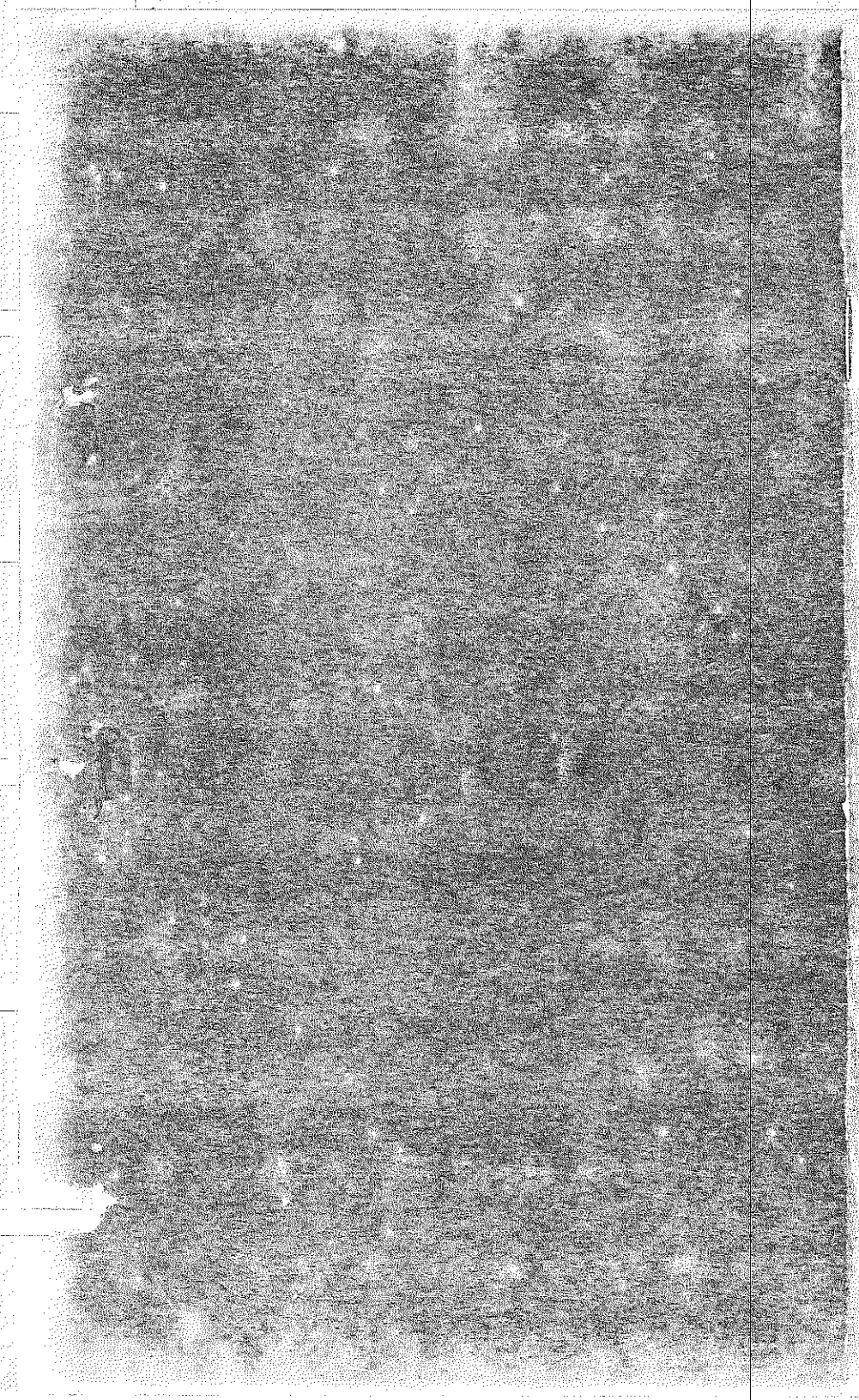

In the Supreme Court of Pennsylvania

Western District

No. 59 March Term, 1973

PENNSYLVANIA HUMAN RELATIONS COMMISSION,

Appellee

vs.

NEW KENSINGTON-ARNOLD SCHOOL DISTRICT,

Appellant

BRIEF FOR APPELLEE

Appeal From the Order of the Commonwealth Court of Pennsylvania at No. 931 *C.D.* 1971, *Affirming the Order of the Pennsylvania Human Relations Commission at Docket No. P-*710.

JAY HARRIS FELDSTEIN
Assistant General Counsel
ISRAEL PACKEL
Attorney General
Attorneys for Appellee

100 N. Cameron St.
Harrisburg, Pa. 17105
(717) 787-4410

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Did the Resolution adopted by the Commission and the filing of the Complaint against the New Kensington-Arnold School District and the Commission's failure to make any investigation constitute an abuse of its powers and discretion and, further, was the Commission's procedure contrary to the provisions of the Human Relations Act?

Answer: Affirmative.

2. Are the Commission's Findings of Fact and Conclusions of Law supported by substantial evidence and the law?

Answer: Negative.

3. Does the Commission have any authority to impose controls on the District's employment practices without first having charged the District with discriminating in its employment practices and without having presented any evidence to that effect?

Answer: Negative.

COUNTER-HISTORY OF THE CASE

On May 8, 1970, by letter to Mr. William L. Jefferson, Superintendent of Schools of the New Kensington-Arnold School District, the Pennsylvania Human Relations Commission, through its Chairman, Max Rosenn, and the Department of Education, through the Secretary, David H. Kurtzman, informed the said school district that there were one or more buildings in the district with a 50% or more Negro enrollment and notified Mr. Jefferson that the Commission and the Department would be requesting the Board of School Directors to submit to the Commission a plan and timetable of implementation to deal with the problem of racial imbalance in the district (Record, page 43). Enclosed with the letter was a copy of "Desegregation Guidelines for the Public Schools" and the "Recommended Elements of a School Desegregation Plan."

Following a seminar on school desegregation at Allenberry, Boiling Springs, Pennsylvania, sponsored by the Human Relations Commission and attended by several representatives of the New Kensington-Arnold Area School District, the Commission, on July 28, 1970, requested the Board of School Directors of New Kensington-Arnold to submit to the Commission a plan to correct racial imbalance, together with a timetable of implementation, no later than December 1, 1970. In addition, the Commission requested a progress report of development of the plan by October 1, 1970. During the months of August

and September, 1970, members of the Human Relations Commission staff visited the New Kensington-Arnold School District three times in an effort to make suggestions for implementation and offers of assistance. In addition, the Commission provided a checklist of suggested data the District should compile in developing its plan (Exhibit 8). On September 29, 1970, the School District submitted a progress report to the Commission and, following a request on December 12 for a delay, the District, on December 11, 1970, submitted to the Commission what purported to be a response to the Commission's request for a plan (Commission's Exhibit 11).

What purported to be a desegregation plan was in reality merely a recounting of the Urban Redevelopment Program that was then in progress in the City of New Kensington with a variety of statistics, including the number of families, white and nonwhite, the number of children, a projected thirty month relocation program, the number of public housing units, the income limitations for residency in said units, and other information relating to the proposed rehabilitation of the downtown New Kensington area (Record, pages 57-8).

Furthermore, instead of any plan to bring about a racial balance and education, the District attempted to rely on what it considered a "natural movement" toward racial balance, which movement allegedly had taken place between 1967 and 1970.

The District's report failed to reveal any affirmative plans on the part of the District to bring about racial balance in its schools. Rather, it emphasized

that there had never been any attempt to isolate Blacks and whites and it reaffirmed its adherence to the neighborhood school concept and a longe-range building construction program.

Statistically, the report showed the District with four Black teachers, two in the elementary schools, one in junior high school and one in the senior high school, and two Black custodians. No change in these statistics was forecast, since the district stated merely that it would "continue to be an equal opportunity employer and abide strictly within the provisions of the Federal Civil Rights Act."

In addition, the statistics indicated that there were only two racially balanced schools in the district, and one school, Terrace Elementary School, which had no Black students at all. One school, the John F. Kennedy Elementary School, had 55.8% Black enrollment, and, coincidentally, was the one school built within the center of the New Kensington Urban Redevelopment Project (Appellant's Brief, pages 7-8).

This "Desegregation Plan" failed to meet with the approval of the Human Relations Commission for several reasons. First, it was not a plan at all. What was submitted was a status report of the state of urban redevelopment, urban renewal, church, housing projects, and other contemplated housing instructions and redevelopment going on in the New Kensington-Arnold School District (Record, page 57). The Commission's basic objection was that there was no commitment of the Board itself to take any action to correct the problem of racial imbalance (Record, pages 57-58).

Furthermore, the Commission objected because of the Board's apparent unwillingness to commit itself to any affirmative action whatsoever in the areas of hiring, in-service training for staff, and intergroup education programming. Finally, there was no timetable at all contained in the report (Record, .pages 58-60).

Since the Commission considers the absence of an acceptable timetable to be a crucial element in the desegregation plan, and since the plan did not indicate any item by which the Board committed itself to overcome the problems of racial segregation, the Commission voted, at its December 21, 1970 meeting, to initiate a Complaint against the New Kensington-Arnold School District, and to find probable cause to credit the allegations of the Complaint in the matter (Commission's Exhibit 13).

When measured against the Commission guidelines, the percentage distributions of Black and white students appeared as follows in New Kensington-Arnold:

A. Black pupils constituted a 9.5% of the total elementary school enrollment (Appellant's Brief, page 7);

B. Although "racial balance" guidelines require that each school, therefore, maintain a Black enrollment percentage of somewhere between 6.5% and 12.5%, only two schools, Third Ward Elementary and Martin Elementary, could be said to be racially balanced;

C. The John F. Kennedy School indicated a substantial imbalance with 55.9% enrollment

(Appellant's Brief, page 7), while Crawford Elementary School was also substantially imbalanced with an enrollment of 21.3% Black;

D. One school, Terrace Elementary School, had no Blacks at all, and three schools, Mt. Vernon, Greenwald, and H. D. Berkey, all had less than 2% Black.

With this background, the Human Relations Commission, beginning on May 3, 1971, conducted a public hearing and published its Findings of Fact, Conclusions of Law, and Final Order, from which the School District now appeals.

ARGUMENT

I. THE RESOLUTION ADOPTED BY THE COMMISSION, THE FILING OF THE COMPLAINT AGAINST THE NEW KENSINGTON-ARNOLD SCHOOL DISTRICT AND THE COMMISSION'S FAILURE TO MAKE AN INVESTIGATION DID NOT CONSTITUTE AN ABUSE OF ITS POWER AND DISCRETION

A. The Failure To Make an Investigation Into the Alleged Quality of Education in New Kensington-Arnold Was Not an Abuse of Discretion by the Commission as To Void Its Desegregation Order

Appellant has claimed at page 15 of its brief that the Commission abused its power by failing to undertake an investigation into the alleged quality of education in New Kensington-Arnold. Appellant is essentially arguing that once the Commission has determined that a condition of segregation existed, or had filed a complaint, it had the duty to investigate intangible and tangible evidences of educational quality in New Kensington-Arnold in order to determine whether or not education for Blacks was really inferior.

Such a contention, however, flies in the face of *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 38 A.L.R. 2d 1180

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(1954) and its logical extension would lead inevitably to return to the "separate-but-equal" doctrine of *Plessy vs. Fergesson,* 163 U.S. 537 (1896).

Moreover, the conditions which the supreme Court has in its opinions required be investigated are not those conditions which would go to show the inferiority or equality of segregated education, but those conditions which would be considered in formulating a remedial plan. *Brown v. Board of Education of Topeka II,* 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

The rationale behind *Brown I* was the inherent inequality of segregated education. The *Brown I* Court, it should be noted, assumed that it could be proven that all the tangible facilities of all Black schools could be shown to be equal to those in white schools. To require the Human Relations Commission to undertake an extensive investigation into the tangible facilities in the New Kensington-Arnold Schools therefore, is to presume that such an investigation would make a difference. It is presumed that if the Commission found such facilities to be equal from school to school, the racial imbalance would be and should be permitted to exist. Such a presumption leads inevitably back to *Plessy* and the separate but equal doctrine. The *Brown I* Court said that:

> Here . . . there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricular, qualifications and salaries of the teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look ahead to the effect of segregation itself on public education. 347 U.S. at page 492.

Further, the court stated:

> In *Sweatt v. Painter* . . . in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in law school." In *McLaurin v. Oklahoma State Regents* . . . the court in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them 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 effect their heart and minds in a way unlikely to be ever undone. 347 U.S. at 493-4.

The inherent inequality in terms of intangibles was pointed out strongly by the Court in *Blocker v. Board of Education of Manhasset,* 226 F. Supp. 208 (E.D. N.Y. 1964):

> The denial of the right not to be segregated cannot be assuaged or supported by evidence

> indicating that under-achievement in the 3 R's may be due in whole or in part to low socio-economical level, home influence or measured intelligence quotient. The role of public education in our democracy is not limited to these academic subjects. It encompasses a broader perforation for participation in the main stream of our society. Public education "is the very foundation of good citizenship." *Brown v. Board of Education*, supra, 347 U.S. at 493, 74 S. Ct. at 691, 98 L. Ed. at 873. The extent to which this objective is being attained is not measurable by a comparison of achievement in 3 R's to IQ, or to socio-economic level. Nor can segregation be justified on the basis of the opinion of the defendants that it enures to the benefit of those segregated. 226 F. Supp. at page 228.

In *Brown* the court emphasized "intangible considerations." The opportunity "to study, to engage in discussions and exchange views with other students" at the graduate level was found to "apply with added force to children in grade and high schools." . . . it also adverted to the psychological effect of segregation with and without the sanction of law. Id.

Further, the court in *Blocker* noted:

> We are dealing with children in grades K through 6, i.e., from age 5 to 11 . . . they are not so mature and as sophisticated as to distinguish between total separation of all Negroes pursuant to a mandatory or permissive state statute based on race and almost identical situation prevailing in their school district . . . [T]his harmful effect, like pain and suffering in a tort action, is not susceptible of precise measurement, nor is it known when and how this psychological damage is manifested. Id. at 229.

Furthermore, in none of the Supreme Court decisions since *Brown II* is there any emphasis placed upon discussion of factors which would show whether or not the segregated schools as operated would be equal in fact.

In *Brown II*, the court began with the premise that racial discrimination in public education is unconstitutional. From there, the interest of the court was primarily to determine appropriate desegregation plans in each instance.

The court said:

> Full implementation of these constitutional principles may require solution of very local school problems. School authorities have the primary responsibility for elucidating, assessing and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. 349 U.S. at 299.
>
> * * * * * * *
>
> Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner but it should go without saying that the

validity of these constitutional principles cannot be allowed to yield simply because of disagreement with them. 349 U.S. at 300.

* * * * * * *

To that end, the Courts may consider problems related to administration, arising from the physical condition of the school planned, the transportation system, personnel, revision of school districts and attendance hearings at the compact units to achieve a system of determining admission to the public schools on a nonracial basis and revision of local laws and regulations which may be necessary in solving the foregoing problems. Id.

The emphasis on "fashioning remedies" is undeniable in the cases following *Brown II*, and beginning with *Green v. County Board of New Kent County*, 391 U.S. 430 (1968). In none of the cases is the court concerned with whether or not the segregation *really* resulted in unequal education. Cf. *Green*, supra, *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969) and *Raney vs. Board of Education of the Gould School District*, 391 U.S. 443.

As a matter of fact, the investigation of the Pennsylvania Human Relations Commission reveals an absolutely reasonable application of its guidelines to the New Kensington-Arnold District in the Commission's attempt to formulate a remedy for a condition of racial imbalance.

The Commission did not seek to impose a particular condition of racial balance on the New Kensington-Arnold School District. The Commission's findings as to racial imbalance merely provided a starting point from which the Commission hoped the School Board would begin in formulating its own remedy. In this regard the Commission's investigation in the history and present status of racial imbalance in New Kensington-Arnold was sufficient as a matter of law to discharge its obligations to deal with racial imbalance under the Human Relations Act and *Pennsylvania Human Relations Commission vs. Chester School District*, 427 Pa. 157, 233 A. 2d 290 (1967).

The Commission has shown that it is not only concerned with desegregation, but also with student safety and convenience. In the companion *Uniontown* case, for instance, in deliberately exempting the four Mountain Schools from its order, the Commission reasonably applied its guidelines by taking into consideration the administrative and transportation problems faced by the School Board. Its investigation into the conditions facing Uniontown as a segmented school district also comported with reasonable discharge of its legislative mandate. There is no reason to believe that the Commission would fail to take into consideration administrative, transportation, safety and related problems in New Kensington-Arnold in approving a desegregation plan in that community.

B. The Pennsylvania Supreme Court, Interpreting the Human Relations Act, Has Already Ruled That the Human Relations Commission Has the Power To Deal With De Facto Segregation

Appellant has made the argument that because the verb "segregate" implies a wilful act on the part of school officials, the Pennsylvania Human Relations Commission does not have the power to deal with *de facto* segregation (pp. 13-14 Appellant's brief). A corollary of that argument is Appellant's additional argument that "segregation" is not synonymous with "racial imbalance."

There is no question but that Appellant's arguments have been made successfully before some courts, notably the Federal District Court for the Northern District of Indiana in *Bell vs. School City of Gary, Indiana*, 213 F. Supp. 819 (N.D. Ind., 1963), as cited in Appellant's brief, p. 18 et seq.

Such an argument, however, has been notably unsuccessful in Pennsylvania, and unless this honorable Court is willing to ignore *Pennsylvania Human Relations Commission vs. Chester School District*, supra, the question appears too well settled here for serious argument.

While it is conceded that the conditions of imbalance in *Chester* were more severe than in the instant case, the Supreme Court nevertheless considered, in the very first sentence of its opinion, the *Chester* situation to be one of *de facto* segregation.

Furthermore, and particularly applicable to Appellant's argument that "segregation" is not synonymous

with "racial imbalance," the *Chester* court appears to have accepted the two terms as meaning the same thing and used them interchangeably throughout the opinion. In its first footnote to the opinion, the Court stated "According to one student of the problem, '*de facto* segregation may be defined simply as the racial imbalance in schools which occurs when the number of Negroes in a compact Negro area becomes so great that drawing school zone boundaries on a geographical basis causes the great majority of Negro children to attend schools which are overwhelmingly Negro in population.' "

The school board in *Chester* appears to have made all the same arguments which the New Kensington-Arnold Board now wishes to urge upon this court. Primarily, the opinion notes, "The School Board contended that the all-Negro schools were the result of residential patterns for which they were not responsible, and denied the allegations of purposeful discrimination."

Although Appellant argues that the Human Relations Act does not define the words "segregate" and "discriminate" (p. 13), the court has in fact interpreted these very words at length and has clearly indicated their meaning in light of the statutory language of Section 5 of the Pennsylvania Human Relations Act, Act of October 27, 1955, P. L. 744, as amended, by the Act of February 28, 1961, P. L. 47, 43 P.S. Sec. 955(i)(1), to which Appellant draws our attention on p. 10 of its brief.

In the face of the lower court's specific ruling that the words of the statute " 'contemplated intentional

or affirmative acts on the part of the wrongdoer,' 85 Dauph. at 27, 244 A. 2d at 821," the court stated:

> "In our view a more reasonable construction of the disputed phrase would be that where, as here, the responsible party has the power to take corrective measures, indeed of necessity it must redistrict periodically, its failure to act amounts to the continued withholding from most Negro children the admitted advantages of an integrated education. Total nonaction by school boards is thus impossible and even seemingly neutral decisions frequently encourage de facto segregation." Citing *Jackson vs. Pasadena City School District,* 59 Cal. 2d 876, 382 P. 2d 878 (1963).

While, on page 15 of its brief, Appellant argues that neither the legislature through the Human Relations Act nor the court in *Chester* gave authority to the Commission to deal with racial imbalance and therefore, *de facto* segregation, the court's opinion in *Chester* reveals just the opposite.

While the court assumed, arguendo, "that the interpretation we have adopted is not apparent solely from the wording of the statute, any latent ambiguity disappears once we examine the circumstances of its passage." Relating briefly the recognition in the late fifties by civil rights leaders of the existence of *de facto* segregation in northern communities, the court reconstructed the legislative history of the Act giving particular emphasis to the 1961 amendments. One such amendment dealt specifically with the legislative findings and declaration of policy, which, the

court noted "specifically refer to the evils resulting from racial segregation in the public schools."

> Had the Legislature intended to reach by the 1961 amendments only *de jure* segregation, its legislative pronouncements would have been unnecessary. The 1954 Brown decision made it eminently clear that *de jure* segregation—racial isolation produced by the acts of public officials —is unconstitutional. A legislative pronouncement to this effect, and this effect only, would be mere gild on the lily.

Referring to the finding in the lower court that the legislative declaration of policy did not include *de facto* segregation as such, the court stated:

> In our view this is a vast oversimplification and does not adequately reflect the mandate that the statute be liberally interpreted to reflect its purpose. The restrictive construction placed upon this section by the courts below ignores completely the legislative conclusion that racial segregation in the public schools, whatever its source, threatens, "the peace, health, safety and general welfare of the Commonwealth and its inhabitants." There are many social and economic causes for the rigidified residential patterns which dominate our communities, and despite anti-discrimination laws, the barriers to integrated housing are often difficult to breach. Indeed, the way to attack discrimination in housing and employment may be to begin with a program of quality integrated education.
>
> Finally, we must be cognizant of the consequence of a particular interpretation. . . . The

> interpretation adopted by the courts below would almost totally deprive the Commission of effectiveness in the area of racial imbalance, for as the New York Court of Appeals observed in an early case interpreting New York's Anti-discrimination law: "One intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose. . . ." Pennsylvanians are justly proud of this Commonwealth's leadership in promoting equal opportunities for all its citizens, and we believe it to be more than coincidental that the 1961 amendments were adopted at a time when many educators and sociologists were giving serious attention to the educational problems posed by *de facto* segregation.

On pages 16 through 20 of its brief, Appellant attempts to distinguish the *Chester* case from the instant one by arguing essentially that *Chester* was really a *de jure* segregation decision. Appellant points out, as did in fact the *Chester* Court, the extreme nature of the racial imbalance, the evidence of unequal attention given by the *Chester School Board* to the facilities in the Black schools, and the deliberate assignment by the School Board of Black professionals to Black schools.

A fair reading of the *Chester* decision, however, can give rise to no other conclusion than that the court was only minimally concerned with the alleged acts of commission by the School Board, and that such acts were no more than a decorative scroll on the icing with which the court had already covered the cake, especially in view of the court's previous recognition of the ease with which deliberate acts of discrimination can be camouflaged. The Court said:

> We note only that there was evidence which suggests, in the words of the Commission, "that the segregation of the public schools in Chester is not entirely accidental." While these findings add weight to its adjudication on the de facto issue, we need not, and do not decide, whether its conclusion that the school authorities purposefully perpetuated the existing segregated structure meets the substantial evidence test.

Moreover, a reading of the record in this case does not lead inevitably to the conclusion that no deliberate discriminatory acts were ever committed there. Appellant notes the extreme conditions of segregation in *Chester*, although the racial imbalance per se is not necessarily conclusive on the question of deliberate policies of discrimination.

We know that new school construction, however, is one of the prime motivating factors in the creation of segregated residential patterns. When the school board undertakes to construct schools which will serve predominantly white areas, then it does, consciously or not, itself contribute to the residential segregation over which it now claims to have no control. While such construction is not per se indicative of a deliberate discriminatory effort on the part of the school board, shouldn't the school board be held, like all reasonable persons and groups of persons, to foresee and therefore avoid the harmful consequences of its own action? "Yet seemingly neutral decisions by

school officials, such as construction sites of new schools, school size, attendance zones, and methods of relieving overcrowded schools, frequently perpetuate racial isolation." *Chester,* at p. 171. Cf. *Dowell vs. School Board of Oklahoma City*, 244 F. Supp. 971 (W.D. Okla. 1965), cert. den. 387 U.S. 931 (1965), in which the construction of new schools to serve white residential areas was construed as a form of *de jure* action.

Even in *Swann v. Charlotte-Mecklenburg*, U.S. , 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971), the court stated:

> The construction of new schools and the closing of old ones is one of the most important functions of local school authorities and also one of the most complex. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.

* * * * * * *

> . . . This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning". Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning", further lock the school system into the mold of separation of the races.

It is not claimed in any way that there is any deliberate policy of discrimination based on race by the New Kensington-Arnold School Board. But they do indicate patterns and trends of the concentration of Black students in certain schools, and with such concentrations, all of the attendant educational evils recognized in *Brown vs. Board of Education of Topeka*, 347 U.S. 483, 74 A. Ct. 686, 98 L. Ed. 857, 38 A.L.R. 2d 1180 (1954). With such patterns and trends, therefore, the Human Relations Commission has the power to deal, under *Chester*.

C. A Reasonable Interpretation of "Brown I" Indicates That Its Rationale, the Detrimental Effects of Segregated Educational Conditions, Applies Equally to De Facto Segregation as Well as De Jure

At the risk of engaging in an unnecessary clash over semantics, the Commission herein has recalled the reliance by Appellant on its definition of "segregate," an active verb admittedly implying the accomplishment of willful and deliberate acts. The dictionary definition of "segregate," however, does not necessarily tell us anything about the meaning of the word "segregation" when it is used in the context of educational civil liberties, for "segregation," the noun, is as much an existing condition as it is a process. In other words, to say that segregation exists as much indicates to the listener a set of circumstances in essence which can be described in terms of certain mathematical proportions as it does a policy of deliberate goal-oriented actions by governmental authorities. And this is particularly true in northern communities.

While *Brown I* arose under circumstances indicating deep-rooted governmental discrimination—*de jure* segregation—the rationale of the case, the inherent harm to Blacks of separate educational facilities, applies equally to *de facto* segregation. It cannot be questioned that the *Brown I* court was primarily concerned not with the morality or propriety of the process or motives which gave rise to the segregated facilities, but with the effect of that separateness on the students. The court relied heavily

on psychological knowledge in determining the adverse effects of segregation on the pupils involved. The rationale of the court clearly indicates that it was talking about segregation in general, and not just *de jure* segregation:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is *greater* when it has the sanction of law." (Emphasis added.)

The court's emphasis on the harmful effects of separateness itself, rather than the cause, is embodied in the famous statement:

> "Separate educational facilities are inherently unequal." At p. 495.

The evils of racial isolation have, furthermore, already been recognized by our own Court in *Chester*, as well as by other courts, such as *Blocker*, supra, in which the court held that the maintenance of long-standing attendance lines in the face of residential segregation due to socio-economic factors was a denial of the equal protection of the 14th Amendment because of the immeasurable damages which such separateness caused though not ostensibly based on race.

Although the Supreme Court has not itself ruled on the question of *de facto* segregation, and although the Appellant relies on *Swann vs. Charlotte, Mecklenburg Board of Education*, there is significant support, even in the Supreme Court, for the proposition that *de facto* segregation is constitutionally prohibited and that school boards, despite the *Bell* decision, have

the constitutional obligation not only to cease segregation, but to integrate.

First, it is important to note what the Supreme Court in all of its decisions since *Brown* has been telling school boards to do. It has been telling them not merely to cease *de jure* discriminatory policies, but to integrate, to cease the operation of dual educational systems and create unitary ones. In *Green*, the court said:

> "*Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the Appellant then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts." 391 at pp. 437-8.

And in succeeding cases, the court has reiterated its basic proposition, stated in *Green:* "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." 391 at p. 439.

These sentiments have been repeated in *Raney; Montgomery; Swann,* and other cases.

Moreover, the primary question with which the court is concerned is "Does the desegregation plan work?" In *Green,* the court stated the test to be: "If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end," citing *Bowman vs. County School Board,* 382 F. 2d 325, 333 (C.A. 4th Cir. 1967) (concurring opinion).

Under these doctrines, therefore, the court's main concern has been the result: was substantial desegregation achieved. And in applying the *Green* doctrine, the court has disapproved a variety of plans, including freedom of choice plans (*Green* and *Montgomery*), on the grounds that they just did not work.

Appellant correctly points out that these cases deal with *de jure* segregation, but does that really make a legal difference?

It has been said that if we look hard enough, we can probably trace back any present condition of segregation in education to a *de jure* cause.

> . . . When, if ever, can segregation be found to occur without some form of state action?
>
> Residential segregation emanating from legislative requirements was legal until 1917. Thus the inherently segregated nature of the older downtown areas of many of our larger cities can be traced to segregationist legislation of the past century. Private residential segregation was held constitutional by the Supreme Court as recently as 1926. It was not until 1948 that private residential segregation was declared illegal

in *Shelley vs. Kramer*. History has shown that once housing patterns are established they are more or less permanent, and therefore, many pockets of segregation can be said to be products of private segregational practices prior to 1948. It is significant to note that the companion case to *Shelley* arose in Michigan. Therefore, these segregationist policies existed in both the North and the South.

On July 7, 1970, Ramsey Clark, former Attorney General of the United States, testifying before the Senate Select Committee on Equal Educational Opportunities, said: "In fact, there is no de facto segregation. All segregation reflects some past action of our governments." This conclusion appears justified if one considers that practically every state outside the South at some point in history had either (1) mandatory segregation of public schools, (2) permissive segregation, (3) anti-negro voting laws, (4) miscegenation statutes, or (5) local practices reflecting racial distinctions as revealed by judicial decisions or statutes, regardless of state laws. Whether such state action required or merely permitted school segregation would be irrelevant if the result was segregation of the races. Even where the statutes were repealed prior to 1954, the pattern of segregation may have been so well established that its continued existence could only be classified as de jure. 12 William & Mary L. Rev. 858 (1970-71).

But what good would it do to look for such causes? The evil to be corrected is the condition of segregation,

tion, a condition in which there exists an imbalance in the proportion of races in a particular school. This condition carries with it recognized dangers to individuals and to society, *Brown I*, whether it arises from deliberate governmental policies which can be labelled *de jure*, or from apparently "innocent", that is non-governmentally motivated, factors such as housing patterns. To say that we can't deal with it if it is the result of the latter is to forever deprive us of the ability to do away with the danger, since once the condition exists, it can be perpetuated by any one of a number of "innocent" subterfuges. What makes segregation so invidious is not its origin, but its consequences. We must be able to deal with those consequences.

What the Supreme Court is saying loudly and clearly is: "It is your duty to correct the condition of segregation. We don't care how you do it, but if your method does not in fact work, it is not acceptable, even if predicated on non-racially oriented school assignment factors."

The Supreme Court, in school desegregation cases, has obviously concerned itself with remedies, not punishments. Appellant's contention that the Human Relations Commission can only deal with *de jure* segregation would lead to the absurd result that the entire burden of integration would fall discriminatorily on southern school children because northern segregation has not resulted from deliberate policies of racial discrimination. Can we really believe, however, that the court would say to one school district, in essence, "Because you did not engage in deliberate discriminatory efforts, you do not have to remedy

the condition of segregation which exists in your district," but at the same time require another school district to destroy its neighborhood school system as a punishment for having committed deliberate governmental acts of racial discrimination? Not only would such an approach completely fail to achieve the Supreme Court's integration goal, but it would completely destroy the effectiveness and credibility of the court itself.

D. The Pennsylvania Human Relations Commission Does Not Abuse Its Power Merely Because Its Definition of Desegregation Does Not Comport With Title 42, United States Code, Subchapter IV, Section 2000 C

Appellant has argued, beginning on page 19 of its Brief, that the definition of "desegregation" utilized by the Pennsylvania Human Relations Commission is not in accordance with the definition of the same word in the United States Code and that, therefore, the Commission's definition is in violation of the Constitution of the United States and the Fourteenth Amendment.

Appellant, however, has misinterpreted the scope of the Civil Rights Act of 1964, on which it relies. As the Supreme Court said in *Swann:*

> The language and history of Title 4 shows that it was not enacted to limit by define the role of the Federal Government in the implementation of the *Brown I* decision. It authorizes the Commissioner of Education to provide technical assistance to local boards in the preparation of desegregation plans, to arrange "training institutes" for school personnel involved in desegregation efforts, and to make grants directly to schools to ease the transition to unitary systems. It also authorizes the Attorney General, in specified circumstances, to initiate Federal desegregation suits. . . . On their face, the sections quoted support only to ensure that the provisions of Title 4 of the Civil Rights Act of 1964 will not be read as granting new powers. The proviso in §2000 C-6 is in terms designed to foreclose any interpretation of the Act as expanding the existing *powers of the Federal Courts to enforce the equal protection clause.* (Emphasis added.)

In short, therefore, the Civil Rights Act of 1964 imposes no restriction upon the states in their efforts to deal with the problems of segregation that exist within their boundaries.

The fact that the word "desegregation" is defined one way in Title 4 of the Civil Rights Act of 1964 has no bearing upon how a state legislature may define the same word in extending power to a state administrative agency to deal with problems of discrimination in public accommodations.

That the Federal District Courts are prevented by Federal Law from "requiring the transportation of pupils of students from one school to another or one school district to another in order to achieve such racial balance," does not mean that the state legislature is prevented from permitting such transportation.

Unless the promotion of racial balance is in itself unconstitutional, or unless it conflicts with a Federal law in an area in which Congress has an exclusive right to act, neither of which conditions appellants has shown to exist, it is perfectly within the power of the state legislature to require or permit a condition of racial balance in its public schools.

II. THE FINDINGS OF THE PENNSYLVANIA HUMAN RELATIONS COMMISSION ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND THE LAW

A. The Pennsylvania Human Relations Commission Has the Power To Formulate Guidelines by Which To Determine in Which School Districts Racial Imbalance Exists

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Once it is determined that the Pennsylvania Human Relations Commission has the power to deal with *de facto* segregation, the only question is whether it has the power to formulate guidelines by which to determine those school districts in which racial imbalance exists. It is axiomatic that an administrative agency may be given the power to adopt reasonable rules and regulations aimed at carrying out the mandate of the legislature.

In this instance, the Human Relations Commission was specifically given the power to make such rules and regulations by Section 7(d) of the Act of October 27, 1955, P. L. 744.

In addition, the Human Relations Commission has adopted a set of guidelines which are made available to all school districts (Record, p. 328a), and which state that "insofar as possible every school building should reflect in its enrollment a cross-section of the entire community."

The Commission has further limited the number of cases into which it will look by specifically limiting such cases to school districts in which as noted by Appellant at page 11 there are "one or more schools among buildings of the same grade span in which the percentage of Black pupils is 50% or higher and is out of balance compared to the proportion of Black pupils in a particular grade span of that school district." Furthermore, a school is out of balance when the percentage of Black students in that school is higher or lower by 30% of the percentage of Black students in the same grade span throughout the district.

Under such guidelines, racial imbalance and therefore *de facto* segregation is easily determinable by the commission by mathematical analysis and immediate steps may be undertaken to correct the situation.

In the absence of a showing by Appellant, therefore, of a clear abuse of authority, the commission maintains that *Chester* gave to it the power to promulgate guidelines for the determination of racial imbalance.

While recognizing the *obvious* inequities of the *Chester* situation, the Court said:

> Clearly, the above figures, which are not disputed, satisfy any definition of de facto segrega-

tion. But because "racial imbalance" is not precisely defined, in the Human Relations Act, the School District argues that the Legislature has failed to provide adequate standards within which the Commission may act; thus, it suggests there has been an unconstitutional delegation of authority. We find this contention to be without merit, for as early as 1872, this Court stated: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some facts or state of things under which the law makes, or intends to make, its own action depend." . . .

. . . Most observers agree that when courts are forced to devise and supervise programs whose goal is the elimination of racial imbalance they are acting in an area alien to their expertise. These observers would prefer to see de facto segregation attacked by the community itself utilizing other organs of the government. The Human Relations Commission, whose function is to work with the parties to the dispute in an attempt to alleviate the source of the friction through "conference, conciliation and persuasion," and whose procedure is considerably more flexible than the courts, is, as the Legislature recognized, better equipped to deal with this problem than the courts. "In each case, the interests protected by adherence to neighborhood attendance zones must be weighed against the substantiality of the racial imbalance in the community's schools. An agency such as the Human Relations Commission is best equipped to make these difficult judgments, and flexible enough to enter appropriate remediable orders." (pp. 178, 179)

Moreover, because the Court has accepted and used a definition of *de facto* segregation which is synonymous with "racial imbalance", the Commission therefore clearly has the power to promulgate percentage guidelines in determining ratio disproportions alone.

Appellant relies on *Swann* for the proposition that the constitution does not require that every school in every district be strictly balanced in accordance with racial proportions within the community, and therefore maintains that the Human Relations Commission has abused its discretion by requiring such proportions.

The question, then, is whether or not the Commission could decide that *de facto* segregation existed, and therefore its attendant evils, when a school district with a school containing more than 50% Black student population also had an overall Black student population of only 9.5% in the same grade span.

First, the guidelines as proposed by the Commission do not so require. Since the Commission has conceded that it would not have even become interested in New Kensington-Arnold problem except for the John F. Kennedy School, it is apparent that the 50% figure is significant. The 50% Black enrollment percentage, however, is not per se bad, but only when such a school exists in the same district with other schools of substantially lower Black enrollment. Furthermore, the guidelines for racial balance indicate realization on the part of the Commission that, as Appellant aptly points out, there is no magic in abso-

lute racial balance per se. Under the Commission guidelines and the Human Relations Act as interpreted by the *Chester* Court, a school with a 50% Black enrollment can exist in any district where the Black enrollment is anywhere from 39 to 70% in a similar grade span throughout the district. Such guidelines do not come close to requiring the absolute racial balance of which Appellant accuses the Commission of requiring.

Moreover, Appellant's reliance on *Swann* is misplaced. While that case may have stated that absolute racial balance is not constitutionally required, the Court did not say that a *state legislature* could not attempt to achieve substantial racial balance in its schools pursuant to its police power and in accordance with a stated general policy that segregation results in

> . . . Grave injury to the public health and welfare, compels many individuals to live in dwellings which are substandard, unhealthful and overcrowded, resulting in racial segregation in public schools and other community facilities, juvenile delinquency and other evils, thereby threatening the peace, health, safety and general welfare of the Commonwealth and its inhabitants. (Act of October 27, 1955, P. L. 744, as amended, Section 2.)

On the contrary, *Swann* as well as *Montgomery*, recognized the usefulness of the mathematical relationships between the races as a starting point in formulating a school desegregation plan.

The *Swann* court stated

> We see . . . that use made of mathematical ratio was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point, the District Court proceeded to frame a decree that was within its discretionary powers, an equitable remedy for the particular circumstances. As we said in *Green*, a school authority's remedial plan or district courts remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. 91 S. Ct. at page 1280.

In *Montgomery*, the Supreme Court also recognized the utility of community proportions as a starting point toward the formulation of a remedy for segregated education. Cf., 395 U.S. at 232, et seq.

In the instant case, the Pennsylvania Human Relations Commission has not commanded that all schools within the New Kensington-Arnold community be racially balanced. It has merely requested that a plan be submitted. If the School Board can show some reasonable grounds for maintaining imbalanced schools in certain circumstances, there is no reason to believe the Commission will not let them do so. In the *Uniontown* case for example, the Commission has exempted the four "mountain schools" from its Order, because of hazardous travel conditions between the City of Uniontown and the mountain district. Cf., *Pennsylvania Human Relations Commission vs. Uniontown Area School District*, No. 744 C.D. 1971.

Appellant, at page 25 of its Brief, has argued that the Pennsylvania Human Relations Commission's Findings of Fact are not supported by substantial evidence. The "Findings of Fact", however, deal with the various percentages of population within the schools and the school district. Certainly, these facts are supported by substantial evidence and are admitted by Appellant over and over in the record.

The use made of the statistical data relating to the Black-white school distribution, therefore, was within the Commission's administrative powers and was consistent with Supreme Court decisions in that such figures could be used as a starting point from which to frame remedies, remedies which the school board itself may propose.

B. The Human Relations Commission Has Not Abused Its Discretion Merely Because the Effect of Its Order Will Be To Hinder the Application of the "Neighborhood School" Concept

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Appellant argues that "Because of the neighborhood school system, there is no discrimination and there is no prejudice" in the New Kensington-Arnold School System. "The present system has worked in this district, is working, and will continue to work if the present policies of the school administration are allowed to continue," Appellant further contends. (Page 28, Appellant's Brief)

Again, however, Appellant's arguments run afoul of the *Chester* opinion, in which the Court said:

The argument that the commission's order will destroy the neighborhood school system completely distorts the historical rationale of neighborhood schools. Traditionally, the neighborhood school has been an exercise in democracy, "a single structure serving a heterogeneous community in which children of varied racial, cultural, religious, and socio-economic backgrounds were taught together—the proverbial melting pot." One educator has recalled: "Most men and women over 40 recall a childhood schooling in which the sons and daughters of millowners, shop proprietors, professional men, and day laborers attended side by side. School boundaries, reaching out into fields and hills to embrace the pupil population, transcended such socio-economic clusterings as existed."

However, increasing population density in our nation's urban areas have caused neighborhoods to shrink drastically until today convenience is the most common justification for school attendance zones. Thus, "because of rigid racial and socio-economic stratification, ethnic and class similarity has become the most salient present-day neighborhood characteristic, particularly in urban areas. The neighborhood school, which encompasses a homogeneous racial and socio-economic grouping, as is true today, is the very antithesis of the common school heritage. Rather than neighborhood schools, we have all too frequently developed a system of ghetto schools. Integration need not see the demise of neighborhood schooling, although unquestionably new

patterns of districting will have to occur. (Pages 174-175.)

Furthermore, in *Swann,* the concept of the neighborhood school system was not strong enough to stand against the necessity of student transportation to achieve racial balance:

> The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.
>
> Thus, the remedial techniques used in the District Court's Order were within that Court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority. . . . In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool for school desegregation. These segregation plans cannot be limited to the walk-in school.

See also *North Carolina State Board of Education vs. Swann,* U.S. , 91 S. Ct. 1284, 28 L. Ed. 2d 586 (1971), and *McDaniel v. Barresi,* U.S. , 91 S. Ct. 1287 L. Ed. 1287 (1971).

C. The Pennsylvania Human Relations Commission Was Acting Within Its Power When It Required a Desegregation Plan From a School District in Which There Was at Least One School Which Had a Majority or More of Black Enrollment and Was at the Same Time Racially Imbalanced

Appellant has argued at pages 22-24 of its Brief that the Courts of the Commonwealth of Pennsylvania have not determined that racial imbalance is segregation. Appellant, by comparing New Kensington-Arnold to the *Chester* case, is essentially arguing that the Human Relations Commission must be limited in its actions to cases in which racial discrimination have become so obvious and the duality of the school system so apparent that racial strife and community friction is the result.

Once the courts have determined, however, that the Commission has the power to deal with *de facto* segregation and racial imbalance, the question arises as to what point remedies begin to become necessary so that situations which existed in the Chester School District can be avoided altogether and so that the harms inherent in segregated education and warned of in *Brown I* do not occur.

Appellant has stated that the legislature, "through the Human Relations Act, has delegated a power to the Commission to determine whether discrimination exists within the public schools of this Commonwealth in accord with established standards. In the instant case, the Commission has ignored the standards created by the legislature, has formulated its own

arbitrary regulations to implement the act, and is forcing its own standards and philosophies upon the school community without ever having made an investigation to determine the needs and desires of the Blacks and whites residing within that community." (Appellant's Brief, page 13.)

The Commission maintains, however, that it is charged under the Act with bringing an end to racial segregation in public schools. Under its power to adopt, promulgate, amend and rescind rules and regulations and formulate remedial policies, the Commission is charged with determining what condition constitutes *de facto* segregation. Since by definition *de facto* segregation does not contemplate the overt, purposeful acts of school officials, then the task of the Commission is to determine under what set of conditions *de facto* segregation exists.

If we consider further the basic *Brown I* rationale that segregated educational facilities are unconstitutional because they are inherently unequal and hence harmful to school children, which is the basic issue for determining what degree of racial imbalance constitutes *de facto* segregation, the real question becomes at what degree of racial imbalance do the evils and harms of the *Brown I* segregation begin to appear. Or, at what percentage of Black to white students can we say with reasonable certainty that the harms inherent in segregated education exists.

Appellant has charged that the Pennsylvania Human Relations Commission has magically pulled some numbers and percentages out of the air in an effort to achieve nothing more than racial balance.

We have already noted above that the fact of the matter is that substantial racial imbalance can exist within a school district under the Commission's guidelines and yet the Commission would not have required a remedial plan to be submitted. It has been conceded by appellant that but for the "trigger school", in this case, John F. Kennedy Elementary School, which has a Black enrollment of 55.8%, no complaint would have been issued against New Kensington-Arnold (Appellant's Brief, pages 11-12).

It is apparent, therefore, that the existence of a school with a majority of Black students is an important consideration.

But is this condition of majority Black enrollment a factor which the Commission has arbitrarily and magically come upon as that significant factor which makes a difference between a segregated and an integrated education? The truth is that the Commission, in formulating its desegregation guidelines and in attacking the entire question of segregated education has drawn upon knowledge available to it in the field in which it is proceeding.

The United States Supreme Court, in *Brown I*, relied heavily on various sociological and educational studies and histories (Cf. 347 U.S. at page 494). There are hundreds, perhaps thousands, of variables which go to determine how a child will do in school. No study could possibly account for them all, and no study has tried, but there are studies which have arrived at certain conclusions about public school education, conclusions which are admittedly not absolute in their proof because none could be, but con-

clusions which are of such compelling importance and valid beyond the preponderance of the credible evidence that we can and should make sociological and educational decisions based upon them.

Such studies indicate, among other things, that achievement levels of disadvantaged students in schools where there is a majority of disadvantaged students are lower than in those schools where advantaged students are in a majority.

Faced with this evidence, can it be said that the Pennsylvania Human Relations Commission abuses its power in determining that the evils of segregation begin to appear when a school has a majority of disadvantaged students?

One of the most exhaustive studies to date is the Coleman Report, otherwise known as *Equality of Educational Opportunity*. Commissioned by the United States Department of Health, Education and Welfare, and the Office of Education, the report was completed in 1966. It studied and tested more than 600,000 students from grades 1 to 12. (*Equality of Educational Opportunity*, James S. Coleman et al., U. S. Government Printing Office, Washington 1966, Superintendent of Documents Catalogue Number SS5.-238:38001).

At pages 28-29 of the *Coleman Report*, its writers stated:

> An education in integrated schools can be expected to have major effects on attitudes toward members of other racial groups. At its best, it can develop attitudes appropriate to the integrated society these students will live in; at its worst, it can create hostile camps of Negroes and whites in the same school. Thus, there is more to "school integration" than merely putting Negroes and whites in the same building, and there may be more important consequences of integration than its effect on achievement.

> Yet the analysis of school factors described earlier suggests that in the long run, integration should be expected to have a positive effect on Negro achievement as well. An analysis was carried out to seek such effects on achievement which might appear in the short run. This analysis of the test performance of Negro children in integrated schools indicates positive effects of integration, though rather small ones. Results for grades 6, 9, and 12 are given in table 21 for Negro pupils classified by the proportion of their classmates the previous year who were white. Comparing the averages in each row, in every case but one the highest average score is recorded for the Negro pupils where more than half of their classmates were white. But in reading the rows from left to right, the increase is small and often those Negro pupils in classes with only a few whites score lower than those in totally segregated classes.

The results themselves were exhibited in charts beginning on pages 332 and 333 of the report, which charts show almost without exception higher achievement levels for disadvantaged students who attend classes in which the proportion of white students is

more than half than those in which the proportion was less than half. (*Coleman Report,* Tables 3.3.2 and 3.3.3.)

In another study, *Racial Isolation In Public Schools,* completed in 1967 by the United States Commission on Civil Rights, it was recognized that:

> . . . increasing numbers of educators believe that the racial composition of schools can affect the performance and attitudes of students. There is some evidence that the academic achievement of Negro students is lower in majority-Negro than in majority-white schools, and many educators have said that attending school almost exclusively with children of the same race has a negative effect upon the attitudes of both Negro and white students. (*Racial Isolation in Public Schools,* John A. Hannah et al., U. S. Government Printing Office, Washington, D. C. 1967, page 76).

While, therefore, the Commission has been accused of playing a numbers game and using mystical percentages just to achieve racial balance, the truth is that the guidelines used by the Commission are reasonably related to the purpose for which the Commission was created in the first place and are aimed not at achieving mere racial balance, but equality of educational opportunity.

Furthermore, even assuming that the desegregation order is to achieve a numerical racial balance within the 30% variance guidelines, can it be said that the achievement of such racial balance is not within the

power of the Human Relations Commission and that such achievement does not further the policies as expressed by the state legislature in the Human Relations Act?

While it can be argued that the Court in *Chester* speaks in terms of advantages for Negro children, the question is whether a situation in which white children never attend school with Blacks until their attitudes are already formed is consistent with the declaration of public policy in the Human Relations Act.

It can be argued that the *Chester* Court recognized that white children are equally isolated from realistic "society" by not attending schools with persons they will have to meet, deal with, and associate with in life. The Chester Court, in quoting *Jackson vs. Pasadena City School District* (59 Cal. 2d 876, 382 P. 2d 878, at 881-82, 1963) stated:

> Residential segregation is in itself an evil which tends to frustrate the youth in an area and to cause anti-social attitudes and behavior. Where such segregation exists, it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in a classroom if school attendance is determined on a geographic basis without corrective measures. The right of an equal opportunity for an education and the harmful consequences of segregation require that school boards take steps insofar as reasonably feasable to alleviate racial imbalance in the school.

The Court stated further on:

> "Indeed the way to attack discrimination in housing and employment may be to begin with a program of quality integrated education. The best way to demonstrate the 'inherent worth of (one's) neighbor' is to place individuals in a situation where they are exposed to their neighbor. This is especially true if a child can become aware of his neighbor's capabilities before his prejudices have had a chance to develop, but interracial cooperation may also have a beneficial effect on thinking of adults."

How can the Human Relations Commission overcome the bigotry, racism, and its attendant evils as cited in the Human Relations Act if it cannot take steps to affect the attitudes of potential bigots and racists.

Logically, unless more than a majority of white children have an opportunity to associate in ordinary social contacts with Blacks, the Human Relations Commission must eventually lose the battle against bigotry, discrimination and those cited social evils.

America is not a white society to which Blacks have to be introduced. America, realistically, is a multiracial society, to which all children have to be introduced.

Even assuming that our concern is only with Blacks, Appellant fails to understand that to broaden the cultural and racial horizons of whites, is in itself a remedial measure to ensure that future generations of Blacks have equal opportunities in a multi-racial

society and to avoid the evils listed in the Human Relations Act statement of policy.

Obviously, discrimination, bigotry, and racism have adversely affected the Black community, but the Commission defies Appellant to reveal how the adverse effect is to be remedied without making fundamental changes in the attitudes of white persons.

Again, however, the attitude of the Commission is not one which it snatched out of the air arbitrarily and without good reason. At page 331, the writers of the *Coleman Report* indicated that:

> The survey data also shows that white students who first attended integrated schools early in their school careers are likely to value their association with Negro students. Tables 3.3.3 and 3.3.4 (at page 333) show that the smallest percentage of white students who would choose all-white classes or all-white friends are those who first attend classes with nonwhites in the early grades.

The Human Relations Commission's guidelines, percentages, and goals, therefore, are far from arbitrary, mystical or abusive of power. They are based on rational considerations of what steps are necessary to do away with and avoid in the future the evils of a segregated society recounted in the statement of policy of the Human Relations Act. They represent valid and effective methods to deal with the problems of *de facto* segregation, problems with which the Commission, by Court and legislative mandate, have the power to deal.

III. THE PENNSYLVANIA HUMAN RELATIONS COMMISSION DID NOT HAVE TO CHARGE THE DISTRICT WITH DISCRIMINATION IN HIRING PRACTICES BEFORE IT COULD REQUIRE AFFIRMATIVE ACTION ON THE PART OF THE DISTRICT TO IMPROVE ITS REPRESENTATION OF PROFESSIONAL AND NONPROFESSIONAL BLACK EMPLOYEES

Appellant has argued that the Commission's finding of discrimination in employment practices is not supported by the evidence.

Appellant, however, has misinterpreted the Commission's findings. The findings, as quoted by Appellant beginning on page 30 of its Brief, mentions absolutely nothing about discriminatory hiring practices.

The lack of Black professional and nonprofessional staff does not have significance insofar as hiring practices are concerned, but does have significance insofar as a more racially representative staff can have a positive effect on the atmosphere of integrated education in general. The primary thrust of the Commission's Findings of Fact as quoted by Appellant is the relationship of the number of professional and nonprofessional staff to the proportion of students, not its relationship to hiring practices. Moreover, support for the concept of integrated faculty and staff in terms of its effect upon quality education and equal educational opportunity, can be found in the decisions of the United States Supreme Court.

In *Swann*, the Supreme Court cited *United States v. Montgomery County Board of Education*, 395 U.S. 225, 89 S. Ct. 1670, 23 L. Ed. 2d 263 (1969), in which

> "The district court set as a goal a plan of faculty assignment in each school with a ratio of white to Negro faculty members substantially the same throughout the system. . . . The district court in Montgomery then proceeded to set an initial ratio for the whole system of at least two Negro teachers out of each twelve at any given school."

This Order was modified by the Court of Appeals, but the United States Supreme Court reversed the Court of Appeals and restored the District Court's Order in its entirety, holding that the Order was "adopted in the spirit of this Court's opinion in *Green*. . . ." 395 U.S. at page 235, 89 Supreme Court at 1675.

Further, in the *Jackson* v. *Pasadena* case, cited by the Pennsylvania Supreme Court in *Chester*, the Court, although dealing with facts indicative of actual discrimination in hiring and promotion, nevertheless recognized the effects of unbalanced staff and faculty on the students. The Court said "Students need examples, both in teaching and administrative positions, of a multi-racial system. Black students need to see that equal opportunities for Black teachers exist in order to believe that equal opportunities for Black students exist." (311 F. Supp. at 516-517). Since, therefore, by analogy, the School Board has the affirmative duty to overcome the effects of *de facto* segregation, it also has the affirmative duty to overcome racial imbalance in professional and nonpro-

fessional staff in order to achieve the atmosphere of racial equality which promotes minority achievement as well as respect and understanding by the majority.

CONCLUSIONS

There can be no question any longer but that the Human Relations Commission, under the *Chester School District* case and in all common sense, must have the authority to deal with *de facto* segregation as it is known in our northern cities. To deprive the Commission of that power would be to totally nullify the legislative mandate contained in the Human Relations Act and nullify the Commission's ability to prevent the horrible conditions which came to exist in Chester, Pennsylvania, and other similar cities and towns.

To require the Human Relations Commission to prove the existence, either now or at some time in the past, of unlawful and official discriminatory action, would constitute an open invitation to those who would match their ingenuity at concealing racial motives against the Commission's ability to discover them.

Moreover, while the Constitution may not require racial balance in all schools within a given district, neither does the Constitution prevent a state from creating a system whereby to achieve that substantial racial balance as a matter of state policy.

Since the *Chester* court itself has equated *de facto* segregation with racial imbalance, and has specifically granted the Commission's authority to deal with *de facto* segregation, the Commission did not abuse its power by confining its investigation to finding disproportionate Black-white enrollments in the New Kensington-Arnold schools, and utilizing the 9.5% ratio of Black to white students as a starting point for the formulation of remedies to overcome the substantial racial imbalance in some New Kensington-Arnold schools.

Neither does the Commission abuse its power simply because compliance with its order might necessitate the disruption of the neighborhood school policy, or because it requires affirmative action in hiring to overcome an atmosphere of segregated education.

The Human Relations Commission has an extremely difficult task in its effort to wipe out the invidious consequences of segregated education. In the accomplishment of that task, it must have the power and authority to formulate reasonable guidelines which enable it to carry out its legislative mandate effectively and permit it to identify with ease those problem areas which require its earliest attention.

JAY HARRIS FELDSTEIN
Assistant General Counsel
J. SHANE CREAMER
Attorney General
Attorneys for Appellee.