Opinion No. 55-6080

January 18, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Honorable Georgia L. Lusk Superintendent of Public Instruction, Santa Fe, New Mexico

On July 27, 1954, your predecessor, Mr. Wiley, requested an opinion from this office on four questions presented to him by Mr. Charles L. Mills, Superintendent of Schools at Hobbs, New Mexico. Mr. Mills' inquiries were relative to an interpretation of the decision of the United States Supreme Court in the "School Segregation Cases", (Brown v. Board of Education; Briggs v. Elliott; Davis v. County School Board and Gebhart v. Belton, 374 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 583), rendered on May 17, 1954.

The rough draft of an opinion in answer to Mr. Wiley's request was prepared by Henry A. Kiker, Jr., former Assistant Attorney General, but the opinion was never released due to the fact that a District Court suit was filed and pending for some time in Lea County regarding this matter. Recently, this District Court suit was dismissed by the plaintiffs and on January 14, 1955 you have renewed the previous request made by Mr. Wiley for an opinion relative to this matter.

The first question was:

"(1) As to whether or not the Supreme Court's decision of May 17, 1954 ending segregation in the public schools in the United States ended segregation on that date and made the continued operation of separate schools for Negroes an immediate violation of the Fourteenth Amendment to the Constitution of the United States, under New Mexico's permissive segregation law (New Mexico Statutes 55-1201)."

The United States Supreme Court held, in the cases referred to above, that segregation in public schools solely on the basis of race constitutes a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution, notwithstanding the fact that the separate facilities provided for children so segregated may be equal in all "tangible" respects to all other school facilities.

In arriving at the answer to the question set forth above, it is necessary to bear in mind the fundamental rule of constitutional law that a decision by the United States Supreme Court as to the validity of a state statute, or constitutional provision, under the Fourteenth Amendment declares its validity or invalidity only as it affects the rights of the particular litigants involved in the case in which the decision is rendered. 16 CJS, "Constitutional Law" Section 102, page 291; Dunn v. Fort Bend County, 17 F.2d 329.

That this rule is applicable to the decision in the "School Segregation Cases" cannot be denied. See Laurent B. Frantz, "The School Segregation Cases", A Lawyer's Guild Review, Summer, 1954.

Thus, the decision in the cases is binding only upon the litigants involved, and upon the particular statutes by which they were aggrieved. The first case considered in the decision involved a Kansas statute which permitted, but did not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students. (Kan. Gen. Statutes, 1949, Section 72-1724).

The other three cases involved provisions in the state constitutions and statutory codes of the State of South Carolina, Virginia and Delaware, which require the segregation of Negroes and whites in public schools.

The effect of the decision in the cases was to declare that all of the statutes and constitutional provisions of the four states mentioned which permitted or required segregation of Negroes and whites in public schools were unconstitutional, within the meaning of "equal protection clause" of the Fourteenth Amendment.

Beyond this, however, the decision has greater significance in that it represents the present status of the law with regard to the segregation of pupils in public schools solely on the basis of race. It may be presumed that this decision will be followed by the Supreme Court, and by all inferior courts, both state and federal, in considering all future cases involving statutes or state constitutional provisions providing for segregation in public schools.

Thus, any statute which provides for compulsory or permissive segregation in public schools should be held unconstitutional when subjected to a test in litigation.

Section 55-1201, New Mexico Statutes Annotated, 1941, which provides for the segregation of pupils of the African and Caucasian races in separate school rooms, where "in the opinion of the County School Board or Municipal Board and on approval of said opinion by the State Board of Education, it is for the best advantage and interest of the school", is a statute of the same type as the Kansas statute declared unconstitutional by the Supreme Court. While the Court's decision does not automatically render the New Mexico statute unconstitutional, for the reason that it was not before the Court, it is abundantly clear that our statute would be declared unconstitutional upon the same basis if it were subjected to the Supreme Court's scrutiny.

In the sense described, then, the decision in the "School Segregation Cases" did "end" segregation in the public schools of the United States, and it did make the continued operation of separate schools for Negroes an immediate violation of the Fourteenth Amendment.

It is apparent, however, from the Supreme Court's opinion, written by Mr. Chief Justice Warren, and from its action in returning all four of the "School Segregation Cases" to the docket for further argument, that the Court did not intend that the states whose statutes and constitutional provisions were involved in the decision should cease to segregate school children on the day that the decision was rendered, May 17, 1954.

The Court said in this regard:

"Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question - the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 propounded by the Court for the reargument this Term."

The opinion goes on to say that the Attorney General of the United States is invited to participate in these arguments, and that the Attorneys General of the states requiring or permitting segregation will also be permitted to participate as amici curiae upon request to do so before September 15, 1954.

The questions that the Supreme Court desires to have argued further, are these:

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which question 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b).

(a) should this Court formulate detailed decrees in these cases;

(b) if so, what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the Courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

It is clear from these questions that the Supreme Court of the United States had not, at the time of the issuance of the decision in the "School Segregation Cases", arrived at a conclusion as to the method that should be used in de-segregating public schools.

In the original brief filed by the United States Department of Justice in the "School Segregation Cases", it was argued that "a program for orderly and progressive transition would tend to lesson antagonism". Two possible forms of gradual adjustment were suggested in that brief. They were (1) grade by grade integration (with, as Frantz points out in his article, "The School Segregation Cases", supra, the apparent result that all children now beyond the first grade would be permanently denied relief); (2) integration school by school. See: Frantz, supra.

We are, of course, unable to express an opinion as to what plan of desegregation the Supreme Court will adopt, if any.

The foregoing discussion constitutes the most complete answer that we are able to make to the first question propounded by Mr. Mills.

The second question asked was:

"(2) If not immediately illegal, when does the operation of a separate school for Negroes become illegal?"

For the reason contained in the preceding discussion, we are of the opinion that, were it subjected to a court test at this time, § 55-1201, N.M.S.A., 1941, should be declared unconstitutional. We are of the opinion, therefore, that the operation of a separate school for Negroes is illegal, and has been illegal since the issuance of the decision in the "School Segregation Cases", but, as we have indicated above, no method has as yet been prescribed for terminating this "illegality", nor has any period of time been indicated by the United States Supreme Court within which its termination should be accomplished.

Mr. Mills' third question was:

"(3) Regardless of when the operation of a separate school for Negroes becomes illegal, is a Board of Education operating a separate school for Negroes immediately liable to Negro teachers, students, and parents, under Federal and State (New Mexico Statutes 57-1201) Civil Rights Legislation?"

In answering this question, it is necessary first to consider some basic principles with regard to the civil and criminal liability of a municipal board of education. Section 55-

801, N.M.S.A., 1941, provides for the power of county boards of education to sue and be sued, and § 55-907, N.M.S.A., 1941, gives municipal boards of education the same powers as county boards of education. Clearly, then, municipal boards of education may be sued.

The general rule, however, is that statutory provisions conferring upon boards of education the powers to sue and be sued do not confer upon any would-be adversaries of such boards the power to sue them in tort.

"Since * * * the school districts and other local school organizations are agencies or instrumentalities of the state, and, considered as corporations, are public or quasi-municipal in character * * * it is the generally accepted rule that such a district, or its directing board, as such, or a municipality in charge of local schools, is not liable for torts." 78 CJS, "Schools and School Districts", § 320, p. 1321.

Further, it is clear that as quasi-corporations, boards of education may not be indicted for felonies. Wharton's Criminal Law, Vol. 1, § 115, p. 164.

As we have indicated above, the basis of the decision in the "School Segregation Cases", is that segregation of Negro students deprives them of the equal protection of the law guaranteed to them by the Fourteenth Amendment. We find nothing in the decision which could give rise to any liability on the part of a board of education, arising from a policy of segregation, to any other person or persons than students who are segregated. We believe, therefore, that there is no cause for fearing possible liability on the part of such boards to teachers or parents.

Students, however, through their legal representatives, do have the right to maintain actions to enjoin the enforcement of the statutes permitting or requiring segregation in public schools. It was through actions of that nature that the "School Segregation Cases" came before the Supreme Court. We believe that the board of education of a municipality maintaining separate schools for Negros, and its individual members, as well as other school officials, would be liable at the present time to a suit to enjoin the operation of such a segregated system of schools.

Section 57-1201, N.M.S.A., 1941, referred to in Mr. Mills' third question, has no relation to segregation in public schools. That statute is a part of the Equal Employment Opportunities Act, adopted by the New Mexico Legislature in 1949; this Act is concerned with employment practices rather than with educational practices. No liability could attach to a board or to its members by reason of the maintenance of segregated schools under that Act, or any section of it, as it is now constituted.

It is our opinion, however, that a municipal board of education maintaining a segregated system of schools, or its individual members, is now liable, in the light of the decision in the "School Segregation Cases", to two separate Federal Statutes, one criminal and one civil.

Title 18, § 242, U.S. Code Anno., provides that:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $ 1,000, or imprisoned not more than one year, or both."

In 1882, in the case of United States v. Buntin, 10 Fed. 730, a school teacher was prosecuted under § 5510 of the Revised Statutes of the United States, which, in all material respects, was the same as the statute quoted above, for depriving a Negro child of the right to attend a public school.

The "color of law" under which the defendant in that case had acted was § 4008 of the Revised Statutes of Ohio, which provided that:

"When, in the judgment of the Board, it will be for the advantage of the district to do so, it may organize separate schools for colored children. The boards of two or more adjoining districts may unite in a separate school for colored children, each board to bear its proportionate share of the expense of such school according to the number of colored children from each district in the school, which shall be under the control of the board of education of the district in which the school is situated."

In that case, the Court instructed the jury that it could find the teacher who was the defendant guilty, under § 5510, supra, of depriving the colored child involved of his right to attend a public school. The Court also instructed that separate schools could be provided for colored children, but said that they must be reasonably accessible, and must afford substantially equal educational advantages with those provided for white children. (The latter declaration was an application of the "separate but equal facilities" doctrine, which the Supreme Court held in the "School Segregation Cases" has no place in the field of public education.)

Under the instructions so given, the jury found the defendant in the Buntin case not guilty, but the case stands firmly for the proposition that a school official may be prosecuted under a civil liberties statute such as Title 18, § 242, supra, for denying a Negro child his right to attend a public school.

The "School Segregation Cases" had the effect of abolishing the "separate but equal" doctrine as it had been applied to the school segregation cases, and the decision in the cases made it clear that a Negro child has a right, protected by the United States Constitution, to attend a non-segregated school.

The statute quoted above is a felony statute, and for that reason, upon the basis of the authority cited above, we conclude that a board of education itself could not be indicted

under the said statute. It is our opinion, however, that the individual members of a board of education which maintains a segregated system of schools, as well as other school official, are subject to indictment and prosecution under § 242, Title 18, supra.

Section 1983 of Title 42 of the United States Code Annotated provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subject, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

It is our opinion that an "action at law" under the above statute would be an action in tort, and that a board of education would not be subject to such an action. A board of education, however, would be subject to a "suit in equity", under the above statute, to enjoin the operation of segregated schools, for example.

It is our opinion that the individual members of a board of education, or other school officials, of a municipality which maintained a segregated system of schools would, at the present time, be subject, under the above statute, to an action at law as well as to a suit in equity.

Mr. Mills' fourth question is:

"(4) If no immediate liability exists under State and Federal Civil Rights Statutes, when does the operation of a separate school for Negroes make a board of education liable under these statutes?"

Inasmuch as we have concluded that a board of education is at present liable to suits in equity under federal civil rights statutes, and that members of such a board are liable at present to actions at law, suits in equity, and to criminal prosecution under such statutes, we deem it unnecessary to answer Mr. Mills' fourth question.

In summary, it is the opinion of this office that § 55-1201, N.M.S.A., 1941, is, under the rule announced by the United States Supreme Court in the "School Segregation Cases" unconstitutional, for the reason that it violates the "equal protection of the laws" clause of the Fourteenth Amendment to the United States Constitution, and that it would be so declared if it were subjected to a court test, even though the decision of the United States Supreme Court referred to does not have the effect of declaring our said statute unconstitutional.

Further, it is our opinion, that at the present time municipal boards of education maintaining segregated school systems are subject to suits in equity under federal civil rights statutes to enjoin them from so doing, and that individual members of such boards, as well as other school officials, are subject, at the present time, to actions at law for damages, as well as to suits in equity, for permitting such segregated school

systems to be maintained, as well as to criminal prosecution under § 242, Title 18, United States Code Annotated.

Trusting that this opinion will be of service to you in answering the questions put to you by Mr. Mills, I am

By

C. C. McCulloh

Assistant Attorney General