

EDU #5702-88 and #4064-89 (consolidated)
SB # 47-89
SB # 78-89
C # 214-92
SB # 48-92

BOARD OF EDUCATION OF THE BOROUGH :
OF MERCHANTVILLE, CAMDEN COUNTY, :

PETITIONER-APPELLANT, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP :
OF PENNSAUKEN, CAMDEN COUNTY, :

RESPONDENT-CROSS/PETITIONER- :
CROSS/APPELLANT, :

STATE BOARD OF EDUCATION
DECISION

V. :

BOARD OF EDUCATION OF THE BOROUGH :
OF HADDONFIELD, CAMDEN COUNTY, :

CROSS/RESPONDENT-RESPONDENT. :

Decision on motion by the Commissioner of Education, July 10, 1989

Decision on motion by the Commissioner of Education, October 6, 1989

Decision on motion by the Commissioner of Education, November 13, 1989

Decision on motion by the State Board of Education, January 3, 1990

Decision on motion by the State Board of Education, September 5, 1990

Decision on motion by the State Board of Education, November 19, 1990

Decided by the Acting Commissioner of Education, September 16, 1992

Decision by the State Board of Education, January 8, 1997

For the Petitioner-Appellant, Kalac, Newman, Lavendar & Campbell (Peter B. Kalac, Esq., of Counsel)

For the Respondent-Cross/Petitioner-Cross/Appellant, Hill Wallack (Joseph J. Finley, Esq., of Counsel)

For the Cross/Respondent-Respondent, Kenney, Kenney, Gross & McDonough (Malachi J. Kenney, Esq., of Counsel)

This matter involves an appeal and a cross-appeal from a decision rendered by the Acting Commissioner of Education, which denied both the application made by the Board of Education of the Borough of Merchantville (hereinafter "Merchantville") pursuant to N.J.S.A. 18A:38-13 to terminate its sending-receiving relationship with the Board of Education of the Township of Pennsauken (hereinafter "Pennsauken") so as to establish a new relationship with the Board of Education of the Borough of Haddonfield (hereinafter "Haddonfield") and Pennsauken's cross-petition to enjoin Haddonfield from accepting students from Merchantville or Pennsauken on a tuition basis. The case calls upon us to determine whether this agency may approve such a change in designation pursuant to N.J.S.A. 18A:38-13 where the statistical change in the racial composition of the current receiver may not be statistically significant, but under circumstances in which the current receiver is integrated, the proposed receiver is almost exclusively white and the sending district is predominantly white. Such determination requires that we further explore the relationship between racial balance and educational quality and our obligations in this context to effectuate our State's policies.

The case was initiated on July 6, 1988, when the Merchantville Board of Education petitioned the Commissioner pursuant to N.J.S.A. 18A:38-13, seeking to terminate its sending-receiving relationship with the Pennsauken Board of Education and to establish a new relationship with Haddonfield. This represented Merchantville's second attempt to terminate the relationship it had entered in 1972-73 when it closed its own high school.

On July 25, 1988, Pennsauken filed its answer to this petition and the matter was transmitted to the Office of Administrative Law. Subsequent to the prehearing conference in October, Pennsauken filed a cross-petition against Haddonfield, seeking to enjoin it from accepting tuition students from Merchantville. On February 3, 1989, Haddonfield became a party respondent and filed its answer to Pennsauken's cross-petition on May 17, 1989. On July 26, 1989, the matters were consolidated.

The hearing in the matter commenced in November 1990 after extensive discovery, the issuance of several prehearing rulings, and an interlocutory appeal to the State Board of Education which was decided on September 5, 1990.¹ The hearing concluded in October 1991 after twenty-two days of testimony. However, because of additional motions filed by the parties, the record before the Administrative Law Judge was not closed until March 16, 1992.

On May 1, 1992, the Administrative Law Judge ("ALJ") issued his initial decision, finding that there would not be any significant negative impact on the quality of

education or the racial composition of the pupil populations of the districts involved and that there were no financial or educational implications precluding severance of Merchantville's relationship with Pennsauken. He therefore concluded that, under the terms of N.J.S.A. 18A:38-13, the Commissioner should approve severance of the relationship. The ALJ also found that the effect of Haddonfield's tuition policy was only remotely related to the enrollment at Pennsauken High School, and therefore granted Haddonfield's motion to dismiss Pennsauken's cross-petition against it.

On September 16, 1992, Acting Commissioner John Woodbury rendered his decision, rejecting that portion of the ALJ's decision which found that there would not be a significant negative impact on the racial composition of the pupil population at Pennsauken High if Merchantville were permitted to terminate its relationship with Pennsauken. Rather, the Acting Commissioner concluded that severance of the relationship would result in advancing the deterioration in the balance of racial and national origin groupings represented at Pennsauken High. He therefore denied Merchantville's request to terminate the relationship. However, the Acting Commissioner concurred with the ALJ's determination to deny Pennsauken's cross-motion to enjoin Haddonfield's tuition program.

Both Merchantville and Pennsauken appealed to the State Board from the Acting Commissioner's decision.

II

¹ In that decision, the State Board delineated the burden of production under N.J.S.A. 18A:28-13.

When Merchantville initiated this litigation, questions relating to racial balance did not appear to be central. In its petition, Merchantville asserted that it was seeking a change in designation because Pennsauken was overcrowded and Haddonfield's more academically-oriented program represented a more compatible secondary school experience for its students than did Pennsauken's educational program. In conformance with N.J.S.A. 18A:38-13, Merchantville asserted that the change it sought would not have any substantial negative impact on the educational program, racial balance or finances of the affected districts.

At hearing, Pennsauken contested each of Merchantville's claims, including the assertion that Pennsauken was overcrowded. Moreover, as reflected by the record, the focus narrowed during the course of the proceedings before the ALJ and review of the matter by the Acting Commissioner.² As a result, the determinations challenged by the appeals before the State Board are those relating to racial balance.

The ALJ focused solely on the statistical impact of Merchantville's withdrawal on the racial composition of Pennsauken High School's student population when he assessed whether severance would have a substantial negative impact. From this perspective, he determined that there would not be any substantial negative impact on

² The only mention of racial balance in the original feasibility study prepared by Guidelines, Inc. was its report of the number of minority students at Pennsauken High School and the statistical change if Merchantville's students had been withdrawn in 1987-88. The study then stated without any discussion that a phased withdrawal in 1989-90 would not have a substantial impact on "the racial enrollment of the Pennsauken District." Exhibit P-13a, in evidence, at 54-55. Merchantville subsequently submitted a study dated January 2, 1990, prepared by Emanuel Averbach, Ph.D., on the "Dynamics of Current Racial/Ethnic Enrollment Changes in Pennsauken Schools that Bear on Deciding a Petition for the Withdrawal of Merchantville Students from Pennsauken High School." Exhibit P-33, in evidence. Together with two supplemental reports of similar title dated May 2, 1991 and September 14, 1991, exhibits P-34 and P-35, in evidence, these documents posit that major changes reducing the number of whites at Pennsauken High and increasing the number of minorities had been in progress since 1985 and that "the growing racial/ethnic imbalance is of significance now." Averbach report of January 2, 1990, at 7.

the racial composition because severance would result in only a 1.7% decrease in Pennsauken High School's white population.

Based on the same facts, and relying heavily on the State Board and Appellate Division decisions in Board of Educ. of Englewood Cliffs v. Board of Educ. of Englewood, decided by the State Board of Education, April 4, 1990, aff'd, 257 N.J. Super. 413 (App. Div. 1992), aff'd, 132 N.J. 327 (1993), cert. denied, 510 U.S. 991, 114 S.Ct. 547, 126 L.Ed.2d 449 (1993), the Acting Commissioner concluded that although the decrease in the white population at Pennsauken might not be statistically significant, withdrawal of the Merchantville students would "result in advancing the deterioration in the balance of racial and national origin groupings represented in Pennsauken High School's community." Commissioner's Decision, slip op. at 111. He therefore rejected the ALJ's determination and denied severance.

On appeal to the State Board, Merchantville stresses that it is in full agreement with New Jersey's policy against racial segregation in our public schools. However, it is Merchantville's current position that because Pennsauken High School was not already racially segregated during the period relevant to this litigation and would not be segregated if all of Merchantville's students were withdrawn from Pennsauken, race is not relevant to this case. See supra note 2.

In response to Merchantville's appeal, Pennsauken argues that the Acting Commissioner properly determined that withdrawal of the Merchantville students would result in a substantial negative racial impact on Pennsauken High, and that legal precedents such as Englewood mandate that Merchantville's petition be denied. Pennsauken, however, contends that the Acting Commissioner erred in adopting the

ALJ's determination that there would not be any substantial negative educational impact from severance, arguing in this respect that educational impact is interwoven with racial impact.

In addition, by its cross-appeal, Pennsauken seeks reversal of the Acting Commissioner's determination to deny its cross-petition to enjoin Haddonfield's tuition policy. Pennsauken claims that Haddonfield's policy undermines racial integration in the public schools by siphoning off Merchantville students from Pennsauken, and that Haddonfield should therefore be enjoined from accepting any Merchantville or Pennsauken students on a tuition basis.

III

After exhaustive review, we reject Merchantville's view that questions relating to racial balance are not relevant to this matter. To the contrary, resolution of those questions are pivotal in assessing the educational implications of approving the change of designation which Merchantville is seeking.³

Initially, we, like the Acting Commissioner, reject the view that a statistical change in the racial composition of the current receiver is alone dispositive of whether a significant negative impact will result from severance. Englewood, supra. Rather, as mandated by the statute, it is imperative that the significance of the statistical change in a particular case be evaluated under "all of the circumstances." Id.

The statistical change in the proportion of white students attending Pennsauken High School in 1988 would have been almost identical to that which would have

resulted in Englewood had severance been granted in that case. Further, Merchantville, like Englewood Cliffs, had a largely white student population, and, like Tenafly, Haddonfield was more focused on college preparation and was almost exclusively white.

Hence, it was appropriate for the Acting Commissioner to use the decisions in Englewood as his point of departure. However, closer examination of the factual circumstances in this case reveals that they are markedly different from those presented to the State Board in the Englewood matter. Most apparent is that, in contrast to Englewood's Dwight Morrow High School, Pennsauken High was only 25% minority at the time of hearing.⁴ Accordingly, in contrast to Englewood, this case does not present us with a situation where there is already a concentration of minority students that is unacceptable from either a legal or policy perspective. Nor is there any indication of conduct by any of the districts involved in this case that is inconsistent with the legal relationship between Merchantville and Pennsauken. Finally, in stark contrast to Englewood, nothing indicates that there has already been a loss of Merchantville students to Haddonfield because of its tuition policy which has affected the racial balance at Pennsauken.

However, the differences between the circumstances in Englewood and those in this situation do not mandate the conclusion that severance of the sending-receiving relationship between Merchantville and Pennsauken is appropriate in this case. To the contrary, for the reasons that follow, it is our conclusion that severance should not be granted.

³ See supra note 2.

N.J.S.A. 18A:38-11 mandates that all school districts which, like Merchantville, lack high school facilities must designate a high school for the attendance of its pupils.

N.J.S.A. 18A:38-13 then provides in pertinent part that:

No such designation of a high school...shall be changed or withdrawn...except upon application made to and approved by the commissioner. Prior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study, considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by the pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts. The commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts. The commissioner shall grant the requested change in designation...if no substantial negative impact will result therefrom.

The central question in this appeal is whether the change sought by Merchantville will result in a substantial negative impact on the districts involved. This inquiry requires that the Commissioner consider a series of factors which must be included in a feasibility study submitted by the district seeking the change, and, as embodied in the terms of the statute, further requires that the Commissioner evaluate the effect of a requested change in receiving districts on the children of each district concerned. Hence, while N.J.S.A. 18A:38-13 is not a traditional balancing statute, Englewood, supra, at 461-62, the determination in this case cannot be made solely by evaluating the impact of severance on Pennsauken without regard to the other districts involved.

⁴ In this decision, "minority" includes Hispanic and Asian, as well as African-American.

When Merchantville initiated the present litigation, it specified that it was seeking to terminate its relationship with Pennsauken so as to enter a new relationship with Haddonfield. Accordingly, the feasibility study which it submitted in support of its petition centered on comparison of Haddonfield to Pennsauken. Exhibits P-13a and P-13b, in evidence. In point of fact, as the documentary evidence Merchantville submitted at hearing amply illustrates, its application for severance was predicated on establishing a new relationship with Haddonfield, exhibits P-1 through P-12, in evidence, and there is nothing in the record to suggest that it considered any other alternative during the course of the litigation.

Haddonfield, however, has indicated that it is no longer willing to commit itself to entering into a sending-receiving relationship with Merchantville without obtaining a new feasibility study.⁵ Hence, at this point, Merchantville's application does not meet the statutory prerequisites for consideration and on these grounds alone we would dismiss the matter.

In this respect, we stress that a failure by the petitioning district to designate an alternative to its present receiving district makes it impossible to apply the statutory standard. Furthermore, as expressed by the State Board in our decision in Board of

⁵ In correspondence dated April 11, 1997, Haddonfield advised us that it was reserving the right to conduct a new feasibility study before making a final decision on entering into a sending-receiving relationship with Merchantville and informed us that we should not assume that severance of Merchantville's relationship with Pennsauken would automatically result in the establishment of a relationship between Merchantville and Haddonfield. In reaction, Pennsauken filed a motion with the State Board seeking dismissal of Merchantville's petition or, in the alternative, adjournment of the matter until Haddonfield completed a new feasibility study and declared whether it would accept Merchantville's students. Merchantville then moved for bifurcation of the matter for the purpose of obtaining a decision from the State Board as to the impact that Merchantville's withdrawal from Pennsauken would have on the Merchantville and Pennsauken school districts.

Education of the City of Absecon v. Board of Education of the City of Pleasantville,

decided by the State Board of Education, October 5, 1988:

...at minimum, it is the obligation of the State Board of Education to insure that the students of the sending district will have an educational alternative, and to permit withdrawal in the absence of a demonstrated alternative would contravene that responsibility. Accordingly, the State Board of Education will not direct termination without knowing where the senders' children are to be educated.

Absecon, supra, slip op. at 2.

Nonetheless, because the record in this matter is such as to permit us to decide the appeal and cross-appeal now before us on their merits, and in view of the significance of the questions involved, as well as the resources which all three parties have expended in litigating the matter, we have reviewed and decided the merits of the matter as well.

The starting point for any substantive discussion of issues such as those raised by Merchantville's appeal is our State's fundamental policy in favor of equal educational opportunity. Englewood, supra, at 452. Integrated schools are an essential part of such opportunity, and, for this reason, the New Jersey Supreme Court has repeatedly stressed the importance of eliminating segregation in our public schools. See, e.g., Jenkins v. Tp. of Morris School District and Bd. of Educ., 58 N.J. 483 (1971); Booker v. Bd. of Educ. of Plainfield, 45 N.J. 161 (1965).

As has been long recognized by the New Jersey Supreme Court, segregation, whether de jure or de facto in origin, has an undesirable effect upon attitudes related to successful learning. E.g., Booker, supra, at 178. As expressed by the New Jersey State Board of Education:

Educational considerations are primary in eliminating school segregation. The elimination of racial imbalance is not to be sought as an end in itself but because such imbalance stands as a deterrent and handicap to the improvement of education for all.

New Jersey State Board of Education, A Statement of Educational Policy, November 5, 1969.

Therefore, given the interrelationship between racial balance and educational quality, the Commissioner has been vested with broad power to deal with the subject.

As expressed by the New Jersey Supreme Court:

In a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority....

Booker, supra, at 170-171.

It is axiomatic that our responsibility to insure equal educational opportunity is not limited to those situations where a significant racial imbalance has already developed.⁶ To the contrary, given the substantial negative educational implications of

⁶ We note that Merchantville continues to argue in its exceptions to our Legal Committee's report that this case does not involve any issues of "segregation." We also note that such position does not appear to be consistent with that embodied in the Averbach reports submitted by Merchantville during the litigation. See supra note 2. Those reports argue that "radical" changes in the racial/ethnic composition of Pennsauken's pupil population have been "in process" since 1985 leading to an "evolving, massive racial/ethnic imbalance." Averbach report, January 2, 1990. Hence, these reports argue for severance, not because racial balance is irrelevant to this case, but because Merchantville's predominantly white students would not be sufficient in number to "dilute a continuing influx" of minority pupils to Pennsauken. Id.

permitting our State's student populations to be separated by race and because of the difficulties involved in correcting such a situation once it has developed, it would be counterproductive to allow an existing sending-receiving relationship to be disturbed where the change may contribute to the development of racial imbalance.

Furthermore, as we stressed in our decision in Englewood, supra, the educational benefits of a heterogeneous student population accrue not only to minority students, but to all children who attend school in an integrated educational environment. See Deepening Segregation in American Public Schools, Harvard Project on School Desegregation (April 5, 1997).⁷

The record shows that Pennsauken High School offers an integrated educational environment. At hearing, it was projected that Pennsauken would remain integrated with or without severance, but that the white/minority ratio would decline from 58% white and 41.9% minority in 1992 without severance to 56.3% white and 43.4% minority if severance was approved. Exhibit P-32, in evidence.

By decision of January 8, 1996, the State Board directed supplementation of the record with: 1) Current numerical data showing the composition by race and national origin of the student populations of Pennsauken, Merchantville and Haddonfield, 2) Current numerical data showing the composition by race and national origin of the total number of high school age students from Merchantville and of those who attend Pennsauken High, 3) Data from the 1990 census showing by race and national origin

⁷ We note that if existing trends continue, whites will become one of several minorities in the schools, as well as in society. Deepening Segregation in American Public Schools, ibid. As the American population changes, the skills that develop through exposure and interaction with other minorities will become even more critical.

the composition of both the general populations and school age populations of Pennsauken, Merchantville and Haddonfield.

The parties submitted the updated information requested by the State Board. The updated information shows that as of October 1996, Pennsauken High School enrolled a total of 1,548 students in grades 9-12, excluding classified special education students. Of these, 53.9% (835) were white, 30.36% (470) were African-American, 11.8% (183) were Hispanic, and 3.875% (60) were from other groups, including Asian. From the 1990 census data, Pennsauken's total school age population (6,397) was 66.5% white, 18.8% African-American, 7.97% Hispanic, and 6.7% other, including Asian. In contrast, Haddonfield's total school age population (1,907) was comprised of 96.3% white, 1.3% African-American, 0.9% Hispanic, and 1.45% other, including Asian. Merchantville's school age population (696) was 92.8% white, 2.2% African-American, 2.7% Hispanic, and 2.3% other, including Asian.

Although there is no one statistical balance which is ideal from an educational perspective, a truly integrated setting offers the best opportunity for meaningful exposure of different races in the educational context.⁸ Again, Pennsauken High School offers such a setting.⁹

⁸ We note that there is a primary distinction between formal desegregation and actual integration. Desegregation refers to the removal of legal and social practices that separate whites and minorities and to the physical presence of both in the same schools, while integration occurs only if there develops joint participation and mutual acceptance in all activities normally associated with school attendance. See A Common Destiny: Blacks and American Society, National Research Council (National Academy Press, 1989).

⁹ In this respect, we reject the characterization made in the Averbach reports that Pennsauken is a district which is significantly racially/ethnically imbalanced.

In contrast to Haddonfield High, which is virtually all white, Pennsauken affords Merchantville's high school students the educational opportunity to learn to live with and respect people from a variety of racial and ethnic backgrounds by attending school with such individuals. While alternative methods for achieving this educational objective must be instituted in school districts with homogeneous student populations, there is no substitute for the educational benefits afforded by the opportunities for interaction both in and out of the classroom where the student population is diverse. Severing Merchantville's relationship with Pennsauken and establishing a new one with Haddonfield would deprive Merchantville's students of these benefits. See, e.g., Englewood Cliffs v. Englewood, 257 N.J. Super. at 461, 464-65. We believe that this result would contradict our long-standing policy favoring integrated educational opportunities and would constitute a substantial negative impact on both Merchantville and Pennsauken.

In this respect, we cannot ignore that some New Jersey school districts have become largely minority as the white population shifted to the suburbs. Even though it may not have been intended, the end result has been the segregation of minorities in the larger urban districts. See Deepening Segregation in American Public Schools, ibid.¹⁰ We can no longer ignore the educational implications that follow from the fact that while New Jersey never had a "dual" school system sanctioned by law, our public

¹⁰ In New Jersey, 53.7% of African-American students attend schools which are 90-100% minority. Deepening Segregation in American Public Schools, ibid. at 28.

school system is now one of the most segregated in the nation.¹¹ Id. This fact makes it all the more important for us to sustain our efforts to effectuate our State's policy by taking such measures as are necessary to maintain diversity among our student populations in order to avoid segregation.

Again, this case does not require us to remedy racial imbalance, but asks that we maintain the existing level of diversity. While denying severance of Merchantville's sending-receiving relationship with Pennsauken cannot guarantee that racial imbalance will not develop in the future, it eliminates the possibility that racial imbalance in these school districts will be encouraged by any action we have taken.

In this respect, we recognize that it is difficult to establish the exact point at which the percentage of minority students at a given school is so sharply out of balance with the composition of the society in which those students must function so as to allow that school to be characterized as a minority school and to carry the stigma attached thereto. Englewood, supra, State Board's decision, slip op. at 36. See Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). We also recognize that such point may not be reached until the student body is more than 50% minority. Booker, supra, at 180. We stress, however, that it is generally reached well before the student body is 100% minority. Id.

As the record in this case shows, while the proportion of minority students at Pennsauken High has increased in recent years, its student population continues to be diverse. While severance would not change the diverse character of Pennsauken

¹¹ The four states with the highest levels of segregation are Illinois, Michigan, New York and New Jersey. Id. Moreover, the proportion of African-American students in New Jersey who attend largely minority schools has increased since 1980. Id.

High School, it would result in a slight increase in the proportion of the minority population at Pennsauken High, which currently constitutes approximately 50% of the student population. In addition to the educational benefits which will accrue to Merchantville's students, their continued presence will help maintain the stability of the sensitive racial balance of the pupil population at Pennsauken High, and thereby avoid the future necessity for undertaking the much more difficult task of correcting an imbalance after it has developed.

Therefore, for the reasons stated in this opinion, the State Board of Education denies Merchantville's petition to sever its sending-receiving relationship with Haddonfield. However, in that Pennsauken has not established that Haddonfield's tuition policy has in fact had a negative impact on the composition of its student population, we deny the relief sought by Pennsauken's cross-appeal.

Attorney exceptions are noted.

January 7, 1998

Date of mailing _____