

1989

Maria Espinal, Donnie James, G. Harvey Hamilton,
Joyce Campbell and Terry Hoecher, for themselves
and all others similarly situated v. Salt Lake City
Board of Education : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Espinal v. Salt Lake City Board of Education*, No. 890037.00 (Utah Supreme Court, 1989).
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BRIEF

890037

IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs and Appellants,

vs.

SALT LAKE CITY BOARD OF
EDUCATION,

Defendant and Appellee.

No. 890037

BRIEF OF APPELLANTS

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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JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS
IN DISTRICT COURT

The Supreme Court of the State of Utah has jurisdiction to hear this appeal pursuant to Utah Constitution Article VIII, section 4, and Utah Code Ann. sec. 78-2-2(3)(j).

The proceedings below consist of plaintiffs' class action seeking: (1) an order of the court enjoining defendant (the "**Board**") from enforcing the Board's order of January 19, 1988 (the "**Order**"), or otherwise preventing certain children of plaintiffs and other students similarly situated from attending the high school of their choice or closest to their places of residence in the Salt Lake City School District (the "**District**"), after taking into account school capacities and natural physical barriers; (2) a declaratory judgment determining that the Order is void and of no effect because the Order is unconstitutional and is ultra vires the powers of the Board; (3) an order of the court directing notice to the Board of the particulars in which the Order violates the Utah Constitution and exceeds the powers of the Board as granted by the statutes of the State of Utah, and giving the Board a reasonable opportunity to rescind the Order and develop a voluntary plan consistent with Utah law; 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.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented for review on this appeal are as follows:

A. Whether the Order denies plaintiffs' their liberty to control the education of their children, which denial is contrary to the provisions of Utah Constitution Article I, section 7;

B. Whether the Order is unconstitutional as contrary to the provisions of Utah Constitution Article X, section 8 prohibiting a partisan test or qualification for admission or attendance in the public high schools of Salt Lake City, Utah; and

C. Whether the Order is unlawful because it is ultra vires the enumerated powers conferred on the Board by former Section 53-6-20, Utah Code Ann.¹

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

The determinative provisions of the Utah Constitution, and the determinative statutes of the State of Utah read verbatim as follows:

¹In 1988 Title 53 was recodified and replaced by Title 53A. The section applicable to this action is 53-6-20, which section as amended has now been designated as section 53A-3-402. In this brief Plaintiffs will refer to the old section 53-6-20 which was in effect at the time the Order was adopted by the Board on January 19, 1988.

UTAH CONSTIT. ARTICLE I, SECTION 7.

No person shall be deprived of life, liberty or property, without due process of law.

UTAH CONSTIT. ARTICLE X, SECTION 8.

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 CODE ANN. SEC. 53-6-20.

Every school 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.

STATEMENT OF THE CASE

Plaintiffs, acting for themselves and all others similarly situated, commenced this class action on March 4, 1988 to nullify the effect of the Order, which Order became effective in August 1988. Pursuant to the Order certain children of plaintiffs and other high school students residing in Salt Lake City, Utah are denied access to the Salt Lake City high school of their choice and located in their respective neighborhoods, and are transported by school bus each school day from the area served by the high school in their respective neighborhoods to another high school not in closest proximity to where they reside.

The Board admits that the students residing in the various neighborhoods denied access to the high school of their choice and closest to them, were selected for assignment and

transport to another high school in Salt Lake City because of their ethnic status, their academic achievement scores and the socio-economic classes of the parents and students involved. However, the Board contends that under Utah law the Board has the plenary power to adopt and enforce the Order regardless of its reasons for determining which student was selected for mandatory assignment to which high school.

Although originally filed in the Third Judicial District Court of Salt Lake County, because of the federal predicates described in the complaint, the Board removed the case to the United States District Court for the District of Utah. Following consideration there of the Board's motion to dismiss or in the alternative for summary judgment, and plaintiffs' cross-motion for summary judgment, the Honorable Judge David K. Winder dismissed all federal claims but refused to rule on plaintiffs' claims grounded on the Utah Constitution and other Utah state law. Upon the federal court's remand to the District Court of Salt Lake County, and after considering the parties cross-motions for summary judgment, the Honorable Scott Daniels granted the Board's motion for summary judgment and denied plaintiffs' motion for summary judgment. Summary judgment to that effect was entered on December 30, 1988, from which summary judgment this appeal is taken.

STATEMENT OF FACTS

There is no genuine issue as to any of the following material facts. All references in this Brief of Appellants are to pages in the original papers and exhibits contained in the record on appeal as contemplated by R. Utah S. Ct. 11(b) and 24(e). Copies of the Order and Judge Daniels' Memorandum Decision are included in the Addendum.

1. The named plaintiffs are the parents of children currently enrolled in one or more schools in the District. (See paragraph 3 on page 131.)

2. The Board is the legal entity created to administer the affairs of the District. (See paragraph 1 on page 131.)

3. Prior to January 19, 1988, there were four high schools in the District, namely, in alphabetical order, East, Highland, South and West. (See pages 643-645, 688.)

4. Prior to January 19, 1988, the Board decided to close South High at the conclusion of the 1987-1988 school year. (See pages 643-645.)

5. On January 19, 1988, by a bare majority vote of four to three, the Board made a formal decision constituting the Order, pursuant to which Order the Board established attendance boundaries for high school students residing in the District who would be attending the remaining three high

schools, East, Highland and West, during the 1988-1989 school year and thereafter. (See pages 643-645, 688.)

6. The boundaries established by the Order are "closed boundaries" in the sense that the high school students residing in the District are required to attend a designated high school, unless, upon a showing of special circumstances, a particular student is permitted to do otherwise by the District. (See paragraphs 22 and 23 on pages 147 and 148, and pages 739-740.)

7. The purpose and effect of the Order is to "gerrymander" the District's high school attendance boundaries so that students represented by plaintiffs are prevented from attending the high school of their choice, in their neighborhood or in nearest proximity to them. (See pages 546, 730, 772, 773, 776, 777.)

8. As a result of the Order, certain of the high school students residing in the Euclid area in the District whose places of residence prior to the Order were located within the West High attendance boundary, and who currently live within walking distance of West High, are now denied admission to or attendance at West High, and such students have been eliminated from the West High student body because a high percentage of such students are low academic achievers, are members of ethnic minorities, and they and their families are perceived by a majority of the Board to be members of a low

social and economic class of people. (See pages 651-655, 665, 688.)

9. As a result of the Order, certain high school students residing within the area immediately south of the Euclid area of the District, whose places of residence prior to the Order were located within the South High attendance boundary, and who currently live within walking distance of West High, are now denied admission to or attendance at West High, and such students have been denied membership in the West High student body because a high percentage of such students are low academic achievers, are members of ethnic minorities, and they and their families are perceived by a majority of the Board to be members of a low social and economic class of people. (See pages 665, 667-669, 688.)

10. As a result of the Order, certain of the high school students residing within the Federal Heights area and the Avenues area of the District, whose places of residence prior to the Order were located within the East High attendance boundary, and who currently live within walking distance of East High, are now denied admission to or attendance at East High, and such students have been eliminated from the East High student body because a high percentage of such students are high academic achievers, are not members of ethnic minorities, and they and their families are perceived by a majority of the Board to be members of a high social and economic class of people. (See pages 648-651, 662-665, 688.)

11. The students described in the next three preceding paragraphs are not within walking distance of the high school where they are required to attend by the Order, and each school day, at extra expense to the District, such students are bussed across Salt Lake City to a high school not closest or most convenient to them. (See pages 680-685, 704-708, 710-715.)

12. As a result of the Order, certain of the high school students residing within the 13th and 17th South area of the District, whose places of residence prior to the Order were in the Highland High attendance boundary, and who are currently living within walking distance of Highland High, are now denied admission to or attendance at Highland High, and such students have been eliminated from the Highland High student body because a high percentage of such students are high academic achievers, are not members of ethnic minorities, and they and their families are perceived by a majority of the Board to be members of a high social and economic class of people. (See pages 646-648, 665, 688.)

13. The Order was designed to make West High a "better school" by denying students residing in the the Euclid area and students residing in the area immediately south of the Euclid area, access to West High (their school of choice and closest to them), while at the same time denying the Federal Heights area students and the Avenues area students access to

East High, and the 13th South and 17th South area students access to Highland High. (See pages 657-661, 665, 669-672, 688.)

14. None of the high schools in the District is or ever has been "segregated." (See pages 803-807.)

15. The Order is not "necessary" to enable the Board to discharge any of its duties as specified in Utah Code Ann. Section 53-6-20. (See pages 617-627, 661, 662, 765, 766, 852, 853.)

16. The three high schools in the District still operating following the closure of South High can operate with all students attending the school in nearest proximity to them, and with enrollments that are unbalanced between the schools on the basis of academic achievement or racial status. (See pages 661, 662.)

SUMMARY OF ARGUMENTS

I. The Order is unconstitutional and therefore should be considered of no force and effect because the Order denies plaintiffs their liberty to control the education of their children, which liberty is protected by the due process clause found in Article I, section 7 of the Utah Constitution. Several persuasive federal Supreme Court decisions have declared that such rights are among those contemplated by the

concept of "liberty" contained in both the federal and Utah constitutions. In the present case, the Order Gerrymandered the high school boundaries within the District for the same reasons that have historically condemned Gerrymandering -- the failure to treat everyone impartially by taking rights from one group and giving special advantages to others.

II. The Order is unconstitutional and therefore should be considered of no force and effect because the Order subjects certain students in the District to partisan tests or qualifications for access to a certain high school, all in violation of Article X, section 8 of the Utah Constitution. By definition, partisan tests include tests that divide school patrons for reasons of bias, prejudice (discrimination), one-sided allegiance and other unreasonable considerations. Such unfavorable tests resulting in the Order included whether the students resided in a neighborhood of high or low academic achievers; whether the students resided in a neighborhood with a proportionally high or low number of minority residents; whether the students resided in a neighborhood of a high or low socio-economic class of people; or whether the students resided in a neighborhood whose exclusion from a particular school was perceived to be in the best interests of West High.

III. The Order is illegal and therefore should be considered of no force and effect because the Order is not within the competency of the Board because the Order exceeds enumerated powers conferred on the Board by Utah Code Ann.

Section 53-6-20 and the whole Utah statutory scheme governing Utah's public schools. More particularly, the Order is not "necessary" as required by subsection (14) of Section 53-6-20 pursuant to the doctrine ejusdem generis; granting the Board plenary power pursuant to subsection (14) ignores the fundamental rights of parents to make reasonable choices in the education of their children, while granting boards of education the right to make all of those choices in place of the parents so long as members of boards of education sincerely believe that what they are doing is right, which authority in favor of boards of education effectively disenfranchises parents; the Order creates an incredible situation which allows students from e.g., Davis County to attend West High, at the expense of the Davis County School District, but forces a student living within walking distance of West High to be bussed across town to East High; and the Order is the result of an arbitrary and capricious decision on the part of the Board because it does not meet the criteria prescribed by Section 53-6-20 and constitutes Gerrymandering.

ARGUMENT

This case presents a classic clash between the powers of the State to control and regulate public schools, and the

individual rights of parents and students who are patrons of the public schools. Plaintiffs contend that the Order is contrary to the "fundamental principles. . .essential to the security of individual rights"² in violation of the Utah Constitution and Utah statutory law.

POINT I

THE ORDER CONFLICTS WITH THE LIBERTY OF PARENTS TO CONTROL THE EDUCATION OF THEIR CHILDREN IN VIOLATION OF ARTICLE I, SECTION 7 OF THE UTAH CONSTITUTION.

Judge David K. Winder of the United States District Court for the District of Utah, in remanding this matter to the Salt Lake County District Court, held that "plaintiff is correct" "that she has a Constitutional right to make choices about how her children are educated," (See page 558.) citing Wisconsin v. Yoder, 406 U.S. 205 (1972); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Meyer v.

²Utah Constit. art. I, sec. 27 reads in its entirety as follows: "Frequent recurrence to fundamental principals is essential to the security of individual rights and the perpetuity of free government."

Nebraska, 262 U.S. 390 (1923). The nature of the rights thus acknowledged by Judge Winder must, therefore, be understood as a predicate to determining if the Order abrogates those rights in violation of the Utah Constitution and Utah laws.

Meyer v. Nebraska, supra, announced that there must be a balance between the powers of the state over public schools and the rights of the parent to make reasonable choices in the education of his or her child:

The state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, [it] is clear; but the individual has certain fundamental rights which must be respected. Id. at 401. (Emphasis added.)

The issue in Meyer v. Nebraska was whether the state could prohibit the teaching of foreign languages as a measure to promote the public good by fostering a "mother tongue." Promoting purely social goals went too far, it was held, and offended the Fourteenth Amendment provision that "[no] state . . . shall deprive any person of life, liberty, or property without due process of law."

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire

useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts. 262 U.S. 399-400. (Emphasis added, citations omitted.)

The doctrine of Meyer v. Nebraska was applied soon after it was announced, on facts closer to the matter at bar, in Pierce v. Society of Sisters, supra. In Pierce, a law of the State of Oregon requiring children between 8 and 16 years of age to attend the public schools to the exclusion of private ones was held unconstitutional. Appropos, the Order's assignment of students to achieve admittedly socio-economic goals herein, the court declared:

Under the doctrine of Meyer v. Nebraska, we think it entirely plain that the [Oregon statute] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing

them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. 268 U.S. 534-35. (Emphasis added, citations omitted.)

Those propositions were reaffirmed by the modern Court in Tinker v. Des Moines Independent Community School District, supra, and Wisconsin v. Yoder, supra. In Yoder, Amish parents challenged state control of the education of their children, albeit on First Amendment grounds. Justice Burger observed that the case was "not one in which any harm to the physical or mental health of the child or to the public safety, peace, order or welfare ha[d] been demonstrated or may be properly inferred" (406 U.S. 230, citations omitted) and then confirmed the very rights of parents asserted herein:

The history and culture of western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. If not the first, perhaps the most significant statements of the Court in this area are found in Pierce v. Society of Sisters, in which the Court observed (citing the dicta quoted above). . . .

However read, the Court's holding in Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation" to some purpose within the competency of the

state is required to sustain the validity of the State's requirement under the First Amendment. To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under Pierce if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.

* * *

In the face of our consistent emphasis on the central values underlying the Religion Clauses in our constitutional scheme of government, we cannot accept a parens patriae claim of such all-encompassing scope and with such sweeping potential for broad and unforeseeable application as that urged by the State. 406 U.S. 232-34. (Emphasis added.)

We submit that the same principles apply herein, particularly in view of the language of Utah Constitution Article I, section 7, which reads:

No person shall be deprived of life, liberty or property, without due process of law.

Our court held long ago that this due process clause is so similar to the due process clauses of the Fifth and Fourteenth Amendments to the federal Constitution, that the decisions of the federal Supreme Court are highly persuasive as to the application and meaning of the above-quoted section 7. Untermeyer v. State Tax Comm., 102 U. 214, 129 P.2d 881 (1942). Thus, the liberty guaranteed to parents with respect to the education of their children as described and protected by the federal decisions cited above and by our Article I, section 7,

are the same. In other words, the Board cannot do in violation of the Utah Constitution what other government agencies cannot do in violation of the federal Constitution.

More specifically, the principle articulated by Yoder in its reliance on Pierce and Meyer easily apply to the case at bar. Although here the Board did not decree that the children of plaintiffs must attend public schools, the Board did decree that if they do choose to attend public schools, they must attend a particular public school not in their neighborhood or convenient to them. Contrary to the Board's assumption that its power is plenary, Yoder, Pierce and Meyer all stand for the proposition that the Board may enforce a binding decision only if such decision has a "reasonable relation to some purpose within the competency of the State." Ibid.

For purposes of this case, what is within the competency of the state is defined at Article I, section 7 and Article X, section 8 of the Utah Constitution and at Utah Code Ann. Section 53-6-20. Plaintiffs contend that the Order is not within the competency of the state as so defined, because, by the Order, a parent such as the named plaintiff, Mrs. Espinal, for example, is denied the choice of a school in her neighborhood or convenient to her (see her affidavit at pages 529-533), while a parent residing on the other side of the freeway is given that option. Mrs. Espinal and her children are denied basic liberties while others are protected in

theirs. Certainly that is so if the basis for the denial is an arbitrary one -- viz., based upon racial, or academic achievement, or socio-economic values of others, rather than the standards set in the Utah Constitution and the Utah code as being within the competency of the Board.

Mrs. Espinal and her children, and other patrons of the District like them, are the victims of Gerrymandering.³ Judge Winder not only acknowledged the rights of parents to control their children's education, but he also frankly found that the Order "jerimanded" (sic) the attendance zones of the District. (See page 546.) His decision thus brings into focus the question of whether the Utah Constitution and Utah laws empower the Board to make such decisions. It is that question which Judge Winder considered of such importance that it should be decided, in the first instance, by a Utah court. Put differently, the question is: do the parents' rights to educate their children prevail over the Board's decision to Gerrymander boundaries to create a social "sameness" in the three high schools; or do the Utah Constitution and Utah laws protect parents and their children from Gerrymandering to accomplish social engineering. Gerrymandering, by definition,

³The term derives from Elbridge Gerry, Governor of Massachusetts, who used the method to reshape voting districts to his advantage in 1812, and salamander, which resembled the shape of the resulting district. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (1961). Board Vice President Boyden explained the attendance zones created by the Order in terms precise to the definition:

amounts to an unnatural and unfair taking of rights from one group and giving special advantages to another. The innate discrimination of the Gerrymandering resulting from the Order, by itself, is sufficient to cause this Court to prohibit

(footnote continued)

Q (BY MR. ROBSON) You used the term "gerimandering" school boundaries or something like that. Could you explain for me what you mean when you use the word gerimandering or gerimandered?

A Well, as I understand it, it's a southern word that came from the good old boys who were trying to stay in office by moving their boundaries, and one looked so much like a salamander that it came up with the word gerimander. . . . What you're looking at if you look at Exhibit 3, if you look at that blue area, that block is taken out of Highland to feed into East to try to compensate for the brown and green areas that were going to West because that would have left East with the preponderance of low achieving students were that chunk not taken out. Why is this strip included over here? Why didn't the line -- why is the red strip not attached to West? Because there were too many low achieving students in that area to be attached to West, and they had to either go to East or Highland. And there were a number of maps which jiggled these lines around.

I used the term gerimander because if you look at my voting district, it makes absolutely no sense whatsoever, and I think that the Salt Lake City Commission figured that one out. State legislatures do this all the time. And so our school board used that kind of precedent, I suppose, to move these lines around in a willy-nilly fashion. They don't follow any geographic boundary necessarily. What they are designed to do is get these student bodies that have nearly the same median equivalent achievement. (See pages 772, 773.)

enforcement of the Order as a violation of Article I, section 7 of the Utah Constitution. Surely, no board of education in Utah has the unfettered power to deny individual liberties by Gerrymandering as has been done by the Order.

POINT II

THE ORDER VIOLATES THE ABSOLUTE PROHIBITION⁴ OF ARTICLE X, SECTION 8 OF THE UTAH CONSTITUTION AGAINST PARTISAN TESTS.

The Utah Constitution, Article X, section 8 provides:

(footnote continued)

Vice President Boyden then explained that the boundary of East would be truly "serpentine" if the University area, which has virtually no students, was disregarded:

Q (BY MR. LINEBAUGH) So if you take those six students on Sunnyside and throw them in with all the students, you have in effect almost a serpentine description of the East High boundary, do you not, given the order?

A That's correct.

Q In other words, there is really no contiguous alignment for the whole East High district other than they line onto each other, is that right?

A Yeah. It snakes through the city. (See page 777.)

⁴Utah Const. Article I, section 26 reads in its entirety as follows: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

No religious or partisan test or qualification shall be required as a condition of employment, admission, or attendance in the State's education systems.

We can find no other state constitution containing the language of Utah's Article X, section 8, nor can we find any cases construing the language of section 8. However, by definition, many of the students in the District are being subjected to partisan considerations to determine whether they can attend the high school in their neighborhood or at least closest to them. The Universal Dictionary of the English Language published in New York by Peter Fenelon Collier and copyrighted in 1897, close to the time of the adoption of our Utah Constitution, defined the adjective "partisan" pertinently as follows:

Pertaining or attached to a party or faction; biased or acting in the interest of a party or faction.

According to that same source, the word "partisan" is derived from the Latin root "partitus," which literally means "to divide." A partisan test then, is literally a test designed to divide persons from each other. While plaintiffs readily agree that such tests designed to divide school patrons for the right reasons, for example, proximity to schools and the affect of natural barriers, highways, etc., are clearly acceptable, any such tests designed to divide school patrons into factions, combinations or cliques based upon biases or interests that

favor one group over another, are partisan tests and therefore proscribed by the Utah Constitution.

More currently, The Oxford English Dictionary, in its 1961 edition, defines the noun "partisan" as follows:

One who takes part or sides with another; an adherent or supporter of a party, person, or cause; esp. a devoted or zealous supporter; often in unfavorable sense: One who supports his party "through thick and thin"; a blind, prejudiced, unreasoning, or fanatical adherent.

This same source defines the adjective "partisan" as:

Of, pertaining to, or characteristic of a partisan; supporting a party, esp. zealously or blindly; biased, prejudiced, one-sided.

Similarly, Webster's Third New International Dictionary in its 1961 edition, defines the noun "partisan" as follows:

a. one that takes the part of another; an adherent to a party, faction, cause, or person. . . b. a strong or devoted supporter; a zealous advocate. . . c. an adherent characterized by prejudiced, unreasoning, blind, or fanatical allegiance. . . .

This same source defines the adjective "partisan" as:

2: exhibiting, characterized by, or resulting from partisanship. . . .

Although our Supreme Court has not construed the term "partisan," our Court has condemned the arbitrary dividing of school patrons. Upon consideration of Utah Const., Article X, section 1 requiring that Utah public schools be "open," our

Court prohibited dividing the students "into classes, groups and grant[ing], allow[ing], or provid[ing] one group privileges or advantages denied another." Logan School District v. Kowallis, 77 P.2d 348, 350 (Utah 1938).

The agreed fact is that the Board did, precisely, what Kowallis held could not be done. According to Board president Keith Stepan, the Order divided the students into groups, according to race, place of residence, academic achievement and socio-economic status, and selected groups were denied attendance at the school convenient to them on that basis, while others were permitted attendance at the most convenient school. (See pages 643-685, 688.) Restrictions imposed by the Order plainly do not apply indiscriminately to all of Salt Lake City's high school students. Some of those students are subjected to busing or transportation according to the circumstances of their birth, or whether they are members of a particular faction or combination within the community (whether favored or unfavored).

Given the plain meaning of the term "partisan" as defined above, the use of the term "partisan" in Article X, section 8 must be held to prohibit the Order. Based on the those definitions, a partisan test or qualification is one which requires a group of students to meet biased, prejudiced, (discriminatory), one-sided and unreasonable criteria for admission to a particular school. For example, for any group

residing generally west of the I-15 freeway and generally south of the I-80 freeway wanting to go to West High, the Order imposes the following partisan tests or qualifications for attendance at West High:

1. Your group can't go to West High unless it is predominantly non-minority;

2. Your group can't go to West High unless, as a group, it achieves comparatively high academic scores; and

3. Your group can't go to West High unless it is predominantly of a high social and economic class.

The partisan tests or qualifications imposed on students residing generally east of the I-15 freeway wanting to attend East High are just opposite, thus demonstrating the partial (as opposed to impartial), partisan nature of the Order. For example:

1. Your group can't go to East High unless it is predominantly minority;

2. Your group can't go to East High unless, as a group, it scores comparatively low on academic tests;

3. Your group can't go to East High unless it is predominantly of a low social and economic class.

For purposes of this case, a "partisan test or qualification" is a test or qualification that denies some students (regardless of their personal minority status, academic competence or socio-economic class) the right to attend the school closest to them because they are included in

a particular group, faction or combination defined by race, academic achievement or their socio-economic status. Clearly, that is what the Order does. Students are denied access to the schools closest to them, and unnecessarily and expensively bussed across town, because they were unlucky enough to be included in a group, faction or combination of people in the District based upon their race, or because they reside among a group which scored too low or too high the day an academic achievement test was given, or because they reside among families deemed too poor or too rich. Others of the same race, having achieved the same academic scores, and/or having the same amount of money are permitted to go to the school closest to them, without the concomitant waste of time and money and the deprivation of opportunity for required and extracurricular high school programs, inherent in being bussed across town, for no reason better than that they reside among a group, faction or combination of people which has been subjected to partisan tests. Dividing school patrons for such reasons is surely partisanship in its "unfavorable" sense.

It has been said that if anyone tries to convince you of the importance of ideas over the importance of individual rights, that person is usually talking about his ideas and your rights. That the Order was a result of partisan ideas, in other words that the Order was a result of biased, prejudicial, discriminatory, one-sided and unreasonable tests and

considerations, imposed by a majority of the Board, is best illustrated by understanding what the Order says to Mrs. Espinal and her children and the District's other high school patrons residing in the Euclid area.

As is clear from the Statement of Facts herein, the Order excludes the Euclid area from the West High boundary, and requires the high school students in that area to travel across town to attend East High. This, in spite of the fact that high school students from the Euclid area were previously included in the West High boundary, and in spite of the fact that all such students live closer to West High than they do to East High.

What does the Order say to the Euclid area students and their families denied access to West High? What message is given to them as they are bussed across town to attend East High? Any way we look at it, the Order tells everyone that those students are being swapped for high achieving, "waspish" and supposedly higher class students from the east side of Salt Lake City. (See page 773.)

The hard reality is that the Order says to those students removed from West High, and their families, that:

You have to go to East High because you are poor achievers -- you and your neighbors didn't score high enough when we gave the tests; and

You have to go to East High because too many of you are members of an ethnic minority; and

We have to exchange you for those rich high achievers from the east side because socio-economically you are poorer and we have to have more high-class people with more money at West High; and

You have to go to East High because you come from families who won't or can't give West High the "critical mass" of good students it needs; therefore, what we are really doing is swapping you for a better class of families -- but don't take it personally; or

Forget about what is best for West High, the school which has your allegiance and affection, we are really sending you to East High for your own good, and every day we are going to put you on a bus that will pick you up within walking distance of West High and will take you across town to East High, and then after school, on an extra-curricular basis, you can continue in the worthy effort of trying to make a cohesive school with your fellow students, provided you don't miss your bus home.

By the Order, a majority of the Board has clearly told these dislocated students that they are being required to leave West High because they don't have enough educational quality. Since when did lack of educational quality justify the imposition of biased, prejudicial, discriminatory, one-sided and unreasonable tests to determine whether students get to attend their neighborhood public school of choice?

Plaintiffs concede it is uncomfortable to face the reality of what has been done to the District's patrons in the Euclid area. It makes us squirm, because frankly, the messages from the Order are terribly offensive. However, as uncomfortable as such considerations make us, far worse is the

emotional cruelty inflicted upon the patrons expelled from the West High community, their school of preference, for such untenable reasons. The dehumanizing result of the Order is that it inflicts upon the patrons of the Euclid area the pain and bitterness that surely comes from knowing that the unembellished reason for moving them is that they are not wanted. At least, the students being moved by the Order from East High to West High can make the move with the assurance that they are wanted and that their educational quality is sought after.

The patrons of the Euclid area became a bartering chip to implement an idea in the minds of a majority of the Board, and thus they had imposed upon them biased, prejudicial, discriminatory, one-sided and unreasonable tests, i.e., partisan tests, which tests and considerations are proscribed by Article X, section 8 of the Utah Constitution. Precisely because of their lower economic status and their lower achievement levels, the injury to them is magnified, since they are least able to afford the consequences of the Order. That relatively small group removed from West High (not because they were viewed as desirable someplace else, but because they were viewed as undesirable at West High) cannot depend on the political process to protect them. Consequently, they look to this Court to insure their access to the public high school of their choice, the public high school closest and most convenient to them.

POINT III

THE ORDER IS NOT WITHIN THE BOARD'S POWERS AS LIMITED BY UTAH STATUTORY LAW.

The Board's justification for the Order also fails as a matter of statutory construction. The powers of the Board are enumerated in careful detail at Utah Code Ann. section 53-6-20. For the convenience of the Court, that section is quoted here in its entirety:

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.

A. The Board's Powers are Limited by the Enumeration at Section 53-6-20.

Allen v. Board of Education, 120 Utah 566, 236 P.2d 756 (1951) held that a school board 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." (Emphasis added.)

B. "Catchall" Powers are Limited by the Doctrine Ejusdem Generis.

The broad language of Utah Code Ann. Section 53-6-20(14), declaring that

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

does not mean that the Board may act to achieve social objectives, such as a racial, academic achievement or socio-economic mix in the schools. The generality of such language, preceded by a specific enumeration of powers, is uniformly limited by the doctrine ejusdem generis. See BLACKS LAW DICTIONARY (4th ed. 1951):

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.

Ricker v. Board of Education, 16 U.2d 106, 396 P.2d 416 (1964) held that the Board's "broad latitude" must be exercised "within the sphere of its responsibilities" Id. 420. See also, Logan City School District v. Kowallis, 94 U. 342, 77 P.2d 348 (1938). In what may be the definitive pronouncement on the subject, Allen v. Board of Education, 120 U. 566, 236 P.2d 756 (1951) split with Hansen v. Board of Education, 116 P.2d 936 (Utah 1941) on the issue of whether the closing of schools was implied by the power to "establish, locate and maintain" them. In overruling the holding of Hansen, the Utah court relied upon the ejusdum generis concept. Allen, supra at 763. The Honorable Bruce S. Jenkins, Chief Judge of the United States District Court for the District of Utah, has held in a closely related context, that "courts should read the questioned statute (viz., defining the powers of the school board) in the context of other, similar laws on the same subject." Downy v. Burningham, ____ F.Supp. ____ (Docket No., C83-1004J, U.S.C.D., D. Utah 1983). To accept the proposition that the Board has plenary power, this Court must conclude that

the Legislature did a senseless, meaningless thing by the foregoing enumeration of specific powers if subdivision (14) confers plenary authority upon the Board.

C. "Catchall" Powers must be "Necessary".

The catchall powers conferred by subdivision (14) is further qualified by the requirement that whatever is done be "necessary" for the maintenance, prosperity and success of the schools. Accepted maxims of construction require that a considered use of the term "necessary" be given its ordinary and accepted meaning. It cannot be construed as a grant of discretionary authority to do anything though desirable as a societal end, unless necessary to the maintenance of the schools.

Significantly, there is nothing in the record to establish any such determination, nor could there be. The statute requires more than an opinion that the Order is favored by some. Even if one accepts that a racial, academic or socio-economic mix is desirable, it is not necessary -- certainly not to the maintenance of the schools. Both District Assistant Superintendent John Keegan and Board Vice-President Steve Boyden categorically testified that the Order was not "necessary" to any purpose specified at Utah Code Ann. Section 53-6-20. (See pages 617-627, 766.)

The plain meaning of the terms employed by the Legislature thus prohibit the Order.

**D. Parental Rights to Make Reasonable
Selections of Schools their Children
will Attend are Preserved by Utah Law.**

The proposition that the generality of subdivision (14) vests the Board with sweeping powers over student assignments, including assignment for purposes unrelated to the specific powers enumerated in the thirteen preceding subdivisions, ignores the fundamental rights of parents to make reasonable choices in the education of their children in the public school system. Meyer v. Nebraska, supra, recognized that:

The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted. The Ordinance of 1787 declares: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws. 262 U.S. 401. (Emphasis added.)

See also, Wisconsin v. Yoder, supra; Pierce v. Society of Sisters, supra.

In construing the intention of the Legislature which adopted Utah Code Ann. Section 53-6-20, and whether subdivision (14) invests the Board with plenary authority over student assignments, it is important to consider that numerous provisions in Utah law confer rights on the parent respecting

the choice of what school a child shall attend. The parent has the right to select a private school rather than a public one. Utah Code Ann. Section 53-24-1. There is a right to attend school in another district in the State, Utah Code Ann. Section 53-4-16, or to attend school outside of the state, and in either instance and have the district of his or her residence pay the necessary tuition, Utah Code Ann. Section 53-4-17. A child residing outside the state may elect to attend school within a state district, Utah Code Ann. Section 53-1-18(1). A school board could adopt rules, including rules restricting the rights of the parent, but only if "necessary" to the control and management of the schools. Utah Code Ann. Section 53-6-20(13).

Further, it is obvious from other provisions that the Legislature intended that a student have the right to attend a school close to his place of residence. Each county must include at least one school district, Utah Code Ann. Section 53-4-1, and cities of the first and second class may constitute separate school districts. Ibid. Clearly, the wisdom of those provisions is, as Kowallis declared, that a student be afforded a school close to his or her residence. That intent is also made clear by the provision excusing a minor from attending a school located more than 2.5 miles from his residence, at least if free transportation is not provided. Utah Code Ann. Section 53-24-1.2(b)(iv).

The Utah court in fact held, in Kowallis, supra, that children have the right, subject only to limitations that are reasonable and necessary, to attend the school that is convenient to them:

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. 77 P.2d 351. (Emphasis added.)

In so holding, Kowallis confirmed a school board's right to charge tuition to a student from a neighboring district, because a convenient school was provided near the child's residence. It would be incongruous, to be sure, if this Court now denied the right to attend the convenient school as well.

We note that the trial court concluded that "necessary" simply means whatever the Board concludes is necessary. (See pages 1053, 1054.) That is another way of saying that if a majority of the Board sincerely believes that what they are doing is necessary, then what they do does not have to pass statutory or constitutional muster. History is replete with examples of officials who sincerely believed that what they were doing was necessary for somebody else, but history also proves that they were sincerely wrong.

Any high school students in the District, and particularly those in the Euclid area, who are forced to go across town to the high school not closest to them and not of

their choosing, and who were selected for such treatment for the reasons admitted by the Board, are certainly among those disenfranchised students that Article I, section 7 and Article X, section 8 of the Utah Constitution and section 56-6-20 are designed to protect from an illegal rule adopted by a Utah school board. The decision of this Court in Berry v. Beech Aircraft, 717 P.2d 670 (Utah 1985) makes it clear that the Board does not have plenary power to do whatever a majority of the Board decides is desirable, regardless of how well intentioned the majority may be. Construing the Open Courts clause of the Utah Constitution, and its limitations on the power of the Legislature, the Court held as follows:

Necessarily, the Legislature has great latitude in defining, changing, and modernizing the law, and in doing so may create new rules of law and abrogate old ones. Nevertheless, the basic purpose of Article I, section 11 is to impose some limitation on that power for the benefit of those persons who are injured in their persons, property, or reputations since they are generally isolated in society, belong to no identifiable group, and rarely are able to rally the political process to their aid.

What was said in Beech about the limitations on the power of the Legislature, is certainly applicable to the power of the Board, particularly given the limitations expressed by the word "necessary" contained in the Board's enabling statute.

E. The Order Defies Logic.

This Court should also consider the paradox presented by the Order when compared with the statutory scheme described above. The Order creates the anomolous situation where a student living, for example, in Davis County could choose to attend West High in the District on a space available basis at the expense of the Davis County District, but a student living in the Euclid area within walking distance of West High could not attend West High because of such student's racial, academic or socio-economic status. The Order reaches just such an incredible result. Likewise, a resident of the Nevada side of Wendover has the right to attend any school in Tooele County, subject only to space availability, but based upon the rationale of the Order, a resident of the Utah side of the same city would have no corresponding right to choose to attend the most convenient school in Tooele County.

We can agree that the Legislature intended that school boards have broad discretion, but not that they run roughshod over the reasonable choices of the parent in educating his or her child. The powers of the Board, we submit, are limited for the purpose of preserving the correlative rights of the parent, and the scope of the limitation is indicated by the powers enumerated at Utah Code Ann. Section 53-6-20. Those powers are largely concerned with the establishment of physical facilities and the conduct of educational pursuits within them. The catchall provision of subdivision (14) plainly says that the

Board may do anything else "necessary" to the enumerated powers, but nothing in that enumeration confers, or implies, the power to determine what racial, academic, or socio-economic mix is desirable in the District, nor is such a determination "necessary," in any sense, to the enumerated powers.

F. The Order is an Arbitrary Abuse of the Board's Discretion.

For the foregoing reasons, the Complaint alleges that the Order is arbitrary and capricious, and an abuse of discretion. (See paragraph 43 on page 16.)

Webster defines "arbitrary" as being "based on one's preference, motive or whim." A "capricious" decision is one that is "changeable, fickle, fanciful." Plaintiffs contend that, in the context of this case, any decision by the Board is also arbitrary and capricious if not based upon the criterion prescribed by Utah Code Ann. Section 53-6-20. Both terms apply to the Order which was not the result of natural geographical divisions, neighborhood alignments, physical barriers such as major roadways or commercial districts, political subdivisions or other features that would be considered fair and natural.

The "Gerrymandered" scheme of transporting pockets of students across the natural divisions to schools not convenient is appropriately described as arbitrary. The low income and minority students south and west of the I-15/I-80 interchange (many of whom are within walking distance of West High) are

removed from West High against their will and selected for transportation to East High -- not because West High lacks facilities for them or because East High is a better school for them, and not because they will make East High a better school, but to achieve a racial, academic and socio-economic mix fitting notions of a majority on the Board about how society ought to be ordered. Students north and east of the 13th East/17th South junction (some of whom are within four blocks of Highland High) are removed against their will from Highland High and assigned to East High -- not because Highland High lacks facilities for them or because East High is a better school for them, and not because they will improve East High, but to make room for others who will be arbitrarily transported even greater distances from other areas of the District. The Utah Legislature has neither directed nor authorized the Board to balance our public schools racially, academically or according to socio-economics.


This case is one of the Board assigning students for reasons not within its competence, as defined by Utah Code Ann. Section 53-6-20. Plaintiffs readily concede that the Board might make reasonable assignments, even mandatory ones, for reasons of space availability [subdivisions (2), (3), (4) and (13)], safety considerations [subdivision (9)], availability of funds [subdivision (10)], or because of personnel limitations [subdivisions (7) and (11)], or facilities [subdivisions (4)

and (5)]. It might do so, as well, for reasons dictated by natural barriers, or based upon constitutional considerations such as, e.g., segregation. However, if schools are to be manipulated for racial, academic achievement or socio-economic ends, the competence to do so still resides with the Legislature, unless and until it has delegated that authority to the school boards.

CONCLUSION

For the foregoing reasons, the Order offends provisions of the Utah Constitution and laws, the summary judgment in favor of the Board should be reversed and the case remanded to the District Court with instructions to enter summary judgment in favor of plaintiffs, including without limitation, directing notice to the Board of the particulars in which the Order violates the Utah Constitution and exceeds the powers of the Board as granted by the statutes of the State of Utah, and giving the Board a reasonable opportunity to rescind the Order and develop a voluntary plan consistent with Utah law.

RESPECTFULLY SUBMITTED this 14th day of June 1989.



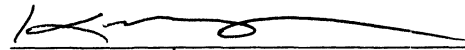
Kent B Linebaugh
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that four (4) true and correct copies of the foregoing Brief of Appellants was mailed, first-class postage prepaid, to:

M. Byron Fisher, Esq. and
John E.S. Robson, Esq.
FABIAN & CLENDENIN
215 South State Street, Suite 1200
Salt Lake City, Utah 84111

this 14th day of June 1989.

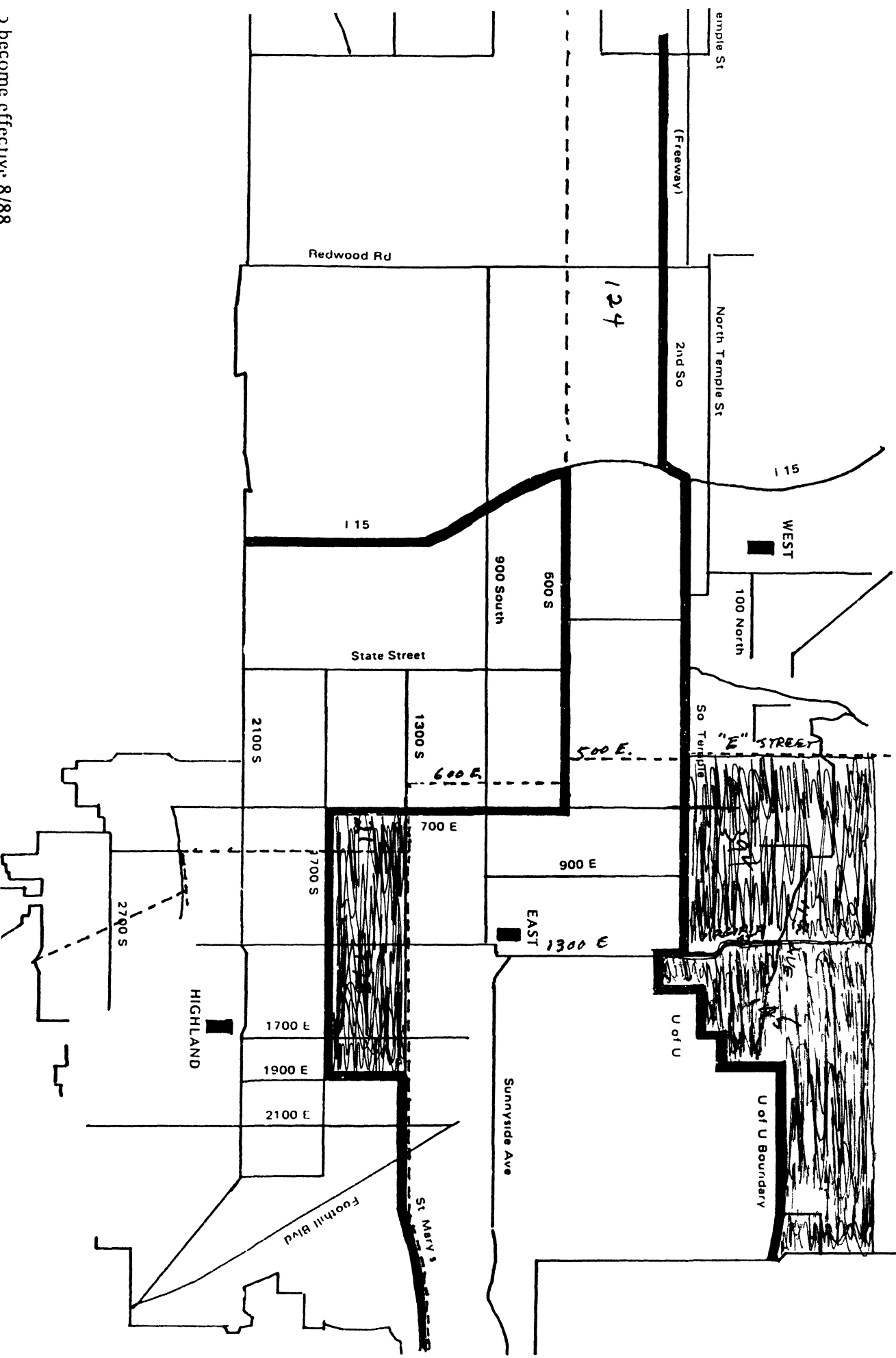

Kent B Linebaugh

KBLP655

ADDENDUM

Beck St

MAP OF HIGH SCHOOL BOUNDARIES*



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.

By Scott Daniels
SCOTT DANIELS
DISTRICT COURT JUDGE

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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