Published on *Penn GSE Perspectives on Urban Education* (https://urbanedjournal.gse.upenn.edu)

AN EXAMINATION OF PHILADELPHIA 'S SCHOOL DESEGREGATION LITIGATION

Malik Morrison

Introduction

Fifty years after *Brown v. Board of Education* (1954) (Brown I), American schools remain racially separate and radically unequal in both per pupil expenditures and student performance. Although *de jure* school segregation is still illegal, *de facto* racial segregation is increasing. According to Frankenberg, Lee & Orfield (2003) at the turn of the century American public schools were twelve years into the process of continuous resegregation, so that by the 2000-2001 school year 72% of African-American children and 76% of Latino children attended predominantly minority schools. Although we are often informed of the racial isolation of Black and Latino students, Whites are the most segregated group in the nation's public schools; they attend schools, on average, where eighty percent of the student body is White (Frankenberg et al., 2003).

In order to understand why schools are resegregating it in necessary to understand the historical and legal failures of the desegregation process. The legal and historical analysis of federal race based equity case law has previously been done in depth (Orfield, Eaton, Harvard Project on School Desegregation., 1996; Parker, 2000; Rossell & Hawley, 1983). While macro-level analysis is important, I believe it is useful to examine the desegregation process on a smaller scale. To this end this work seeks to examine desegregation in Pennsylvania generally and Philadelphia specifically to understand the goals and failings of desegregation litigation. I begin with a brief overview of Supreme Court desegregation jurisprudence because it provides context for Pennsylvania's desegregation process, and then I examine the thirty-year process of desegregation in Philadelphia.

Federal Overview

Brown v. Board of Education (1954)(*Brown I*) is arguably the most important judicial decision of the twentieth century. The court in *Brown I* held that segregated schools were "inherently unequal" and therefore unconstitutional. This overturned the *Plessy Doctrine* (1896), which allowed for segregated facilities, as long as they were equal, and started the modern era of civil rights. *Brown II* (1955) was the first attempt by the courts to set policy in this area. The Court attempted to define how and when school desegregation would be achieved. Here the Court begins its slow retreat from the promise of *Brown I* when it stated that schools should be desegregated with "all deliberate speed." Because no time certain was set for schools to desegregate, Southern school districts began a pattern of evasion. This pattern of evasion required a continued return to the courts to define the promise of *Brown*.

For a period of about twenty years from Brown I in 1954 until 1974, the Supreme Court tried to define what made a segregated school and to construct remedies to achieve integrated schools. *Green v. County Board of Education of New Kent County* (1968) required that school systems dismantle their dual segregated systems "root and branch." To this end, the Supreme Court set out "*Green*" factors to be used in desegregation plans. This required that desegregation be achieved in respect to facilities, staff, faculty, extracurricular activities, and transportation. A year later in *Alexander v. Holmes County* (1969) the Court required that a "unitary" (non-segregated) district be achieved "at once" and "operate now and hereafter only unitary schools." The cases set the groundwork for courts to address residential segregation in *Swann v. Charlotte-Mecklenberg Board of Education* (1971). The Supreme Court held that "racially neutral" student assignments that relied on residential segregation were unacceptable, and that desegregation must be achieved to the greatest extent possible. In defining the extent to which districts should go to achieve integrated schools, the Court approved busing as an acceptable remedy.

Keyes v. Denver School District No. 1 (1973) was the first Supreme Court case to address segregation outside the southern states where there were no explicit statutes requiring racial segregation. It required the Court to begin to address the issue of *de facto* versus *de jure* segregation. The Supreme Court held that school systems were responsible for policies that resulted in racial segregation within the school systems themselves. Once it was determined that intentional segregation existed in a portion of a district, the entire district was presumed to be illegally segregated. School districts were not however responsible for *de facto* segregation.

Beginning with *Milliken v. Bradley* (1974) (*Milliken I*) the United States Supreme Court began its retreat of attempting to achieve racial integration in America's schools. *Milliken I* rejected a remedy, which would have created a "metropolitan" school district

encompassing Detroit, Michigan and its surrounding suburbs. The Court held that unless a constitutional violation on the part of one the suburban districts leading to the segregation in the urban districts could be shown, inter-district remedies were not allowed. This was the beginning of the end of federal supervision of desegregation plans. In *Milliken II* (1977) the Supreme Court held that the state could pay for educational programs to repair the harm caused by segregation. Orfield referred to this as a return to "separate but equal" (Orfield et al., 1996). In *Board of Education of Oklahoma City Public Schools v. Dowell* (1991) the Supreme Court established a "good faith" test, allowing courts to relinquish supervision over desegregation orders once a district had shown a good faith effort to comply with the order and to eliminate segregation "to the extent practicable" (p. 249-250). Finally, in *Freeman v. Pitts* (1994), the Supreme Court allowed courts to withdraw supervision of desegregation cases in incremental stages once it was determined the school district had complied with the good faith standard from *Dowell*.

In 2002 the Charlotte-Mecklenberg School District, the district that introduced busing -- like so many other districts around the country -- was found to be unitary and removed from court supervision. There is a good chance that had the Philadelphia desegregation litigation been brought in federal court it too would now be considered unitary. Philadelphia, however took a different path.

The Philadelphia Story

> The opportunity for an individual to obtain all the accommodations, advantages, facilities and privileges of any public accommodation . . . without discrimination because of race, color, familial status, religious creed, ancestry, handicap or disability, age, sex, national origin . . . is hereby recognized and declared to be a civil right which shall be enforceable as set forth in this act (Pennsylvania Human Relations Act, 1955).

School desegregation litigation in Philadelphia is not directly affected by federal desegregation case law. Unlike federal desegregation, Pennsylvania's desegregation litigation is brought pursuant to the Pennsylvania Human Relations Act (1955)(the "Act")1, not the equal protection provisions of the 14th Amendment of the United States Constitution. Pursuant to the act the Pennsylvania Human Relation Commission (the "Commission")2 enforces Pennsylvania's desegregation efforts. Unlike federal desegregation, the desegregation process in Pennsylvania has been sparsely studied. A law review article by Milby (1996) provides one of the few insights into the Commission's struggle to a desegregate Pennsylvania's public schools.

Pennsylvania Desegregation Foundational Cases

Despite the lack of study the Pennsylvania cases in many ways tell the story for themselves. The seminal case on desegregation in Pennsylvania is *Pennsylvania Human Relations Commission v. Chester School District* (1967). *Chester* is important because it establishes the Commission's authority to compel school districts to cure *de facto* segregation and to direct the school districts to take immediate action to desegregate schools. The limitations placed on the Commission help us to understand why desegregation litigation is still ongoing after thirty years. In deference to the belief that local control is a central tenant of American education, the Court held that the Commission must first attempt to give effect to the policies of the Act through "conference, conciliation and persuasion," and only then can it "hold hearings, make findings of fact, and issue a final order" (*Chester*, p. 299 citing the Act § 959).

Although based on the Act and not the 14th Amendment, both the Commission and the courts look to federal desegregation in making remedies and limiting remedies. Following the lead of the United States Supreme Court in *Swann v. Charlotte-Mecklenberg Board of Education* (1971) the Commission imposed busing to address *de facto* segregation. In *Balsbaugh v. Rowland* (1972), the Supreme Court of Pennsylvania addressed a challenge by taxpayers to a school board desegregation plan that provided for reassignment and cross-town busing of many of the public school students to cure *de facto* segregation. The Court held that the Commission had the authority to use computers and busing to assign students in a manner that reduced racial segregation and that the elimination of "neighborhood schools" using public monies was not an equal protection violation (p. 91-92, citing *Swann*). As *Swann* did in the federal arena, *Balsbaugh* removed any doubts about constitutional impediments to the use of busing and public monies to desegregate Pennsylvania public schools.

Early Philadelphia Cases

While guided by the earlier state Supreme Court cases, the Commonwealth Court of Pennsylvania heard the Philadelphia desegregation litigation3. The Philadelphia litigation began with *School District of Philadelphia v. Pennsylvania Human Relations Commission* (1972)(HRC I) the first in a series of eleven cases,4 spanning thirty-one years and arising in response to an order promulgated by the Commission. The initial order required five state school districts to formulate plans to balance the racial composition in their public school systems. The districts brought an administrative agency appeal to the Commonwealth Court

praying for relief from the order on a number of issues. The appellants argued that the Commission had no authority to require school integration in the absence of *de jure* segregation. The United States Supreme Court had not yet decided *Keyes v. Denver School District No. 1* (1973), which created a requirement of *de jure* segregation for a constitutional violation. The Pennsylvania courts, therefore, relied on *Balsbaugh* and *Chester*, and found that *de jure* segregation was not required for the Commission to have authority to force integration or to require busing as a means to desegregate schools. The Commonwealth Court did, however, hold that the Commission could not require the plans to include provisions for achieving racially balanced school faculties without first alleging discriminatory employment practices (HRC I, p. 414).

In response to the Court's decision districts began using financial burden in attempts to thwart desegregation remedies. Because districts challenged remedies on cost before they were actually proposed, the Court did not address this issue, and instead found that a district could not challenge the order on the basis of financial inability to comply with any proposed plan until a plan was submitted (*HRC I*, p. 413).

In *Pennsylvania Human Relations Commission v. School District of Philadelphia* (1976) (*HRC II*), the limitations of "conference, conciliation and persuasion" become more apparent. The Commission brought the suit to force the District to comply with its plan to integrate the Philadelphia public schools. Judge Wilkinson, the judge overseeing the case, ordered the Commission and the School District as well as other interested parties to develop remedial plans. This occurred after both the District and the Commission opposed the plan of a court-appointed expert.

All of the plans presented to the Court were rejected as "fatally flawed." The Commission's plan conceded that 34 of the 294 schools in the District could not be integrated due to the length of time it would take to bus the children to and from schools that would constitute an integrative result. Moreover, the Commission's remedial plan was ultimately rejected, because Dr. Gordon Foster, the Commission's expert, admitted that he had not consider "community involvement, educational benefit, and future building concerns" as required by the Commission's own guidelines for a desegregation plan (*HRC II*, p. 210-11).

The District's plan was rejected because it proposed full financing by the Commonwealth and the inclusion of other school districts adjacent to Philadelphia, all of which in a post-*Milliken* (1974) world was beyond the power of the Court to compel. As a result of the failure to develop a workable plan, the Court ordered the District to submit a new plan and timetable for compliance within four and one-half months. Because the Commission conceded that it was impossible to integrate 34 schools using busing, the Court held that the District's plan should not require any student to be on a bus for more than forty-five minutes and that it was not required to balance the racial composition of every school provided that the District offered a justification for not doing so (*HRC II*, p. 216).

I n *H R C III*(1977) we again see the process of Philadelphia mirroring national trends. The Court acknowledges that desegregation in Philadelphia was *de facto* and not *de jure*, resulting from housing patterns and not any overt acts on the part of the School District (*HRC III*, p. 1015). As such the desegregation did not rise to the level of "constitutional proportions" (*HRC III*, p. 1015,). This provided the basis for the Court to reject the Commission's challenge to the school districts desegregation plan on the basis that it was voluntary and that there was no backup plan for enforced desegregation if the voluntary plan failed. It accepted the District's all-voluntary plan, which proposed magnet schools and permitted parents and students to choose their school, provided the decision was consistent with the desegregation plan (*HRC III*, p. 1015). The school district was given an eighteen-month trial period to implement the voluntary plan (*HRC III*, p. 1016).

In 1981 *Pennsylvania Human Relations Commission v. School District of Philadelphia* (*HRC IV*) returned to court at the request of the Commission. The Commission argued that the Philadelphia School District should be required to submit an involuntary plan for integration of its public schools in light of the failure of the voluntary plan. Although the Commission and the School District disagreed on what defined a segregated school, it was clear to the Court that schools in Philadelphia where still highly segregated. This was true whether using the Commissions 1979 formula, which defined "a segregated school as one which either has less than 25% White enrollment or less than 40% Black enrollment unless the school contains at least 20% Hispanic enrollment in which case it is segregated if it also contains less than 25% White enrollment or less than 25% Black enrollment" (*HRC IV*, p. 1345), or the Court's Desegregation Index, which used the percentage of White students attending school with the average Black student, divided by the actual percentage of White students in the district (*HRC IV*, p. 1354). In fact, 66% of Black students at the time attended a school that was 90% or more Black (*HRC IV*, p.1356). This disparity was too great for the Court to accept. The Court relied on federal precedent[5] as well as the Pennsylvania Supreme Court's findings in *Chester* to find that a "desegregation plan which leaves unaffected a substantial number of racially identifiable schools containing a high proportion of Black students is insufficient" (*HRC IV*, p. 1354). While the School District was allowed to continue its voluntary plan, it was to be supplemented by pairing elementary schools and reassigning students of closed schools in such a manner as to promote racial balancing.

Transition from Equity to Adequacy Standard

In the fourteen years that passed between *HRC IV* (1981) and *HRC V* (1994), the Commission agreed to allow the School District a three-year period to implement its 1983 modified desegregation plan. Subsequent to its evaluation of the three-year implementation period, the Commission notified the School District in June 1988 that the maximum feasible desegregation had not been achieved thereby invoking terms of the agreement and authorizing the appointment of a settlement team to independently evaluate the School District's progress toward desegregation. The settlement team, appointed by former President Judge Crumlish in July 1990, submitted a report in November 1992 in which the team found that a great majority of Philadelphia's public schools were segregated and concurred that the School District had not achieved maximum feasible desegregation (*HRC V*, p. 307).

In *HRC V* the Philadelphia School District sought unsuccessfully to challenge the use of race-based assignment to effectuate desegregation, and the Court's authority to address *de facto* segregation. While the Court's support for race-based remedies and plans to address de facto segregation are still enunciated, perhaps the most important development in *HRC V* is the shift in focus on the part of the Court and the Commission to *assuring equal educational opportunity to all students* (HRC V, p.671, emphasis added). The primary goal became reducing racial disparities in academic achievement, which required further development of a feasible desegregation plan. This shift in focus can be seen as reflective of the federal trend started in *Milliken II*(1977) and it allows an examination of how such a shift affects the desegregation process.

As a result of the judges order in *HRC V*, the parties met again for court approval of a plan, developed by the educational teams of both parties. At that time the parties met not to develop integration plans, but to develop plans to enhance educational opportunity and academic achievement. Further attempts at school desegregation were reduced to voluntary plans like those used in 1981.

The Court in *Pennsylvania Human Relations Commission v. School District of Pennsylvania* (1994)(*HRC VI*) ordered the School District to develop a new plan containing the following: provisions for parental involvement, including parent classroom representatives and school volunteers; a program focusing on exemplary educational standards, professional development, full-day kindergarten, smaller class sizes, preschool programs, tutorial programs, collaboration with higher education institutions, additional funding sources, and minority-bilingual education programs; provisions for educational improvement with respect to preparation for higher education, curriculum, class leveling, and assignment of substitute teachers; desegregation strategies; provisions concerning financial resources and allocation; provisions concerning school climate, safety, and discipline through a code of conduct, truancy control and a voluntary dress code; organizational restructuring to develop a local and city-wide school council, executive committee, equity assurance office, professional development center, and a student recruitment and educational counseling office; provisions for accountability with regard to this order; plans for facility improvement; and plans to prevent or control overcrowding (*HRC VI*, p.189).

While the introduction of measures that emphasize performance are important, they exemplify the flaws in plans that lose emphasis on desegregation. The cases cease to be about equity, and instead follow larger educational reform efforts. Pursuant to the above-mentioned order, the District continued to develop reform plans, but in many ways the plans the District presented to the Court reflected the reforms that Superintendent David Hornbeck sought to enact more generally. The "Reform Plan and of the Action Design," submitted to the Court and reviewed in *HRC VII* (1995), worked primarily through the use of Educators' Committees comprised of teachers and principals. Dr. Hornbeck's proposal to establish an "educator driven" process to develop performance standards for Philadelphia schools commencing spring 1995 was part of his general plan for whole school reform. But it provided no clear remedial plan for the court. Dr. Hornbeck testified that he "recognized that these professionals ('teachers') have the 'bottom-line' responsibility to educate students and that they must be a part of the standards process" (*HRC VII*, p. 471). Dr. Hornbeck further testified about the development of school clusters and stated that specific cluster plans were still in progress. He concluded that only one school council was necessary for each school building, described the proposed organizational structure, and noted plans for increasing parental involvement within the schools.

Although what was presented was a whole school reform plan little different than those being presented in many districts not attempting to address issues of residential segregation, Dr. Hornbeck persuaded the Court that the School District's plans for class leveling at the beginning of the school year were realistic and reasonable, and that various strategies for educational reform presented were rational and necessary to change the public school system.

The Commonwealth Court in *HRC VII* accepted Dr. Hornbeck's plan with the following ordered modifications to the plan. The District was required to: include provisions for parental involvement in discipline and school safety matters; describe the procedures and criteria for curriculum selection; describe plans for special educational programs, community involvement, school safety, school self-evaluation procedures, and placement of more experienced teachers in racially isolated schools; provide additional feasible desegregation strategies; provide audit and follow-up procedures for administrative staff reductions and expenditures by school board members; strengthen absence and truancy controls, school safety plans and add a voluntary dress code; provide an equity formula for resource allocation with considerations for racially isolated schools, and organizational restructuring to eliminate duplication of efforts; include rules of priority for racially isolated schools with respect to facility

improvement; and add reporting and monitoring requirements (*HRC VII*, p 474-76).

In *Pennsylvania Human Relations Commission v. School District of Philadelphia* (1995)(*HRC VIII*), the Commonwealth Court found that the district was in substantial compliance with the Court's previous order in *HRC VII*, requiring modifications of the reform plan. The Court, however, ordered the district to continue developing full-day kindergartens in racially isolated schools, curriculum standards and parental involvement programs. The District was also required to develop better absence and truancy controls. Finally, the District was ordered to make modifications to its organizational restructuring plan. The case at this point resembles the process laid out by the United States Supreme Court in *Dowell* and *Freeman*. The Commonwealth Court begins to withdraw supervision of the Philadelphia desegregation case in incremental stages, as it determined that the School District had complied with the standard laid out in *HRC VII* and *HRC VIII*. This allows the School District to meet their burden while still leaving students of color in isolated and underperforming schools.

Transition to Finance Type Remedies

The case shifts somewhat in *Pennsylvania Human Relations Commission v. School District of Philadelphia* (1995)(*HRC IX*) because politics was more directly introduced into the process. The School District successfully moved to join the Commonwealth of Pennsylvania and Governor Thomas J. Ridge, and ASPIRE, the intervenor, successfully renewed a motion to join the City of Philadelphia and Mayor Edward Rendell. This represented a move on the part of the District to address finance issues that had been rejected by the Pennsylvania Supreme Court. All of the foregoing parties were joined to determine their liability, if any, for necessary funding to comply with the Court's order to implement the reform plan.

The Court reached the question of the role of funding in desegregation in *Pennsylvania Human Relations Commission v. School District of Philadelphia* (1996) (*HRC X*). While the Court sought to distinguish the case from school finance cases, in actuality, that is what it most resembled. The record before the Court clearly demonstrated that equal educational opportunity was denied to Black and Latino children in Philadelphia's racially isolated schools (*HRC X*, p. 1370). In light of this fact, the Court ordered the state to provide for any shortfall on behalf of the School District and the City of Philadelphia in meeting the educational need of its students and in addressing the issues of de facto segregation (*HRC X*, p.1386).

Epilogue

This moment of promise was quashed by the Pennsylvania Supreme Court in *Pennsylvania Human Relations Commission v. School District of Philadelphia* (1999). The Pennsylvania Supreme Court did not examine the racial isolation or the failure to provide equitable education. It instead overruled the Commonwealth Court using state civil procedure. The Pennsylvania Supreme Court found that the Commonwealth Court did not have the authority to join the Governor, the Mayor or the City as parties. As a result, it became as if the decision in *HRC X* never occurred. The case was remanded to the Commonwealth Court to consider remedies that were not addressing the underlying issues of isolated urban school districts.

In *Pennsylvania Human Relations Commission v. School District of Philadelphia* (2001)(*HRC XI*), the Court, which had sought to challenge the entire educational system, was now "satisfied that the School District has made a significant and continued effort to comply with the Remedial Order and that the Comprehensive Safety and Security Plan and the Curriculum Renewal Plan present a renewed opportunity for the School District to effectively respond to many of the educational issues that it faces" (*HRC XI*, p. 274).

Although the Pennsylvania Supreme Court tells us otherwise, after "more than 30 years of litigation in this case and the indefensible delays in providing an equal educational opportunity to children in racially isolated schools, the foundation nevertheless remains for the Court's enforcement of the right" (*HRC XI*, p. 274). The Philadelphia litigation illustrates the difficulty, or even futility, of desegregating large urban public school systems. Perhaps it is cases like this and the impracticality of school desegregation in highly segregated urban areas that has caused many African Americans to give up the goal of desegregation and instead focus on improving the quality of education in segregated schools (Days, 1992). Of course, it is not clear that we can even improve segregated schools without additional support.

Fifty years after *Brown* the issue of educational equity in Philadelphia remains a very troubling question. The process of addressing the issues that create ghettoized schools is still informative. It provides insight into the intersection of race and class that will allow us to develop remedies for students trapped in isolated, urban schools. As long as we take hope from *Brown*, the struggle for educational equity in access and opportunities continues.

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Endnotes

1 - Although not bound by federal interpretations the Act is generally applied in accordance with Title VII of the Federal 1964 Civil Rights Act. back

2 - The "Commission" was established by § 956 of the Act and consists of eleven members appointed by the Governor and receiving approval by a majority of the Senate. back

3 - The Commonwealth Court of Pennsylvania was launched in 1970 at the time the early desegregation cases were filed. It functions as an intermediate appellate court under the Pennsylvania Supreme Court and alongside its sister intermediate appellate court, the Superior Court of Pennsylvania. The jurisdiction of the Commonwealth Court and that of the Superior Court are mutually exclusive. The subject-matter jurisdiction of the Superior Court deals with private party disputes, including business law, family law, and criminal law appeals under Pennsylvania's Crimes Code, whereas the subject-matter jurisdiction of the Commonwealth Court deals with public sector cases (see Craig, 1995). back

4 - 294 A.2d 410 (Aug. 17, 1972) HRC I; 352 A.2d 200 (Feb. 13, 1976) HRC II; 374 A.2d 1014 (July 1, 1977) HRC III; 443 A.2d 1343 (April 15, 1982) HRC IV; 638 A.2d 304(Feb. 4, 1994) HRC V; 651 A.2d 177 (June 4, 1993) HRC VI; 658 A.2d 470 (April 27, 1995) HRC VII; 660 A.2d 235 (June 13, 1995) HRC VIII; 667 A.2d 1173 (Nov. 3, 1995) HRC IX; 681 A.2d 1366 (Aug. 20, 1996) HRC X;784 A.2d 266 (Sept. 28, 2001) HRC XI back

5 - Miller v. Board of Education of Gadsden, Alabama, 482 F.2d 1234 (5th Cir. 1973); Kelley v. Metropolitan County Board of Education of Nashville, Tennessee, 463 F.2d 732 (6th Cir. 1972); Lee v. Macon County Board of Education, 448 F.2d 746 (5th Cir. 1971); Allen v. Board of Public Instruction of Broward County, Florida, 432 F.2d 362 (5th Cir. 1970). back

Malik Morrison

Malik Morrison is a Ph.D. candidate at the University of Pennsylvania Graduate School of Education and a Fontaine Fellow. Mr Morrison received his Juris Doctorate from New York University School of Law. His research examines the intersection of race

and class in the constructing of educational remedies. He can be reached at malike@dolphin.upenn.edu.

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