 463, 468 (S.D.Tex. 1978); Lemon v. Bossier Parish School Board, 566 F. 2d 985, 989 (5th Cir. 1978).

The appeals court rejected this contention, pointing to the success of magnet school programs in Boston and elsewhere, and held that "nothing in the Constitution says that superior educational facilities for the talented are forbidden so long as racial segregation policy plays no part." 512 F. 2d at 54. Furthermore, the court found the plan unobjectionable since the lower court had hedged the magnet school plan, which concededly would take several years for full achievement, with conditions which, if not met on schedule, would require reversion to the "Model II" plan favored by plaintiffs--the "backup" busing plan.

The foregoing indicates various of the factors the courts have considered relevant to the use of busing in school desegregation cases and the range of alternative remedies available to the Federal courts. It also suggests the complexity of the factual inquiry underlying a final judicial determination as to what constitutes constitutionally adequate desegregation within the confines of a specific case.

Another issue that has been considered by the courts relates to the authority of local officials to bus students to relieve "racial imbalance" or so-called "de facto" segregation in the schools. Swann held that absent state action, or a finding that segregated schools are the product of illicit acts by State or local officials (i.e. de jure segregation), there is no constitutional violation and the Federal courts

are precluded by Title IV of the 1964 Civil Rights Act[29/] from requiring busing to promote "racial balance." Thus, if segregation in the schools is a mere reflection of segregated housing patterns in the community, or otherwise results from forces beyond the control of school officials, the Federal courts are without authority to act. But Swann also suggests that local school officials are not so limited and may, as a matter of "educational policy," bus students to achieve a racial balance in the schools.[30/]

Even prior to Swann, a series of lower court decisions had reached an analogous conclusion in suits by white parents attacking the constitutionality of voluntary efforts taken at the State or local level to eliminate or alleviate de facto segregated conditions in the public schools. In Fuller v. Volk, 230 F. Supp. 25 (D.N.J. 1964), for instance, the school board, under a plan to reduce racial imbalance in the public schools, assigned all sixth grade students to one city-wide school and gave all

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29/ Congress withheld authority from the Attorney General to seek, and from a Federal court to issue, an order under Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6(a), calling for the busing of pupils from one school to another to "achieve a racial balance."

> ...provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance,...

30/In Swann, 402 U.S. at 16, the Court stated:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each

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students in grades one through five in that school the option to attend other specified elementary schools. The plaintiffs, parents of white sixth grade children, argued that the plan had been adopted solely because of racial considerations, that their children were being discriminated against on the basis of race because they could not attend their neighborhood schools and that, therefore, the plan was unconstitutional. Disagreeing, the court held that "a local board of education is not constitutionally prohibited from taking race into account in drawing and redrawing school attendance lines for the purpose of reducing or eliminating de facto segregation in the public schools." 230 F. Supp. at 34.

Action taken to implement New York State policy on racial imbalance has frequently been challenged in the courts by white parents as repugnant to the due process and equal protection clauses of the Fourteenth Amendment and to New York State law. Except for one case where the results were held to be arbitrary and capricious, the lawsuits

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> school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

have been uniformly unsuccessful.[31/] In Offerman v. Nitkowski, suit was brought in Federal District Court attacking as violative of the Fourteenth Amendment an order of the Commissioner of Education requiring the Buffalo School Board to remedy racial imbalance in the schools. Rejecting this argument, the court held that "...the Fourteenth Amendment, while prohibiting any form of invidious discrimination, does not bar cognizance of race in a proper effort to eliminate racial imbalance in a school system." 248 F. Supp. at 131. Similar suits by white parents challenging the constitutionality of desegregation efforts undertaken at the State and local level have like wise been unavailing in several other states.[32/]

Moreover, in Bustop, Inc. v. Board of Education of the City of Los Angeles, 58 L. Ed 2d 88 (1978), Justice Rehnquist refused to stay implementation of a desegregation plan for Los Angeles County, California. That plan had been ordered by a State court judge pursuant to the California Constitution which, as interpreted by the Supreme Court of that State and in contrast to Federal law, makes no distinction between de jure

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31/ Balabin v. Rubin, 14 N.Y. 2d 727, 199 N.E. 2d 375, 250 N.Y.S. 2d 281 (Ct. App.), cert. denied 379 U.S. 881 (1964); Addabbo v. Donovan, 16 N.Y. 2d 619, 209 N.E. 2d 112, 261 N.Y.S. 2d 68 (Ct. App. 1965); Strippoli v. Bickal, 21 A.D. 2d 365, 209 N.E. 2d 123, 250 N.Y.S. 2d 969 (App. Div. 1964); Katalinic v. City of Syracuse, 22 A.D. 2d 1003, 44 Misc. 2d 734, 254 N.Y.S. 2d 960 (App. Div. 1964); Offerman v. Nitkowski, 248 F. Supp. 129 (E.D.N.Y. 1965).

32/ See, e.g., Morean v. Board of Education, 42 N.J. 237, 200 A. 2d 97 (1964); Tometz v. Board of Education, 39 Ill. 2d 593, 237 N.E. 2d 498 (1968); School Committee of Boston v. Board of Education, 352 Mass. 693, 227 N.E. 2d 729 (1967), appeal dismissed 398 U.S. 572 (1968); Citizens Against Mandatory Busing v. Brooks, 80 Wash. 2d 121, 492 P. 2d 536 (1972).

and de facto segregation but requires school officials to take "all reasonably feasible steps" to eliminate segregation whatever the cause. The Los Angeles plan will apparently affect some 60,000 pupils and require the busing of students from 36-66 miles for up to 1 1/2 hours. Bustop, Inc. claimed that the order was inconsistent with the Supreme Court's 1976 ruling in the Dayton case and that it "ignore[d] the federal rights of citizens... to be free from excessive pupil transportation that destroys fundamental rights of liberty and privacy."

In denying the stay application, Justice Rehnquist was "inclined to agree" that the remedial order went beyond that required by Federal law but noted that the California Constitution had been interpreted by the highest tribunal in that state "to require less of a showing on the part of plaintiffs who seek court-ordered busing than this Court has required of plaintiffs who seek similar relief under the United States Constitution." Distinguishing his recent action staying an order in the Columbus case, Justice Rehnquist observed that

> that case is of course different in that the only authority that a federal court has to order desegregation or busing in a local school district arises from the United States Constitution. But the same is not true of state courts. So far as this Court is concerned, they are free to interpret the Constitution of the State to impose more stringent restrictions on the operation of a local school board. 589 L. Ed 2d at 90.

Further rejecting Bustop's argument based on student and parental rights, Justice Rehnquist expressed "the gravest doubts that the Supreme Court of California was required by the United States Constitution to take the action that it has taken in this case," but had "little doubt that it was permitted by that Constitution to take such action." 58 L. Ed 2d at 91.

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