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NOTES

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In the *Brown v. Board of Education*[1] decisions of 1954 and 1955, the United States Supreme Court made it clear that separate public school facilities for pupils of different races are inherently unequal and constitute a denial of the equal protection of the laws.[2] While it was not altogether clear from the language of the opinions whether segregated faculties in public schools are also unconstitutional,[3] subsequent lower court decisions have held that racial discrimination in the selection and assignment of teachers is forbidden.[4]

Although desegregation of faculties has been recognized as a vital part of any meaningful process of desegregation,[5] its implementation has barely begun. Not only have there been few instances of complete integration of faculties,[6] but many areas have evidenced a

1. 347 U.S. 483, 495 (1954); 349 U.S. 294 (1955).

2. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV. The 1954 decision held that separate public school facilities were inherently unequal. Recognizing that the problems stemming from enforcement of this holding would vary from one locality to another, the Court postponed for one year a decision on the relief to be afforded. In the second *Brown* decision, the Court ordered the local school authorities to make a "prompt and reasonable start toward full compliance," 349 U.S. at 300, in order that admission to public schools without considerations of race could proceed with "all deliberate speed," *id.* at 301.

3. There was little language in the opinions referring explicitly to teachers. Courts have generally construed the following passage as including teachers within its scope: "[T]he courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner . . . . To that end the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, *personnel*, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." Brown v. Board of Educ., 349 U.S. 294, 300-01 (1955). (Emphasis added.)

4. Bradley v. School Bd., 345 F.2d 310 (4th Cir.), *vacated and remanded*, 86 Sup. Ct. 224 (1965); Board of Pub. Instruction v. Braxton, 326 F.2d 616 (5th Cir. 1964); Calhoun v. Latimer, 321 F.2d 302, *vacated on other grounds*, 377 U.S. 263 (1964). Rights of both pupils and teachers have arisen from this line of decisions. It is clear that teachers may sue if they are the targets of racial discrimination. It seems established also that pupils have standing to sue when there is racial discrimination in faculty selection. See Griffin v. Board of Supervisors, 339 F.2d 486 (4th Cir. 1964); Board of Pub. Instruction v. Braxton, *supra*; Jackson v. School Bd., 321 F.2d 230 (4th Cir. 1963); Augustus v. Board of Pub. Instruction, 306 F.2d 862 (5th Cir. 1962). *But cf.* Bowditch v. Buncombe County Bd. of Educ., 345 F.2d 329 (5th Cir. 1965); Mapp v. Board of Educ., 319 F.2d 571 (6th Cir. 1963); Monroe v. Board of Comm'rs, 244 F. Supp. 353 (W.D. Tenn. 1965).

5. Rogers v. Paul, 345 F.2d 117 (10th Cir. 1965); see note 48 *infra* and accompanying text. See also New York Times, May 25, 1965, p. 26, col. 1 (remarks of Leonard Jackson, correspondent for the Southern Educational Reporting Service in Oklahoma City).

6. There are, of course, exceptions. See CARMICHAEL & JAMES, THE LOUISVILLE STORY (1957); Dwyer, *A Study of Desegregation and Integration in Selective School Districts of Central Missouri* (unpublished dissertation, University of Missouri, 1958).

reduction in the number of Negro teachers in direct proportion to the rate and extent of school desegregation.[7] This can be partially attributed to various circumstances peculiar to teacher employment in the South. First, the implementation of school desegregation plans has encouraged the consolidation of schools and school districts, and consequently has resulted in the closing of many schools.[8] The first schools to be closed are usually those which were formerly all-Negro,[9] and, as a result, the teachers displaced and not rehired in the consolidation process have been mainly Negro.[10] Second, because previous segregation has in many cases rendered the quality of the education of Negro teachers and administrators inferior to that of whites,[11] employment on the basis of merit has tended to put Negro applicants at a disadvantage in competition with white applicants for the same positions.[12] School boards have often used this factor as a reason for not rehiring Negro teachers, on the theory that the fundamental objective of providing the best available instruction for all students must not be sacrificed for the sake of achieving integrated faculties.[13] Thus, although the lower quality of Negro education has

7. There are no authoritative figures on the precise scope of this problem, although there are some reported estimates. One official has stated that 396 Negro teachers have been dismissed as a result of the desegregation process in Oklahoma. New York Times, May 25, 1965, p. 1, col. 4. The New York Board of Education has estimated that 5000 teachers had lost their jobs due to the closing of Negro schools in the South. New York Times, August 3, 1965, p. 1, col. 3. An official of the National Education Association has reported 500 displaced Negro teachers. New York Times, Sept. 8, 1965, p. 22, col. 3. See generally Report of N.E.A. Task Force Appointed To Study the Problem of Displaced School Personnel Related to School Desegregation and the Employment Status of Recently Prepared Negro College Graduates Certified To Teach in Seventeen States, December 1965 (copy on file with the *Michigan Law Review*).

8. *Ibid.* The Supreme Court in the second *Brown* decision seems to have recognized that at least some school consolidation would follow the decisions. See note 3 *supra.*

9. Negro schools have generally been the first to be closed because as a rule they have inferior physical plants, inadequate libraries, and less-competent teachers. *Cf.* ASHMORE, THE NEGRO AND THE SCHOOLS 160 (1954); EMBREE, EVERY TENTH PUPIL, THE STORY OF NEGRO SCHOOLS IN THE SOUTH 3-6, 8, 9 (1935); Kaplan, *Segregation Litigation and the Schools—Part I: The New Rochelle Experience*, 58 NW. U.L. REV. 1, 3 (1963). Despite a pronounced trend in recent years to upgrade Negro school facilities in the South, there still remains a large disparity between white and Negro schools on the basis of per-pupil expenditure, value of physical facilities, and pupil-teacher ratios. *Cf.* PIERCE, KINCHELOE, MOORE, DREWRY & CARMICHAEL, WHITE AND NEGRO SCHOOLS IN THE SOUTH: AN ANALYSIS OF BIRACIAL EDUCATION 289-90 (1955).

10. See note 7 *supra.* See also Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 16 W. RES. L. REV. 478, 484 (1965).

11. See note 9 *supra.* This is true despite the fact that in many instances Negro teachers have more college degrees. Because of the comparatively lower quality of many Negro colleges, the competence of a Negro teacher often cannot be adequately measured by years of college training. PIERCE, *op. cit. supra* note 9, at 212.

The poor education of Negroes has been a class, and therefore a sociological, problem as well. See Brown v. Board of Educ., 347 U.S. 483, 494 (1954), and authorities cited therein; BARTLEY, SOCIAL ISSUES IN PUBLIC EDUCATION 135-38 (1963); Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 NW. U.L. REV. 157, 207 (1963).

12. See note 7 *supra* and accompanying text; Carter, *Integrating the Negro Teacher Out of a Job*, The Reporter, August 12, 1965.

13. See Dowell v. School Bd. of Oklahoma Pub. Schools, 219 F. Supp. 427 (W.D.

often been a result of earlier public school segregation, employment of teachers will probably continue to be based on merit, as it clearly should be.[14]

However pressing these considerations may be, the most crucial and persistent problems involving desegregation of faculties relate to racial discrimination against Negro teachers in hiring and assignment practices. Two jurisdictional questions make these problems especially difficult to solve through resort to the courts. First, the power of a federal court to assist in desegregation of faculties has not been fully defined, since it is not yet clear whether the fourteenth amendment imposes a positive duty on local authorities to integrate faculties, or whether it merely requires them to refrain from discriminating on the basis of race.[15] If the mere existence of racially imbalanced faculties were declared to be a denial of equal protection under the fourteenth amendment,[16] courts could ascertain the ex-

Okla. 1963). In that case, the superintendent of schools maintained in good faith that nothing would be gained from the standpoint of education by a desegregation of teaching staffs, and that integration for the sake of integration was not a sufficient reason to desegregate. *Id.* at 444. The district court rejected this contention and held that the school board had a duty to establish a policy of integration of faculty members of different races. Although there is strong support for retaining traditional educational policies, some recent decisions have held that such standards must yield when they conflict with the overriding objective of achieving desegregation. See note 62 *infra.*

14. Neither the rights of the teacher nor those of the pupil include the right to secure employment for an unqualified teacher. The goal of desegregation is to eliminate racial discrimination in the selection and assignment of teachers, not to give job preferences unjustified by ability. See note 62 *infra. But cf.* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts,* 78 HARV. L. REV. 564, 577 (1965), where it is asserted that an important school board policy should be to protect the Negro student from psychological harm, even when it is admitted that there is no racial discrimination being practiced by the school board. Certainly this position would appear valid if it implies only that racial considerations in the selection and assignment of teachers are valid criteria when there are qualified Negro teachers available; but it is a far less defensible proposition to say that the quality of education should be diminished by hiring a Negro teacher in preference to a better qualified white teacher in order to avoid the possibility of psychological harm to Negro pupils.

15. The problem is whether racial imbalance (*de facto* segregation) in schools is illegal when caused by factors other than racial discrimination by the local school board. A few courts have said that racially imbalanced schools are inherently unequal if they are a result of prior discriminatory policies of school boards. In such a case, these courts hold that a school board has an affirmative duty to integrate pupils and teachers. See Singleton v. Jackson Municipal Separate School Dist., 348 F.2d 729 (5th Cir. 1965); Dowell v. School Bd. of Okla. Pub. Schools, 244 F. Supp. 971 (W.D. Okla. 1965); Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1964); Branch v. Board of Educ., 204 F. Supp. 150 (E.D.N.Y. 1962); Taylor v. Board of Educ., 191 F. Supp. 181 (S.D.N.Y.), *aff'd and enforced,* 195 F. Supp. 231 (S.D.N.Y.), *aff'd,* 294 F.2d 36 (2d Cir.), *cert. denied,* 368 U.S. 940 (1961); Booker v. Plainfield Bd. of Educ., 34 U.S.L. WEEK 2036-37 (N.J. June 28, 1965).

Most of the courts that have passed on the question, however, have held that the fourteenth amendment prohibits only deliberately caused racial imbalance. Monroe v. Board of Comm'rs, 244 F. Supp. 353 (W.D. Tenn. 1965), and cases cited therein; Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955).

16. See Fiss, *supra* note 14; Wright, *De Facto Segregation in Public Schools,* 40 N.Y.U.L. REV. 285 (1965). The Supreme Court has thus far declined to pass on this question.

istence of such a denial simply by observing the racial composition of the faculty.[17] In fact, however, although there are a few decisions to the contrary,[18] the great majority of courts have held that only deliberate racial imbalance is unconstitutional.[19] Remedies for the slow progress of teacher desegregation, therefore, must be proposed within this framework.[20] Second, racial discrimination in the hiring and assignment of teachers has been difficult to prove because under state statutes school boards traditionally have been allowed wide discretion in the selection of school personnel.[21] As in other areas where administrative discretion is involved,[22] unless a clear and arbitrary abuse of such discretion is shown, the courts are unwilling to substitute their judgment for that of the administrative body.[23]

It is clear that a federal court may enjoin school board hiring practices which take into account the race of the applicant.[24] A major problem, however, in view of the great discretionary power of school boards, is to determine when such racial discrimination has in fact occurred.[25] Recent decisions have required, as a minimum safeguard against administrative abuse, that teacher hiring be based on a fair comparison of all applicants for a teaching position. In *Franklin v. Giles County School Board*,[26] for example, consolidation of a Negro school with a white school resulted in loss of employment by seven Negro teachers. It had previously been the policy of

17. Of course, what degree of racial imbalance would be illegal is a troublesome question, and probably would depend upon local circumstances. For an insight into the difficulties inherent in declaring fortuitous racial imbalance unconstitutional, see Springfield School Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Bell v. School City of Gary, 213 F. Supp. 819, 829-31 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963).

There are no grounds for holding that a teacher has a fundamental right to work in either a white or an integrated school, absent racial discrimination against him. Therefore, an argument that racial imbalance in faculty allocation is *per se* a denial of equal protection would have to be based on the pupils' standing to sue. This standing arises from the psychological harm done the Negro student when he feels that his race is not being represented on an equal level with the white race. See Brown v. Board of Educ., 347 U.S. 483 (1954); Rogers v. Paul, 345 F.2d 117 (10th Cir. 1965); Dowell v. School Bd. of Okla. Pub. Schools, 219 F. Supp. 427 (W.D. Okla. 1963).

18. See note 15 *supra*.

19. *Ibid.*

20. See notes 15 and 17 *supra*.

21. EDWARDS, THE COURTS AND THE PUBLIC SCHOOLS 446-47 (1955); GIBSON & HUNT, THE SCHOOL PERSONNEL ADMINISTRATOR 362 (1965); MESSICK, THE DISCRETIONARY POWER OF SCHOOL BOARDS 60 (1949).

22. COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 36, 40-48 (1951); DAVIS, ADMINISTRATIVE LAW 132-33, 537-38 (1959). See also SARGENT, EDUCATIONAL ADMINISTRATION 431-39 (1955).

23. See authorities cited note 22 *supra*. See also Brooks v. School Dist., 267 F.2d 733 (8th Cir.), *cert. denied*, 361 U.S. 894 (1959); Buford v. Morgantown City Bd. of Educ., 244 F. Supp. 437 (W.D.N.C. 1965); Johnson v. Branch, 242 F. Supp. 721 (E.D.N.C. 1965).

24. Garner v. Board of Public Works, 341 U.S. 716 (1951); Franklin v. County School Bd., 242 F. Supp. 371 (W.D. Va. 1965). See note 4 *supra*.

25. Downs v. Board of Educ., 336 F.2d 988, 996 (10th Cir. 1964), *cert. denied*, 85 Sup. Ct. 898 (1965); Bell v. School City of Gary, 213 F. Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963).

26. 242 F. Supp. 371 (W.D. Va. 1965).

the school board to absorb teachers displaced because of consolidations. The Negro teachers and the Virginia Teachers Association brought an action in the federal district court against the school board, alleging that racial discrimination was the cause of the Negro teachers' dismissal. The court held that the school board was under an affirmative duty to compare the qualifications of the seven displaced teachers with those of all the other teachers in the system in order to determine which would be subject to dismissal.[27] Only after demonstrating to the court that the Negro teachers were less qualified for the available positions than other teachers could the school board dismiss them.[28]

Despite the willingness of the court in *Franklin* to rule on the constitutionality of the selection procedures used, effective judicial review of the actual selection process remains difficult. Typical criteria[29] for judging an applicant for a teaching position include training, experience, classroom performance, personality, and ability to fulfill the specific requirements of the job.[30] "Training" and "experience" are objective criteria involving educational background and the duration and character of teaching experience; as such they are readily subject to evaluation by the courts. The other three criteria are subjective, however, and require the exercise of disciplined, professional judgment. For this reason, the courts have been reluctant to overturn administrative decisions based on an examination of these factors.[31] Thus, a question naturally arises as to what extent, and in what circumstances, the courts will inquire into the motives behind the exercise of a school board's discretion and the effect of those motives on the desegregation process.

In analogous areas involving discrimination against Negroes, the courts have moved swiftly to ascertain the effects of certain administrative decisions and to hold the decisions unconstitutional when necessary. For example, the courts have been particularly sensitive

27. The court in *Franklin* distinguished a similar fact situation in Brooks v. School Dist., 267 F.2d 733 (8th Cir.), *cert. denied*, 361 U.S. 894 (1959). In *Brooks*, the school board had already compared the qualifications of all teachers in the system before deciding that the Negro teachers could not be retained.

28. 242 F. Supp. at 373-74.

29. Methods for the evaluation of teachers are at present in flux. See note 62 *infra* and authorities cited.

30. *Better Than Rating, New Approaches to Appraisal of Teaching Services* 34-40 (1950) (a pamphlet prepared by the NEA Comm. on Teacher Evaluation of the Ass'n for Supervision and Curriculum Development). These criteria are standard and have received judicial recognition. See Brooks v. School Dist., 267 F.2d 733 (8th Cir.), *cert. denied*, 361 U.S. 894 (1959) (qualifications, training, experience, personality, and ability to fulfill the requirements of the position); Buford v. Morgantown City Bd. of Educ., 244 F. Supp. 437 (W.D.N.C. 1965) (classroom performance); Johnson v. Branch, 242 F. Supp. 721, 723 (E.D.N.C. 1965).

31. See authorities cited note 22 *supra*. *Cf.* Manjares v. Newton, 44 Cal. Rptr. 343 (1965); Tripp v. Board of Examiners, 44 Misc. 2d 1026, 255 N.Y.S.2d 526 (Sup. Ct. 1964); Board of Educ. v. Bentley, 383 S.W.2d 677 (Ky. 1964).

to the effects on Negroes of racially gerrymandered school districts.[32] In *Dowell v. School Board of Oklahoma Public Schools*,[33] community resistance to efforts by Negroes to obtain housing in all-white areas had resulted in segregated residential patterns and a concomitant racial imbalance in the schools. The court ordered the school board to establish an affirmative policy enabling students to transfer to non-neighborhood schools.[34] In other situations, courts have invalidated discretionary decisions by local administrative authorities regarding jury selection procedures,[35] housing ordinances,[36] zoning laws,[37] and pupil transfer plans[38] which have had the effect of discriminating against Negroes and perpetuating racial imbalance. State laws having the same effect have also been held unconstitutional.[39] Judicial action in these areas demonstrates that the courts have become increasingly competent and experienced in dealing with a variety of discrimination problems, and have evinced a willingness to impose their newly acquired expertise on local administrators.[40]

In spite of the advances in these areas, courts for the most part have restricted judicial inquiry in faculty desegregation cases to determining whether there exists a sufficient factual basis to infer that racial considerations have been used.[41] For instance, some courts

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32. See, *e.g.*, Green v. School Bd., 304 F.2d 118 (4th Cir. 1962); Northcross v. Board of Educ., 302 F.2d 818 (6th Cir.), *cert. denied*, 370 U.S. 944 (1962); Norwood v. Tucker, 287 F.2d 798 (8th Cir. 1961); Clemons v. Board of Educ., 228 F.2d 853 (6th Cir. 1956).

33. 244 F. Supp. 971 (W.D. Okla. 1965).

34. *Id.* at 982.

35. See, *e.g.*, Arnold v. North Carolina, 376 U.S. 773 (1964); Eubanks v. Louisana, 356 U.S. 584 (1957); Cassell v. Texas, 339 U.S. 282 (1950).

36. See, *e.g.*, Detroit Housing Comm'n v. Lewis, 226 F.2d 180 (6th Cir. 1955); Anderson v. Town of Forest Park, 239 F. Supp. 576 (D. Okla. 1965); Banks v. Housing Authority, 120 Cal. App. 2d 1, 260 P.2d 668 (1953), *cert. denied*, 347 U.S. 974 (1954).

37. See, *e.g.*, Wiley v. Richland Water Dist., 5 RACE REL. L. REP. 788 (D. Ore. 1960); Youngblood v. City of Delray Beach, 1 RACE REL. L. REP. 680 (S.D. Fla. 1956).

38. Goss v. Board of Educ., 373 U.S. 683 (1963); Cooper v. Aaron, 358 U.S. 1 (1958); Becket v. School Bd., 3 RACE REL. L. REP. 942 (E.D. Va. 1958). See Comment, *State Efforts To Circumvent Desegregation: Private Schools, Pupil Placement, and Geographic Segregation*, 54 NW. U.L. REV. 354, 360-65 (1959).

39. Griffin v. State Bd. of Educ., 239 F.2d 560 (5th Cir. 1964). See Comment, *Unconstitutional Racial Classification and De Facto Segregation*, 63 MICH. L. REV. 913 (1965).

40. See Comment, *supra* note 39, at 913. See also Bickel, *The Decade of School Desegregation*, 64 COLUM. L. REV. 193, 218 (1964); Note, 107 U. PA. L. REV. 515 (1959).

41. To date an established pattern of Negro teacher dismissals has not, by itself, been enough to prove the existence of racial discrimination. One possible reason for this is that the majority of courts may believe that to allow such evidence to be presumptive of racial discrimination would be perilously close to holding faculty racial imbalance illegal per se. Most courts are unwilling so to hold. See note 15 *supra*. In *Buford*, the plaintiff argued that the fact that there were few Negro teachers being hired while many were being dismissed was sufficient to prove racial discrimination in the school board's hiring practices. The court stated that such an argument was analogous to the *res ipsa loquitur* rule of evidence and that it had no judicial precedent whatever. *But cf.* Evans v. Buchanan, 207 F. Supp. 820 (D. Del. 1962), where a rebuttable presumption of the unconstitutionality of a school boundaries decision was created on the basis

have grounded their holdings on the demonstrated "good faith" of the school boards in working toward pupil desegregation,[42] such a showing being considered sufficient to prove that the school board is working with "all deliberate speed" to accomplish teacher desegregation. Implicit in these decisions is the feeling that the case of the Negro pupil is far more pressing from the standpoint of equal protection than is that of the Negro teacher. A striking example is *Yarborough v. Hubert-West Memphis School District*,[43] in which the school board submitted a plan to the court for the desegregation of pupils but was unable to arrive at a solution for the desegregation of faculties. The court accepted the plan for pupils and refused to enjoin the school board from employing discriminatory practices in the hiring and assignment of teachers. The court's rationale was that, in light of the board's good-faith progress in pupil integration, it was enough that it was taking steps to solve the problems of desegregation of teachers.

On the other hand, several courts have recently held that, although the fourteenth amendment does not require the correction of racial imbalance where school board policies have been considered fair, school boards nevertheless have a duty to "disestablish segregation" where the effects of earlier segregation policies have not been corrected.[44] These courts reason that faculties should be desegregated so that "both white and Negro students would feel that their color was represented on an equal level and that their people were sharing the responsibility of high-level teaching."[45]

The problems relating to the assignment of teachers are similar to those involved in the hiring of teachers. In fact, it is common for a single suit to seek relief for discrimination in both hiring and assignment practices. Difficulties peculiar to discrimination in assign-

of mathematical evidence that racial considerations had been used. See also Comment, *supra* note 39, at 917-20.

42. See Bradley v. School Bd., 345 F.2d 310 (4th Cir.), *vacated and remanded*, 86 Sup. Ct. 224 (1965); Lockett v. Board of Educ., 342 F.2d 225 (5th Cir. 1965); Augustus v. Board of Pub. Instr., 306 F.2d 862 (5th Cir. 1962); Brooks v. School Bd., 267 F.2d 733 (8th Cir. 1959). If there has been bad faith on the part of the school board, the courts will exercise a tighter control over the desegregation process. See Evans v. Ennis, 281 F.2d 385 (3d Cir.), *cert. denied*, 364 U.S. 933 (1960).

43. 243 F. Supp. 65 (E.D. Ark. 1965).

44. See note 15 *supra*. It was in the second *Dowell* case that the court employed the term "disestablish segregation." The phrase implies that existing racial imbalance is a consequence of past segregation policies, and, because of this, school boards have an affirmative duty to remedy racial imbalance. The court distinguished this from a positive duty to integrate pupils and teachers; but to the extent that it can be determined that present racial imbalance is indeed a result of prior segregation policies, the affirmative duty imposed in the two situations is the same. It is unclear, however, whether the affirmative duty to act arises when racial imbalance is due to segregation policies over which the school board has no control, as, for example, in connection with a segregated housing program.

45. Dowell v. School Board of Okla. City Pub. Schools, 244 F. Supp. 971, 984 (W.D. Okla. 1965).

ment, however, require separate consideration. Normally, teachers of a particular race are assigned to schools in which a large percentage of the pupils are of that race. Most courts and school boards have reasoned that the pattern of teacher desegregation in a school should correspond with the racial patterns established in the student body after the elimination of discrimination in the assignment of pupils.[46] In many instances this belief has led the courts to delay the desegregation of faculties until a program of pupil integration has been effectively implemented.[47] However, a recent United States Supreme Court decision has removed this formidable impediment to immediate desegregation of faculties. In *Bradley v. School Board*,[48] the Court held that the lower court erred in approving plans for school desegregation without considering at a "full evidentiary hearing" the petitioner's contention that faculty allocation on an allegedly racial basis rendered the plans inadequate under the principles of *Brown v. Board of Education*. This decision represents a significant move toward accomplishing faculty desegregation, by its requirement that these problems be treated on an equal basis with pupil desegregation issues in determining the validity of school desegregation plans.

Another significant factor in the area of teacher assignment is the attitude of the community.[49] Hostile community feeling manifested in the form of social and professional harassment of teachers can cause substantial delay in the implementation of court-ordered plans.[50] This factor has particular significance where the individual teachers have been given a voice in determining where they will teach. If overwhelming community sentiment is against any form of desegregation, few teachers of either race are likely to request transfer to a school in which the large majority of pupils are of the other race.[51] Such a system of teacher assignment places the burden of desegregation upon individual school teachers, in contravention

46. Bradley v. School Bd., 345 F.2d 310 (4th Cir.), *vacated and remanded*, 86 Sup. Ct. 224 (1965); Rogers v. Paul, 345 F.2d 117 (10th Cir. 1965); Jackson v. School Bd., 321 F.2d 230 (4th Cir. 1963); Yarborough v. Hubert-West Memphis School Dist. No. 4, 243 F. Supp. 65 (E.D. Ark. 1965).

47. Jackson v. School Bd., *supra* note 46. Generally this delay has taken the form of court approval of a desegregation plan for pupils while the issue of teacher desegregation has been postponed until the school board has had time to formulate a plan. See note 43 *supra* and accompanying text.

48. 86 Sup. Ct. 224 (1965).

49. For a brief description of the fears arising in the various groups involved in the desegregation process in general, see Group for the Advancement of Psychiatry, *Psychiatric Aspects of School Desegregation* (*Report no. 37*) 71-72 (1957).

50. New York Times, Sept. 8, 1965, p. 22, col. 3. See Report of N.E.A. Task Force, *supra* note 7, at 16, 35-37.

51. CONFERENCE BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS, FOURTH ANNUAL EDUCATIONAL CONFERENCE ON PROBLEMS OF SEGREGATION AND DESEGREGATION OF PUBLIC SCHOOLS 21, 25, 38 (1962) (statement of Dr. Houston R. Jackson, Assistant Superintendent, Staff Services, Baltimore Public Schools).

of the clear mandate of the *Brown* decisions that the responsibility for desegregation rests with the local school boards.[52] Although there is little a court can do on a short-term basis to alter local biases, it can recognize their existence and proceed to allocate the burden of desegregation to the proper authority—the local school board.[53]

It is well settled that school board policies which discriminate against teachers on the basis of race are in violation of the equal protection clause of the fourteenth amendment.[54] Enforcement by the federal district courts of this constitutional prohibition has been supplemented by recent policies and regulations set down by the Department of Health, Education, and Welfare[55] in order to implement effectively the Civil Rights Act of 1964.[56] Under the act, HEW has the power to withhold federal funds from states which continue to practice racial discrimination in federally supported programs.[57] It has been suggested that, pursuant to this power, funds be withheld from school districts recalcitrant in implementing teacher desegregation.[58] Such action could involve a temporary

52. "Full implementation of these constitutional principles may require solutions 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 the school authorities constitutes good faith implementation of the governing constitutional principles." Brown v. Board of Educ., 349 U.S. 294, 299 (1955).

53. In the *Dowell* case the court was especially cognizant of this problem, and required the school board to propose a plan which clearly marked the board as the body responsible for ensuring an effective and successful desegregation program. Dowell v. School Bd. of Okla. City Pub. Schools, 244 F. Supp. 961 (W.D. Okla. 1965).

54. See notes 4 and 5 *supra*.

55. 29 FED. REG. 16299-300 (1964). The regulations provide in part that a recipient of federal welfare funds may not practice racial segregation against any individual in any way related to a benefit incurred under the program. To that end, all recipients must file an "assurance" with HEW which contains (1) a statement that the activity receiving federal funds will be carried out in accordance with the regulations, and (2) provisions for adequate administrative methods of complying with the regulations in the activity in question. *Id.* at 16300.

In *A General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools*, issued April 1965, HEW explicitly includes teacher desegregation as an important element in the overall desegregation process. Information on the racial distribution of teaching personnel throughout a school system is to be included in the initial compliance report. *Id.* at 5. In addition, "steps shall . . . be taken toward the elimination of segregation of teaching and staff personnel in the schools resulting from prior assignments based on race, color, or national origin." *Id.* at 2. Two Fifth Circuit cases have held that these HEW policy statements are proper guidelines for the implementation of desegregation. Price v. Denison Independent School Dist. Bd. of Educ., 348 F.2d 1010 (5th Cir. 1965); Singleton v. Jackson Municipal Separate School Dist., 348 F.2d 729 (5th Cir. 1965). *But cf.* 64 MICH. L. REV. 340 (1965), which contends that such a practice would amount to abdication of judicial responsibility for setting the desegregation criteria.

56. 78 Stat. 241, 42 U.S.C. § 1971 (1964).

57. HEW does not have the unlimited discretion to cut off funds; there is a procedure set out by Congress which must be followed. See 78 Stat. 252-53, 42 U.S.C. § 1975(e) (1964).

58. See New York Times, June 11, 1965, p. 64, col. 1; *The Federal Dollar and Non-*

curtailment of funds for school lunch programs and state welfare programs.[59] Because the impact of such formidable sanctions would tend to be felt largely by those with little voice in the school boards' policy decisions, the sanctions must be employed sparingly and only in the face of obstinate resistance by a school board to desegregation.[60]

There are other, more basic, remedies for the slow progress of faculty desegregation, however, which approach the heart of the problem—discrimination by local administrators—and avoid the coercive effect of the HEW remedy. First, the responsibility of the local school board for carrying out the desegregation of teachers and pupils should be clearly set forth and filed with the court in the form of a comprehensive plan.[61] A mere statement by the school board of a "desegregation policy" should not be sufficient, especially where there is a history of troubled race relations. In addition, the school board should be responsible for assuring that its plan does not rely for its success upon the broad discretion of a school superintendent. If the superintendent is responsible for the hiring and assignment of all teachers, criteria for that selection and assignment should be as objective as possible, as well as consistent with recognized educational standards, in order to prevent abuse of administrative discretion.[62] In this way the criteria will be made more

discrimination—A Guide to Community Action Under Title VI of the Civil Rights Act of 1964 (available upon request from the Secretary of Health, Education, and Welfare).

59. It seems clear from the legislative history of the Civil Rights Act that the framers were aware of the possibility of such action. See 110 CONG. REC. 6545-47 (1964) (remarks of Vice President Humphrey); 110 CONG. REC. 9112 (1964) (remarks of Senator Keating).

60. *Cf.* New York Times, April 19, 1963, § 2, p. 2, col. 1.

61. This is consistent with the HEW guidelines. See note 55 *supra*. See also Levenson, *Educational Implications of De Facto Segregation*, 16 W. RES. L. REV. 475 (1965).

62. Encouraging the use of more objective standards for the evaluation of teachers is consistent with modern educational theory. See FAWCETT, SCHOOL PERSONNEL ADMINISTRATION 7-40 (1964); GIBSON & HUNT, *op. cit. supra* note 21, at 234-53; *Better Than Rating, New Approaches to Appraisal of Teacher Services, op. cit. supra* note 30, at 34-36, 40.

Some decisions have held that certain educational standards may be dismissed as irrelevant if they stand in the way of achieving the overriding purpose of ending racial discrimination in the schools. Most often the "educational standard" to be overridden is the neighborhood-school system, and its demise is justified if it is used intentionally as a tool to perpetuate racial imbalance. Downs v. Board of Educ., 336 F.2d 988, 989, 995 (10th Cir. 1964), and cases cited therein. There are also good reasons for asserting the supremacy of the desegregation goal over other educational policies which affect only the placement of pupils in various schools, provided that the safety problems involved in mass transportation can be overcome. See Ross v. Dyer, 312 F.2d 191 (5th Cir. 1963) (striking down a strict school board policy of assigning pupils to the schools where their older brothers or sisters were sent); Dove v. Parham, 282 F.2d 256 (8th Cir. 1960); note 32 *supra*. But before entrenched and respected educational doctrines relating to the hiring and assignment of teachers are ignored for the sake of speeding up teacher desegregation, the relative merits of the two objectives should be carefully compared. The quality of education a student receives depends heavily upon the competence of his teacher and upon his curriculum. Faculty selection based on merit is designed to

subject to judicial evaluation, and hence racial discrimination will be more easily recognizable in administrative decisions. Second, the courts should encourage school boards to take advantage of the provisions of federal law authorizing grants by the federal government to finance in-service training of teachers[63] and expert advice on solving the problems of desegregation.[64] The use of these programs would tend to accomplish the objective of curtailing discriminatory practices in both the pupil and teacher desegregation areas without sacrificing important educational principles.

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implement the attainment of this goal. GIBSON & HUNT, *op. cit. supra* note 21, at 234-53. Racial discrimination in teacher selection and assignment should be eliminated, therefore, by using, rather than subverting, educational criteria, since educational goals are in accord with constitutional objectives in working for the end of racial discrimination.

63. "In-service training" refers to the educational preparation of teachers after graduation from college. See generally MOFFITT, IN-SERVICE EDUCATION FOR TEACHERS (1963). As to the importance of continuing education, note the statement of Thompson in INTEGRATING THE URBAN SCHOOL, OUR WASTED POTENTIAL (1963): "The most promising way of closing the cultural gap between the lower class Negro youth and the predominately middle class white youth is superior teaching."

64. 78 Stat. 247, 42 U.S.C. § 2000c-3-4 (1964), provides for federal grants to local school boards to be used in employing experts to help formulate plans by which school boards can overcome their desegregation problems.