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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 281

JAMES E. SWANN, et al., *Petitioners*

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al., *Respondents*

NO. 349

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al., *Cross Petitioners*

v.

JAMES E. SWANN, et al., *Cross Respondents*

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondents and Cross Petitioners, the Charlotte-Mecklenburg Board of Education, et al, present this petition for a rehearing of the above entitled cause, and in support thereof, respectfully show:

I.

The appeal in this cause was argued before this Court on the 12th day of October, 1970.

II.

On April 20, 1971, this Court rendered its decision in favor of the Petitioners and Cross Respondents and against the Respondents and Cross Petitioners. It held "the judgment of the Court of Appeals is affirmed as to those parts in which it affirmed the judgment of the District Court. The order of the District Court dated August 7, 1970, is also affirmed."

III.

The Respondents and Cross Petitioners seek a rehearing upon the following grounds:

A. The Opinion Of The Supreme Court, By Its Own Terms, Clearly Discloses That The Orders Of The District Court Were Unwarranted And Clearly In Excess Of The Powers Of The District Court.

In its opinion of April 20, 1971, this Court clearly held that a school system may operate free of judicial surveillance once it eliminates racial discrimination occasioned by official action, unless there is a showing that school authorities or some other state agency have "deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools . . ." (*Swann v. Charlotte-Mecklenburg Board of Education*, April 20, 1971, p. 28). School authorities are not constitutionally required, and federal courts are not permitted, to change the racial composition of a school system in which racial discrimination has been eliminated.

The cornerstone upon which the opinion of this Court rests is its unwarranted conclusion that the

Charlotte-Mecklenburg School Board conceded that it fell short of achieving a unitary school system in 1969:

> ". . . All parties now agree that in 1969, the system fell short of achieving a unitary school system that those cases require." *Swann,* supra., p. 3.[1]
>
> and
>
> "As the voluminous record in this case shows, the predicate for the District Court's use of the 71%-29% ratio was twofold; first, its express finding approved by the Court of Appeals and not challenged here, that a dual school system has been maintained by the school authorities at least until 1969; . . ." *Swann,* supra., p. 20.[2]

On the contrary, the Board has steadfastly maintained throughout the course of this litigation that its school system has been unitary and non-dual since 1965 when its plan for desegregation was approved by the District Court, *Swann v. Charlotte-Mecklenburg Board of Education,* 243 F. Supp. 667 (1965), and by the Court of Appeals for the Fourth Circuit, 369 F. 2d. 29 (1966). The 1965 plan was held to be ". . . sufficient

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[1]Transcript of Oral Argument, October 12, 1970, p. 89. "Mr. Waggoner: I will say this. Before 1965, there were still some vestiges of the old state dual system." If the Court is attempting to impute such concessions to counsel, it should be observed that "distinct and formal admissions of facts made by counsel during the progress of a civil or criminal trial are binding on the client only *when made for the express purpose* of dispensing with formal proof." (Emphasis added) 7 Am. Jr. 2d. Attorneys at Law, §122. See also 7 CJS, Attorney and Clients, §100.

[2]See footnote No. 13 at p. 19 and argument, p. 43, Brief of Respondents and Cross Petitioners herein, in which the findings were challenged.

compliance with the duty imposed upon the Board by the Constitution."

Since 1965, the Charlotte-Mecklenburg system has been operating not under state direction, but under the express authorization and approval of the federal judiciary.

In its April 23, 1969, order, the District Court reviewed the performance of the Board under the 1965 plan, acknowledged that the Board had operated in good faith pursuant to "the general understanding of 1965 about the law regarding desegregation" and concluded:

> ". . . They have achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts, and *have exceeded the performance of any school board whose actions have been reviewed in appellate court decisions*. The Charlotte-Mecklenburg schools in many respects are models for others." (Emphasis added) (311A).

In the same April 23, 1969, order, the District Court found there was no racial discrimination or inequality with reference to the use of federal funds for special aid to the disadvantaged, use of mobile classrooms, the quality of school buildings and equipment, coaching of athletics, parent-teacher association contributions and activities, school fees, school lunches, library books, elective courses, individual evaluation of students and gerrymandering (293A-302A).

These and similar findings of the District Court regarding the Board's operation of its schools under the 1965 court-approved plan negated any implication of a deliberate attempt "to fix or alter demographic patterns to affect the racial composition of the schools."

Absent such a showing, the Board's faithful adherence to the 1965 plan removed this school system from any justifiable surveillance and control of the federal court. When that plan was adopted and approved by the Court, racial discrimination through official state action was eliminated from the Charlotte-Mecklenburg system, which at that point ceased to be dual.

It is acknowledged that prior to 1965, Charlotte-Mecklenburg maintained a dual system. However, this acknowledgment does not support a conclusion that its schools were unlawfully segregated in 1969.[3]

The pertinent findings upon which all expressions of the District Court are based with respect to state action creating such segregation are not limited as to time. Instead, the findings are said to be based upon actions of school boards before and since 1954. To fall within the bounds of the opinion of the Supreme Court in this case, such findings must expressly relate to the post-1965 period of the operation of schools in this system. Neither the parties nor the appellate court can discern those facts upon which the District Court relied in finding "the resulting schools are not 'unitary' or 'desegregated.'" (662A). The actions which the District Court found unlawful extend over the entire history of the public school system, thereby presenting the appellate courts with findings that are not related to the critical post-1965 period.

The Charlotte-Mecklenburg school system complied with the Constitution in 1965. Its good faith implementation of the 1965 plan for desegregation

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[3]The fact that the Board offered a far-reaching and sweeping plan to the District Court is not an acknowledgment that its system of schools in 1969 was one in which children were excluded from any school on account of race.

places this case beyond the power of the federal judiciary to intervene further. As declared by this Court:

> ". . . Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system . . ." (*Swann,* supra., p. 27).

The Supreme Court's reliance upon its own erroneous conclusions regarding admissions of the parties as to the condition of the system in 1969 and reliance upon the unsupported and undefined findings of the District Court warrant reversal of the District Court and the Court of Appeals.

B. The Court Substantially Rejected Education As The Foundation Upon Which Its Decision Rested. Instead, It Erroneously Based Its Holding Primarily Upon Racial Quotas In Contravention Of The Equal Protection Clause Of The Fourteenth Amendment.

Concern for equal educational opportunity for all children was the foundation of this Court's opinions in *Brown I* and *II,* 347 U.S. 483; 349 U.S. 294. But in the *Swann* opinion, there is only one limited reference (at p. 26) to an awareness of the effect which desegregation plans of the District Court may have upon the educational process.

Now, social reform, rather than education, appears as the major thrust of the goal to be achieved. The emphasis is put on racial quotas, balancing, transportation, existence of predominantly black or white

schools and other "baggage" loaded upon the school wagon to prepare children to "live in a pluralistic society."

Due regard has not been given to the opinions and recommendations of education experts, the Superintendent and others (including some of the plaintiffs' own witnesses) with respect to the detrimental effects which the Court-ordered plan will have upon the school children of Charlotte-Mecklenburg. This includes the deprivations resulting from consequent financial burdens that seriously encumber other programs of the schools.

To condone desegregation arrangements that are administratively awkward, inconvenient and even bizarre relegates education to a subordinate role and ultimately will be self-defeating.

Racial assignments which result in impairment of the very educational process intended to be benefited clearly violate the rights of all children, black or white, under the Equal Protection Clause of the Fourteenth Amendment. Such constitutional violation and resulting impingement upon the educational process warrant reversal of the District Court orders. *Swann*, supra., p. 26.

C. The Implications Of The Opinion With Respect To The Power Of The Federal Courts To Order A Prescribed Racial Ratio Of Students At Each School Requires Clarification.

This Court addressed itself to the authority of a federal court to order each school to have a prescribed ratio of Negro to white students reflecting the proportion of the district as a whole.

At page 12 of its opinion, this Court stated:

> ". . . Absent a finding of constitutional violation, however, that (i.e. prescribing fixed ratios) would not be within the authority of the federal court. . ."

This assertion does not square with the implications of a later statement of the Court appearing on page 19 of the opinion, where the Court declared:

> ". . . If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. . ."

Although disavowed, the District Court's goal was to achieve a 71%-29% racial balance in each of Charlotte-Mecklenburg's schools to reflect as nearly as possible the racial ratios of the system at large. This objective was approved by this Court as being within the discretionary powers of the District Court to fashion an equitable remedy "for the particular circumstances." No guidelines and no limits are prescribed.

It would appear, therefore, that once a school system is found or presumed to be dual, the door is open for a trial judge subjectively to require racial balancing in whatever amount he may consider expedient.

Upon rehearing, this Court should define the circumstances justifying racial balancing and the extent to which it may be employed. Until this is done, neither the Charlotte-Mecklenburg, nor any other system, can prepare or present meaningful desegregation plans without recourse to fixed and disruptive mathematical ratios in all schools.

D. The Court, Having Raised The Difficult Problem Of School Location, Must Furnish To School Boards And District Courts Guidance In The Location And Construction Of Schools.

The Court carefully describes some of the problems of school construction and school location which lead to racial isolation. However, school boards are told that it is wrong to construct a school in a black area for the school will remain black. Similarly, they are advised they cannot build in white areas for the schools will remain white. They are further admonished that they should not build in border racial areas as such schools are likely to become black. Furthermore, school boards quickly receive the condemnation of the courts where the racial composition of a school changes to reflect the shift in the racial composition of the attendance district. The Charlotte-Mecklenburg Board, implementing the Court-approved plan for 1970-1971, has been condemned by the District Court for the shifts in population that have converted three schools from predominantly white to predominantly black. A number of other schools are similarly threatened.

In this highly mobile society, the mortals who serve on the school boards do not have the omniscience to foretell the changes in the racial complexion resulting from the movement of people.

Unless practical, rational and clearly understood guides are furnished to school boards and the district courts, compliance with the directive of this Court will be largely impossible. On rehearing, such guides should be established.

E. It Is Incumbent Upon The Court To Clearly Define A Unitary System So That School Boards May Know The Necessary Ingredients Comprising Such A System.

The Supreme Court has approved the sweeping desegregation order of the District Court. It accomplishes more racial balancing than has been achieved by any comparable school system. Yet, we find in the opinion that the plan is an "interim plan" and that at some point in the future the system should comply with *Brown I* and *Green v. New Kent County*, 391 U.S. 430 (1968).

Brown II directed that assignments should be non-racial. *Cooper v. Aaron*, 358 U.S. 1 (1958) suggested geographic attendance zones. *Goss v. Board of Education*, 373 U.S. 683 (1963) suggested freedom of choice. *Green v. New Kent County*, 391 U.S. 430 (1968) introduced the term "unitary system" which has not been clearly defined to this date by the Supreme Court. *Alexander v. Holmes*, 396 U.S. 19 (1969) attempted to define a unitary system as one "within which no person is to be effectively excluded from any school because of race or color." We are now told that the objective is "to see that school authorities exclude no pupil of a *racial minority* from any school, directly or indirectly, *on account of race*." (Emphasis added).

The racial assignments of the District Court's order obviously violate the principles of the non-racial assignments of *Brown II* and the prohibited exclusion of students on account of race as enunciated in *Alexander*, supra. The effect of the District Court's order so fully balances students and faculty and so fully satisfies the other criteria of *Green* that we are unable

to comprehend why a unitary system has not been achieved by the sweeping desegregation order.

It is incumbent upon the Court to furnish the solid guidance it professed to give. It will thereby permit this School Board to extricate itself and the citizens of Charlotte-Mecklenburg from the legal quagmire created by the conflicting and inconsistent statements regarding the law of the land with respect to the establishment and operation of a unitary school system. Rehearing of this case will afford this Court an opportunity to do so.

F. The Court's Concern For The Time Or Distance Of Travel, Particularly For Young Children, Is Overshadowed And Rendered A Nullity By Approval Of The District Court's Orders.

In school cases, courts should not utilize the worst features of a school system (such as transportation) as the tools for bringing about further desegregation. In this case, the action of this Court in approving the orders of the District Court reflects upon the viability of this Court's holding that "the limit of time of travel will vary with many factors, but probably with none more than the age of the students." *Swann,* supra., p. 27.

This application of the Court's pronouncement is further cast in doubt by its acknowledgment that four and five year olds travel the longest routes in the system. *Swann,* supra., p. 25. Obviously, the age of the child was of little concern to the District Court. We can only conclude that in Charlotte-Mecklenburg, students of any age may be subject to assignment to any school within the system.

The Supreme Court must give rational, practical and reasonable guidelines with respect to transportation of students. In its present posture, this pronouncement of the Court is meaningless to this school system.

G. The Opinion Of This Court Unfairly Discriminates. A Nationwide Standard Is Required.

The dual standard adopted by the Court for this school system is a clear violation of the rights and privileges guaranteed to its citizens. The stringent and apparently insurmountable burden it faces regarding predominantly black schools is not shared by school systems located in other areas of the country.

The Board on many occasions offered comparisons of desegregation in the Charlotte-Mecklenburg schools with that in other non-southern systems. The District Court, while observing that our system compared favorably, rejected such proffers. (663A). Actually, this system was more racially balanced on February 5, 1970, under its 1969-70 plan than any other large urban area in this nation. The exclusion of this evidence effectively prevented the Board from showing that it had eliminated the effects of the former state imposed dual system.

We further offered evidence which showed that seven of its schools had changed from predominantly white to predominantly black during the period 1965 through 1968—for reasons totally unrelated to School Board action. These changes took place while the 1965

Court-approved plan was in effect. Nevertheless, the District Court, while noting the plan was administered in good faith, made a broadside finding that all predominantly black schools in the system, including those seven schools, to be "illegally segregated." The Supreme Court, by approval of the District Court's orders, sustained this finding. This case offers clear evidence that southern school systems face an impossible burden of proof. As a result, the citizens of this area are subjected to invidious discrimination.

The decision goes further than the ancient practice of visiting the sins of the father upon the son and later generations. It visits punishment upon children for the recently discovered offenses of their forebears or the forebears of their neighbors. Racial assignments are imposed upon young citizens residing in this district. It is immaterial that a child is a newly arrived foreign national or a former citizen of a non-southern state or that he was born subsequent to 1954. By residing in Charlotte-Mecklenburg, under this opinion, upon identification of the color of the child's skin, the child will be assigned to school according to color. This is expressly prohibited by *Brown I* and *II*.

Unless a uniform reasonable standard, with national application, is established for a unitary school system, a southern school district such as our own will be saddled with the irrefutable presumption that schools substantially disproportionate in their racial composition are unconstitutional.

CONCLUSION

For the foregoing reasons, it is urged that this petition be granted.

This the 14th day of May, 1971.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

We hereby certify that the foregoing petition is submitted in good faith and not for purposes of delay.

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CERTIFICATE OF SERVICE

This is to certify that I have served three copies of the foregoing Petition for Rehearing upon the following persons at their addresses by depositing same in the United States mail, postage prepaid, first class, as follows:

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This the 14th day of May, 1971.

/s/ WILLIAM J. WAGGONER
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