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Recent Legislation: Constitutional Law--Equal Protection--Pupil Placement Statutes

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Recent Legislation

CONSTITUTIONAL LAW — EQUAL PROTECTION — PUPIL PLACEMENT STATUTES

Ten states have recently enacted statutes regulating the placement and assignment of pupils.[1] For the most part these statutes were enacted as a result of the Supreme Court's decision in *Brown v. Board of Educ.*,[2] to meet the problems presented by that decision, if not to circumvent its directive entirely.[3]

Generally, these statutes set out various criteria relating to school facilities and the pupils themselves.[4] The criteria are used by local school authorities as a basis for placing and assigning pupils within a local public school system. Most of these statutes also empower school officials to examine the individual pupil to determine his qualifications by using the standards embodied in the placement statute. Many of the standards, however, do not embody definitive objective tests for such an analysis. Therefore, the local school officials have discretionary powers in making pupil-placement determinations. As such, these statutes have the inherent infirmity of being readily subject to abuse.

One of the criteria set forth in the subject Alabama statute,[5] for example, provides that school officials may consider "the psychological qualification of the pupil for the type of teaching and associations involved." This provision clearly allows a wide latitude of discretion by the local school officials. Its subjective nature provides a means by which segregation can be perpetuated. In addition, many of these statutes can be used to perpetuate segregation by applying their standards only to certain groups, or by using frivolous

1. ALA. CODE RECOMP. tit. 52, § 61 (1958); ALA. CODE RECOMP. tit. 52, §§ 1, 61(13) (Supp. 1963); ARK. STAT. ANN. §§ 80-1519 to -1530 (Repl. 1957); FLA. STAT. ANN. § 230.232 (1961); LA. REV. STAT. ANN. § 17.101 (1963); MISS. CODE ANN. §§ 6334-01 to -11 (Supp. 1962); N.C. GEN. STAT. §§ 115-176 to -179 (Repl. 1960); S.C. CODE ANN. tit. 21, § 230(9) (1962); TENN. CODE ANN. § 49-1742 (Supp. 1964); TEX. REV. CIVIL STAT. ANN. art. 2901a (Supp. 1964); VA. CODE ANN. tit. 22 § 232.1 (1964).

2. 347 U.S. 483 (1954).

3. Pupil placement and assignment statutes are criticized because they often give school officials the authority to initially assign the pupils to specific schools and thereby leave the Negro with the initiative of seeking admission to a "white school." See Hartman, *The United States Supreme Court and Desegregation*, 23 MODERN L. REV. 353, 366 (1960).

4. For a complete list of the criteria see notes 32, 34 *infra*.

5. ALA. CODE RECOMP. tit 52, § 61(4) (1958).

and arbitrary standards. As a result, several questions have arisen as to their constitutionality.[6]

This article will survey some of the more recent enactments, giving particular emphasis to a recently enacted Alabama placement statute. More specifically, these statutes will be treated in light of the legal environment in which they were conceived, *i.e.*, the fourteenth amendment, the Supreme Court's decision in the segregation cases,[7] and the recent federal court decisions relating to pupil placement laws.

Pupil Placement and Equal Protection.—The fourteenth amendment prohibits any state from denying "to any person within its jurisdiction, the equal protection of the laws."[8] The language of the amendment is clearly prohibitive in form in that it restrains the states from engaging in, or lending support to, discriminatory practices. The fourteenth amendment has been used by the courts as the basis for striking down discriminatory state action in many areas, including education. Accordingly, in *Brown v. Board of Educ.*,[9] the Supreme Court held that separation of pupils in public schools solely on the basis of race or color is violative of the equal protection clause of the fourteenth amendment. The Court stated that the "opportunity of an education . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[10] The rationale of the Court was that "to separate them [Negro pupils] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[11] The rationale and holding of

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6. Three statutes have been declared unconstitutional: the Virginia Act, Va. Acts Ex. Sess. 1956, ch. 68, 70, because it provided no adequate remedy, Adkins v. School Bd., 148 F. Supp. 430 (E.D. Va.), *aff'd*, 246 F.2d 325 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957); the Florida Act, Fla. Laws 1959, ch. 59-428, §§ 1, 2 and Fla. Laws 2d Ex. Sess. ch. 31380, §§ 1-6, because the requirement of racial segregation continued, Gibson v. Board of Pub. Instruction, 272 F.2d 763 (5th Cir. 1959); the Louisiana Act, La. Acts 1st Ex. Sess. 1960, No. 26, § 1, and La. Acts 1954, No. 55, §§ 1-4, because it did not provide standards for the placement decisions of the school board, Orleans Parish School Bd. v. Rush, 242 F.2d 156 (5th Cir.), *cert. denied*, 354 U.S. 921 (1957). These Acts have since been amended. See note 1 *supra*.

7. These consisted of class actions originating in Kansas, South Carolina, Virginia, and Delaware which were consolidated into one case, Brown v. Board of Educ., 347 U.S. 483 (1954).

8. U.S. CONST. amend. XIV, § 1.

9. 347 U.S. 483 (1954).

10. *Id.* at 493.

11. *Id.* at 494.

the Court in *Brown*[12] clearly indicate that its prohibition is confined to segregation on the basis of race, rather than to all methods of classification which might result in *de facto* segregation.

It was in this setting that the pupil placement laws had their origin.[13] Although the courts have held that pupil placement laws are not inherently unconstitutional[14] and that the school authorities have the inherent power to exercise discretion in assigning and placing pupils,[15] they have recognized that these laws could be used to discriminate against Negroes. Accordingly, the federal courts have placed restrictions on their form and operation. The first requirement is good faith. Under this requirement, any action by the state such as the establishment of criteria for pupil placement and assignment must comply with the good faith requirement set forth in the second *Brown* case.[16] There, the Supreme Court, recognizing that its ruling would pose many problems in school administration, stated that "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."[17]

It is doubtful that the Court had pupil placement laws in mind at the time of this decision. Nevertheless, the principle stated is applicable. It was on this basis that the Virginia Placement Act[18] was held unconstitutional in *Adkins v. School Bd.*[19] There it was found that the act, when considered in context with other legislation and the state policy against desegregation, provided no adequate remedy to an aggrieved party.[20] The school authorities' fixed policy and cer-

12. 347 U.S. 483 (1954).

13. In keeping with the custom of segregation embedded in the tradition of the South, a number of states adopted statutes with the apparent motive of circumventing, or at least lessening the immediate impact of the directives of Brown v. Board of Educ., 347 U.S. 483 (1954). See note 1 *supra.*

14. Goss v. Board of Educ., 301 F.2d 164, 169 (6th Cir. 1962), *rev'd*, 373 U.S. 683 (1963).

15. Calhoun v. Board of Educ., 188 F. Supp. 401 (N.D. Ga. 1959).

16. 349 U.S. 294 (1955).

17. *Id.* at 299. (Emphasis added.)

18. Va. Acts Ex. Sess. 1956, ch. 70, §§ 1-2a, 3(1-8), 4-11. The statute has since been amended by the repeal of Virginia's "massive resistance laws," and has been held constitutional on its face. VA. CODE ANN. tit. 22, § 232.1 (1964). Beckett v. School Bd., 185 F. Supp. 459 (E.D. Va. 1959), *aff'd sub nom.* Farley v. Turner, 281 F.2d 131 (4th Cir. 1960).

19. 148 F. Supp. 430, 445 (E.D. Va.), *aff'd*, 246 F.2d 325 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957).

20. *Ibid.* In Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 372 (N.D. Ala.), *aff'd per curiam*, 358 U.S. 101 (1958), the district court distinguished the Alabama

tain legislation[21] manifested the state's lack of good faith and noncompliance with the directives of *Brown*.[22] But although the determination of good faith in *Adkins* was not difficult under the circumstances, there appears to be no definitive judicial statement as to what constitutes good faith implementation of the governing constitutional principles. It seems that this determination is made on an *ad hoc* basis in light of all the facts and circumstances of the specific case. Nevertheless, the fact that this principle has such an infirmity does not detract from its importance as a key factor in determining the constitutionality of any state action.

A second requirement is that the criteria used for pupil placement and assignment must be applied on an individual basis. Thus, classification of pupils cannot be on the basis of racial traits.[23] This principle was applied in *Stell v. Savannah-Chatham Bd. of Educ.*,[24] where, in a well reasoned opinion which sheds light on the meaning of "equal protection of the laws" in this area, the Fifth Circuit Court of Appeals criticized the classification of pupils on the basis of racial traits as being discriminatory. The court found that such classification deprived Negro pupils whose abilities were equal to those of whites of the opportunity to proceed along with other pupils without regard to race. The *Stell* decision, by emphasizing the importance of treating each pupil on an individual basis, giving each the opportunity to improve his position commensurate with his ability, provides a principle of primary significance in defining "equal protection of the laws."[25]

Placement Laws, ALA. CODE RECOMP. tit. 52, § 61 (1958), from the Virginia Placement Act, Va. Acts Ex. Sess. 1956, ch. 70, §§ 1-2a, 3(1-8), 4-11, on the basis that the Alabama statutes provide an adequate remedy to any aggrieved party and the statutes do not prevent integration and therefore do not manifest lack of good faith as did the Virginia Placement Act.

21. Virginia law required closing of any school that was integrated, and in addition provided a plan for tuition grants to students who objected to integrated schools.

22. Brown v. Board of Educ., 349 U.S. 294 (1955); see Dove v. Parham, 176 F. Supp. 242, 248 (E.D. Ark. 1959).

23. Stell v. Savannah-Chatham Bd. of Educ., 333 F.2d 55 (5th Cir.), *cert. denied sub nom.*, Gibson v. Harris, 376 U.S. 908 (1964).

24. *Ibid.*

25. It should be noted that the Alabama statute provides that it is to be administered on an individual basis; it thereby rejects the concept of classifying pupils on the basis of racial traits. ALA. CODE RECOMP. tit. 52, § 61 (1958).

Additional restrictions imposed by the federal courts are that the criteria used in placing and assigning pupils: (1) must not be arbitrary, see Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956); and (2) must be applied to all individuals regardless of race or color, see Calhoun v. Latimer, 321 F.2d 302 (5th Cir. 1963); Dillard v. School Bd., 308 F.2d 920 (4th Cir. 1962).

Validity of Criteria in Pupil Placement Statutes.—The federal courts have utilized the foregoing principles as the bases for determining the validity of many of the criteria embodied in pupil placement and assignment laws of the various states. For example, the criterion of adaptability, *i.e.*, the ability of a student to accept or conform to a new and different educational environment, although difficult to evaluate, has been held not to be frivolous, especially when supported by the opinion of an educator.[26] Intelligence, achievement, and health have also been held to be legitimate reasons for separating pupils, as long as each child is treated as an individual regardless of race or color.[27] However, the Supreme Court has held that such factors as friction, disorder, violence, and economic retaliation cannot be considered in carrying out pupil placement as part of a plan for desegregation if such factors pertain solely to race or color and are induced by actions of the state's officials.[28] But requiring a student to attend a school nearest his home, or assigning a student to a certain school because another is overcrowded, have been held to be valid criteria where the school district boundaries have not been altered so as to promote segregation.[29] Finally, in *Calhoun v. Board of Educ.*,[30] the district court held that factors such as psychological qualification, psychological effect upon the pupil, social and psychological relationships with other pupils and teachers, ability to accept and conform to new and different educational environment, morals, conduct, health, and personal standards of the pupil "would be relevant and material in Pupil Placement and there is no reason why they should be applied in a discriminatory way. The fact that the language is general does not mean that it can be made to encompass a test which would not be valid."[31] But the relevancy of the foregoing factors depends upon the objective to be achieved by the educational system. As-

26. Thompson v. County School Bd., 166 F. Supp. 529, 534, 536 (E.D. Va. 1958). The court also accepted the validity of the following criteria: attendance area, overcrowding, academic accomplishment, and psychological problems.

27. These criteria were specifically enumerated by the court as being valid factors to consider in assigning pupils. Borders v. Rippy, 247 F.2d 268, 271 (5th Cir. 1957).

28. Cooper v. Aaron, 358 U.S. 1 (1958). Whether these factors could be considered if not induced by actions of the state's officials, or whether they are valid when based upon the personal traits of a pupil regardless of race or color, are considerations open to question. See also Calhoun v. Board of Educ., 188 F. Supp. 401, 408 (N.D. Ga. 1959).

29. Thompson v. County School Bd., 166 F. Supp. 529, 536 (E.D. Va. 1958); see also Lynch v. Kenston School Dist. Bd. of Educ., 229 F. Supp. 740 (N.D. Ohio 1964).

30. 188 F. Supp. 401, 409 (N.D. Ga. 1959); see also Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956).

31. Calhoun v. Board of Educ., *supra* note 30, at 409.

suming that this objective is to provide the means whereby each pupil can develop his potential to the fullest extent possible, it becomes obvious that the foregoing factors would be relevant. They promote the operation of an effective educational system which meets the requirements of the individual pupil by grouping only those pupils of similar ability, personality, and social background, thereby recognizing that culturally deprived pupils and others similarly situated are in need of special care.

The Alabama Statutes.—In 1955, the Alabama legislature enacted its basic statute regarding the placement and assignment of pupils in the public school system.[32] This statute was amended in 1957,[33] and additional statutes were enacted in 1963.[34] These stat-

32. ALA. CODE RECOMP. tit. 52, § 61(4) (1958). The statute provides, *inter alia*, that:

> In the assignment, transfer or continuance of pupils among and within the schools, or within the classroom and other facilities thereof, the following factors and the effect or results thereof shall be considered, with respect to the individual pupil, as well as other relevant matters: Available room and teaching capacity in the various schools; the availability of transportation facilities; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for particular pupils; the adequacy of the pupil's academic preparation for admission to a particular school or facility thereof; the effect of admission upon prevailing ligence or mental energy or ability of the pupil; the psychological qualification of the pupil for the type of teaching and associations involved; the effect of admission of the pupil upon the academic progress of other students in a particular school of facility thereof; the effect of admission upon prevailing academic standards at a particular school; the psychological effect upon the pupil of attendance at a particular school; the possibility or threat of friction or disorder among pupils or others; the possibility of breaches of the peace or ill will or economic retaliation within the community; the home environment of the pupil; the maintenance or severance of established social and psychological relationships with other pupils and with teachers; the choice and interests of the pupil; the morals, conduct, health and personal standards of the pupil; the request or consent of parents or guardians and the reasons assigned therefor.

The act from which this statute is derived contains a severability provision which is given full scope and effect in Alabama. Ala. Acts 1957, No. 367, at 482. The Alabama legislature also passed statutes which provide for closing schools, and which prohibit the commingling of a pupil of one race with those of another against the pupil's will: ALA. CODE ANN. tit. 52, §§ 61(8), (13)-(19) (1960).

33. ALA. CODE RECOMP. tit. 52, § 61 (1958).

34. ALA. CODE RECOMP. tit. 52, §§ 1(8)-(11) (Supp. 1963). This statute includes the following criteria for pupil placement and assignment: pupils who create disciplinary problems and whose presence in the class may be detrimental to the best interest and welfare of other pupils; and for the purpose of preventing or minimizing disciplinary problems, the local school authorities may consider the pupil's social attitudes; amenability to discipline; hostility toward the school environment; health, morals, cleanliness, and habits of personal behavior. In addition, the local school authorities may prescribe special courses in citizenship, health, morals, or any other subject necessary to meet needs of special groups of pupils, and may assign special teachers and special classrooms or other places for such purposes. The act from which this statute is derived also contains a severability provision. Ala. Acts 1963, Nos. 460, 522, at 995, 1126.

utes, in addition to setting out the criteria to be used in placing and assigning pupils, empower local school boards to use the enumerated criteria for that purpose.[35]

The basic Alabama statute[36] was held constitutional on its face in *Shuttlesworth v. Birmingham Bd. of Educ.*[37] There, four Negro pupils brought a class action to test the constitutionality of the statute and enjoin the school officials from enforcing it. The three judge district court held that "the School Placement Law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to race or color. We must presume it will be so administered. If not, in some future proceeding it is possible that it may be declared unconstitutional in its application."[38]

The 1963 Alabama pupil placement and assignment statutes have not, however, been tested in the federal courts.[39] Among other factors, these statutes authorize the local school boards to take into account pupil disciplinary problems, pupil morals and health, and the interest and welfare of other pupils in the placing and assigning of pupils.[40] These criteria are similar to those originally enacted by the Alabama legislature in 1955, and thus it would seem that they, like the others, would be found constitutional. But considering the federal court decisions relating to similar criteria embodied in other placement laws, two factors contained in the Alabama statutes may be invalid: (1) the possibility of threat of

35. A careful analysis of the Alabama statute will indicate a great similarity between the criteria contained therein and those contained in the statutes mentioned. It is apparent from this similarity that many of the states which have enacted pupil placement laws subsequent to their adoption by Alabama have emulated the Alabama statute. *Compare* ALA. CODE RECOMP. tit. 52, § 61 (1958), *with* FLA. STAT. ANN. § 230.232 (1961), *and* MISS. CODE ANN. §§ 6334-01 to -11 (Supp. 1962), *and* TENN. CODE ANN. § 49-1742 (1964), *and* TEX. REV. CIVIL STAT. ANN. art. 2901a (Supp. 1964).

36. See note 32 *supra.*

37. 162 F. Supp. 372 (N.D. Ala.), *aff'd per curiam*, 358 U.S. 101 (1958). The Supreme Court affirmed upon the limited grounds on which the court below rested its decision. This narrow affirmance of the district court's decision reflects the Supreme Court's uneasiness in affirming the constitutionality of Alabama's statute. Nevertheless, this appears to be the only case to date relating to pupil placement laws that the Supreme Court has heard.

38. *Id.* at 384. Here, the plaintiffs had specifically objected to the constitutionality of particular tests embodied in the statute, but the court did not rule on the validity of these tests since no evidence was presented to show that the Negro pupils were excluded on the basis of the objectionable tests, rather than on the basis of the admittedly valid criteria. The court also rejected the proposition that the Alabama statute lacked good faith as did the Virginia Placement Act, see note 18 *supra.*

39. See note 34 *supra.*

40. *Ibid.*

friction or disorder among pupils or others; and (2) the possibility of breaches of the peace, ill will, or economic retaliation within the community.[41] The Supreme Court's decision in *Cooper v. Aaron*,[42] casts doubt upon the validity of these factors. There, the Court refused to delay integration even though the possibility of disorder, violence, and economic retaliation was imminent. It should be noted, however, that these factors would not invalidate the entire statute due to its severability clause.[43]

Although a pupil placement statute may be found constitutional on its face, it may still be subject to attack on the grounds that it is unconstitutional as administered or applied. This is particularly important in light of the fact that many of the criteria embodied in the statutes are so intangible and nebulous as to leave wide discretion with the school officials in applying the statutes. Thus, the statutes may easily become the subjects of severe abuse and provide a basis for discriminatory practices.[44] However, it is clear that many of the criteria in the Alabama statute are germane to an enlightened educational system in that they recognize the special needs of individual pupils and promote an efficient and effective educational system. But as desirable as these results may be, they are overshadowed by the past actions and attitudes of many states which have enacted placement laws.[45] Regardless of the reason for their adoption, the placement laws can serve a useful purpose if properly administered. As observed by one court,[46] the termination of segregation based on race or color in the public schools is a social

41. ALA. CODE RECOMP. tit. 52, § 61(4) (1958).

42. 358 U.S. 1 (1958). This ruling may be limited to the specific fact situation where the state authorities encourage disorder. See also Watson v. City of Memphis, 373 U.S. 526 (1963), where the Court ruled that constitutional rights may not be denied because of hostility to their assertion or exercise. *Accord*, Borders v. Rippy, 247 F.2d 268 (5th Cir. 1957).

43. See note 32 *supra*.

44. Among the criteria having this infirmity are: the psychological qualifications of the pupil for the type of teaching and association involved; the psychological effect upon the pupil of attendance at a particular school; the maintenance or severance of established social and psychological relationships with other pupils and with teachers. See note 32 *supra*; Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 372, 383 (N.D. Ala.), *aff'd per curiam*, 358 U.S. 101 (1958).

45. The past actions of Alabama have led one author to state that:
> There is little doubt that the Alabama pupil placement law is being used to carry on a pattern of strict segregation. It must be expected, however, that the day will come when the continued systematic exclusion of Negroes from Alabama "white" schools will make inevitable a holding by the federal courts that the pupil placement law is administered in a discriminatory way. Hartman, *supra* note 3, at 368.

46. Thompson v. County School Bd., 166 F. Supp. 529, 535 (E.D. Va. 1958).

epoch ending a custom which prevailed in the South for many years. Adapting to its demands means overhauling the existing educational system. The enactment of pupil placement laws is a result of this overhauling and they are not discriminatory merely because they are adopted in an environment of social change.

It appears that regardless of the motives which prompted their adoption,[47] pupil placement laws which do not lack good faith are constitutional on their face; however, they may prove to be unconsitutional in application and administration. It is unlikely that the Supreme Court will strike down these statutes by holding that segregation in public schools, regardless of the basis, is violative of the fourteenth amendment. The fourteenth amendment does not command the federal courts to take the initiative by setting forth a command of integration;[48] rather, it is couched in prohibitive terms directed to discriminatory state action. The function of the courts under the fourteenth amendment, therefore, would seem to be that of overseer, not activator.[49]

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47. See Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949); Doyle v. Continental Ins. Co., 94 U.S. 535 (1876) (ruling that the courts will not examine motives of a state where the state has the power to act).

48. See Bell v. School City, 213 F. Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964); Lynch v. Kenston School Dist. Bd. of Educ., 229 F. Supp. 740 (N.D. Ohio 1964); *cf.* Blocker v. Board of Educ., 226 F. Supp. 208, 230 (E.D.N.Y. 1964).

49. The Fifth Circuit Court of Appeals recently expressed the view that "a Negro is entitled to the equal protection of the laws, no less and no more. He stands equal before the law, and is viewed by the law as a person, not as a Negro." Collins v. Walker, 329 F.2d 100, 105 (5th Cir. 1964).

It has been suggested that racial integration finds support in the spirit of the Constitution and moral right. Perhaps this contention has merit, but forced association as a means of achieving equal treatment may be distasteful to even the most liberal egalitarian. Moreover, the action might prove unnecessary in light of the recent progress made by the Negroes in their drive for equal treatment, *i.e.*, the advance made may well be a heralding of the eventual assimilation of the Negro into society as was accomplished by ethnic minority groups.