Not One Judge’s Opinion: Morgan v. Hennigan and the Boston Schools

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For twenty years, since Brown v. Board of Education, the federal courts have consistently upheld the right of black children to attend a nondiscriminatory school system, and the Boston School decision, Morgan v. Hennigan, has followed in that tradition. However, the violent and visceral reaction to the decision has raised the question whether the law will withstand the pressure to turn away from our national commitment to an integrated society. The Boston School decision, therefore, portends to be a watershed in the development of our national commitment to equality under the law. In this article, Professor Abrams, who was one of the plaintiffs’ counsel in the litigation, examines the factual and legal bases of the federal district court’s opinion.

On June 21, 1974, Judge W. Arthur Garrity of the Boston Federal District Court ordered the Boston School Committee to desegregate the Boston schools.1 The long-term implications of this ruling for the kind of education black and white

1 Morgan v. Hennigan, 379 F. Supp. 410 (D.Mass. 1974). Subsequent to its decision on Constitutional liability, the court substituted as first-named defendant the present Chairman of the School Committee, John J. Kerrigan, for the prior Chairman, James W. Hennigan, who no longer serves on the Committee. Further court activity in the remedial stage of the suit therefore proceeds under the name Morgan v. Kerrigan, C.A. No. 72-911-G. This paper was drafted prior to the announcement of the circuit court opinion on the appeal brought by the School Committee, but after Boston had suffered an extended period of disorder arising out of the first stage of desegregation of its schools.
students receive from their public school system and, indeed, the way we as a people think about ourselves, our fellows and our national purpose, are as yet untold. The short-term results of the decision, which are disturbing if not unexpected, can be read on the front pages of the newspapers of the world. The process of understanding requires that the reasons for the decision and the underlying facts upon which it is based be known. To that end, this brief paper is to serve as an introduction to the court's opinion.

To begin, certain misconceptions about the case must be disabused. There was no question that the Boston schools were segregated, and in fact the issue was virtually uncontested during the trial. As of the 1971-1972 school year, almost 85 percent of the approximately 60,000 white students enrolled in the system were assigned to schools over 80 percent white; over 60 percent of the approximately 30,000 black students were assigned to schools over 70 percent black. "Racial segregation permeates schools in all areas of the city, all grade levels, and all types of schools." The central judicial inquiry was how the schools came to be that way and how they were kept that way. The court found that school segregation in Boston was not the fortuitous or adventitious result of a neighborhood school policy and segregated housing patterns, but rather was the foreseeable and intended result of deliberate, conscious, purposeful policies and practices of the Boston School Committee. The ostensibly racially neutral neighborhood school policy, "so selective as hardly to have amounted to a policy at all," was maintained only so long as it was a convenient segregatory strategy.

A second misconception is that somehow the court's decision was a unique exercise in judicial adventurism. On the contrary, the decision in Boston was the latest in a long series of federal court rulings censoring deliberate governmental acts taken to segregate northern public schools, decisions which have mandated redress for de jure segregation in Topeka, New Rochelle, Washington, South Holland, Pasadena, Detroit, Pontiac, Las Vegas, Minneapolis, Indianapolis, Kalamazoo, Brooklyn, Dayton and other cities. The Supreme Court in Keyes v. School Dist. No. 1, Denver, Colorado definitively set the specifications for judicial

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2 379 F. Supp. at 478.
3 379 F. Supp. at 424.
4 379 F. Supp. at 473.
5 379 F. Supp. at 476.
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scrutiny of northern school systems that were alleged to be segregated by governmental policy and practices. The Keyes court emphasized that a finding of purpose or intent to segregate differentiated "adventitious de facto segregation" from unconstitutional "de jure segregation." Moreover, in addition to examining the racial composition of the schools of the system, a court should look to faculty and staff policies, school site location, school assignment policies, and other school board acts and practices in order to determine whether a governmental body has purposefully created or perpetuated a dual school system. The Boston court followed the Keyes blueprint to the court's ultimate legal conclusion that the Boston schools were segregated de jure. Based as it was on over 1,000 exhibits and 30 witnesses and a strong body of controlling precedent, this decision was not merely one judge's opinion.

While it is convenient to analyze the court's decision in segments, and I shall so proceed, it must be remembered that the full import of the School Committee's actions can only be appreciated by the reader in the aggregate. The various strategies employed by the School Committee—student assignments, feeder patterns, open enrollment, utilization of facilities, use of portables, construction of new schools, busing to segregate and faculty discrimination in hiring, assignment and promotion—are intertwined in "a systematic program of segregation." Such a program, the court found, evidenced de jure segregation.


District court opinions holding school systems segregated in San Francisco, Johnson v. San Francisco Unified School Dist., 399 F. Supp. 1315 (N.D. Calif. 1971), vacated, 500 F. 2d 349 (9 Cir. 1974) and Oxnard, California, Soria v. Oxnard School Dist., 328 F. Supp. 155 (C.D. Calif. 1971), vacated, 488 F. 2d 759 (9 Cir. 1973), have been remanded to the lower courts for findings on intent required by Keyes v. School Dist. No. 1, Denver, 413 U.S. 189 (1973). Pending such findings the desegregation relief ordered by the district courts was to remain in effect.

7 413 U.S. 189 (1973).
8 Keyes, supra, 413 U.S. at 196-214.
9 379 F. Supp. at 477.

The actions of the Boston School Committee have been reviewed in other fora as well. Federal Administrative Law Judge Ring found the School Committee to have been guilty of de jure segregation in violation of the 1964 Civil Rights Act, In re Boston Public Schools, No. CR-982 72-1 (3/2/73) and the Massachusetts Supreme Judicial Court in numerous decisions documented the School Committee's concerted campaign to evade the statutory requirements of the State's Racial Imbalance Act. School Committee of Boston v. Bd. of Educ., 1973 Mass. Adv. Sh. 160, 275, 1315.

10 379 F. Supp. at 482. Although the acts taken to implement these strategies may stand alone as Constitutional violations, the court expressly relied "upon the record as a whole including the multiplicity and cumulative effect of the defendants' policies and practices" to support its ultimate finding. 379 F. Supp. at 479.
11 379 F. Supp. at 482. For an excellent exposition of northern segregrative strategies see Paul R.
I shall proceed to examine that program by looking first at the acts of the defendants which separated students by race and then at faculty and staff practices which reinforced school segregation. Finally, I shall address some concluding remarks concerning the import of the court’s decision and the events since its announcement.

Where the Students Go to School

The Boston School Committee, like all school boards, decides where students go to school, where new schools should be constructed, how overcrowding should be alleviated and what grade structure schools should have. In making these decisions the school board makes choices from the available options. When it does so on nondiscriminatory bases, the choices made may transgress preferred educational norms, but they do not rise to the level of constitutional errors. However, the court found that the defendants made many of those choices without educational justification and with “the purpose of promoting racial segregation and [the defendants] accomplished their purpose.”

One set of these choices, found by the court to have foreseeable segregative effects, involved the use of school facilities. The defendants assigned white students to overcrowded white schools rather than to adjoining underutilized black school districts. South Boston High School, for example, was assigned 676 students over its capacity in 1971-1972, while nearby Girls High—92 percent black—was underenrolled by 532 places. To alleviate overcrowding at the


Reference herein to “the defendants” should be read to include the Boston School Committee, its individual members and the Superintendent of Schools, a practice of collective designation followed by the court through the largest part of its opinion. The plaintiffs, who were certified by the court as proper representatives of “all black children enrolled in the Boston Public Schools and their parents,” also sued the Board of Education of the Commonwealth of Massachusetts, its individual members and the Commissioner of Education, alleging constitutional violations which the court concluded were not proven by the evidence. 379 F. Supp. at 476-477.


A similar practice of school utilization as a segregatory strategy has been found to exist in numerous northern school systems. See, e.g., Keyes, supra, 413 U.S. at 202; Booker, supra, 351 F. Supp. at 803, 808; Spangler, supra, 311 F. Supp. at 509, 522; Kalamazoo, supra, 368 F. Supp. at 172-174. It is remarkable how many of Boston’s segregative techniques paralleled those used by other northern school systems. Presumably each system discovered the strategies on its own. Footnotes throughout the article will cite decisions where courts have found segregative techniques similar to those used in Boston.


379 F. Supp. at 426.
white Cleveland Junior High School, the defendants chose not to assign students
to the closer and underutilized black schools, but rather to crowd further already
overutilized South Boston High.18 Deputy Superintendent of Schools Thomas
Meagher testified that assigning white students to black schools to alleviate over­
crowding was not considered because white parents would protest.19 The School
Committee chose instead to overcrowd.

A related technique by which the defendants "perpetuate[d] the racial concen­
trations in both the overcrowded [white] schools and the [black] schools to which
displaced students might have been sent" was the placement of portable class­
rooms at white schools.20 However, when portables were recommended by a study
as an effective means of reducing segregation, the Boston Superintendent of
Schools rejected their use as "educationally undesirable."21

The court also noted instances of the deliberate use of new facilities to
perpetuate racially segregated schools.22 For example, the School Committee
purchased an existing Catholic school in the 98 percent white Roslindale section of
the city and bused black children to it from black neighborhoods past white
schools with vacant seats. The school opened 93 percent nonwhite in the middle of
a white neighborhood.23

The defendants claimed that many new schools opened as segregated because
of shifting racial populations that could not be foreseen at the time the schools
were planned. The court found, to the contrary, that a study commissioned by
defendants in 1962 had predicted with 95 percent accuracy the growth and
movement of Boston's black population through the decade of the 1960's. "The
existence of this report is a sufficient answer to defendants' intimation that they
were surprised by shifting racial concentrations which frustrated their racial
balance plans."24

Boston school construction practices "deliberately incorporated" residential
segregation, of which the defendants were keenly aware, into the public school

18 379 F. Supp. at 426. In 1971-72, 788 students were assigned to South Boston High who did not live
in South Boston. Overcrowding was so great at South Boston High that the defendants converted part
of the L Street Bathhouse into a school, which opened with a totally white student body.
19 379 F. Supp. at 427.
21 379 F. Supp. at 428.
22 379 F. Supp. at 428-432. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1,
20-21 (1971); Bradley v. Milliken, supra, 484 F. 2d at 235; School Dist. 151, supra, 432 F. 2d at 1149.
23 379 F. Supp. at 429. Although the court did not expressly refer to the matter, the white stu­
dents assigned to the school, who constituted 7 percent of the student body, were mostly visually
handicapped pupils.
24 379 F. Supp. at 471.
At least 20 small elementary schools, built within or adjacent to segregated public housing projects, necessarily reflected the racial compositions of the projects. For example, the Hennigan School, built adjacent to the Heath Street housing project which was 99 percent black, opened as racially segregated in 1972, a result that the court held “could not have come as a surprise.” In fact, the defendants “built new schools for a decade with sizes and locations designed to promote segregation.”

The School Committee consistently rejected and evaded the demands of the Massachusetts State Board of Education—demands made pursuant to state law—to redistrict schools to alleviate racial imbalance. At the same time, however, the defendants in effect did redistrict by altering feeder patterns—“a combination of seat assignments, preferences and options” which determined enrollment at high schools—in order to perpetuate racial separation. The defendants also changed school grade structures by converting four black junior high schools (grades 7 through 9) into middle schools (grades 6 through 8), which tended to channel black students into black high schools (which began at grade 9) and away from white high schools (which began at grade 10). “The only consistent basis for the feeder pattern designations, changes and deletions was the racial factor;” the segregation which resulted from the manipulation of feeder patterns was intentional and purposeful.

The consequences of the feeder pattern changes and discriminatory options, in combination with the opening of four middle schools, was altogether foreseeable, almost immediate, and well-understood by the defendants: a dual system of secondary education was created, one for each race.
To facilitate segregation in areas of the city where black and white residential communities abutted, the School Committee administered an open-enrollment program which "enabled white students to transfer from schools with racial compositions not to their liking." For five years the School Committee refused to accede to the demands of the State Board of Education that open enrollment be limited to transfers which would redress racial imbalance in the schools.

Under the pressure of withheld state funds, the defendants finally did create such a controlled transfer policy, but with five eviscerating exceptions:

1. A "grandfather" clause was included, perpetuating preexisting segregatory transfers and filling up available seats;
2. Transfers applied for, but not granted, prior to the new policy were considered to have been granted, and thus were protected by the "grandfather" exception;
3. Intra-district transfers were not to be covered;
4. "Group exceptions" on a case-by-case basis were to be voted upon by the School Committee; and
5. Hardship transfers, referred to by the School Committee members as an "escape clause" and "a big out," were allowed.

The court found that, viewed together, the open enrollment and controlled transfer policies were managed under the direction of the defendants with the singular intent of discriminating on the basis of race. The assignment of pupils to schools on the basis of race, albeit covert or subtle, was a carefully cultivated program.
Thus, the court's approach to a finding of purpose or intent to segregate complied with the mandate of Keyes. The court assayed the evidence to determine if the defendants acted "with a desire to bring about or continue segregation in the Boston schools or with knowledge that such segregation was certain, or substantially certain, to result from their actions." The record upon which the court made its findings of intent was unique: the Boston School Committee kept a stenographic transcript of all its meetings, both public and executive sessions. The "several hundred pages" of transcripts relied upon by the court in making its findings of segregative intent made clear—often in graphic terms—why certain actions were taken and why certain strategies were pursued.

The court stated it could not overlook racist statements of individual Committee members such as the statement of the Chairman in June of 1971: "I think the facts of the matter are that the Negro immigrants from the South are disinclined to put their efforts into our northern type of education." The Chairman continued, "You certainly have a right to say that I seem to be talking about letting the Negroes have their own schools and the whites have their own schools."

Who Teaches the Students

After carefully setting forth the facts which demonstrated to the court's satisfaction that the Boston students were intentionally segregated by acts and practices of the school authorities, the court examined faculty and staff policies which discriminated against black children "indirectly—but no less significantly." Rationalizations employed elsewhere to excuse defendants' conduct, such as neighborhood schools or residential segregation, were not applicable to faculty and staff assignment practices, since such matters were undeniably within the total control of the defendants. Thus, the results of those practices were particularly telling.

Keyes, supra, 413 U.S. at 208. The Boston court's "detailed findings of intentional segregation of students and staff at all grade levels and in all parts of the city" discussed above satisfied the Keyes test, shifting to the defendants the burden of disproving unlawful intent with regard to the elite and vocational schools, which burden the court found the defendants failed to carry. 379 F. Supp. at 467.


of intentionally segregative school board actions in a meaningful portion of a school system. . . ."
Black teachers, the court found, were intentionally segregated in black schools. "A rough understatement of the situation is that less than one-third of the schools are majority black, but over two-thirds of the black teachers are sent to them."\textsuperscript{47} Three quarters of all new black teachers hired in 1971 were assigned to majority black schools. On the other hand, over 40 percent of the Boston schools had never been assigned a black teacher.\textsuperscript{48} Black administrators in Boston were even more segregated: All five black principals and fourteen assistant principals were assigned to majority black schools.\textsuperscript{49} The defendants carried out faculty segregation by granting express requests from principals that black teachers be assigned to particular schools and by administering a teacher transfer program which allowed experienced white teachers to flee black schools for white schools.\textsuperscript{49}

The court found that the defendants also allocated teacher resources on a discriminatory basis. Black schools were staffed with "less qualified and experienced teachers and with ever-changing faculties."\textsuperscript{51} For example, in 1971-1972, in an average school which was 80 to 100 percent black, only 75 percent of the faculty were permanent, fully qualified teachers, while in a school 80 to 100 percent white, over 90 percent of the teachers were permanent;\textsuperscript{52} teachers in black schools averaged less than half the experience of teachers in white schools. This "experience imbalance" was well known to senior school department officials and to the School Committee which discussed the subject at several meetings.\textsuperscript{53} Teacher transfer policies and a disproportionate allocation of provisional teachers resulted in a rate of teacher turnover which was higher in black than in white schools. The defendants, the court found, "were aware that the high rate of teacher turnover at predominantly black schools was educationally harmful."\textsuperscript{54} Such a disproportionate allocation of teacher resources denied black students an equal educational opportunity.\textsuperscript{55}

In order to hire faculty and promote administrators, the defendants used unvalidated selection devices which discriminated against potential black teachers and administrators. They misused the National Teachers Examination (NTE) for

\textsuperscript{47} 379 F. Supp. at 459.
\textsuperscript{48} 379 F. Supp. at 459. See, e.g., Keyes, supra, 413 U.S. at 199-200, 202, 206; Booker, supra, 351 F. Supp. at 808; Kelly, supra, 456. F. 2d at 107; Spangler, supra, 311 F. Supp. at 513-514.
\textsuperscript{50} 379 F. Supp. at 460.
\textsuperscript{51} 379 F. Supp. at 461. See, e.g., Spangler, supra, 311 F. Supp. at 514.
\textsuperscript{52} 379 F. Supp. at 461.
\textsuperscript{53} 379 F. Supp. at 462.
\textsuperscript{54} 379 F. Supp. at 463.
teacher hiring. An arbitrary, high cut-off point was applied to the NTE score, which excluded a higher percentage of black applicants than white applicants. Applicants who "passed" the NTE were then allocated points based on a brief interview and on their educational credentials. Dr. Stephen Michelson, the plaintiffs' expert, reported to the court and testified at trial that these additional factors were random variables with little variation and that the correlation between the NTE and total point score was virtually perfect. Thus, a single variable, the NTE score, determined rank on the permanent teacher eligibility lists, which in turn determined who was hired and who was not. Dr. Richard Majetic of the Educational Testing Service, which prepares the NTE, testified at trial that such use was contrary to the NTE guidelines—of which the defendants were aware—because the NTE does not have substantial predictive validity and use of the NTE score for ranking purposes assumes "a kind of precision to testing that just doesn't exist." Moreover, studies conducted by the Educational Testing Services, of which Boston school officials again were aware, indicated that black applicants scored lower than white on this standardized examination which measured "only a fraction of the characteristics required for effective classroom performance." Thus reliance on the NTE score alone as the basis for the hiring decision had a foreseeable discriminatory impact. In addition, Dr. Michelson's study of 1971 applicants for permanent teaching positions concluded that two to three times as many Whites as Blacks were hired compared to the number who applied.

In defense, the defendants asserted that they had attempted to recruit black teachers in the school system. This argument was dismissed by the court; the success of the black recruiter was meager "and the reason has been obvious enough: lack of time, money, authority and cooperation from the defendants." The School Committee had merely "gone through the motions." Administrative positions in Boston were filled by means of a promotional system which by its express requirements had the effect of limiting applicants to a pool almost totally white. The court noted that the School Committee was aware of the problem of discrimination in the promotional process and froze the promotional system in August, 1971, pending consideration of a new mechanism for

57 379 F. Supp. at 464.
60 379 F. Supp. at 464.
selection of administrators. During the period from August, 1971 to February, 1973, the defendants filled administrative positions only on an "acting" basis. The 30 administrative vacancies filled on this basis all went to whites.61

The faculty and staff practices of the defendants denied Boston's black students their constitutional right to attend a public school system free of the taint of racial segregation and discrimination.62 The deliberate faculty and staff segregation reinforced the effects of student segregation by identifying certain schools as officially designed for students of a particular race "just as clearly as if the words were printed across the entrance in six-inch letters."63

Redress for Racial Insult

The case now stands in the remedy stage. As a first step, the court ordered the School Committee to implement a plan designed earlier by the State Board of Education under the now effectively repealed State Racial Imbalance Act. Faculty desegregation and remedial hiring have begun. A comprehensive plan using all available desegregation techniques and embracing the entire city is scheduled to go into effect in September, 1975. While much of the public furor has crystallized around the symbol of busing, it should be noted that busing as a tool for segregation was widely used by the defendants before the Boston decision was reached. The court found that at least 30,000 pupils were transported daily in Boston prior to the court order.64 The question then is not whether busing will be instituted, but rather where the buses will go.

The Boston case has caught the public conscience not so much because of the merits of the judicial decision, but rather because of the reaction to it on the streets of Boston. Twenty years after Brown v. Board of Education,65 black children have been assaulted by mobs while attempting to go to school.66 What the violence, the parades and the boycotts indicate, however, is not that desegregation ought not to occur, but rather that it must. Black and white students must receive public education under conditions consistent with the mandate of our Constitution that there be no "black schools" nor "white schools," but only "schools."67

Moreover, the court's decision presents the communities of Boston with the

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61 379 F. Supp. at 466.
64 379 F. Supp. at 424, 456.
opportunity to fulfill the Constitutional promise of equality under the law and redress the racial insult delivered by the School Committee to the black citizenry of Boston. And more importantly, the court's decision presents communities everywhere with the opportunity to continue the dialogue about what kind of people we want to be, what principles we stand for and how we want our children to be educated. The resolution of that dialogue is of great significance to our mutual future.