SCHOOL DESEGREGATION

A Lawyer's View

HAROLD W. HOROWITZ

University of California, Los Angeles

THE OFFICE OF EDUCATION'S REPORT, *Equality of Educational Opportunity* (the Coleman Report), and the Civil Rights Commission's report, *Racial Isolation in the Public Schools,* have, to say the least, fundamental implications for the formulation of educational policy in the United States. Aside from their impact on legislative and administrative policy-makers, and the electorate which selects those policy-makers, these reports have a separate significance for the law. They provide data essential to the resolution of current issues of the constitutional doctrine which makes up the legal matrix within which educational policy-making takes place. Further, they suggest new issues of equal import on which future programs and studies must be undertaken. The case studies in *Desegregation and Education* are illustrative: a number of cities have seen threatened and actual law suits to bring about elimination of de facto racial segregation in the public schools, and school administrators are concerned at the lack of sufficiently clear legal doctrine. Recently, in *Hobson v. Hansen,*[1] a case dealing with the District of Columbia public schools, Judge J. Skelly Wright made use of some of the data in the reports in ordering the school board to take various steps to deal with inequalities in educational opportunity.

It will be useful, first, to summarize the relevant data in the reports and highlight the data that are not there.

The starting point is that the "average [racial or ethnic] minority pupil scores distinctly lower on . . . [achievement] tests at every level

1. 269 F. Supp. 401 (1967).

than the average white pupil." [2] To the extent that schools and school environments are factors in individual students' achievement levels, disadvantaged children—low socioeconomic status, and, particularly, Negro—are affected most by what the schools offer. More specifically, the composition of the student body—percentage higher socioeconomic status and percentage white—and, to a lesser extent, the quality of teachers, are related to achievement of individual students, and this relationship is most meaningful with respect to educationally disadvantaged children. These in-school factors account, however, for less than the total explanation of the variations in achievement between, for example, Negro and white children; to state this point in another way, educationally disadvantaged students will not be enabled to achieve at their grade levels solely by changing the composition of the student bodies in their schools and the quality of their teachers.

There is an important gap in the legally significant data in these reports—a gap which exists because public school education in the United States has yet to rise to its greatest current challenge. The findings in the Coleman Report are based on a standard pattern of public school education as it exists today—*i.e.*, there are not in these data any separable results based on special programs for disadvantaged children—*e.g.*, drastically reduced class sizes, supportive health and welfare personnel, programmed learning, and the like. The Civil Rights Commission's report does assess "compensatory education" programs, *i.e.*, programs to increase the quality of ghetto schools, and concludes that such programs "on the present scale are unlikely to improve significantly the achievement of Negro students isolated by race and social class." [3] The words "present scale" are critical here, for the Commission does refer to increases in achievement under a high-cost experimental compensatory education program in New York which preceded Higher Horizons. Gains in achievement diminished under the lower-cost Higher Horizons. The Commission's report does not include a description of the current, expensive, More Effective Schools program in New York, in which, it has been reported, minority students are achieving at grade level. The Commission states its confidence that massive upgrading of the quality of education offered in ghetto schools cannot but help to increase achievement, but cautions that it is speculative whether the effects of racial and

2. J. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY 21 (1966).

3. U. S. COMM'N ON CIVIL RIGHTS, 1 RACIAL ISOLATION IN THE PUBLIC SCHOOLS 205 (1967).

social class isolation on achievement could be overcome. There is need for much more social science data—for educational policy-making and the development of pertinent legal doctrine—about educational programs through which schools can enable educationally disadvantaged students to achieve at or closer to their grade levels.

The Commission's report analyzes in detail the factors in metropolitan areas and in central cities which lead to racial imbalance in schools. The metropolitan area problem is summed up in the statement that the 212 metropolitan areas in the nation are served by 6,604 school districts.[4] This is the governmental structure, with its attendant disparities in governmental resources available for spending for education, which is the background to the flight to the suburbs by those who flee for educational reasons. In the central cities it is school board actions—in selecting school sites, defining attendance areas, setting transfer policies, and the like—which contribute to racial imbalance in the schools. And in both metropolitan area and central city there are, overriding, racial patterns in housing, which determine the makeup of student bodies in school districts and attendance areas within districts.

Why are these findings, and the need for others, relating to compensatory education, legally significant? In an excellent "Legal Appendix," which concludes that school boards should be found to have a constitutional duty to eliminate de facto school segregation, the Commission's report relies, as did Judge Wright in *Hobson v. Hansen,* on one of the findings: a de facto segregated school offers an unequal educational opportunity to the Negro child, and the Negro child achieves closer to his grade level in an integrated classroom. These studies provide the factual basis for the argument that children in racially and socioeconomically isolated schools are severely harmed by that educational environment. The legal issue is the constitutional significance of these facts.

The Commission's legal memorandum suggests that the injury to Negro children is so grave that the equal protection clause should be found to require undoing all racial imbalance in public schools, whatever the competing considerations may be—*i.e.*, there can be no constitutionally permissible rational basis or justification for a school board's permitting the continuation of racially isolated schools. The analogy is to, among other cases, *Reynolds v. Sims*[5] and *Harper v. Virginia State Board*

4. *Id.* at 17 n. 1.

of Elections;[6] the justifications there, for geographical apportionment of the upper house of a state legislature and for a poll tax, were insufficient to outweigh the harm done to "one man's" vote. Judge Wright, as have a few judges before him, finds the injury inherent in racially imbalanced public schools to be constitutionally significant, and orders remedial measures in *Hobson.* But he does not require undoing racial imbalance at all costs; he orders busing of Negro students from overcrowded to underutilized schools, after considering the reasons advanced for not doing so and finding them insufficient to outweigh the injury done the students in the overcrowded school. "For at least this one alternative . . . the resulting social gains far exceed the costs of any and every kind," so that "adherence to the neighborhood policy is beyond justification . . . ." [7] And he orders the school board to formulate an integration plan "which carefully assesses the virtues and costs of the spectrum of integration strategies" [8] which might at least be considered in the context of Washington, D.C.'s population distribution. Presumably, if the costs are great enough the school board will not be required to adopt measures which would have the virtues of lessening racial imbalance. Judge Wright's standard goes no further than that of the other courts which have found constitutional violations in maintenance of de facto segregated schools—the school board must take whatever steps are "reasonably feasible" to eliminate the racial imbalance.[9] The analogy here is not to *Reynolds* and *Harper* but, staying within the realm of voting cases, to *Carrington v. Rash,*[10] in which the Court said that Texas could have residence tests for voting, but it could not, relying on a presumption that many servicemen in Texas do not intend to stay there when military compulsion has been lifted (and for reasons of administrative feasibility), deny the vote to all servicemen who came to Texas in uniform. Texas was required to adopt a reasonably feasible means—inquiry into each serviceman's intentions as to residence—of administering its registration processes which would lessen the injury its system would otherwise inflict on some servicemen.

5. 377 U.S. 533 (1964).

6. 383 U.S. 663 (1966).

7. Hobson v. Hansen, *supra* note 1, at 510.

8. *Id.* at 510.

9. *See, e.g.,* Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963).

10. 380 U.S. 89 (1965).

The data in the Coleman and Civil Rights Commission reports support the less expansive constitutional duty. As mentioned previously, makeup of the student body and the other factors isolated in the two reports do not account for anywhere near the total variances in achievement of children. Courts can understandably and soundly leave to school boards the weighing of the costs and virtues of varying aspects of school administration, within constitutional limits such as those articulated by Judge Wright, when the one factor attacked, maintenance of neighborhood schools in the face of racially imbalanced student bodies, accounts for just some portion of lower school achievement. The data these reports do not contain are relevant here, too. If compensatory education programs can significantly increase achievement, effectuation of these programs may require dealing with students in a way that would not be possible while at the same time integrating classrooms. Again, some scope for the school board's weighing the virtues and the costs may be the better solution here, rather than isolating racial imbalance for mandatory school board action regardless of the possible compensatory education justification for adhering to neighborhood schools.

Judge Wright has significant words in this regard, which have tended to be overlooked in some of the discussion about his opinion in *Hobson:* "where," he said, "because of the density of residential segregation or for other reasons children in certain areas, particularly the slums, are denied the benefits of an integrated education, the court will require that the plan include compensatory education sufficient at least to overcome the detriment of segregation. . . ."[11] Experience with, and data from, innovative and expensive compensatory education programs will have an importance beyond the de facto racial segregation problem. To the extent that compensatory education programs can bring the educationally disadvantaged children, particularly in central city schools, closer to achieving at grade level the same constitutional principle arguably implies: the schools must take whatever steps are reasonably feasible—must make a constitutionally permissible assessment of the virtues and the costs of various compensatory education strategies, as well as integration strategies, as they might be carried out in specific districts—to provide a more equal educational opportunity to such children. Certainly there is no more important educational policy issue today than that of finding means to provide opportunity for all children to achieve to

11. Hobson v. Hansen, *supra* note 1, at 515.

the fullest extent of their capacities. Advances in constitutional doctrine can be expected to follow closely upon the demonstration of "reasonably feasible" means of enabling educationally disadvantaged children to achieve at or closer to their grade levels.

The Commission's report examines the reasons why racially isolated schools occur in metropolitan areas, and its description of the patchwork, or crazy-quilt, of school district boundaries suggests the inclusion here of a comment on the constitutional significance of such local governmental organization. The Commission's emphasis is on racial isolation, but its point is applicable as well to other aspects of equality of educational opportunity. Just as the reasons for the neighborhood school may not justify some inequalities in educational opportunity, so the reasons for the local school district may not justify some district-to-district inequalities in educational opportunity. The Commission's report examines this question, as the basis for its conclusion that Congress is empowered under the fourteenth amendment to deal with such inequalities. It has been held that state law could not permit one locality in the state to close its public schools while schools were still operating in the rest of the state,[12] and that principle may well be applicable with respect to inequalities in educational opportunity from district to district within a state. The time has come, it seems, for declaration by the courts that states (and their subdivisions, school districts) are required by the fourteenth amendment to adopt "reasonably feasible" means of dealing with interdistrict racial imbalance and other inequalities in educational opportunity. At the very least, there is to be decided, in Judge Wright's terms, the question whether the resulting social gains from requiring such interdistrict action in a state would "far exceed" the costs of doing so. Today, perhaps, adherence to individual school districts, for some purposes at least, is beyond justification.

The Coleman and Civil Rights Commission reports are good examples of attempted answers by social scientists to some questions asked by, among others, lawyers. The current constitutional issue raised by de facto segregation need not be finally decided now without access to pertinent social science data. A lawyer's view of these reports makes clear the necessity that lawyers, anticipating tomorrow's legal issues, do their part in asking the questions which other social scientists seek to answer.

12. Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962). *See also*, Griffin v. County School Bd., 377 U.S. 218 (1964).