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The Duty of the State Is to Act at Once to Eliminate by Positive Means All Vestiges of the Dual School Structure and to Compensate for the Abiding Scars of Past Discrimination.

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CONSTITUTIONAL LAW—RACIAL DISCRIMINATION—SCHOOLS AND SCHOOL DISTRICTS—DESEGREGATION—THE DUTY OF THE STATE IS TO ACT AT ONCE TO ELIMINATE BY POSITIVE MEANS ALL VESTIGES OF THE DUAL SCHOOL STRUCTURE AND TO COMPENSATE FOR THE ABIDING SCARS OF PAST DISCRIMINATION. *United States v. Texas*, 447 F.2d 441(5th Cir. 1971).

Defendants[1] were charged with violation of Title VI of the Civil Rights Act of 1964[2] and the fourteenth amendment to the United States Constitution. The allegations pertained to the creation and continued maintenance of nine all-black school districts, which denied the students equal educational opportunities.

The trial court found that the policies and practices of the Texas Education Agency were responsible for or contributed to the operation of the all-black districts.[3] The defendant county boards of education denied, avoided and failed to consider or order the consolidation of these all-black districts into adjacent units in their jurisdiction. The district court held that school districts which are created and maintained to perpetuate a dual school system were unconstitutional and required consolidation with nearby units to assure their students equal educational opportunities.[4] The defendants were charged with the affirmative duty to take whatever steps necessary to convert to a unitary system. The district court ordered the Texas Education Agency to reevaluate and scrutinize its policies and practices and submit a plan developed in light of the analysis.[5] Defendants filed their plan and plaintiff responded with objections and recommendations. The district court considered these objections and recommendations upon rehearing[6] to determine whether the defendant agency's plan would meet its affirmative duty to eliminate racial discrimination. Both decisions of the district court were appealed to the United States Court of Appeals for the Fifth Circuit. Held—*Affirmed in part, modified, and remanded*

1 The defendants included the Texas Education Agency, the independent school districts, the county boards of education, and the county superintendents.

2 Civil Rights Act of 1964, 42 U.S.C. § 2000c *et seq.*

3 United States v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970). The State of Texas through the Texas Education Agency failed to adequately oversee and supervise the districts. The defendants also arranged for, approved, or acquiesced in various detachments and annexations of territory, student transfers and transportation arrangements which had the effect of creating and perpetuating the all-black districts.

4 United States v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970) (hereinafter referred to as *Texas I*).

5 *Id.* The primary responsibility for the plan was allocated to the Texas Education Agency. In the plan, the defendants were to consider and include the nondiscriminatory assignment of students, the creation of bi-racial committees and the nondiscriminatory treatment of faculty and staff in the newly consolidated districts.

6 United States v. Texas, 330 F. Supp. 235 (E.D. Tex. 1971) (hereinafter referred to as *Texas II*).

with directions.[7] The duty of the state is to act at once to eliminate by positive means all vestiges of the dual school structure and to compensate for the abiding scars of past discrimination. The defendants shall not permit, make arrangements for, approve, acquiesce in or give support of any kind to activities that will have the effect of reducing or impeding desegregation or resulting in the discriminatory treatment of students on the ground of race, color, or national origin; such activities consisting of student transfers, changes in school boundaries, bus routes or runs, extra-curricular activities, assignment of students, or the treatment of personnel who work directly with children in a discriminatory manner on account of race. A defendant district found not to be operating in compliance with the order will have its percentage of state funds reduced and/or its accreditation jeopardized and subject to suspension.

Prior to the decision in *Brown v. Board of Education*,[8] the State of Texas operated separate schools for white and black children pursuant to the state constitution[9] and statutes.[10] This resulted in a dual school system, and eventually led to the establishment of school district lines enclosing single schools that served small communities, usually consisting of only one race. The isolation of these racially homogeneous communities entrenched segregation. To eliminate this segregation, the Supreme Court in *Brown I* ruled that the "separate but equal" doctrine[11] had no place in the field of education, and that the "plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."[12] One year later, *Brown v. Board of Education*[13] was decided on

[7] United States v. Texas, 447 F.2d 441 (5th Cir. 1971) (hereinafter referred to as *Texas III*), affirmed *Texas I* and affirmed in part, modified, and remanded with directions *Texas II*.

[8] 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (hereinafter referred to as *Brown I*).

[9] TEX. CONST. art. VII, § 7, provided that separate schools were to be provided for white and colored children, with impartial provisions to be made for both. *See also* TEX. CONST. art. VII, § 7 comment, for an interesting historical background of the education of Negroes in Texas.

[10] Tex. Laws 1905, ch. 124, § 96 at 289. "[N]o white children shall attend schools supported for colored children, nor shall colored children attend schools supported for white children. The terms 'colored race' and 'colored children,' as used . . . include all persons of mixed blood descended from Negro ancestry." (Quoted materials are from the latest codification of the earlier statute found at TEX. REV. CIV. STAT. ANN. art. 2900 (1914), *repealed* by Acts 1969, 61st Leg., p. 361, ch. 129, § 1, eff. Sept. 1, 1969; Acts 1969, 61st Leg., p. 3024, ch. 889, § 2, eff. Sept. 1, 1969).

[11] Brown v. Board of Education, 347 U.S. 483, 488, 74 S. Ct. 686, 688, 98 L. Ed. 873, 877 (1954). The "separate but equal" doctrine as announced in Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), declared that equality of treatment was achieved when substantially equal facilities were provided even though these facilities were separate.

[12] Brown v. Board of Education, 347 U.S. 483, 495, 74 S. Ct. 686, 692, 98 L. Ed. 873, 881 (1954). The question presented in *Brown I* was whether segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors were equal, deprived these children of equal educational opportunities. The decision did not turn on a comparison of the tangible factors involved, but upon the effect of segregation itself on public education. *Id.* at 492, 74 S. Ct. at 690, 98 L. Ed. at 879. Thus

the question of relief. *Brown II* recognized that different local conditions and problems would prevent the court from formulating any detailed decrees, or setting specific guidelines for desegregation, thus requiring the defendants to "make a prompt and reasonable start" toward compliance with *Brown I*.[14] In cases decided since *Brown II*, the Supreme Court and various federal appellate courts have been faced with the task of deciding whether different desegregation plans adequately complied with the established mandates.[15] In *Green v. County School Board*[16] the Court placed the burden on the school board to propose a plan that "promises realistically to work, and promises realistically to work *now*,"[17] eliminating the "prompt and reasonable start" language of *Brown II*. The Supreme Court in *Alexander v. Board of Education*,[18] held that the standard of "all deliberate speed" as espoused

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the Court held that "[s]eparate educational facilities are inherently unequal," and deny to Negro children the equal protection of the laws guaranteed by the fourteenth amendment. *Id.* at 495, 74 S. Ct. at 692, 98 L. Ed. at 881.

13 Brown v. Board of Education, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955) (hereinafter referred to as *Brown II*).

14 *Id.* In remanding the cases to the district courts, the Supreme Court said:

> 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; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.

Id. at 299, 75 S. Ct. at 756, 99 L. Ed. at 1105.

The only requirement placed on the defendants in *Brown II* was to "make a prompt and reasonable start toward full compliance," (*Id.* at 300, 75 S. Ct. at 756, 99 L. Ed. at 1106), with *Brown I* and that the defendants should proceed with "all deliberate speed." *Id.* at 301, 75 S. Ct. at 757, 99 L. Ed. at 1106.

15 *See* Carter v. West Feliciana Parish School Board, 396 U.S. 290, 90 S. Ct. 608, 24 L. Ed.2d 477 (1970); United States v. Montgomery County Board of Education, 395 U.S. 225, 89 S. Ct. 1670, 23 L. Ed.2d 263 (1969); Monroe v. Board of Commissioners, 391 U.S. 450, 88 S. Ct. 1700, 20 L. Ed.2d 733 (1968); Raney v. Board of Education, 391 U.S. 443, 88 S. Ct. 1697, 20 L. Ed.2d 727 (1968); Griffin v. School Board, 377 U.S. 218, 84 S. Ct. 1226, 12 L. Ed.2d 256 (1964); Cooper v. Aaron, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed.2d 5 (1958). *See, e.g.*, Andrews v. City of Monroe, 425 F.2d 1017 (5th Cir. 1970) (to achieve a unitary system, existing transportation facilities should be reorganized); United States v. Board of Trustees, 424 F.2d 625 (5th Cir. 1970); Taylor v. Ouachita Parish School Board, 424 F.2d 324 (5th Cir. 1970); United States v. Hinds County School Board, 402 F.2d 926 (5th Cir. 1968); Acree v. County Board of Education, 399 F.2d 151 (5th Cir. 1968); Adams v. Mathews, 403 F.2d 181 (5th Cir. 1968) (consolidation of 47 actions for purposes of appeal); United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), *cert. denied*, 389 U.S. 840, 88 S. Ct. 77, 19 L. Ed.2d 104, *modifying decree on rehearing en banc* 380 F.2d 385 (5th Cir. 1967); Price v. Denison Board of Education, 348 F.2d 1010 (5th Cir. 1965); Christian v. Board of Education, 440 F.2d 608 (8th Cir. 1971).

16 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed.2d 716 (1968).

17 *Id.* at 439, 88 S. Ct. at 1694, 20 L. Ed.2d at 724. (Court's emphasis.) While imposing this burden on the school boards, the Court said:

> There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress . . . .

Id. at 439, 88 S. Ct. at 1695, 20 L. Ed.2d at 724.

18 396 U.S. 19, 90 S. Ct. 29, 24 L. Ed.2d 19 (1969). *See also* Carter v. West Feliciana

in *Brown II* was no longer constitutionally permissible and directed the school districts to "begin *immediately* to operate as unitary school systems. . . ."[19] Finally, in *Swann v. Charlotte-Mecklenburg Board of Education*,[20] the Court specifically endorsed the use of definite means and plans including (1) busing, (2) consolidation, (3) student transfers, (4) racially based mathematical ratios and (5) establishing faculty ratios based on race to eliminate the dual school system.

The Supreme Court's language has evolved from directing a "prompt and reasonable start," to requiring plans "that promise . . . to work *now*," to "begin *immediately*," and finally, to a specific endorsement of definite means which the Court feels will guide the defendants in complying with their "affirmative duty" as announced in *Green*,[21] and fulfill the mandates long ago established in *Brown I*.

The decision in *Texas I* was founded upon those mandates established in *Brown I* and *Green*.[22] In fashioning the relief to be granted, the court relied upon the decisions announced in *Brown II*, *Lee v. Macon County Board of Education*,[23] and numerous other cases.[24] This

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School Board, 396 U.S. 290, 292, 90 S. Ct. 608, 609, 24 L. Ed.2d 477, 480 (1970), where the Court held that "[g]raduated implementation of the relief [in school desegregation cases] is no longer constitutionally permissible."

19 Alexander v. Board of Education, 396 U.S. 19, 20, 90 S. Ct. 29, 30, 24 L. Ed.2d 19, 21 (1969). (Emphasis added.)

20 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed.2d 554 (1971). The decision in *Texas II* was announced April 20, 1971, the same day *Swann* was decided by the Supreme Court. The *Swann* decision probably weighed heavily in guiding the Fifth Circuit's holdings announced in the instant case.

In Alexander v. Board of Education, 396 U.S. 19, 21, 90 S. Ct. 29, 30, 24 L. Ed.2d 19, 21 (1969), the Supreme Court allowed the court of appeals the use of its discretion to "accept all or any part of the . . . recommendations of the Department of Health, Education, and Welfare, . . . insofar as those recommendations insure a totally unitary school system . . . ," but the decision in *Swann* was the first specific endorsement by that Court of the stated recommendations.

21 Green v. County School Board, 391 U.S. 430, 437, 88 S. Ct. 1689, 1694, 20 L. Ed.2d 716, 723 (1968). "School boards . . . [are] charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."

22 United States v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970) (*Texas I*):

> When evidence shows that these constitutionally guaranteed rights are being denied or abridged under color of state law and that children are being denied equal educational opportunities with the approval, acquiescence or direct support of a state agency, it is the affirmative duty of that state to take "whatever step might be necessary to . . . [eliminate] racial discrimination . . . root and branch."

Id. at 1057, *citing* Green v. County School Board, 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed.2d 716 (1968).

In viewing the districts in question as isolated racially homogenous residential areas around which district lines were drawn, the Court said, "The same factors which were found to exist in *Brown v. Board of Education* (citations omitted), and which led the Supreme Court to hold that separate education was 'inherently unequal,' exhibit themselves in the 'separate' districts, and, similarly, have rendered these segregated districts 'inherently unequal.'" *Id.* at 1051.

23 Lee v. Macon County Board of Education, 267 F. Supp. 458 (M.D. Ala. 1967) (3-judge court), *aff'd sub nom.*, Wallace v. United States, 389 U.S. 215, 88 S. Ct. 415, 19 L. Ed.2d 422 (1967).

> This Court can conceive of no other effective way to give the plaintiffs the relief to which they are entitled under the evidence in this case than to enter a *uniform*

relief was divided into two parts, the first ordering the elimination of the nine all-black school districts through consolidation, and the second requiring the Texas Education Agency to re-evaluate its policies and prepare plans for desegregation to be implemented on a statewide basis.

On rehearing to determine the validity of the plan,[25] the court imposed upon the defendants certain duties and guidelines to be followed. One of the duties prohibits student transfers, if such transfers impede desegregation, thus limiting the use of a "freedom of choice" plan as announced in *Green*.[26] Another responsibility of the defendants is student assignments. Student assignments are permissible if they are necessary to "comply with constitutional standards,"[27] such as the elimination of "racially or ethnically identifiable schools."[28] Each year the Texas Education Agency is to file a report with the district court showing whether or not the student assignment plans "have resulted in compliance . . . ."[29] One of the means endorsed to achieve proper student assignment is busing.

> Bus routes and runs as well as the assignment of students to buses will be designed to insure the transportation of all eligible pupils on a non-segregated and otherwise nondiscriminatory basis.[30]

The transportation systems are to be completely re-examined each year and those routes found to serve 66 per cent or more students of a minority group should be investigated to determine whether they may be terminated, re-routed or combined with non-minority student routes. However, this is not to be construed as requiring any fixed percentage of a minority group on a particular route or run.[31] Another permissible tool to effect desegregation is the changing of school district boundaries. Changes in the school district boundaries whether by detachment,

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state-wide plan for school desegregation, made applicable to each local county and city system not already under court order to desegregate, and to require these defendants to implement it. (Emphasis added.)

24 *See, e.g.*, Haney v. Board of Education, 410 F.2d 920 (8th Cir. 1969). "Separate neighboring or overlapping school districts one black and the other white, are unconstitutional when created and maintained to perpetuate a dual school system and such districts require consolidation with nearby units so as to assure their students equal educational opportunities," United States v. Texas, 321 F. Supp. 1043, 1050 (E.D. Tex. 1970), *citing* Haney v. Board of Education, 410 F.2d 920 (8th Cir. 1969). *See also* United States v. Tatum, 306 F. Supp. 285 (E.D. Tex. 1969) interpreting the school districts' obligations under Title VI of the Civil Rights Act of 1964; Whittenburg v. Greenville School District, 298 F. Supp. 784 (D.S.C. 1969).

25 United States v. Texas, 330 F. Supp. 235 (E.D. Tex. 1971) (*Texas II*).

26 Green v. County School Board, 391 U.S. 430, 440, 88 S. Ct. 1689, 1695, 20 L. Ed.2d 716, 725 (1968). "[I]n desegregating a dual system a plan utilizing 'freedom of choice' is not an end in itself."

27 United States v. Texas, 447 F.2d 441, 442 (5th Cir. 1971) (*Texas III*).

28 *Id.* at 447.

29 *Id.* at 447.

30 *Id.* at 445.

31 *Id.* at 441.

annexation, or consolidation are acceptable if they are not designed to create a dual school system. The court stated:

> [S]chool districts whose enrollment of minority race children is greater than 66 per cent and whose total student population is fewer than 250 students . . . [should] be annexed to or consolidated with one or more independent school districts of over 150 students, or one or more common school districts of over 400 students, so as to eliminate its existence as a racially or ethnically separate educational unit.[32]

The decision is not limited to student transfers, assignments, busing, and consolidation, but includes alterations of the curriculum,[33] extra-curricular activities[34] and personnel policies.[35] In each instance, the defendants are required to "[c]hange or modify present administrative practices or policies, so as to enforce federal constitutional and statutory standards throughout the . . . school system of the state of Texas; . . . ."[36]

The objective of desegregation cases from *Brown I* to the present has been the elimination of the dual school system. The means by which this objective was to be attained was, at first, a duty left entirely to the school districts; but the courts have in each successive case defined more precisely the scope of the defendant's duty and finally announced specific remedial techniques. The "affirmative duty" has moved from the school districts to the courts.[37] While not laying down any "rigid rules" the *Swann* decision and *Texas III* strongly suggest the use of certain "permissible tools" and at times have required the use of these tools.[38]

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[32] *Id.* at 447.

[33] *Id.* at 448. In order to achieve a comprehensive balanced curriculum, the defendants are to institute a study of the educational needs of minority children, as well as provide means "for students to transfer to different schools . . . on a part-time basis to avail themselves of subjects not offered in their assigned school."

[34] *Id.* at 445. The defendants shall not support extra-curricular activities that are operated on a discriminatory basis, and ". . . a suspension or reduction of programs and activities to avoid operating them on a desegregated basis constitutes a violation of Title VI and the Fourteenth Amendment."

[35] *Id.* at 446. Any educational agency applying for state funds is ". . . to include with its preliminary application for such funds a list of objective, non-racial and non-ethnic criteria by which the . . . district will measure its faculty and staff for assignment, promotion, demotion, reassignment or dismissal and by which it will judge prospective employees for faculty and staff positions."

[36] United States v. Texas, 321 F. Supp. 1043, 1060 (E.D. Tex. 1970) (*Texas I*).

[37] In Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, —, 91 S. Ct. 1267, 1276, 28 L. Ed.2d 554, 566 (1971), the Court held, "If school authorities fail in their affirmative obligations . . . , judicial authority may be invoked, [but] [r]emedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults."

[38] The court has retained "jurisdiction of this matter . . . for the purpose of entering any and all further orders . . . to enforce or modify this decree." United States v. Texas, 447 F.2d 441, 449 (5th Cir. 1971) (*Texas III*). Since the decision in *Texas III*, the district court issued an order August 26, 1971, under this same action, which requires the consolidation of the Del Rio and San Felipe Independent School Districts and the preparation of a comprehensive plan for the desegregation and operation of the consolidated district.