

MEMORANDUM

To: Rose Hermodson

From: Myron Orfield

Re: Eliminating the Remedial Clauses of the School Desegregation Rule

Date: January 28, 2014

Steve Liss, the general counsel of the Minneapolis School District and chair of the school desegregation rule alignment task force, has proposed that the remedial portions of the school desegregation rule be eliminated. I do not believe this is possible until the Minneapolis school district has been declared formally unitary under the terms specified in the Supreme Court's opinion in *Oklahoma v. Dowell*, 498 U.S. 237 (1991). We should request an opinion of the Minnesota Attorney General on this question.

Discussion

In 1983 Judge Larson withdrew his jurisdiction over the Minneapolis school desegregation case. He did so in reliance on an affidavit that the Commissioner of Education would maintain integrated schools in Minneapolis and throughout the state under the terms of Minn. Rule 3535, which mirrored the terms of his court order in Minneapolis. See Affidavit of John Feda, Commissioner of Minnesota Department of Education (April 29, 1983), referenced in the order of *Booker v. Minneapolis School District No. 1*, No. 4-71 Civ. 382 (D.Minn. June 8, 1983). Judge Larson never declared the district "unitary" and assured the parties that he would intervene if Minneapolis ceased compliance with terms of his injunction as embodied in the state desegregation rule, or if the state did not fulfill its duty under his injunction.

In *Oklahoma v. Dowell*, 498 U.S. 237 (1991), the Supreme Court declared that a specific and clear finding of unitary status must be made before the parties can assume that the court's injunction is terminated. In *Dowell*, a federal district court found that the school district had complied with its desegregation order for many years and, in 1977, dissolved its jurisdiction based on its belief the district would continue to comply with the order, very much like Judge Larson did in the *Booker* case. In 1984, the district sought to implement a more segregated school attendance plan. Plaintiffs brought suit arguing that even though the court dissolved its jurisdiction, Oklahoma City schools had not been declared unitary and were still bound by the terms of the court's injunction. The Supreme Court, per Justice Rehnquist, agreed, holding that the "the 1977 order did not dissolve the desegregation decree, and the District Court's unitariness finding was too ambiguous to bar respondents from challenging later action by the Board." 498 U.S. at 244-45.

The Court continued:

We therefore decline to overturn the conclusion of the Court of Appeals that ... the 1977 order ... did not finally terminate the Oklahoma City school litigation. In [*Pasadena City*](#)

Bd. of Education v. Spangler, we held that a school board is entitled to a rather precise statement of its obligations under a desegregation decree. If such a decree is to be terminated or dissolved, respondents as well as the school board are entitled to a like statement from the court....

[T]he preferable course is to remand the case to that court so that it may decide, in accordance with this opinion, whether the Board made a sufficient showing of constitutional compliance as of 1985, when the [new assignment plan] was adopted, to allow the injunction to be dissolved. The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable....

After the District Court decides whether the Board was entitled to have the decree terminated, it should proceed to decide respondent's challenge to the [new assignment plan]. A school district which has been released from an injunction imposing a desegregation plan no longer requires court authorization for the promulgation of policies and rules regulating matters such as assignment of students and the like, but it of course remains subject to the mandate of the Equal Protection Clause of the Fourteenth Amendment. If the Board was entitled to have the decree terminated as of 1985, the District Court should then evaluate the Board's decision to implement the [new assignment plan] under appropriate equal protection principles.

498 U.S. at 246, 249-51 (citations omitted).

Before the remedial portions of the school desegregation rule can be eliminated, the Commissioner must receive a clear and unambiguous finding of unitary status under the procedure specified by the Supreme Court in *Dowell*. Moreover, the court must determine whether the Minneapolis school district's conduct since 1983 is in compliance with the "mandate of the Equal Protection Clause of the Fourteenth Amendment."

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) the Supreme Court held because housing and school segregation are deeply inter-related, neighborhood school assignments based on geographic proximity did not satisfy the board's duty to desegregate. The court found that past discriminatory conduct, such as building or adding capacity to schools that foreseeably increased system wide school segregation, was not only school level discrimination but was an important cause of metropolitan wide housing segregation. The court concluded the interplay of housing and school segregation must be considered in shaping a school desegregation remedy. 402 U.S. at 20-21.

Additionally, the *Swann* Court held that when a school assignment plan allowed some schools to be all or predominantly one race, a district with a history of discrimination bore the burden of proving that such segregation was not the result of past or present discrimination. 402 U.S. at 25-26. To satisfy this heavy burden, the school district must show that its past discriminatory conduct involving the racial designation of schools, siting, and determination of school size, is "not a link in the causal chain" causing segregation. 402 U.S. at 26. The court further noted, "independent of student assignment, where it possible to identify a 'white school'

or a ‘Negro school’ simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the equal protection clause is shown.” 402 U.S. at 18.

In *Wright v. City of Emporia*, 407 U.S. 451 (1972), the Supreme Court held that once a school desegregation plan was in place, a new school system could not be created that might impede the district’s ability to desegregate. Specifically, the court held that school district boundaries between city and suburban schools – even if drawn without discriminatory intent – could not limit the scope or effectiveness of a school desegregation remedy if respecting these boundaries could increase white flight from one of the local school districts.

Emporia was an independent city in the Greenville County, Virginia. While its children historically attended the Greenville County school district, it had the right under state law to form and operate its own school district at any time. There was no evidence that the boundaries of Emporia were drawn in a racially discriminatory manner. The Greenville County schools operated under a freedom of choice plan and had remained racially segregated. After the Supreme Court’s decision in *Green v. County School Board*, a federal court ordered a more extensive desegregation plan. At this point, Emporia announced its intention to operate a separate school district as provided by state law.

Whereas the Greenville County system was 34 percent white and 66 percent black, the separate district of Emporia would be 48 percent white and 52 percent black. Without Emporia’s students, Greenville County schools would be 72 percent black and 28 percent white. The district court enjoined Emporia’s action, stating that it would frustrate its plan to end the dual school district in Greenville County. It found that Emporia’s decision had been partly—but not entirely or even predominantly—motivated by race. The Court of Appeal reversed, holding that Emporia’s motivation was not discriminatory, and that absent proof that Emporia exercised its pre-existing rights in a discriminatory manner, a court could not enjoin the formation of separate school district.

On appeal, the Supreme Court again reversed, holding that Emporia’s intent was irrelevant. It declared “the measure of any desegregation plan was its effectiveness....Thus, we have focused on the effect, not the purpose or motivation -- of a school board’s action in determining whether it is a permissible method of dismantling a school system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect.” 407 U.S. at 462.

The Court found that if Emporia were allowed to withdraw, Greenville County schools would increase from 66 to 72 percent black and that this could lead to greater white flight from that system. Thus even though Emporia would by itself be a majority black system, would be desegregated under *Green*, and would refuse to accept white transfer students from the county, its non-discriminatory exercise of its pre-existing right to operate an independent school district based on boundaries that had been drawn in a race neutral manner was impermissible, if it *might* increase white flight from Greenville County schools.

In *Keyes v. School District No. 1*, 413 U.S. 189 (1973) the Court declared that if a judge found that one or more of the following past actions was undertaken with intent to discriminate, or that it was reasonably foreseeable that such an action would result in segregation, the district would be segregated by law.

The actions included:

- (1) the drawing or alteration of attendance zones that had racially segregative effects,
- (2) the location of new school construction or expansion of existing schools that increased segregation, or the failure to relieve overcrowding at segregated sites in ways that could increase integration;
- (3) hiring, promotion, or faculty placement decisions with racially disparate impacts;
- (4) perpetuation or exacerbation of district segregation by strict adherence to a neighborhood school policy; and
- (5) transfer policies that systematically increase racial segregation in a district's schools.^[13]

Another creative tactic was the creation of single race black schools with all black faculties to *incent* blacks to accept segregation. These black schools were often “chosen” by black students who had been subjected to discrimination, intimidation and other forms of harassment in integrated schools. Black school faculties became bulwarks of segregation, fearing they would lose their jobs in an integrated system. These faculties consistently mobilized segments of the black community to oppose school integration efforts.

In *Dayton v. Brinkman*, 443 U.S. 526 (1979) (*Dayton II*) the Supreme Court upheld *Keyes* after *Washington v. Davis*, and declared that a school district which in 1954 had operated an optional all-black, city-wide high school with and all black-faculty, operated three all-black elementary schools, and had segregated faculty assignments, was segregated by law. It did not matter that Dunbar High School was very popular among part of the black population, or that its black faculty fought to preserve it. The court found that dividing the black community was an act which facilitated illegal racial segregation. Most significantly, *Dayton II* held that once a finding of intentional discrimination is made, anything the district does that maintains or worsens the segregation, even if done without discriminatory intent, constitutes an additional constitutional violation.

The conduct of the Minneapolis school district since 1983 is replete with evidence of fresh equal protection violations. It even more replete with actions that have intensified de facto segregation, which constitutes unconstitutional conduct in a non-unitary district under *Dayton II*.

Minneapolis is a district with a history of racial discrimination. It now has at least one dozen single-race schools.¹ It has intentionally sponsored Afro-centric and Hmong-centric single-race schools, and its charter schools in very poor, segregated neighborhoods, are

¹ MDE data for the 2012-13 show that there were 15 traditional schools in the Minneapolis School District with student populations that were more than 85 percent non-white and two schools that were more than 80 percent white. This count excludes special schools/programs and schools with limited enrollments.

intentionally and/or foreseeably segregated. Through segregative boundary drawing, it has created several clearly foreseeably all-white public schools.

Swann mandates that past discriminatory conduct, including siting and determinations of school size, not constitute “a link in the causal chain” leading to present segregation. Under *Swann*, Minneapolis is presumed racially segregated and has the burden to prove that the present segregation is not the result of past discrimination. It cannot do so.

First, Minneapolis has embarked on a segregated construction plan by building at least five schools in poor neighborhoods that were foreseeably racially isolated. In its expansion policies for the more than 90 percent white Lake Harriet schools and the rebuilding of Burroughs school as an all-white school its construction policies are classic violations of both *Swann*, *Keyes*, and *Dayton II*.

Minneapolis has redrawn school boundaries at least two times in a manner that would create intentionally and /or foreseeably racially isolated schools in violation of the equal protection clause as delineated under *Keyes* and *Dayton II*.

Minneapolis, by itself and in cooperation with the State of Minnesota, has operated transfer policies and other optional attendance boundaries that intentionally and/or foreseeably allow whites to avoid racially integrated schools, in violation of the equal protection clause as delineated in *Keyes* and *Dayton II*. See Institute for Metropolitan Opportunity, *Open Enrollment and Racial Segregation in the Twin Cities: 2000-2010* (January 2013) <http://www.law.umn.edu/uploads/30/c7/30c7d1fd89a6b132c81b36b37a79e9e1/Open-Enrollment-and-Racial-Segregation-Final.pdf>

Minneapolis, by itself and in cooperation with the state of Minnesota, has sponsored segregated single-race charter schools. To the extent these are considered Minneapolis schools, they violate *Keyes* and *Dayton II*. To the extent the charters constitute a separate school district that interferes with Minneapolis’s effort to desegregate its traditional public schools, they are inconsistent with the Supreme Court’s holding in *Wright v. Emporia*. See Institute of Race and Poverty, *Failed Promises: Assessing Charter Schools in the Twin Cities* (2008) and 2012 and 2013 updates. <http://www.law.umn.edu/metro/school-studies/integration-and-segregation.html>

Minneapolis faculty assignment is segregated and unconstitutional. Its all-white schools have few, if any, non-white teachers. Its non-white faculty are disproportionately placed in non-white schools.