North Carolina Central Law Review

Volume 6
Number 1 *Volume 6, Number 1*

Article 5

10-1-1974

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The author wishes to thank Melvyn Leventhal of the NAACP Legal Defense Education Fund of Jackson, Mississippi for furnishing materials and insights.

A large number of key Supreme Court and lower federal court decisions dealing with the public schools have been made since *Brown I*[1] and *Brown II*[2] in 1954 and 1955. However, in spite of those monumental decisions, very little public school desegregation occurred in the South until well into the Sixties. No Black children attended public schools with white children in Mississippi for a decade after *Brown I*. When at long last true desegregation began, a number of private schools and academies were established in order that a segregated school system could be perpetuated for those white children whose parents wanted and could afford such a system.[3] Meanwhile, the Southern states were attempting to prevent desegregation through freedom of choice plans. Inevitably, court cases evolved out of this situation.

In 1968 the freedom of choice approach followed by a rural Virginia county school district was struck down in *Green v. County School Board of New Kent County*.[4] The United States Supreme Court held, in effect, that continued delays would no longer be acceptable in those southern and border states with legally sanctioned dual school systems. The Court declared that freedom of choice methods were inadequate if they did not end school segregation as quickly as other methods would. The school authorities were charged with the affirmative duty to take whatever steps necessary to eliminate racial discrimination-"root and branch."[5]

In 1969 the United States Supreme Court in *Alexander v. Holmes County Board of Education*[6] ruled that the continued operation of

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1. Brown v. Board of Education, 347 U.S. 483 (1954).
2. Brown v. Board of Education, 349 U.S. 294 (1955).
3. See Walden and Cleaveland, *The South's New Segregation Academies*, 53 PHI DELTA KAPPAN 238, 238-39 (1971), for a discussion of the impact of the private academies.
4. Green v. County School Board of New Kent County, 391 U.S. 430 (1968).
5. *Id.* at 437-38.
6. Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969).

racially segregated schools under the standard of "all deliberate speed" was no longer constitutionally permissible. The Mississippi districts involved were ordered to terminate their dual school systems at once.[7]

The *Green* and *Alexander* decisions hastened the migration of white students to the private academies in Mississippi. In 1967 the Internal Revenue Service began granting income tax exemptions to some of the private schools. This policy was soon challenged in federal court. In *Green v. Connally*,[8] a three-judge panel held that under the Internal Revenue Code, racially segregated schools were not entitled to federal tax exemptions provided for educational and charitable institutions.[9] This decision was affirmed by the United States Supreme Court.[10]

In the meantime, Southern states were not only resisting school desegregation but some, including Mississippi, were providing state funds as tuition grants for those white students who had fled to the private academies. In a series of federal court decisions, these grants were ruled unconstitutional.[11] However, another type of public aid to private segregated schools had not been touched. Free textbooks were furnished to many of the students attending private segregated schools in Mississippi. In 1940, long before *Brown I*, Governor Paul B. Johnson was able to persuade the Mississippi legislature to pass a bill which provided free textbooks for all school children in the elementary grades. Two years later the legislature decided that high school students would receive free texts as well. These two steps were considered to have been the crowning achievement of Governor Johnson's administration according to the new *History of Mississippi* edited by Dr. Richard A. McLemore.[12]

No legal issues arose from this arrangement for a long time. All students, whether they attended public or private schools were entitled to receive free textbooks. Complications arose, however, in the early 1960's when the new private segregated academies were constructed as a means for white students to avoid attending newly integrated public schools. In 1964, four public school districts (Jackson, Leake County, Biloxi, and Clarksdale) were required to admit Blacks for the first time. This marked the beginning of private segregated academies. Between 1966 and 1970 fifty-five more private academies had

7. *Id.* at 20.
8. 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom.*, Coit v. Green, 404 U.S. 997 (1971).
9. 330 F. Supp. at 1179.
10. See note 8 *supra.*
11. Poindexter v. Louisiana Financial Assistance Commission, 275 F. Supp. 833 (E.D. La., 1967); Brown v. South Carolina State Board of Education, 296 F. Supp. 199 (D.S.C., 1968), *aff'd per curiam*, 393 U.S. 222 (1968); Coffey v. State Educational Finance Commission, 296 F. Supp. 1389 (S.D. Miss., 1969); and Griffin v. State Board of Education, 296 F. Supp. 1178 (E.D. Va., 1969).
12. Jackson (Miss.) Clarion Ledger, Oct. 3, 1973, § A at 16.

been opened, and in the 1970-71 school year alone, thirty-one more began operations. Thousands of white youngsters had withdrawn from the public schools to attend these segregated institutions. This was often done in the name of providing "quality" education for such students.

The textbook issue was bound to become a legal one in the wake of this development. On January 20, 1970, the United States District Court for the Northern District of Mississippi issued an order which required the integration of the public schools in Tunica County by February 2, 1970, in accordance with the standards laid down by the United States Supreme Court in *Green v. County School Board of New Kent County*[13] and *Alexander v. Holmes County Board of Education.*[14]

Following the entry of this order, the parents of all the white pupils in the county withdrew the youngsters from the public schools and established a private academy located in public facilities. The students took their textbooks with them. In addition, the principal and 17 high school teachers from the public school system left their posts and joined the private school.[15]

In the meantime, on December 4, 1969, the Executive Secretary of the Mississippi Textbook Purchasing Board, sent a memorandum to all county and separate school districts as follows:

> Subject: Textbooks for private schools.
>
> We have many disturbed parents since the court decisions. Many of them are going to organize private schools, and they are going to need books.
>
> Since all of the money has been allotted for this year, it will be necessary for the superintendents to transfer books with the student as he transfers to the private school. . . .
>
> We appreciate your cooperation in this endeavor.[16]

By January, 1970, the free textbooks were accompanying the white students to the segregationist academies, including the ones in Tunica County. On October 8, 1970, four Black students from Tunica County filed a class action suit to enjoin the Mississippi Textbook Purchasing Board and its executive secretary from distributing textbooks to the Tunica Institute of Learning and all other private institutions formed in the state to avoid the implementation of *Brown I, Green,* and *Alexander.*[17]

By the time this suit was filed, there were 202 private schools of all

13. 391 U.S. 430 (1968).
14. 396 U.S. 19 (1969).
15. Brief for Appellant at 4, Norwood v. Harrison, 413 U.S. 455 (1973).
16. *Id.*
17. Norwood v. Harrison, 340 F. Supp. 1003 (N.D. Miss. 1972).

kinds in the state of Mississippi. Their breakdown was as follows:[18]

	No. of Schools	Enrollment
Private segregationist academies receiving state textbooks	107	34,000 (all white)
Private segregationist academies not participating in the state textbook program	41	8,000 (all white)
	148	42,000 (all white)
Catholic schools	47	12,100 (9,200 white) (2,900 Black)
Others	7	1,800 (1,000 white) (800 Black)
	54	13,900
Grand Total	202	55,900 (52,200 white) (3,700 Black)

In their complaint to a three-judge panel the Tunica County plaintiffs in *Norwood*[19] pointed out that the defendants were in charge of disposing of textbooks for the state of Mississippi to the children attending elementary and secondary schools in the state. They stated that private schools and academies had been established since the 1964-65 school year in order to provide white children racially segregated schools as an alternative to the racially integrated public schools. The plaintiffs also insisted that the defendants had provided state aid and encouragement to the racially segregated schools through the sale or loan of textbooks purchased and owned by the state of Mississippi. These actions, it was charged, impeded the establishment of racially integrated public schools in violation of the plaintiffs' rights under the Fourteenth Amendment to the United States Constitution.[20]

Moreover, the plaintiffs emphasized that they did not challenge the right of pupils attending private schools to receive textbooks from a state agency as long as the schools were not organized "in the wake of public school desegregation and did not engage in racially discriminatory practices." However, they insisted that the state might not provide free textbooks to students attending private schools engaged in racially discriminatory practices.[21]

Finally, the plaintiffs stated that the evidence established that:

> 34,000 students are presently receiving state-owned textbooks while attending 107 all-white, nonsectarian private schools which have been formed throughout the state since the inception of public school desegregation. This number is to be compared with 534,500 students in more than 1,000 public schools and 12,100 students in

18. Brief for Appellant at 7, Norwood v. Harrison, 413 U.S. 455 (1973).
19. Norwood v. Harrison, 340 F. Supp. 1003 (N.D. Miss. 1972).
20. *Id.* at 1005.
21. *Id.*

> desegregated parochial schools who are receiving free textbooks. It is plain, however, that while the books have not been issued to the schools but to the students, as in the case of the public schools, private and sectarian authorities are held responsible for the books as a matter of orderly administration. The statute does not authorize the distribution of the books to schools, only to pupils.[22]

The three-judge panel, however, was not persuaded by the plaintiffs' arguments. The court pointed out that in *Lemon v. Kurtzman* the United States Supreme Court continued to recognize a distinction between permissible state aid to the student and impermissible state aid to a church-related school.[23] Moreover, the court wondered whether it should apply a more stringent standard for determining what constituted state aid to a school in the context of the Fourteenth Amendment than the United States Supreme Court had applied in First Amendment cases. The judges decided that they could perceive no valid reason for applying a different test to a universally free textbook program.[24]

The court also noted that the tuition grant cases, which had emphasized financial support to the schools, rested upon different considerations than a case involving textbooks. Indeed, "(h)ere we are concerned only with the act of furnishing a state-owned textbook to the student."[25] In the same vein, the court insisted that the invalidation of the federal income tax exemption for contributions to the private segregationist schools was not the same kind of issue as that involving textbook aid directly to the students.[26]

The court stated that the textbook policy originated in 1940 with no racial motivation in mind. In order to take advantage of the state's free textbook program, a school had only one requirement to meet—maintain educational standards which were equivalent to those that had been established by the Mississippi Department of Education for public schools.[27]

The court insisted that there was no federal court decision which even suggested the invalidation of such a textbook program providing materials to all children within a state. Indeed, it was considered illegal to require a change in the Mississippi policy simply because more private schools had come into existence following desegregation of the public schools. Moreover, the unitary public school system was flourishing and there was no evidence that any child attending a private school, even if deprived of free textbooks, would return to the public

22. *Id.* at 1011.
23. 403 U.S. 602 (1971).
24. 340 F. Supp. at 1012-13.
25. *Id.* at 1013.
26. *Id.*
27. *Id.*

schools. Since a unitary school system had been established in the state in spite of the development of new private schools, there was serious question as to whether or not the plaintiffs had really suffered any irreparable injury requiring injunctive relief.[28] Finally, the court declared: "(w)e hold that the free textbook program and the Mississippi statutes authorizing it, for the reasons herein recited, are not constitutionally invalid."[29]

The case was appealed to the United States Supreme Court.[30] There the appellants reiterated the same arguments as had been brought before the three-judge district court panel. The appellees insisted that as under *Pierce v. Society of Sisters*,[31] the right of parents to send children to private schools was at stake.

However, writing for seven members of the court (Douglas and Brennan concurring in the result), Chief Justice Warren Burger disagreed: "We do not see the issue in appellee's terms. In *Pierce* the court affirmed the right of private schools to exist and operate; it said nothing of any supposed right to share with the public schools in state largesse, on an equal basis or otherwise."[32]

The court declared that the lower court ruling raised the question of whether and on what terms a state might provide some kind of tangible assistance to pupils attending private schools. In responding to this matter, the court drew a parallel between state tuition grants to students attending racially discriminatory private schools and the provision of free textbooks to the same type of students. Either way the state was definitely giving aid to such private segregated schools.[33] Moreover, the court insisted that the Constitution did not permit the state to aid racial discrimination even if no causal relationship could be established between the financial aid to the private school and the continued well-being of that school.[34]

In addressing himself to the District Court's finding that the public schools had become unitary no later than 1970-71 and attracted 90% of the state's educable children, Chief Justice Burger stated that the overall state-wide attendance figures did not reflect the impact that the private schools had had in certain school districts. In addition, the Mississippi textbook program violated the Constitution by providing significant aid to the organization and continuation of a separate private

28. *Id.* at 1013-14.
29. *Id.* at 1014.
30. Norwood v. Harrison, 413 U.S. 455 (1973).
31. 268 U.S. 510 (1925).
32. Norwood v. Harrison, 413 U.S. 455 (1973).
33. *Id.* at 464-65.
34. *Id.* at 465-66.

school system which, according to the District Court, might discriminate if it wished.[35]

While the court conceded that a private school that discriminated performed a vital educational function, "the difference is that in the context of this case the legitimate educational function cannot be isolated from discriminatory practices—if such in fact exist."[36] As the court had pointed out in *Brown*, discriminatory treatment exerted a pervasive influence on the whole educational process. Although bias in the private schools was not barred by the Constitution, those schools could not call on the Constitution to support material from a state agency.[37]

Finally, the court held that injunctive relief could be granted without implying that all of the private schools in Mississippi alleged to be receiving free textbooks were in fact practicing restrictive admission policies. The District Court was directed to require that respondents submit for approval a certification procedure to be followed by any school seeking free textbooks for its pupils. The court listed several factors that should be certified by a private school to the Mississippi Textbook Purchasing Board such as an affirmative declaration of its admission policies and the number of its religiously and socially identifiable pupils. However, even the state's certificate of eligibility for the textbooks would "be subject to judicial review."[38]

The reaction to the Supreme Court's decision varied. A.F. Summer, the Mississippi Attorney General, stated that his first impression was that "[w]e had been run over by a Mack truck, but after getting more information, it looks like only a pickup."[39] He also declared that the outcome "apparently means each private school will be looked at separately and will have its day in court."[40]

The plaintiff's major attorney, Melvyn Leventhal, declared that "the decision means $500,000 in base inventories of textbooks will be withdrawn and $250,000 in replacement textbooks will be terminated."[41] He also noted that the decision would have "a great impact throughout the nation . . . as it means . . . any tangible aid to racism and segregation is unconstitutional."[42] Finally, he declared that "it means that the nine states which provide free textbooks and the 26 states which

35. *Id.* at 467.
36. *Id.* at 469.
37. *Id.* at 471.
38. *Id.*
39. New Orleans (La.) Times Picayune, June 26, 1973 at 3.
40. *Id.*; Jackson (Miss.) Clarion Ledger, June 26, 1973 § A, at 1.
41. See note 39 *supra.*
42. Jackson (Miss.) Clarion Ledger, June 26, 1973 § A, at 1.

provide free transportation will be required to examine the admission policies of private schools applying for this aid."[43]

Glenn Cain, Executive Secretary of the Mississippi Private School Association (representing some 130 private academies) felt that the decision was not "as earthshaking as some people think it is."[44] He pointed out that a large percentage of the pupils were not using state-owned textbooks.[45] Finally, he stated: "I don't believe it will hurt us in that schools will not be able to operate."[46]

Following the decision by the United States Supreme Court a hearing was held in the United States District Court for the Northern District, Western Division, with Judge William C. Keady presiding. A court order was issued on July 25, 1973. The Mississippi Textbook Purchasing Board was "permanently enjoined from distributing or otherwise making available state-owned textbooks to any private school in Mississippi which engaged in discrimination of any kind or character based upon race, creed, color or national origin. No private school may receive books if it is not open at all times to students on a non-discriminatory basis."[47]

Any school which failed to qualify was to return the textbooks to state depositories in accordance with procedures specified in the order. Furthermore, the defendants were to implement specified procedures "to assist them, and ultimately the court, in determining whether any private school is eligible to receive state-owned textbooks in accordance with constitutional requirements. . . ."[48]

All schools declared ineligible to receive the state textbooks were allowed sixty days in which to return the books. A copy of the required certification and Background Information Form was included in the court order. It contained 19 separate items which would have to be sworn to before a notary public.[49]

Predictably, on August 22, 1973, the United States Court of Appeals for the Fifth Circuit, in a *per curiam* decision, vacated and remanded a District Court decision to deny a request by the United States for a preliminary and permanent injunction requiring the Louisiana State Board of Education and the Evangeline School Board to cease providing textbooks and supplies to pupils attending Evangeline Academy,

43. *Id.* at 4. It should be noted that Louisiana has a textbook statute very similar to the one invalidated and the decision will probably affect that state most directly. *See* Washington (D.C.) Post, June 26, 1973 § A, at 1.

44. See note 39 *supra.*

45. See note 42 *supra.*

46. See note 39 *supra.*

47. Norwood v. Harrison, No. WC-70-53-K (N.D. Miss., 1973).

48. *Id.*

49. *Id.*

a private segregationist school. The District Court was instructed to reconsider in light of *Norwood*.[50] Here was an instance, once more, of a private academy which had been established immediately after a federal court had ordered the desegregation of the Evangeline Parish Schools. In this case, the Evangeline Academy students received textbooks, library books, and transportation—all supplied from public funds. The court noted that: "State assistance to such a school and its students had the inevitable effect of frustrating the order disestablishing a dual school system."[51] As to state-supported transportation, which was not at issue in *Norwood*, the court made no specific finding. Nevertheless, the District Court was instructed to "consider in the light of *Norwood*, all of the State's assistance to the Academy in determining what further relief might be necessary to disengage the State and its local agencies from the operation of the segregated private school."[52]

Unquestionably the *Norwood* decision will have an impact beyond the boundaries of Mississippi. As noted in the *Graham* case, it is already having an influence in Louisiana and is likely to result in the invalidation of any form of tangible state aid to private schools which follow racially exclusionary policies. As Attorney Leventhal predicted, there will be a close scrutiny of those other states which provide free textbooks and transportation to pupils attending private schools. It would seem that the *Norwood* decision laid to rest any attempt to differentiate between state aid to children and state aid to schools when violations of the Equal Protection Clause of the Fourteenth Amendment are involved. Whenever racial discrimination is involved any type of state aid to private schools and to children who attend them will probably come under legal attack in the very near future.

50. Graham v. Evangeline Parish School Board, 484 F.2d 649 (W.D. La. 1973).
51. *Id.* at 653.
52. *Id.* at 654-55.