

1989

Maria Espinal v. Salt Lake City Board of Education : Brief of Respondent

Utah Supreme Court

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BRIEF

DOCKET NO.

890037

IN THE SUPREME COURT
OF THE STATE OF UTAH

MARIA ESPINAL, DONNIE JAMES,
G. HARVEY HAMILTON, JOYCE
CAMPBELL and TERRY HOECKER,

Plaintiffs and
Appellants,

v.

SALT LAKE CITY BOARD OF
EDUCATION,

Defendant and
Respondent.

NO. 890037

PRIORITY CLASSIFICATION
NO. ~~16~~ 14B

BRIEF OF RESPONDENT
BOARD OF EDUCATION OF SALT LAKE CITY SCHOOL DISTRICT

APPEAL FROM SUMMARY JUDGMENT OF THE THIRD JUDICIAL DISTRICT
COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE SCOTT DANIELS

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Respondent

AUG16 1989

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Appellants/Plaintiffs ("Plaintiffs") have set forth in their brief the jurisdictional statement, nature of the proceedings, statement of issues, determinative constitutional provisions and statutes, a statement of the case and a statement of facts. Respondent, Board of Education of Salt Lake City School District (the "Board"), will not duplicate those items in this brief except to add facts omitted by Plaintiffs which the Board deems specifically relevant to the issues and/or to refute incorrect statements in Plaintiffs' brief.

NATURE OF THE PROCEEDINGS

On page 1 of their brief, Plaintiffs assert that:

The proceedings below consist of Plaintiffs' class action seeking: (1) an order of the court enjoining defendant . . . ; (2) a declaratory judgment determining that the Order is void and of no effect . . . ; (3) an order of the court directing notice to the Board of the particulars in which the Order violates [Utah law] . . . and giving the Board a reasonable opportunity to rescind the Order . . . ; and (4) for an order of the court granting Plaintiffs' judgment against the Board for a reasonable sum for the use and benefit of Plaintiffs' attorneys, and for costs incurred herein.

Plaintiffs' Brief at p. 1. While all of the above appropriately characterize Plaintiffs' complaint, they do not properly characterize the course of the proceedings below. First, Plaintiffs never sought and the court never certified this proceeding as a class action. Accordingly, this action has been maintained only on behalf of the named Plaintiffs. Second, in neither the

federal nor the state court proceedings have Plaintiffs pursued their claim for an injunction or their claim for "a reasonable sum for the use and benefit for Plaintiffs' attorneys and for costs incurred herein." Those issues were not ruled upon by the federal and state judges. Furthermore, the denial of those remedies are not mentioned in Plaintiffs' docketing statement nor in their statement of issues presented for review.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

In their docketing statement, Plaintiffs set out two issues on appeal. Those issues correspond with issues B and C in Plaintiffs' brief. Plaintiffs' Brief at p. 2. Issue A, however, regarding Utah Constitutional Article I, Section 7, was not raised in Plaintiffs' docketing statement. In fact, Plaintiffs did not refer either the federal or state trial courts to that constitutional provision as part of their complaint or arguments below.^{1/} Accordingly, that issue is not one properly before this court for its review.

^{1/} When Judge Winder remanded this case from Federal Court to State Court he specifically remanded it for an "adjudication of plaintiff's claims based on Utah Code Ann. § 53-6-20 and Utah Constitution, Article X, Section 8." R. at 462.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Prior to January 1988, the Board operated four high schools with closed attendance area boundaries - that is, students had to attend the high school located within their boundary. The Board was required, pursuant to state law, to close one of the four high schools. It elected to close South High School. On January 19, 1988, the Board established new closed attendance area boundaries for the remaining three high schools. On or about March 5, 1988, Plaintiffs filed this lawsuit in the Third Judicial District Court of Salt Lake County, State of Utah, challenging the decision on numerous grounds. Because some of the claims asserted were based on federal law, the Board petitioned to remove this action to the United States District Court for the District of Utah. The parties filed cross motions for summary judgment in that federal proceeding. After reviewing the pleadings, affidavits and depositions, and after oral argument, Judge David K. Winder, on July 22, 1988, issued his Memorandum Decision dismissing with prejudice all claims based on federal law and the United States Constitution. A copy of that decision is attached hereto as Addendum A. Pursuant to that Memorandum Decision, this case was remanded to the Third Judicial District Court in and for Salt Lake County for the determination of Plaintiffs' claims

based on Utah Code Ann. § 53(A)-3-402^{2/} and Utah Constitution, Article X, Section 8. R. at 162.^{3/}

The parties again filed cross motions for summary judgment in the Third Judicial District Court with each party filing new memoranda and reply memoranda focusing on the state law claims. Oral argument on those renewed cross motions was held before the Honorable Scott Daniels on the 7th of November, 1988. Judge Daniels issued his Memorandum Decision on December 1, 1988. A copy of that Memorandum Decision is attached hereto as Addendum B. On December 30, 1988, Judge Daniels signed a summary judgment in favor of defendant Salt Lake City Board of Education, Record at 1056-57. It is that decision Plaintiffs ask this court to review.

^{2/} The Utah Legislature recodified Title 53 during its 1988 general session. Title 53 has been replaced by Title 53A. The statute at issue is 53-6-20, which has been reclassified as 53A-3-402. The Board will refer to the prior section which was in effect at the time of the boundary decision.

^{3/} The following abbreviations are used throughout: The record on appeal, as paginated by the District Court Clerk, is designated "R"; the depositions have been paginated with the record on appeal, references to them will include their record page number and the name of the deponent.

II. STATEMENT OF FACTS

A. The Board's Statement of Facts

The Board submits the following additional facts to those set forth by Plaintiffs. These facts are helpful, if not necessary, to understand the context of the decision at issue.

1. Salt Lake City School District (the "District") has had a pattern of declining enrollment over the past three decades. The peak enrollment was in 1957-58 at 42,000 students. Enrollment bottomed out in 1979-80 at 23,000 students and has shown slight increases over the past six years. The present enrollment is approximately 24,300 students with projections of further slight declines through the end of the century. Affidavit of John W. Bennion dated April 7, 1988 (hereinafter "Bennion Affidavit") at ¶6, R. at 145.

2. Despite the declining enrollments, the District has continued to operate the same number of high schools it had when it had 42,000 students, resulting in under-utilized high school facilities. Id. at ¶7, R. at 145.

3. During the 1983-84 school year, the Board held boundary hearings at which time questions of disparity among the educational programs and levels of support for the District's high schools were raised. Id. at ¶8, R. at 145.

4. As a result of those hearings, the Board appointed an advisory citizen's committee called the "High School Improvement Council" in January 1984. Id. at ¶9, R. at 145.

5. Among the recommendations of the High School Improvement Council was a suggestion that the Board study the possibility of closing a high school to improve secondary education in the District. Id. at ¶10, R. at 146.

6. The High School Improvement Council also recommended that the Board continue the existence of the "Equivalency Committee", another advisory citizen's committee, to study the degree of comparability of District schools. Id. at ¶11, R. at 146.

7. The Equivalency Committee's interim report documented disparity between the high schools and recommended steps to address that disparity, including the strengthening of programs at South and West High Schools, and suggested that the Board address issues regarding ethnic mix and academic opportunities in the high schools. Id. at ¶12, R. at 146.

8. During late 1986 and early 1987, the District's staff and the Board discussed issues regarding school utilization and the staff prepared a preliminary proposal regarding the closure of South High School. Id. at ¶13, R. at 146.

9. That preliminary proposal sparked considerable public debate and comment. Numerous board meetings and public hearings were conducted regarding that proposal. Id. at ¶14, R. at 146.

10. During its 1987 session, the Utah Legislature passed Senate Bill 128, Utah Code Ann. § 53A-17-104 (formerly § 53-7-16.5).

11. That statute requires Utah school districts to operate all of their schools at approximately 70% of their maximum student capacity or lose a portion of state funds allocated to support any school falling below that level of capacity. Id.

12. On March 17, 1987, the Board voted to close a high school after the 1987-88 school year with the understanding that the school to be closed would be South High School. Bennion Affidavit at ¶15, R. at 146.

13. The Board voted to keep South High open for the 1987-88 school year, during which time an independent Citizen's Committee would study which of the four high schools should be closed and either concur with the decision to close South or recommend which of the other high schools should be closed. Id. at ¶16, R. at 146-47.

14. The Board also voted to hire an outside consultant to work with the Citizen's Review Committee. Id. at ¶17, R. at 147.

15. In April 1987, the Board appointed the advisory citizen's review committee pursuant to its decision on March 17, 1987 and called it the High School Closure Committee ("Closure Committee"). Id. at ¶18, R. at 147.

16. After its in-depth study with the assistance of an independent consultant, the Closure Committee gave its advisory opinion and concurred with the Board's recommendation to close South High School. Id. at ¶19, R. at 147.

17. The Closure Committee recommended, among other things, that: (a) "the closing of South High can best be justified in terms of improved educational opportunities for all the high school students in Salt Lake City;" and, (b) "the Boundary Committee take care not to create high school attendance areas which put a high concentration of lower socioeconomic groups, pockets of high mobility, and minority students into any one of the remaining schools." Id. at ¶20, R. at 147.

18. The decision to close South High necessitated the reassignment of the students who would have attended South High to the three remaining high schools which necessitated a

realignment of the boundaries within the district. Id. at ¶21, R. at 147.

19. Since 1984, the Board has had a policy of closed boundaries for high school students. In other words, a student must attend the particular high school for his/her attendance area absent special circumstances and Board approval. Id. at ¶22, R. at 147.

20. The Board decided to continue the closed boundary policy for the three high schools remaining in operation for the 1988-89 school year. Id. at ¶23, R. at 148.

21. For its deliberations regarding the new boundaries for the high school attendance area, the Board unanimously adopted the following Statement of Purpose:

It is the objective of the Salt Lake City Board of Education to have three outstanding comprehensive high schools that are comparable in academic standards, course offerings, extracurricular programs, quality of staff, learning climate and student achievement. While recognizing that each school should be free to develop its own unique educational environment, the Board believes that any high school student in the city, regardless of place of residence, should have opportunities for education and participation in school activities similar to those of any other student in the District.

Id. at ¶28, R. at 148.

22. The Board appointed another advisory citizen's committee called the High School Boundary Committee to provide

the Board with non-binding recommendations regarding boundaries.
Id. at ¶24, R. at 148.

23. The Boundary Committee was organized in the following manner:

At the invitation of the board, each of the four high school administrations and community councils nominated four individuals for the Boundary Committee. From these nominations, the board selected two committee members from each high school area. In addition, it selected four at-large members from the High School Closure Committee. The High School Boundary Committee members were approved as follows at a board meeting on October 6: Royal Hansen and Kent Linebaugh^{4/} from East High area; Ralph Brinton and Gale Petersen from Highland High area; Ira Rose Fife and Guy Walker from South High area; Ann Clawson and Paul Hanks from West High area; and Andrew (Andy) Gallegos, Julie Monson, Steven Olsen and Pete Suazo as at-large members.

Id. at ¶ 27 and Ex. A, p. 4-5, R. at 149 and 163-64.

24. The Board gave a charge to the High School Boundary Committee that included the above quoted Statement of Purpose, a Statement of Goals, Criteria and Final Statement to be used by the Boundary Committee in making its recommendations. The Statement of Goals, Criteria and Final Statement provided to the Boundary Committee are as follows:

^{4/} Mr. Linebaugh also serves as co-counsel for Plaintiffs in this case.

STATEMENT OF GOALS

In order to give clear direction to the High School Boundary Committee, the following statement has been adopted as a goals statement as to what the school district wants to accomplish as new high school boundary lines are adopted. This statement of goals supports the "Statement of Purpose."

a. In the aftermath of closure of one of our high schools, it is the goal of the school board to improve the educational opportunities for all of the district's high school students with care being taken to maintain the quality of programs at each of the three high schools.

b. It is the goal of the school district to treat the division of the existing South High School students with sensitivity, responding carefully to their needs.

c. It is the goal of the Salt Lake City School District to develop three high schools with a balanced mix of resident high, middle and low achieving students to develop educational and cost-effective curricula which address the needs and challenges of all district students.

d. It is the goal of the school district to achieve the "Statement of Purpose" and these goals through boundary changes as defined by approved criteria.

Criteria of Significant Importance

1. Achievement levels as close as possible using eighth grade data from Spring 1987 and new eighth grade data for Fall 1987, striving for achievement differences ranging between six and 11 percentile points on the average for each school.

2. Minority balance as close as possible with a variance of no more than 12 percentage points, highest to lowest.

3. Numeric balance as close as possible with a range of no more than 200 students among schools.

4. Careful consideration be given neighborhood cohesiveness and unity.

Criteria for secondary Concern

That:

1. Mobility factors and neighborhood stability be given careful consideration.

2. Other data as deemed necessary.

Final Statement

Should the High School Boundary Committee find that it is unable to meet the stated goals given tight criteria, it may come back to the Board with data and rationale for a more moderate approach.

Id. at ¶23 & Ex. A, R. at 148 & 164-66.

25. The Boundary Committee reviewed public input, received information from the District's staff and deliberated during the months of November and December, 1987.

Complaint at ¶31; Bennion Affidavit at ¶26, R. at 13 & 148.

26. The Committee established some rules of procedure for its deliberations including a rule requiring a 75% super majority vote to pass substantive matters. Complaint at ¶30; Bennion Affidavit at ¶28, R. at 149.

27. None of the boundary proposals recommended by the Boundary Committee received a 75% super majority vote. Id. ¶29, R. at 149.

28. Two proposed boundary maps, Map G and Map P, were approved by the Boundary Committee by votes of eight to four and six to four with two abstentions, respectively. Id. at ¶30, R. at 149.

29. Although the Boundary Committee did not recommend any proposal by a 75% super majority, it did comply with the Board's request that it provide several proposals with an indication of how many members of the Boundary Committee supported each proposal. Id. at ¶31, R. at 149.

30. On January 5, 1988, the Boundary Committee submitted a report to the Board which was designated the Boundary Report. Complaint at ¶32; Bennion Affidavit at ¶32, R. at 13 & 149.

31. A Minority Report was also submitted to the Board on January 12, 1988. Complaint at ¶33; Bennion Affidavit at ¶33, R. at 13 & 149.

32. On January 19, 1988, at its regularly scheduled board meeting and after additional public comment and hearing, the Board established closed attendance area boundaries for its high schools in accordance with Map G recommended in the Boundary

Report. Complaint at ¶34; Bennion Affidavit at ¶34, R. at 14 & 149-50.

33. Before the Board made its decision, it had heard and received public comments of hundreds of individuals, had received recommendations from numerous advisory citizen's committees and had received information and input from the District's professional staff. Bennion Affidavit at ¶35, R. at 150.

34. The boundaries adopted by the Board meet all of the criteria it established and result in an increase of the number of students being bussed of only 4% above the minimum level required by closing South High. Id. at 36, R. at 150.

B. Factual Mischaracterizations Contained In Plaintiffs' Brief.

The Board believes that all material facts necessary to the District Court's grant of summary judgment are undisputed. However, the Board takes issue with certain legal conclusions and characterizations made in Plaintiffs' statement of facts as set forth below:

(a) The Board takes exception to Plaintiffs' referral to its boundary decision as "the Order." When Plaintiffs filed this complaint, it referred to the Board's boundary decision as "the Order" to apparently fall within federal anti-bussing legislation which prohibits certain types of "orders." Notwithstanding Judge Winder's decision throwing out all federal claims,

Plaintiffs continue to refer to the boundary decision as "the Order." To the extent the Plaintiffs attempt to attach any legal significance to that terminology, the Board disputes it.

(b) The Board believes paragraph 6 of Plaintiffs' statement of facts may be misleading. Paragraph 6 refers to the boundary decision as creating "closed boundaries." However, the boundaries for high school students were closed both prior to and after the boundary decision at issue. See Statement of Facts ¶19, supra.

(c) The Board disputes several characterizations in paragraph 7 of Plaintiffs' statement of facts. There is no evidence in the record to suggest that the "purpose" of the "order" is as Plaintiffs state. Furthermore, Plaintiffs' characterizations in paragraph 7 amount to legal conclusions and not facts.

(d) The Board disputes the contention contained throughout Plaintiffs' statement of facts and brief, but in particular in paragraphs 7 through 13, that a student has "the right" to attend any particular school of his/her choice. First, that statement amounts to a legal conclusion rather than a fact. Second, Plaintiffs admit that the Board has authority to assign students to particular schools. E.g., R. at 518-19. What the Plaintiffs disagree with in this case are the criteria used by the Board to establish the boundaries.

(f) The Board also disputes the suggestion in paragraphs 8 through 13 of Plaintiffs' statement of facts that a majority of the Board considered the socioeconomic status of students in arriving at its boundary decision. The Board admits that Mr. Keith Stepan, one of the Board members who voted in favor of the boundary decision, considered in general the socioeconomic status of the students. However, Mr. Stepan does not speak for the remaining members of the Board. When asked by Plaintiffs' counsel in that regard, Mr. Stepan's testified as follows:

Q. (By Mr. Linebaugh) Based on your conversations and discussions with the other three who together with you voted for the order, do you know of any of them who did not take into consideration the same factors that you did in voting for the order?

A. I think our conversation was around the **criteria**, Yes. I think they took in similar considerations that I did.

Record at p. 665, (deposition of Keith Stepan)(emphasis added). Mr. Stepan's testimony is not conclusive that the other members of the Board voting for the decision considered a student's socioeconomic status.

(g) The Board disputes Plaintiffs' statement of fact No. 15 as a legal conclusion and not a statement of fact.

(h) The Board also disputes paragraph 16 in that it is incomplete. While it is true that a plan could have been adopted

that would not have balanced students on the basis of academic achievement or the other criteria adopted by the Board, that plan would not have resulted in schools that were even balanced numerically. See Bennion Affidavit, Ex. A: Boundary Report (Addendum), R. at 175-202.

SUMMARY OF ARGUMENT

1. Plaintiffs are precluded from arguing that the Board's boundary decision violated their rights under Article I, Section 7 of the Utah Constitution because they did not raise the issue below. Moreover, in granting the Board summary judgment prior to remanding the case to state court, Judge Winder ruled that the boundary decision did not deprive Plaintiffs of liberty or unduly infringe upon parental rights under the Federal Constitution. That reasoning is persuasive with regard to Utah Constitution, Article I, Section 7.

2. The boundary decision did not create a partisan test under Article X, Section 8 of the Utah Constitution. In drawing boundary lines, the Board did not consider adherence of students to any cause or political party. The objective academic and other factors used by the Board are lacking in partisanship.

3. The Board acted within its statutory authority in drawing the boundary lines. While drawing school boundary lines is not an expressly enumerated power of school boards under

Section 53-6-20, it is authorized under Section 53-6-20(4), (13) & (14) which empowers school boards to "do all things necessary for the maintenance, propriety and success of schools and the promotion of education." The extremely narrow reading of the word "necessary" in Section 53-6-20(14) urged by Plaintiffs is contrary to both Utah case law and decisions from other jurisdictions.

4. The Board's boundary decision was based on carefully considered factors after months of study, public input, and deliberation. The Board considered factors legitimately related to promoting the academic achievement and social development of the students. The record establishes that the boundary decision was not arbitrary and capricious as a matter of law.

5. Students have no right to attend a particular school under Utah law. Neither do parents have a right to send their children to a particular public school.

ARGUMENT

Plaintiffs admit that a school board may assign students to attend a particular school. E.g., R. at 518-19. Plaintiffs further admit that the attendance areas for particular schools may be closed, that is a student must attend the school to which he or she is assigned. Id. Plaintiffs' only argument is that the factors considered by the Board are impermissible.

Plaintiffs cite no statute or case stating that the factors considered are impermissible, but only argue that they are contrary to "fundamental propositions" and beyond the authority of the Board. Plaintiffs make these assertions despite the uncontroverted evidence that the professional educators and the majority of the Board believe that the factors promote education and are for the maintenance, prosperity and success of the schools. See, Affidavit of John J. Keegan, Jr. ("Keegan Affidavit"), ¶¶5-9, R. at 397; and the Board's Statement of Purpose and Statement of Goals in Statement of Facts ¶¶21 & 24, supra.

I. THE BOARD'S BOUNDARY DECISION DOES NOT VIOLATE PLAINTIFFS' LIBERTY INTEREST ESTABLISHED BY UTAH CONSTITUTION, ARTICLE I, SECTION 7.

As noted above, Plaintiffs' claim that the boundary decision violates Utah Constitution Article I, Section 7 is being raised for the first time on appeal. Furthermore, their assertion is without merit. Plaintiffs argue the same cases before this Court that they argued before the United States District Court for the District of Utah. E.g., R. at 352-53 & 434-39. Judge Winder considered those arguments and rejected them.

In support of their argument, Plaintiffs quote Judge Winder's Memorandum Decision: "Plaintiff is correct that she has a constitutional right to make choices about how her children are educated." Plaintiffs' Brief at p. 14. However, Plaintiffs do

not quote the remainder of Judge Winder's decision on the issue.

Judge Winder wrote:

Plaintiff relies on the above cases claiming that her right to direct the education of her children takes priority over the state's rights to create school attendance zones. The court disagrees.

. . . Any law which interferes with a fundamental rights must be narrowly tailored to achieve a compelling state interest. However, the right to attend a particular school is not a fundamental right. Thus, the district zoning decision need only be rationally related to a legitimate state interest. "Providing public schools ranks at the apex of the function of a state." Thus, the state has a legitimate interest in controlling education. Further, dividing students up to insure a diverse student body is related to the state's interest in education.

Accordingly, Plaintiffs' Fourteenth Amendment claim based on parents' rights is dismissed.

Memorandum Decision at p. 15; R. at 950 (citations omitted).

Plaintiffs never appealed Judge Winder's ruling. Nevertheless, when this case was remanded to the state court, Plaintiffs asserted the same arguments presented to and rejected by Judge Winder. E.g., R. at 497-502. Plaintiffs advanced those arguments without ever referring to Utah Constitution, Article I, Section 7. Judge Daniels, like Judge Winder, rejected those arguments.

Plaintiffs now raise the same arguments before this Court. However, they now argue that the boundary decision is in violation of Utah Constitution, Article I, Section 7. But, as

noted in Plaintiffs' brief, "the decisions of the Federal Supreme Court are highly persuasive as to the application and meaning of the above-quoted Section 7." Plaintiffs' Brief at 18.^{5/} Plaintiffs' reliance on federal law defeats their own position. Judge Winder ruled that the Board's boundary decision does not violate Plaintiffs' Fourteenth Amendment rights under the United States Constitution. Accordingly, the Board's decision does not violate Plaintiffs' rights under Article I, Section 7 of the Utah Constitution.^{6/}

While this court has not addressed the issue of parental choice of public schools in the context of Article I, Section 7 of the Utah Constitution, it has addressed that issue in the context of Utah Constitution, Article X, Section 1, requiring: "A public education system, which shall be open to all children of

^{5/} Plaintiffs cite Untermeyer v. State Tax Commission, 102 Utah 214, 129 P.2d 881, 885-86 (1942), for that proposition. The case of Vali Convalescent & Care Institution v. Industrial Commission, 649 P.2d 33, 35-36 (Utah 1982), is also in accord.

^{6/} The Board recognizes that the rights under the Fourteenth Amendment and the rights under Utah Constitution, Article I, Section 7, are not necessarily coextensive. See, Gray v. Dept. of Employment Security, 681 P.2d 807, 825 (Utah 1984)(Durham, J. concurring and dissenting). However, Plaintiffs have not advanced, nor can they in this context, any rationale that the protections of Article I, Section 7 of the Utah Constitution should be greater than the protections of the Fourteenth Amendment to the United States Constitution.

the state;" Utah Constitution, Article X, Section 1. In Logan City School District v. Kowallis, 94 Utah 342, 77 P.2d 348 (1938), this court addressed the requirement of open schools.

The provision for being open . . . simply means that all children must have equal rights and opportunity to attend the grade or class of school for which such child is suited by previous training or development.

It is also noted that there is no requirement that every school building shall be open to every school child in the state. The provision is that the system of public schools shall be open to all children of the state. There shall be provided, for each child in the state, a school suitable to its development and training, and as reasonably convenient for attendance as is practicable, which school such child shall have a right to attend. And when the public schools are open to all children on the same and equal terms, compliance has been had with this clause of the Constitution.

Id. 77 P.2d at 351.

Plaintiffs have neither a fundamental right under the Federal Constitution nor under the Utah Constitution to choose which school among public schools their children attend. Their argument regarding Utah Constitution, Article I, Section 7, is not well-taken.

II. THE BOARD'S ACTION DID NOT CREATE A "PARTISAN TEST OR QUALIFICATION" UNDER THE UTAH CONSTITUTION.

Plaintiffs also assert that the Board's attendance area boundary decision constitutes a "partisan" test under Article X, Section 8 of the Utah Constitution which provides:

No religious or partisan test or qualification shall be required as a condition of

employment, admission, or attendance in the state's education systems.

Utah Const. art. X, § 8.

The Board has found no Utah case addressing the term "partisan" used in this section. Black's Law Dictionary, however, defines partisan as "an adherent to a particular party or cause as opposed to the public interest at large." Black's Law Dictionary, 1008 (5th Ed. 1979). The term "partisan" is generally associated with participation in a particular political party. See Utah Const. Art. VIII, § 9 ("judicial retention elections shall be held on a nonpartisan ballot . . ."). See also State v. Haley, 687 P.2d 305, 312 n.3 (Alaska 1984)(statute prohibiting legislative staff from involvement with "any partisan political organization, faction, or activity" applies only to political parties).

Plaintiffs' attempt to characterize groups of students residing in a particular area as partisan factions ignores the common political connotation of the term. Plaintiffs would also define partisan without the element of belief or adherence to a cause.^{17/} The fact that a student happens to reside within a

^{17/} On pages 26-27 of their brief, plaintiffs attempt to define partisan for the purposes of this case. That definition, however, does not even resemble the various legal and dictionary definitions of partisan cited by plaintiffs on pages 24-26 of their brief.

particular geographical boundary hardly makes the student "a firm adherent to a party, action, cause or person." The factors considered by the Board in establishing attendance areas were objective factors unrelated to a students' political affiliation, beliefs or support concerning any social issues.

There is nothing partisan about a school board considering racial balance, different levels of academic achievement and geographic location in drawing school boundary lines. Plaintiffs' attempted characterization of the classifications as partisan factions or groups stretches the meaning of partisan beyond recognition. If Plaintiffs' argument were carried to any logical conclusion, the Board would be precluded from making any classifications between students even if there were compelling reasons to do so. Arguably, under Plaintiffs' definition, the Board could not classify students on the basis of age, gender, grade or any other basis.

Plaintiffs even suggest that the Board has violated this Court's mandate in Logan School Dist. v. Kowallis, 94 Utah 342, 77 P.2d 348 (1938). To support that position, Plaintiffs quote from 77 P.2d at 350. Plaintiffs' Brief at p. 25. However, Plaintiffs fail to quote the case in context.^{8/} The issue

^{8/} The Kowallis court stated:

Footnote continued on next page.

addressed in that portion of the Kowallis decision is the denial of access to public schools, not the issue of assigning students to specific schools.

Throughout their "partisan test" discussion, Plaintiffs repeatedly characterize the boundary decision as making certain statements to patrons or students of the school district. See Plaintiffs' Brief at pp. 25-30. In fact, on pages 28 and 29 of their brief, Plaintiffs go so far as to state that "the hard reality is that the order says to those students removed from West High and their families, that" Plaintiffs then proceed to quote a statement "made by" the boundary decision. The quote is not from the record. It, as well as the statements, are merely Plaintiffs' characterization of the boundary decision.

Footnote continued from previous page.

"The requirement that the schools must be opened to all children of the state is a prohibition against any law or rule which would separate or divide the children of the state into classes or groups, and grant, allow, or provide one group or class educational privileges or advantages denied another. No child of school age, resident within the state, can be lawfully denied admission to the schools of the state because of race, color, location, religion, politics, or any other bar or barrier which may be set up which would deny to such child equality of educational opportunities or facilities with all other children of the state."

Throughout those characterizations, Plaintiffs choose to highlight the harm to West High patrons and students. However, as noted above, the advisory citizens committee which recommended the boundary decision that was adopted by the Board consisted of two representatives from each of the schools and four at-large members. The only boundary committee representatives that did not join in the majority report were those from East (including co-counsel for Plaintiffs, Mr. Linebaugh) and Highland High Schools.

Plaintiffs' arguments regarding Utah Constitution, Article X, Section 8 and their characterizations of the boundary decision are not well founded either in the law or in the record. The Boundary decision does not violate Article X, Section 8 of the Utah Constitution.

III. THE BOARD'S BOUNDARY DECISION WAS WITHIN ITS STATUTORY AUTHORITY.

A. The Board Has Broad Authority To Manage And Control Its Schools, Including Establishing Closed Attendance Boundaries.

In general, the Board's powers are governed by the Utah Constitution and Statutes. It has the powers expressly conferred upon it by the Legislature and the implied powers that are necessary to execute and to carry into effect its express powers.

Beard v. Board of Education, 81 Utah 51, 16 P.2d 900, 903 (1932). Utah Code Ann. § 53-6-20 provided, in pertinent part:

[A] Board may

(2) purchase, sell, and make improvements on school sites, buildings, and equipment and construct, erect, and furnish school buildings

(4) establish, locate and maintain elementary, secondary and vocational schools

(13) make and enforce rules necessary for the control and management of the district schools

(14) do all things necessary for the maintenance, prosperity, and success of the schools and the promotion of education.

Utah Code Ann. § 53-6-20. In reviewing the statutory language outlined above and similar language contained in predecessor statutes, this Court has stated that "these sections vest in boards of education the entire control of the public school system, including the schools and school property within their respective districts." Beard v. Beard of Education, 16 P.2d at 903-04.

Similarly, in the case of Ricker v. Board of Education, 16 Utah 2d 106, 396 P.2d 416 (1964), this Court stated: "It is the policy of the law not to favor limitations on the powers of the [school board], but rather to give it a free hand to function within the sphere of its responsibilities." Id. 396 P.2d 420. The Ricker Court also stated that "it is inherent in the nature of the board's function in managing school district business that

it have a broad latitude of discretion in order to carry out its objective of providing the best possible school system in the most efficient and economical way." Id.

In light of the Board's authority to maintain high schools and to do all things "necessary for the control of and management of the school district" and "all things necessary for the maintenance, prosperity, and success of the schools and the promotion of education," the Board's decision establishing attendance area boundaries for its high schools is within the scope of the powers granted to it.

The issue of assigning students to particular schools was addressed in this Court's decision in Logan City School District v. Kowallis, 94 Utah 342, 77 P.2d 348 (1938). In Kowallis, a parent who resided in the Cache County School District, but who worked in Logan City and sent his children to Logan City schools, challenged a rule adopted by the Logan City School District requiring the payment of a non-resident fee. In rejecting the parent's attack of the non-resident fee, the Kowallis court discussed a school district's powers and responsibilities over its students and non-resident students seeking admission to its schools. In that discussion, the court stated:

In the orderly administration of the school system, to prevent overcrowding at some schools, to insure an adequate teaching faculty, rooms, seats, equipment, grounds for recreation, to protect health, and secure to

all children the greatest possible amount of contact with, and personal attention from, the teachers, that their individual needs may be met (as well as convenience in attending school), districts are maintained, and even assignment of pupils within a district to particular schools is authorized and necessary. . . . To secure to every child in the state the maximum benefit of the school system, the assignment of children to particular schools is often essential. Economy and efficiency in school operation and administration, as well as effectuating and making possible the harmonious development and growth of all school children, would be seriously impaired were students permitted to shift or change, at their own volition, from one school to another.

Id., 77 P.2d at 353. Thus, the Board's decision to establish attendance area boundaries for the high schools is not only within its powers, but promotes the educational well-being of the students it serves.

B. The Board's Authority To Establish Attendance Boundaries Is Not Limited, In This Case, By The Doctrine Of Ejusdem Generis.

Plaintiffs acknowledge the holding in Kowallis, but assert that the criteria used by the Board do not fall within the Board's powers under the doctrine of ejusdem generis. Again, Plaintiffs' argument is not well-taken. First, Plaintiffs fail to quote the entire definition of that term as given in Black's Law Dictionary.

Ejusdem Generis. Of the same kind, class, or nature. In the construction of laws, wills, and other instruments, the "ejusdem generis rule" is, that where general words follow an enumeration of persons or

things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. The rule, however, does not necessarily require that the general provision be limited in its scope for the identical things specifically named. Nor does it apply when the context manifest a contrary intention.

Black's Law Dictionary, 464 (5th ed. 1979)(citations omitted)(emphasis added to portions not quoted by Plaintiffs).

The Board submits that the intent of the Legislature was to give it the power to do all things necessary for the promotion of education, whether discussed in the proceeding enumerated powers or not. First, the recently reenacted provision provides that "a Board shall do all other things necessary for the maintenance, prosperity, and success of the schools in the promotion of education." Utah Code Ann. § 53A-3-402(16) (1988).

In addition, a few examples of the things found to be within these powers demonstrates that the grant of authority is not limited by the preceding enumerated powers. This Court has held that extra-curricular activities and student body organizations fall within that provision. See Beard v. Board of Education, 81 Utah 51, 16 P.2d 900, 906 (1932).^{9/} These examples lead

^{9/} The Utah Attorney General's Office has opined that Utah school districts operate school lunch programs pursuant to that authority. Informal Opinion No. 85-37, dated August

one to the conclusion that the Legislature meant exactly what it said - all things necessary.

Even assuming the doctrine of eiusdem generis applies, the Kowallis case states that a board may establish attendance boundaries. See pages 29-30, supra. Also the boundary decision is similar to many of the enumerated powers and falls within any concept of eiusdem generis. For example, how can the Board "establish, locate and maintain . . . schools," Utah Code Ann. § 53-6-20(4), if it cannot assign students to those schools.

C. The Board's Boundary Decision Was A Discretionary Decision Within Its Express And Implied Powers And As Such, It Is Not Subject To Judicial Attack Absent Compelling Reasons.

Next, Plaintiffs assert that the Board's boundary decision was ultra vires as not "necessary" for the maintenance, prosperity and success of the schools and the promotion of education. Plaintiffs define necessary as synonymous with indispensable. Such a reading is not supported by Utah case law and decisions of other states.

Footnote continued from previous page.

12, 1985. In fact, the Attorney General's Office has opined that if the Board believed that allowing a teachers' association representative to conduct Association business on school time would promote education, the Board would be authorized to adopt a policy allowing such conduct. Informal Opinion No. 85-73, dated March 11, 1986.

For example, the Maine Supreme Court in Maine School Administrative District No. 15 v. Reynolds, 413 A.2d 523 (Me. 1980), was faced with the interpretation of a statute providing that "the State Board of Education may make such reasonable regulations as it may find necessary for carrying out the purposes, provisions and intent of these sections." The Maine Supreme Court stated that "'necessary' in this context meaning not 'indispensable' but rather 'convenient' or 'helpful' in effectuating the purposes of the Act." Id. at 531.

Similarly, in Kay County Excise Board v. Atkinson, T. & S. F. Railroad, 185 Okla. 327, 91 P.2d 1087 (1939), the Oklahoma Supreme Court interpreted a statute granting the Board of Education the power to "incur all expenses, within the limitations provided by law, necessary to carry out and fulfill all powers herein granted." The railroad challenged the School Board's authority to purchase band uniforms for use in the band and music department of its high school as unnecessary for education. In addressing that argument, the Oklahoma Supreme Court stated:

The word "necessary" must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper or conducive to the end sought.

. . .

The vesting of broad powers and discretion in the Board of Education . . . points readily to the thought that the Legislature did not intend to so restrict such Board as to limit expenses only for things indispensable to the maintenance and operation of its public school system; and we conclude that such expenses as are convenient, useful, appropriate, suitable, proper or conducive to the desired ends of the general program, and to the conduct of such school system, are authorized to be incurred thereunder, in the discretion of the Board, unless otherwise restricted by law.

Id. at 1088 & 1089.

Finally, the Utah case of Beard v. Board of Education, 81 Utah 51, 16 P.2d 900 (1932), is analogous. In that case, a taxpayer challenged the use of school funds for (1) extra-curricular and community activities held within the school building and (2) for the establishment and functioning of the student body organization. The trial court held that the student body organization was not part of the educational system of the District. On appeal, the Utah Supreme Court stated:

The trial court erred in holding that the organized student body of the North Summit High School is not part of the educational system of the district. While not required by statute as part of the minimum educational program, it is within the power of the board of education to authorize and maintain such an organization as one of the required educational activities and as part of the educational system of the district. [I]t may do [so] pursuant to the provisions of Section 4617, wherein it is empowered "to do all things needful for the maintenance,

prosperity and success of the schools, and the promotion of education."

16 P.2d at 906. The term "needful" in the predecessor statute has now been changed to "necessary." If Plaintiffs' arguments were adopted, needful would also have to mean indispensable. A student body organization is not an indispensable part of the educational system. In fact, if necessary were confined to indispensable, many programs, including athletics, extra-curricular activities, driver's education, etc., might be subject to attack as not indispensable to education.

The Board's order is certainly convenient, useful, appropriate, suitable, proper and conducive to the maintenance, prosperity and success of the schools and the promotion of education. See, Keegan Affidavit at ¶¶5-9, R. at 397 and Statement of Facts ¶¶21-24, supra. The boundary decision is within the Board's statutory authority. Plaintiffs simply disagree with the Board's decision and are attempting to contort Utah law to have their judgment superimposed over the judgment of the elected representatives of the School District.

Because the Board has the right, indeed the responsibility, to establish attendance area boundaries for its schools, Plaintiffs' attack on the Board's decision is an attack on a discretionary function of the School Board, which attack, absent exceptional circumstances, will not be sustained.

This for the reason that the decision as to what is best for the school children of the district is left to the decision of the Board of Education by the Legislature of the State of Utah, the body which created it, and is not incumbent upon that board to convince the court as to the wisdom, expediency or the advantage to be gained by such decision. . . . There are remedies available to any citizens of a district who believe the board of education has acted unwisely or will so act in the future. One is by petition to the board and the other is by election of new members. The exercise of discretion within legal limits will not be interfered with by the courts except for compelling, legal or equitable reasons where the board has clearly abused the discretion vested in it.

Allen v. Board of Education, 120 Utah 566, 236 P.2d 756, 758-59 (1951).

Plaintiffs' arguments regarding the Board's authority are not only unfounded in Utah law, they are also contrary to the decisions of other states. E.g., Guida v. Board of Education, 26 Conn. Supp. 121, 213 A.2d 843 (1965); Tyska v. Board of Education, 117 Ill. App. 3d 917, 453 N.E.2d 1344 (1983).

In Guida v. Board of Education, plaintiff challenged the board's decision to redraw the attendance boundaries for two junior high schools, one predominately black and the other predominately white. The board decided that all seventh graders in the combined area would attend one junior high and all eighth graders in the combined area would attend the other junior high. Plaintiff claimed that such a change amounted to discriminating

against the children transported as well as against those not similarly transported. Guida, 213 A.2d at 844. The Superior Court of Connecticut, however, stated that:

While recognition is given to the extensive powers enjoyed by boards of education, claim is made that the problem of racial imbalance is one requiring legislative enactment and is beyond their power. . . . The [board's] report dealt not only with the racial imbalance problem but also considered improvement in the overall quality of instruction possible,. . . . There is no constitutional prohibition on the board against taking into account, in addition to other relevant matters, the factor of racial imbalance. And the board need not "close its eyes to racial imbalance in its schools which, though fortuitous in origin, presents much the same disadvantages as are presented by segregated schools." . . . [A] determination by the board which is otherwise lawful and reasonable does not become unlawful merely because the factor of racial imbalance is accorded relevance.

Id.

Similarly, in Tyska v. Board of Education, the board decided to close a high school and reassign its freshman students to other high schools. In rejecting plaintiff's arguments, the Illinois Appellant Court noted, as this Court has noted, that boards of education enjoy broad latitude in the realm of education. 453 N.E.2d at 1350. The Tyska court went on to note that:

The decision to close a school and to reassign the students to other attendance zones within the district is an exercise of the discretionary powers granted to the board to act as a policy-making body, tantamount to the quasi-legislative power to make prospective regulations and orders. The decision involves a public policy question concerning the school system and the district as a whole, and not an adversarial adjudication of the rights of individuals. . . . A board of education in

the exercise of its discretionary powers may discontinue or abandon the use of public school within the boundaries of its jurisdiction and assign the students thereof to other schools in the school system.

Id. at 1353-54 (citations omitted).

Plaintiffs have not cited any authority for the proposition that boards of education in this State or any other state cannot draw attendance zones using the criteria used in this case. To the contrary, there are many federal and state cases^{10/} such as those cited above.

D. The Board's Decision Was Not Arbitrary And Capricious And Not An Abuse Of The Board's Discretion.

Plaintiffs also argue that the Board's decision was arbitrary and capricious and/or an abuse of its discretion. The undisputed facts and the Plaintiffs' own allegations demonstrate the Board's decision was made after considerable deliberation and discussion and was not arbitrary or capricious.

On September 1, the Board adopted its Statement of Purpose for its boundary line deliberations. Complaint at ¶28, R. at 11. In October, the Board formed and charged a twelve member Boundary Committee to formulate proposals pursuant to the Statement of Purpose, a Statement of Goals and certain criteria. Complaint at ¶29, R. at 11-13. The Boundary Committee deliberated

^{10/} These cases were cited to the federal court below in the Board's memorandum. R. at pp. 259-65.

for two months regarding proposed boundary lines. Complaint at ¶31, R. at 13. The Board received a Boundary Report and a Minority Report from the Boundary Committee. Complaint at ¶¶32 & 33, R. at 13-14. Subsequently, on January 19, 1988, the Board made its decision regarding attendance area boundaries. Complaint at ¶34, R. at 14. Even according to Plaintiffs' Complaint, the Board spent considerable time and obtained considerable input regarding its boundary decision. As a matter of law, its actions were not arbitrary and capricious nor an abuse of its discretion.

Furthermore, as set forth in the Statement of Facts, the above represents only a few months of the study and deliberation that preceded the boundary decision. Those deliberations, public hearings and comment were on-going in one form or another since the 1983-84 school year. The information contained in the Boundary Report and Minority Report 11/ alone would sustain the Board's decision.

In arguing that the Board's boundary decision was arbitrary and capricious, Plaintiffs contend that the Board did not base its decision on the criteria of Utah Code Ann. § 53-6-20. Plaintiffs' Brief at 41. Plaintiffs then refer to a list of "natural" geographical, neighborhood divisions and other physical

11/ These Reports are attached to the Bennion Affidavit as Exhibits "A" and "B."

features as the proper criteria. Id. In fact, Section 53-6-20 contains no such list of criteria, and school boards are not limited to considering physical features in establishing boundaries. The decision of this Court in Kowallis establishes a much broader standard. Kowallis focuses in large part on promoting "harmonious development" and affording all students the opportunity for academic achievement. Kowallis, 77 P.2d at 353.

In making its boundary decision, the Board considered the physical and geographical factors as well as numerous factors designed to promote the academic achievement and social development of the students. After numerous hearings, lengthy studies and deliberations, the Board adopted the boundary plan. While Plaintiffs may disagree with the plan the Board adopted, the record establishes that as a matter of law the Board's decision was not arbitrary and capricious.

E. Plaintiffs Other Arguments Regarding The Boundary Decision Are Without Merit.

In their argument relating to the statutory powers of the Board, Plaintiffs again assert that parents have a constitutional right to send their children to the school of their choice. Plaintiffs' Brief at. pp. 36-37. For the reasons stated at pages 20-23, supra, the Board's decision did not violate any constitutional parental rights of Plaintiffs. Similarly, Plaintiffs' argument that students in Utah have a statutory right to

attend a particular school is not supported by statute. There is no right to send a child to a school in another district.

Rather, there is a statutory framework allowing districts the option of admitting a student from outside their district. See Utah Code Ann. §§ 53A-2-203 & 53A-2-205 (1988) (formerly §§ 53-4-16 & 53-1-18) (board permission required for a child residing in another district or out of state to attend; board may charge tuition). As noted in the Kowallis case, Plaintiffs' argument that parents have a right to choose a particular school is not well taken. See pages 29-30, supra.

The Board, in making its boundary decision, acted within the scope of the authority delegated to it by the legislature. They considered the views of professional educators, public comment and the suggestions of numerous advisory committees in arriving at its decision. The decision was a discretionary one vested in the Board and not subject to review by courts absent compelling reasons.

CONCLUSION

The only issues before this Court are whether the Board's boundary decision violates Utah Constitution, Article X, Section 8 or exceeds the authority conferred on the Board by Utah law.

Education, like society itself, is in a constant state of flux. This court and the legislature have consistently given to Boards of Education broad discretion in determining what is necessary to promote education. Those discretionary decisions will not be disturbed for less than compelling reasons. In the case at bar, Plaintiffs disagree with the criteria used. However, their recourse is not through the court system, but through the political process. The Board's decision does not violate the Utah Constitution. The decision is within the Board's authority and expertise and was made after much deliberation and discussion. The District Court's grant of summary judgment in favor of the Board should be affirmed.

DATED this 16th day of August, 1989.




M. Byron Fisher
John E. S. Robson
Douglas J. Payne
FABIAN & CLENDENIN,
a Professional Corporation
Attorneys for Defendant and
Respondent

CERTIFICATE OF MAILING

I hereby certify that I caused four true and correct copies of the foregoing Brief of Respondent Board of Education of Salt Lake City School District to be mailed, postage prepaid, this 16th day of August, 1989 to the following:

Parker M. Nielson
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ADDENDUM A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MARIA ESPINAL, DONNIE JAMES,
G. HARVEY HAMILTON, JOYCE
CAMPBELL and TERRY HOECKER,
for themselves and all others
similarly situated,

Plaintiffs,

-vs-

SALT LAKE CITY BOARD
OF EDUCATION,

Defendant.

MEMORANDUM DECISION

Civil No: C-88-237W

This matter is before the court on defendant's, the Salt Lake City Board of Education's, (the "Board's") motion to dismiss or in the alternative for summary judgment, and on the plaintiffs' motion for summary judgment. This court heard oral arguments on July 1, 1988. Prior to the hearing the court had read all memoranda submitted by the parties. John E. S. Robson and Douglas J. Payne represented the defendant. Parker M. Nielson represented the plaintiff. After oral arguments the court took the matters under advisement and read four depositions. After further consideration the court now renders the following memorandum decision and order.

Facts

The "Board" controls schools within the Salt Lake City School District. The Board closed one of the district's four

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BY MARCUS B. ZIMMER
DEPUTY CLERK

high schools and redrew attendance zones. In redrawing the attendance zones the Board attempted to balance the achievement level of students, the race of students, the number of students, and neighborhood cohesiveness in order to have three relatively equal high schools in the district. In order to create the three relatively equal high school zones the Board jermanded the attendance zones and resorted to busing in some cases.

The plaintiff is unhappy with the boundary changes and has brought this action challenging the Board's authority to rely on the factors which it relied on.

Jurisdiction

The first matter before the court is whether the court has jurisdiction.

Plaintiff originally brought this action in state court. The defendants removed the case pursuant to 28 U.S.C. § 1441(b) and (c).¹

¹ These statutes provide in pertinent part:

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent

Plaintiff claims that this court does not have original jurisdiction over these claims as required by 28 U.S.C. § 1441(b) for two reasons. First, plaintiff claims that for this court to have jurisdiction over a federal question an amount over \$10,000.00 must be in controversy. Second, plaintiff claims the complaint does not state a federal claim. Plaintiff's first argument regarding the amount in controversy is based on a statute which Congress repealed over eight years ago. Prior to 1980 28 U.S.C. § 1331 provided:

The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000.00 exclusive of interest and costs, and arises under the constitution, laws, or treaties of the United States.

However, in 1980 Congress amended 28 U.S.C. § 1331.

The statute now provides:

The district court shall have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States.

Thus, plaintiff's first challenge to jurisdiction is based on a

claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

repealed statute. There is no longer any requirement that an amount over \$10,000.00 be in controversy. Thus, so long as plaintiff has pled claims based on federal law or the federal constitution this court has jurisdiction.

Plaintiff's second challenge to jurisdiction is that the complaint does not state a claim arising under federal law or the federal constitution. In determining whether plaintiff's complaint states a cause of action under federal law the court looks solely at the complaint. Chevron USA, Inc. v. Aguillard, 496 F.Supp. 1038 (M.D. La. 1980).

The plaintiff is the master of the complaint and thus can choose not to plead federal claims and rely solely on state remedies thereby preventing the defendants from removing the case from state to federal court. Sullivan v. First Affiliated Securities, Inc., 813 F.2d 1368 (9th Cir. 1987). However, if plaintiff intentionally or unintentionally raises a claim under federal law plaintiff no longer is the master of the forum in which the matter will be heard.

In briefly scanning the complaint it is apparent that plaintiff has raised claims based on federal law and the United States Constitution.

In ¶ 4 plaintiff relies on 20 U.S.C. §§ 1706 and 1708; 42 U.S.C. §§ 1983, 2000(c)-6 and 2000(c)-8; and the United States Constitution. In ¶ 11 plaintiff cites several provisions of the

United States Code. In ¶ 37 plaintiff refers to the Civil Rights Act of 1964 and the Equal Education Act of 1974. In ¶¶ 41 and 42 plaintiff raises claims of race discrimination. Given plaintiff's earlier reference to claims arising under the constitution and the laws of the United States these allegations appear to be claims based on the Fourteenth Amendment and 42 U.S.C. § 1983. In ¶¶ 46 and 47 plaintiff relies on 20 U.S.C. § 1713 and 20 U.S.C. § 1758. In ¶ 53 plaintiff cites 20 U.S.C. § 1713. In ¶ 55 plaintiff claims "defendant has deprived plaintiff . . . of their rights, privileges, and immunities secured by the constitution and laws of the United States . . . in violation of 42 U.S.C. § 1983, 2000(c)-6 and 2000(c)-8." In ¶ (e) of plaintiff's prayer for relief plaintiff seeks a remedy based on 20 U.S.C. § 1715.

Given plaintiff's repeated reference to federal statutes and the United States Constitution plaintiff has attempted to state claims based on federal law. Unless these federal claims are wholly insubstantial such that they should be dismissed as obviously being without merit federal jurisdiction exists. Seneca Nursing Home v. Kansas State Board of Social Welfare, 490 F.2d 1324, 1328 (10th Cir. 1974).

This court is of the opinion that plaintiff has raised claims based on federal law and the federal constitution which

are not wholly insubstantial. Therefore, the defendant properly removed this case to federal court.

Federal Claims

In reviewing the complaint it appears plaintiff has raised four federal claims. First, plaintiff argues that race cannot be considered in assigning students to a school. Second, if race is considered it can only be considered if needed to correct the effects of past discrimination. Third, plaintiff argues that the Board's plan unreasonably interferes with the parents' right to raise their children. Fourth, plaintiff may have raised a claim based on title 4 of the 1964 Civil Rights Act.

Consideration of Race in Drawing Boundary Lines

The Board considered race as one of many factors in assigning students to particular schools.²

The Board considered race so as to insure to the extent practicable that each school would contain a representative sample of the community at large. Even though this racial classification is designed to insure schools are racially balanced, any classification based on race must pass a heightened degree of scrutiny.

A majority of United States Supreme Court Justices have

² The other factors considered were the achievement level of the student, the number of students attending each high school and neighborhood cohesiveness.

not agreed on the exact level of heightened scrutiny to be applied where race conscious classifications, designed to benefit an historically disadvantaged class, are made. Some Justices would uphold affirmative action classifications only under the strictest level of scrutiny. As Justice Powell has stated: "Race classifications are acceptable only if the means chosen are narrowly tailored to achieve a compelling government interest." University of California Regents v. Bakke, 438 U.S. 265, 359 (1978). Other Justices have viewed benign racial classifications³ under a less exacting standard. Justice Brennan joined by Justices White, Marshall and Blackmun in University of California Regents v. Bakke, applied a mid-level degree of scrutiny and held that: "Racial classifications designed to further remedial purposes must serve important governmental interests and must be substantially related to achievement of those objectives." University of California Regents v. Bakke, 438 U.S. at 359.

Regardless of the correct degree of scrutiny to be applied the School Board's use of race as a factor withstands the strictest level of constitutional scrutiny. Justice Powell in University of California Regents v. Bakke acknowledged that the

³ By benign racial classifications the court is referring to racial classifications designed to benefit an historically disadvantaged class of persons. See University of California Regents v. Bakke, 438 U.S. 265, 358.

government has a compelling interest in having a diverse student body attending schools. Justice Powell stated:

Students with a particular background whether it be ethnic, geographic, culturally advantaged, or disadvantaged, may bring . . . experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

University of California Regents v. Bakke, 438 U.S. at 314.

Justice Powell struck down the University of California's affirmative action program only because the California program relied solely on race without considering any other factor. In this case the School Board has considered factors other than race in attempting to create three equally balanced schools.

Accordingly, the School Board's use of race as a factor in assigning students did not violate the Fourteenth Amendment.

School Board's Authority to Consider Race Absent deJure Segregation

Plaintiff also argues that the School Board, if it does consider race as a factor in assigning students can only do so if it is attempting to remedy a past constitutional violation. This argument appears to be based on 42 U.S.C. § 2000(c)-6 and 20 U.S.C. § 1754.

42 U.S.C. § 2000(c)-6 outlines the procedure the United States Attorney General should use when bringing suit to enforce a student's rights to attend a desegregated public school. This

section also contains a provision limiting the power of federal courts to order transportation of students in order to achieve a racial balance. 42 U.S.C. § 2000(c)-6 provides in pertinent part:

Nothing herein shall empower any official or a court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or to one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to ensure compliance with the constitutional standards.

The United States Supreme Court has interpreted this provision as preventing federal courts from ordering busing in cases of de facto segregation.⁴ Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16-18 (1971).

Plaintiff argues that 42 U.S.C. § 2000(c)-6 when read in conjunction with 20 U.S.C. § 1754 prevents the School Board from ordering busing in cases of de facto segregation.

20 U.S.C. § 1754 provides:

The proviso of section 407(a) of the Civil Rights Act of 1964 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any

⁴ De facto segregation occurs when racial imbalance exists but there is no showing that the racial imbalance is caused by deliberate state action. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 17-18 (1971). When segregation occurs as a result of deliberate state action it is referred to as deJure segregation. Keyes v. School District No. 1, 413 U.S. 189, 208 (1973).

school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by Title IV, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States, regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

Plaintiff contends that 20 U.S.C. § 1754 turns public school board officials into federal officials and thus, as federal officials, the school board cannot order busing absent a showing of deJure segregation.

The legislative history and cases interpreting 20 U.S.C. § 1754 do not support plaintiff's interpretation of the statute. The purpose of 20 U.S.C. § 1754 when read in conjunction with 42 U.S.C. § 2000(c)-6 is to limit the power of federal officials, and to prohibit those federal officials from ordering public school pupils, public school systems, or public school boards to transport students absent a finding of deJure segregation. See Darville v. Dade County School Board, 497 F.2d 1002 (5th Cir. 1974).

Several federal courts have held that public school officials are free to adopt voluntary plans promoting racial balance in the public schools subject to the limits on affirmative action previously discussed. See Offerman v. Nitkowski, 378 F.2d 22 (2nd Cir. 1967); National Association for Neighborhood Schools of Pittsburgh, Inc. v. Board of Public Education, 497 F.Supp. 471 (W.D. Pa. 1980).

These lower court decisions are supported by holdings from the United States Supreme Court. In Swann v. Board of Education, 402 U.S. 1, 16 (1971) the court stated:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white student reflecting the proportion of the district as a whole.

Another case that this court finds persuasive is Local No. 93 v. City of Cleveland, 478 U.S. 501, 106 S.Ct. 3063 (1986). In City of Cleveland the United States Supreme Court approved a voluntary agreement between minority firefighters and the City of Cleveland calling for an affirmative action plan to promote and hire more minority firemen. The union challenged the city's action claiming that federal law prohibited the city from adopting an affirmative action plan absent a finding of past discrimination. The union based its claim on 42 U.S.C. § 2000(e)-5(g). This statute prohibits courts from entering an

order reinstating an employee or giving other available remedies unless the employee can show that he or she was adversely affected on the job because of race, color, religion, sex, or national origin. The union reasoned that since a court could not order affirmative action absent a finding of past discrimination the city should also be prohibited from implementing an affirmative action program absent proof of discrimination. The United States Supreme Court rejected this argument. The Court held that the voluntary race conscious affirmative action plan adopted by the City of Cleveland was permissible.

Though the City of Cleveland case involved a claim in the employment context there are striking parallels to this case. First, federal officials in the City of Cleveland and in this case cannot order a remedy absent proof of prior race discrimination. Second, non-federal officials voluntarily adopted a system that insures minorities will not be disadvantaged.

This court is of the opinion that voluntary integration whether it is in the workplace or in the schools is permissible so long as factors other than race are also considered. To hold otherwise and prohibit public officials from voluntarily integrating the schools would be contrary to the strong policies expressed in Brown v. Board of Education, 347 U.S. 483 (1954). As the United States Supreme Court stated in United Steel Workers

v. Weber, 443 U.S. 193, 204 (1979):

It would be ironic indeed if a law triggered by the nation's concern over centuries of racial injustice and intended to improve the lot of those who have been excluded from the American dream for so long constituted the first legislative prohibition of all voluntary, private, race conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Further, the Board could not possibly have made everyone happy with the rezoning process. If the Board would have rezoned the district and increased the percentage of minority students in any one school the Board would likely be defending a suit for deJure segregation. See Diaz v. San Jose Unified School District, 733 F.2d 660, 664 (9th Cir. 1984) (school board's decision to draw attendance areas in a manner that achieves or maintains ethnic imbalance is unconstitutional).

Given the realities of the situation, the Board made a tough decision which plaintiffs' counsel's concedes some agree with, some disagree with, and some don't care about.

This court cannot possibly operate the school system. The operation of a local school system in a non-discriminatory manner is the responsibility of local officials. Only when local officials ignore that responsibility should a federal court step in. National Association for Neighborhood Schools of Pittsburg, Inc. v. Board of Public Education, 497 F.Supp. 471, 480 (W.D. Pa. 1980). Given the long history and public debate involved in the

closing of South High School and the rezoning of the district it would be impossible for this court to say that the School Board has ignored its responsibility to operate the school district in a non-discriminatory manner.

Accordingly, the Board did not violate the United States Code or the United States Constitution in adopting a voluntary race conscious school zoning plan. In fact, by adopting a race conscious plan the district may have prevented a lawsuit which might very well have been successful.

Parents' Right to Make Reasonable Choices in the Education of Their Children.

Plaintiff claims that she has a constitutional right to make choices about how her children are to be educated. Plaintiff is correct. Parents do have certain rights in raising children that the state cannot interfere with absent a compelling state interest.

For instance, a parents' strongly held religious beliefs must be balanced against the state's need to set educational standards. Often, the parents' First Amendment rights are more important than the state interest in standardizing education. See Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

A state law abridging a child's free speech rights might also have to give way if it unduly interferes with a

parents' or student's free speech rights. Meyer v. Nebraska, 262 U.S. 390 (1923); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

Plaintiff relies on the above cases claiming that her right to direct the education of her children takes priority over the state's rights to create school attendance zones. The court disagrees.

Freedom of religion and free speech are rights guaranteed by the First Amendment to the United States Constitution. Any law which interferes with a fundamental rights must be narrowly tailored to achieve a compelling state interest. Wisconsin v. Yoder, 406 U.S. at 213-215. However, the right to attend a particular school is not a fundamental right. Bauza v. Morales Carrion, 578 F.2d 447 (1st Cir. 1978). Thus, the district zoning decision need only be rationally related to a legitimate state interest. Royster Guano Company v. Virginia, 253 U.S. 412, 415 (1925). "Providing public schools ranks at the apex of the function of a state." Wisconsin v. Yoder, 406 U.S. at 213. Thus, the state has a legitimate interest in controlling education. Further, dividing students up to insure a diverse student body is related to the state's interest in education. University of California Regents v. Bakke, 438 U.S. at 314.

Accordingly, plaintiff's Fourteenth Amendment claim based on parents' rights is dismissed.

Title 4 of the 1964 Civil Rights Act

The court has had some difficulty in interpreting plaintiff's complaint to determine if any other federal claims are being raised. There is a possibility that plaintiff has raised a claim based on Title 4 of the 1964 Civil Rights Act (42 U.S.C. § 2000(c)-2000(c)-9).

If plaintiff has attempted to bring a claim based on 42 U.S.C. § 2000(c)-6 that claim is dismissed because that section applies to federal and not state or local officials. See McDaniel v. Barresi, 402 U.S. 39 (1971).

Accordingly, defendant's motion to dismiss all of plaintiff's claims based on federal law and the United States Constitution is granted.

Propriety of Deciding State Law Claims

At the beginning of this opinion the court was not in a position to say that plaintiff's federal claims were so insubstantial that this court could summarily dismiss them. Only after a thorough review of the parties' contentions and the applicable law has this court been able to make a decision.

Thus, the question presently before the court is whether to retain jurisdiction over plaintiff's remaining state law claims or remand pursuant to 28 U.S.C. § 1441(c). 28 U.S.C. § 1441(c) provides:

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with

one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

In making this decision the court is guided by cases where courts have exercised discretion in hearing or dismissing pendent state law claims after the claims giving rise to federal jurisdiction have been disposed of.

When federal claims are dismissed and the only remaining issues are pendent state law claims a trial judge must exercise discretion in deciding whether to proceed on the state law claims. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Often, when the federal claims are dismissed prior to trial courts choose to exercise their discretion in favor of also dismissing the pendent state law claims. McFaddin Express, Inc. v. Adley Corporation, 346 F.2d 424, 427 (2nd Cir. 1965). The McFaddin court upheld the district court's decision to dismiss the state law claims after the federal claims had been dismissed holding "where the federal claim is dismissed on the pleadings it smacks of the tail wagging the dog to continue with the federal hearing on the state claims."

However, the court need not in every case dismiss when the federal claims are removed from the case prior to trial. In Rasado v. Wyman, 397 U.S. 397 (1970), the United States Supreme Court upheld the district court's discretion to exercise

jurisdiction over a pendent state law claim when the federal claims had become moot prior to trial. In upholding the district court's decision the United States Supreme Court looked at the policy considerations favoring the exercise of pendent jurisdiction. Those considerations include judicial economy, convenience, and fairness to the litigants. Jones v. Inter-mountain Power Project, 794 F.2d 546, 550 (10th Cir. 1986).

In this case both parties have expended numerous hours briefing the state law issues and the parties orally argued their positions at the July 1st hearing. Further, this court has spent numerous hours reviewing the parties' arguments and the applicable law. Thus, in one respect it might be more efficient for this court to decide the remaining state law issues.

However, there is an issue that this court feels takes precedence over the convenience factor. The United States Supreme Court in Rasado also considered the countervailing policy of federalism. Rasado v. Wyman, 397 U.S. at 403. When the state claims involve issues where strong federal policies are involved federalism concerns favor a federal court deciding the pendent state claims. Rasado v. Wyman, 397 U.S. at 404. However, when the pendent claims involve issues of first impression or novel issues based on unclear state law, state judges, and not federal judges, should hear the case.

In Naylor v. Case and McGrath, Inc., 585 F.2d 557 (2nd Cir. 1978) the circuit court held that the district judge abused his discretion when he failed to remand the case after the federal claims giving rise to removal had been dismissed. The remaining state law claims involved issues of first impression regarding the Connecticut Unfair Trade Practices Act.

The circuit court did not express any opinion as to the correctness of the district judge's interpretation of the Connecticut statute. Rather, the circuit court stated:

It is well for federal courts to remember that in such a case as the present one a federal court can only try to ascertain state law, whereas the state has provided a unified method for the formation of policy and the determination of issues by the Commissioner of Consumer Protection and in the state courts. (emphasis added).

Naylor v. Case and McGrath, Inc., 585 F.2d at 565.

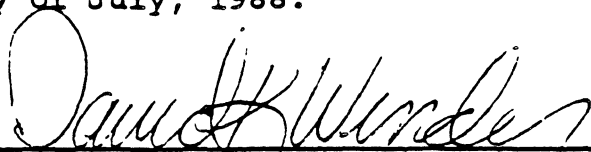
Plaintiff's claim based on Utah Code § 53-6-420 and plaintiff's claim based on Utah Constitution, Article X, section 8 are the type of claims that should be decided in the first instance by state court judges. The court is convinced that federalism concerns take priority over any convenience or inconvenience to the parties. The briefing done in this court can be used in any further state court proceeding. Further, the proceedings in this court have simplified the issues in that the only issues remaining for a state court judge to hear will be the state law claims based on Utah Code Ann. § 53-6-420 and Utah

Constitution, Article X, section 8.

Conclusion

Accordingly, all claims based on federal law and the United States Constitution are dismissed with prejudice. Plaintiff's claim based on Utah Code Ann. § 53-6-420 and Utah Constitution, Article X, section 8 are remanded to the state court. The defendants are requested to submit an appropriate order.

Dated this 22 day of July, 1988.



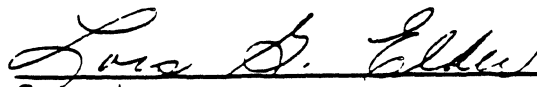
David K. Winder
United States District Judge

Mailed a copy of the foregoing to the following named counsel this 22 day of July, 1988.

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Secretary

ADDENDUM B

DEC 1 1988

H. Dixon Hindley, Clerk 3rd Dist. Court
By Karen Busch
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MARIA ESPINAL, et al.,	:	MEMORANDUM DECISION
Plaintiffs,	:	CIVIL NO. C-88-1444
vs.	:	
SALT LAKE CITY BOARD OF	:	
EDUCATION,	:	
Defendant.	:	
	:	

The issue to be decided by this Court is: Does Utah Code Ann., Section 53-6-20, authorize the Salt Lake Board of Education to set school boundaries in such a way as to achieve a "balanced mix of resident high, middle and low achieving students?" The issue is a critical one because it delineates the balance between the rights of parents to control the education of their children and the power of the state to operate a public education system.

At the beginning, it is important to say that this case does not involve a scheme to reduce the impact of prior racial discrimination. The segregation cases from the federal courts are, therefore, inapplicable. All of the federal claims have been dismissed. The only issue at bench is the power of the school board under the state statute.

The legislature has provided that boards of education shall have the following powers:

Every local board may:

(1) spend minimum school program funds for programs and activities for which the State Board of Education has established minimum standards or rules under Section 53-2-12.1;

(2) purchase, sell, and make improvements on school sites, buildings, and equipment and construct, erect, and furnish school buildings. School sites or buildings may only be conveyed or sold on board resolution affirmed by at least two-thirds of the members;

(3) participate in the joint construction or operation of a school attended by children in the district and children residing in adjoining districts either within or outside the state. The agreement for joint operation or construction of a school shall be signed by the president of the board of each participating district, include a mutually agreed upon pro rata cost, and be filed with the State Board of Education;

(4) establish, locate, and maintain kindergarten, elementary, secondary, and vocational schools. Children seeking to enter school must be at least five years of age before September 2 of the year in which admission is sought;

(5) establish and support school libraries and authorize, and pay for out of district funds, a compilation of the history of the district;

(6) collect damages for the loss, injury, or destruction of school property;

(7) engage in guidance and counseling services for children and their parents prior to enrollment of the children in school;

(8) apply for, receive, and administer funds made available through the programs of the Federal Government. Federal funds are not considered funds within the school district budget under Chapter 20 of Title 53. Federal funds are expended for the purposes for which they are received and are accounted for by the Board.

(9) organize school safety patrols and adopt rules under which the patrols promote student safety. A student appointed to a safety patrol shall be age 11 or over, or age ten or over in elementary schools that do not include a sixth grade, and shall have written parental consent for the appointment. Safety patrol members shall not direct vehicular traffic or be stationed in the portion of the highway intended for vehicular traffic use. No liability shall attach either to the school district, the board of education, an individual board member, a parent of a safety patrol member, an authorized volunteer assisting the program, or other school authority by virtue of the organization, maintenance or operation of a school safety patrol;

(10) on its own behalf, or on behalf of an educational institution for which the board is the direct governing body, accept private grants, loans, gifts, endowments, devises or bequests which are made for educational purposes. These contributions are not subject to appropriation by the Legislature;

(11) appoint and fix the compensation of a compliance officer to issue citations for violations of Subsection 76-10-105(2). A person may not be appointed to serve as a compliance officer without the person's consent. A teacher or student may not be appointed as a compliance officer.

(12) adopt bylaws and rules for its own procedures;

(13) make and enforce rules necessary for the control and management of the district schools. All board rules and policies shall be in writing, filed, and referenced for public access; and

(14) do all things necessary for the maintenance, prosperity, and success of the schools and the promotion of education.

Utah Code Ann., Section 53-6-20.

In this statute the legislature empowers boards of education to establish and locate schools. And in the final clause the boards are given authority to "do all things necessary for the maintenance, prosperity, and success of the schools and the promotion of education."

Obviously, it is "necessary" that boundary lines between schools are drawn. The question is whether in drawing those boundaries social, economic and racial balancing can be taken into consideration. Plaintiffs characterize this as "social engineering," and allege that it is beyond the "necessary" powers of the school board.

The Utah Supreme Court addressed a similar problem in 1932 when the power of schools to provide extra-curricular activities was challenged. In Beard v. Board of Education of North Summit School District, 81 Utah 51, 16 P.2d 900 (1932), the court articulated the following principle:

The board of education, being a creation of the Legislature, has only such powers as are expressly conferred upon it and such implied powers as are necessary to execute and carry into effect its express powers.... The court is not concerned with the policy, expediency, wisdom, or justice of a legislative enactment conferring powers on boards of education of school districts, and where such authorities act within their powers, in the absence of a clear abuse, the courts will sustain the exercise of such power.

81 Utah at 60.

The statute now in effect still does not specifically empower boards of education to provide for extracurricular activities; but certainly it has been accepted that school dances, parties, football games and the like are a legitimate part of the educational process. It can be argued that they are not "necessary for the maintenance, prosperity, and success of the schools"; indeed it may be argued that teaching of any subject beyond reading, writing and arithmetic is not "necessary."

The point is: it is not for the court to substitute its judgment for the judgment of the elected board of education. As the court said in Beard, "the question for determination is one of power rather than of policy."

When the statute says that the boards have authority to do what is "necessary" to promote education, it means "necessary" in the opinion of the board; not "necessary" in the opinion of the

court. The court must sustain the action of the board if under any reasonable view the function in question can be considered "necessary."

The balancing of the student body along social, racial and economic lines can be defended as a legitimate part of the educational process. Certainly the Board may believe that students get a better educational experience in such an environment. Plaintiffs and many others may disagree; but their remedy is at the ballot box, not in the courts.

Plaintiffs' further argument that the order creates a partisan qualification for attendance at the schools is also without merit in my opinion. The plain language of that constitutional provision clearly does seem intended to apply to this situation.

Defendant's Motion for Summary Judgment is granted. Plaintiffs' Motion for Summary Judgment is denied. I request that Mr. Robson prepare an appropriate Order.

Dated this 1 day of December, 1988.

Scott Daniels

SCOTT DANIELS
DISTRICT COURT JUDGE

I CERTIFY THAT THIS IS A TRUE COPY OF AN
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, SALT LAKE COUNTY, STATE OF
UTAH.

DATE: January 5, 1989

Alvin O. Long
DEPUTY COURT CLERK

ATTEST
H. DAVID HINCHLEY
Clerk

Karen Beuch
Deputy Clerk

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this____/____day of December, 1988:

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