10-1975

Pasadena City Board of Education v. Spangler

Lewis F. Powell Jr.

10-20-75 CS/gg

Kepley adds nothing
Carl / Dissent

DISCUSS

Pasadena school case.
The DC in 1970 ordered that no school should have a majority of black students (what about Washington D.C., Detroit, etc?
There were 35 schools. The record was as follows:

1970 - Full compliance - all 35
1971 - One school not in compliance.
1972 - Four " 5 " " "
1973 - Five " " "

One School Bd's motion in 1974 for relief the DC, with due humility, responded

PRELIMINARY MEMORANDUM

October 31, 1975 Conference — never in "my life time". Cert to CA 9 (Ely; Chambers - concurring; Wallace - dissenting)

List 3, Sheet 1

No. 75-164

PASADENA CITY BD. OF EDUC. — Pet. relies on Swann's language that once desegregation has been accomplished, a S/Bd is free to run schools absent new de jure violations. — Federal/Civil

v.

SPANGLER — Timely

The United States is also a respondent.

1. This is a school desegregation case. Petitioner school board has been under the equitable jurisdiction of the DC since the DC entered a 1970 desegregation decree. In the present case the school board moved for relief from the decree on the ground that desegregation had been accomplished. The relief was refused.

(Please see back)
Carl

2. Facts: Private respondents (school children and their parents) brought an action in 1968 seeking injunctive relief from alleged unconstitutional segregation of the Pasadena school system. (The school district is a suburban one near Los Angeles.) The United States intervened as a plaintiff. The action resulted in a finding that the school board had practiced de jure segregation.[1] The DC (Real) entered a decree in 1970 enjoining racial discrimination in operation of the school district. The decree further required that the school board draft a plan for school attendance whereby there would "be no school in the District, elementary or junior high or senior high school, with a majority of any minority students." (This was conceived of as an ongoing requirement.) The "old" school board (see infra) did not appeal this decree and submitted a plan.[2]

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1. The evidence establishing the segregation is summarized in CA 9's opinion (Petition at A3) and in the SG's memorandum in opposition (Response at 2, n. 1.)

2. Under the plan the school district was divided into four ethnically balanced areas. The schools were organized to run from K-3 and 4-6 at the elementary level , 7-8 at the junior high level, and 9-12 at the senior high level. Assignments were made to achieve ethnic balance. Elementary students walked to neighborhood schools for part of their education and were transported "as a neighborhood" to other schools for the remainder. Apparently busing was used more comprehensively on the high school level. (Petition at A4-A5.)

The school district opened its doors for the 1970-71 year in compliance with the "no majority of any minority" requirement. At that time there were 18,000 white, 9,000 black, and 4,000 "other" children enrolled. By 1974 the school population had changed to 11,000 white, 10,000 black, and 5,000 "other." The school district gradually fell out of compliance with the "no majority" requirement:

1970: full compliance (35 schools)
1971: one noncomplying school (51.9%)
1972: four noncomplying schools (50.1% to 53.9%)
1973: five noncomplying schools (51.3% to 60.2%)

In the meantime the composition of the school board also changed. The board that had chosen not to appeal the 1970 decree was replaced with a board that ran on a "no busing" platform.

In 1973 the new board made a motion in DC seeking: (1) relief from the 1970 decree requiring desegregation and approving the old board's plan for desegregation; (2) dissolution of the "no majority" aspect of the injunction; (3) termination of the DC's continuing jurisdiction over the school district, or, alternatively, (4) permission to modify the "Pasadena Plan" [old plan] by substituting an "Alternative Plan." [3] After evidentiary

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3. The "old plan" is discussed in note 2 supra. The Alternative Plan would have differed primarily by reinstituting K-6 primary schools and cutting down busing at that level. Any student would be able to attend any school of his or her choice in the "ethnically-balanced" attendance area in which the student resided. Each primary school would also have a "mini-school" with a special curriculum which would be advertised with an eye toward attracting students of all races. If a school were racially imbalanced through the student choices, that school would be "paired" with another school and the students from the "paired schools" would attend "shared experiences." (See Petn at A34. See also the Appendix to the DC order.)

hearings the DC denied the relief; CA 9 affirmed.

3. Opinions Below:

(a) District Court (Appended at end of this memo.) The DC order is rather unclear. Most of the opinion is devoted to discussion of the request to allow the Alternative Plan. Judge Real began by noting the opposition that the old Plan had encountered almost from the beginning, specifically the "no busing" plank of the present school board. He also cited the violations of the "no majority" requirements. (This despite the stipulation between the parties that the variances from the "no majority" requirement were not "violations." (Petn. at A 32, n. 4.)) The significance of these "findings" is not made clear. The court then turned to the "evidence" offered by petitioner in support of the Alternative Plan to show "changed circumstances." This "evidence" consisted of attempts to prove that the old plan (1) was an educational failure and (2) was causing "white flight." The court found this evidence insufficient to allow substitution of the Alternative Plan. There was contradictory evidence on the effectiveness of the old plan and the court discounted petitioner's adverse evidence because the opposition to the old plan might have deprived it of educational value it would have had if unopposed The court also noted that there was no evidence establishing a link between the old plan and the decrease in white enrollment and that the decrease in white enrollment paralleled a general California trend of white egress. (See petition at A 5.) Finally, DJ Real noted that the Alternative Plan had "freedom of

choice" elements. He found that plans with a "Freedom of Choice" element had previously been unsuccessful in Pasadena and elsewhere in California. And he felt that "realism" suggested they would fail again. He felt such plans bore a heavy burden of justification. In a crucial passage he noted:

> "Before any Court can stamp its imprimatur to a proposed 'freedom of choice' plan of desegregation - or of continuing desegregation - it must be satisfied that freedom of choice is a viable alternative to a plan which can guarantee that no school in a once- segregated [footnote 10] school district shall be permitted to have an enrollment with a majority of any minority. [footnote 11]."

But for how long?

Footnote 10, in essence, said there is "in logic, no distinction" between de jure and de facto segregation. Footnote 11 noted that there were "conceivable circumstances" in which a "no-majority" mandate could not be met. Obviously

With this potpourri of reasoning, substitution of the Alternative Plan was rejected. The Court then summarily refused to lift the injunction or terminate its jurisdiction, reasoning that such relief

> "would. . . leave the Board to its own devices concerning the [old plan] and its continued viability as a mandate for desegregation. To grant such relief would - in light of the avowed aims of four members of a five-member Board - surely be to sign the death warrant of the [old plan] and its objectives."

In his oral ruling, but not in the written opinion, DJ Real said that his decree meant "that at least during my lifetime" what there would be no majority of any minority in any school in

Pasadena." (Petition at A11.)

(b) CA 9: Petitioner appealed. Because of the school board's failure to appeal the 1970 decree, CA 9 considered that the issue before it was: "[W]hether the District Court erred in its determination, in denying appellants' 1974 motions, that events and circumstances occurring and existing in Pasadena since [1970] . . . do not justify relief . . . ." The panel produced three different opinions.

Judge Ely started from the premise that an injunction in a school case, like that in any other case, should be lifted when the "dangers . . . have become attenuated to a shadow." (United States v. Swift & Co., 286 U.S. 106, 114 (Cardozo, J.).) He also noted that the factual determinations involved in Judge Real's order were to be measured against the clearly erroneous standard. Applying these rules, Judge Ely could not fault the DJ's refusal to provide relief.

On the requested relief from the 1970 decree and its "no majority" provision, he concluded:

> "A careful review of the record reveals abundant evidence upon which the district judge . . . could rightly determine that the "dangers" which induced the original determination of constitutional infringement in Pasadena have not diminished sufficiently to require modification or dissolution of the original Order."

He relied on: (1) the variations from the "no majority" requirement in 1971-72-73, (2) the board's desire to substitute a "freedom of choice" plan which would very likely result in rapid

resegregation, (3) the antibusing platform of the new board, (4) and the findings that the educational effects of the new plan and the white egress did not compel a finding of "changed circumstances." He recognized the Swann language to the effect that racial mix cannot be required to be held constant in schools (402 U.S. at 31-32). But he held that the old de jure segregation had not been proved to have been stamped out. Thus the DC was entitled not to dissolve its injunction. However, he specifically disapproved the DC's "my lifetime" standard, noting that "annual readjustment is not necessary once a court determines that there has been a full and genuine implementation which has eliminated, with some anticipated permanence, racial discrimination from the system." (Petition at A 11.)

On the issue of the requested termination of the continuing jurisdiction of the DC, Judge Ely held that the DC was not clearly wrong in refusing termination because petitioner had not proved that segregation had been disestablished. He again relied upon the school board's failure to comply with the "no majority" requirement and its attempt to substitute the "freedom of choice" plan.

On the refusal to allow the substitution of the Alternative Plan, Judge Ely again upheld the DJ. He relied upon the generally recognized ineffectiveness of "freedom of choice" plans and ruled that the DC was entitled to find that substitution of such a plan would not meet the board's duty to "make every effort" to

desegregate. (Davis v. Bd. of School Comm'rs., 402 U.S. 33, 37.)

Judge Chambers concurred. He noted that he might not have allowed imposition of a continuing duty to reassign students had the original decree been appealed. But he agreed that in the procedural posture of the case the DC should be affirmed in refusing relief, provided that he would afford the relief "within a very short time after the school again gets in compliance." He refused to reach the merits of the alternative plan.

Judge Wallace dissented. He felt that there may have existed facts that would have entitled the DJ to refuse the relief requested because desegregation had not succeeded. But he felt that the DC had considered the wrong factors in coming to its decision. Specifically, he felt that in continuing the injunction and its jurisdiction the DC had relied on the "maintenance of an inflexible racial balance" and that Swann prohibits such reliance. He felt that the DC's approach in this respect stemmed from a disregard of the distinction between de jure and de facto segregation. He felt that if these misconceptions were removed, the DC might not have refused the relief. For if strict adherence to racial "balance" were not required, the "violations" of the 1970 decree diminished in significance. He also contended that by focusing merely on numbers, the DC failed to analyze whether racial imbalances that would occur under the Alternative Plan would stem from de jure or de facto sources.

He would have reversed and remanded for new findings on whether there were facts properly to be relied upon that indicated de jure segregation had not been stamped out. (The burden of proof would be on the school board.)

4. Contentions: The School Board contends:

(1) A judicial decree requiring a fixed racial balance for all schools is invalid (citing Swann). It argues that the treatment of the decree by the DC and CA 9 show that the "no majority" requirement was more than a "starting point" in achieving desegregation. The private respondents reply that the terms of the decree are not properly before this Court because of petitioner's failure to appeal the decree. The SG agrees. He notes further that any impermissible reliance on quotas by the DC has been purged by CA 9's repudiation of "such portions of the record as suggest the district judge interprets his injunction to require continuous annual redistricting."

(2) A requirement of annual redistricting is invalid (citing Swann). Petitioner argues that even if the "no majority" requirement was not invalid in the first place, any deviations from it in subsequent years were de facto in their causation. The private respondents and the SG agree that this issue is also not properly in the case.

(3) Its three years of compliance with desegregation entitle the school board to be relieved of the DC jurisdiction. The private respondents argue that the school board has not been in

compliance because of its foot-dragging. The SG notes that injunctions in desegregation cases are designed to (1) stop discrimination, (2) correct discrimination, and (3) protect against future discrimination. He says that non-termination was proper here both because of noncompliance and because of the board's desire to substitute a plan that would lead to resegregation.

(4) CA 9 erred in rejecting the Alternative Plan merely because it had an element of "freedom of choice" (citing Green for the proposition that such plans are not per se impermissible). The private respondents argue that this issue is not presented by this case because the old de jure segregation has not been stamped out. The SG argues that the DC was entitled to find and did find that under the circumstances of this case the plan was insufficient, citing the previous "freedom of choice" plans that had failed in Pasadena and elsewhere in California.

Petitioners also contend that this case is moot because the named plaintiffs have graduated and the action was never properly certified as a class action. (Bd. of School Commrs. of Indianapolis v. Jacobs, 420 U.S. 128 (1975).) The private respondents contend that this case differs from Jacobs and that in desegregation cases, mootness should be judged by different standards. It should be held that school cases fall into the "capable of repetition but evading review" exception or into the Gerstein v.

Pugh notion of a certain "constant existence of a class. . . suffering the deprivation." The private respondents and the SG in any case agree that since the U.S. is a party plaintiff the case is not moot.[4]

5. Discussion: The respondents appear correct in asserting that petitioner's issues (1) and (2) are not in the case, except insofar as Judge Wallace is correct that DJ Real is relying on impermissible factors in rejecting the requested relief.

The law governing a DC's lifting of a desegregation decree is unsettled and obviously important. The case squarely presents issues in the area. Unfortunately the opacity of the DC's opinion make it difficult to deal with these issues. Judge Wallace's position that the DC relied on improper factors has some force. But the DC opinion leaves unclear exactly how much force. For one thing, in talking about the requested termination of the injunction and judicial supervision (as opposed to substitution of the Alternative Plan), the DC noted that allowing relief would "sign the death warrant of the [old plan] and its objectives."

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4. Petitioner has another question presented - presented without further elaboration: "Does a decree imposing racial balance preclude a school board from acting to prevent the school system from becoming an all-minority school system?" The respondent helpfully replies: "Petitioners' question Four . . . . is sophistic phraseology to the nth degree."

The old plan was designed to stamp out de jure segregation, whatever remarks the DJ made about equating de jure and de facto segregation. [5] Further, in discussing the Alternative Plan the DC adverted to elements of de jure segregation - specifically, school board hostility to desegregation. It is thus not clear that the DC failed entirely to consider proper factors. Also, Judges Ely and Chambers are able to rationalize the DC opinion sufficiently to suggest that the same result could have been reached without undue reliance on quotas. And they put the DC on warning against such undue reliance in the future.

There are responses from Spangler and the SG.

There is a suggestion of mootness from petitioner and a response from Spangler. (See also the SG response at n. 4.)

October 21, 1975 Schenker CA 9 op in petn
DC op appended
(and at 375 F. Supp. 1304)

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5. Petitioner asserts that the original decree was aimed at de facto segregation. But see footnote 1 for citation to evidence of de jure segregation.

tion plan, evidence that proposed alternative plan would involve as much or more bussing as court-ordered plan and past history of other school districts in the state with "freedom of choice" plans, court-ordered desegregation plan would not be modified to provide for system of freedom of choice.

4. Injunction ⇐210

In view of opposition of four of five members of school board to court-ordered desegregation plan, injunction which provided that there be no school with a majority of any minority would not be dissolved.

5. Schools and School Districts ⇐13

In view of opposition of majority of school board to court-ordered desegregation plan and in view of fact that proposed "freedom of choice" plan for desegregation was unlikely to succeed, court would not terminate its continuing supervision over the actions of the school board.

A. L. Wirin, Fred Okrand, John D. O'Loughlin, Jill Jakes, ACLU Foundation of Southern Cal., Los Angeles, Cal., for plaintiff.

William D. Keller, U. S. Atty., Frederick M. Brosio, Jr., Asst. U. S. Atty., James Stotter II, Chief, Civil Division, Brian K. Landsberg, Samuel J. Flanagan, Los Angeles, Cal., for plaintiff-intervenor.

Paul, Hastings, Janofsky & Walker, Lee G. Paul, Robert G. Lane, Peter D. Collisson, Los Angeles, Cal., for defendants.

REAL, District Judge.

Defendant, Pasadena City Board of Education (hereafter Board) [1] now moves the court for:

1. Relief from this Court's order of January 23, 1970, for the desegregation of Pasadena schools and the Court's order of March 10, 1970, approving the plan of desegregation submitted by defendants (hereafter Pasadena Plan);

2. Dissolution of the injunction that there be no school with a majority of any minority, under which the Board is presently operating;

3. Termination of the Court's continuing jurisdiction;

4. Alternatively, for modification of the Pasadena Plan approved March 10, 1970.

I. MODIFICATION OF THE PASADENA PLAN AND RELIEF FROM THE ORDER OF JANUARY 23, 1970.

In January, 1970, this Court found racial imbalance or segregation of student bodies and faculties in the Pasadena Unified School District resulting from the Board's actions and inactions in execution of an announced dedication to the neighborhood school concept of education and its opposition to forced cross-town busing. 311 F.Supp. 501 (C.D.Cal.1970).

While no appeal was taken from that ruling, it was, to say the very least, not received with unanimous approbation. Indeed, according to the Board's position in the proceeding at bar, this Court's ruling in 1970 is the sole and proximate cause of "white flight" from Pasadena schools and is, in addition, a barrier to achieving the excellence of educational opportunity which the Board now proposes to accomplish by means of its requested substituted plan, known as The Integrated Zone/Educational Alternatives Plan: A Proposed Modification to the "Pasadena Plan" (hereafter Alternative Plan).[2]

The posture of the Board in 1970 notwithstanding, opposition to the Pasadena Plan came early. The plan had not yet been approved when on March 2, 1970, a Motion for Leave to Intervene to

1. The Board at the time of the Court's January, 1970, order was composed of Mrs. La Vera La Motte, Messrs. Albert C. Lowe, D. Jose a Engholm, Bradford C. Houser and John T. Welsh.

At the time of this hearing, the Board consisted of Messrs. Henry Marcheschi (elected in 1971), Samuel Sheats (appointed in 1971), Lymon W. Newton (elected in 1973), and Drs. Henry Myers and Richard Vetterli, (both elected in 1973).

2. Appendix A to this opinion.

oppose and appeal the judgment of this Court was filed, led by Mr. Bradford C. Houser. This motion was heard and denied by this Court on March 4, 1970. Appeal was taken of this ruling to the Court of Appeals for the Ninth Circuit, which affirmed the ruling of this Court. Spangler v. Pasadena City Board of Education, 9 Cir., 427 F.2d 1352, cert. denied 402 U.S. 943, 91 S.Ct. 1607, 29 L.Ed.2d 111.

Only temporarily rebuffed, those who were determined that the Pasadena Plan would not succeed carried on their crusade. In April of 1970[3] a recall campaign against the three members of the Board who had voted against appeal of this Court's judgment[4] was commenced. With the pledge to "*STOP* FORCED BUSING", Frank C. Crowhurst, Richard W. Millar, Jr., and Henry Marcheschi[5] unsuccessfully attempted to unseat Mrs. La Motte, Mr. Lowe and Dr. Engholm in the recall election of October 13, 1970.

Implementation of the Pasadena Plan was accomplished with the commencement of the 1970–1971 academic year in September of 1970. However, compliance was literal for only the first academic year; for, starting with the 1971–72 academic year, black student enrollment at the Loma Alta School exceeded 50 per cent of the school's total enrollment. By October of the 1972–73 academic year, four schools (Edison, Franklin, Loma Alta and Sierra Mesa) had black student enrollments of more than 50 per cent of the total student body. In the 1973–74 academic year, Eliot Junior High was added to the list of nonconformance; so, at the time of hearing of this matter in March of 1974, five Pasadena schools were and remain in violation of the no majority of any minority injunction of this Court's January, 1970, ruling.

5 in violation

3. Five months before the Pasadena Plan was to be implemented.

4. Mrs. La Verne La Motte, Albert C. Lowe and Joseph Engholm.

5. Mr. Marcheschi is presently president of the Board of Education of the Pasadena Unified School District.

The Board through the testimony of Dr. Robert Dillworth informs the Court that white enrollment relative to total enrollment in Pasadena schools has been precipitously in decline since 1970 due entirely to this Court's desegregation order. The Court rejects this conclusion relative to causation since Dr. Dillworth, admittedly, made no inquiry of anyone as to the reasons for: (1) white or black students moving from Pasadena or (2) white or black student withdrawal from the Pasadena Unified School District. He makes a statistical "guess" as to the cause of "white flight" on the basis that, statistically, it is unnecessary to ask the motivations behind the actions of people. When faced with a direct question, however, he finally admitted to the Court that he could not say "why" students, white or black, left the Pasadena Unified School District. It is of further significance that Pasadena's experience is not unique; for the trends evidenced in Pasadena closely approximate the state-wide trends in California schools, both segregated and desegregated, since 1966.

Achievement of the desegregation proposed by the Pasadena Plan provided for division of the traditional elementary school[6] into primary (K–3) and upper grade (4–6) schools for two reasons:

> 1. ". . . Students will walk to a nearby school for part of their elementary schooling and be transported with students in their neighborhoods to another school to provide ethnic balance.[7]
>
> 2. ". . . reorganization of elementary schools into primary schools (K–3) and upper schools (4–6) will provide specialization which is important to guarantee improvement in basic skills."[8]

6. The Alternative Plan reaches only Kindergarten through Grade 6 schools.

7. Defendants' Exhibit A, page 4.

8. Defendants' Exhibit A, page 5.

The Alternative Plan would return to K-6 organization of elementary education in order to "provide a sufficient number of school sites within each zone in which parents can choose the type education most appropriate for each their children." Howsoever denominated, the Alternative Plan is a "freedom of choice" plan that must overcome, implemented, a large number [9] of presently racially imbalanced schools.

The freedom of choice offered by the Alternative Plan is not new either to the or to Pasadena. The Supreme Court in Green v. County School Board New Kent County, Virginia (1968) U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d warns us:

". . . in desegregating a dual system a plan utilizing 'freedom of choice' is not an end in itself. As Sobeloff has put it,

"'"Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have a continuing duty to take whatever action may be necessary to create a "unitary, nonracial system."'" *Id.* at 440.

[1] The facts of *Green, supra,* may not exactly parallel what this Court found in Pasadena in 1970 or what evidently exists in Pasadena in 1974; but the message of *Green, supra,* is clear. Before any Court can stamp its imprimatur to a proposed "freedom of choice" plan of desegregation—or of continuing desegregation—it must be satisfied that freedom of choice is a viable alternative to a plan which can guarantee that no school in a once-segregated [10] school district shall be permitted to have an enrollment with a majority of any minority.[11]

Pasadena has previously failed to desegregate its schools by freedom of choice plans (*Spangler, supra,* 311 F. Supp. at 510); and efforts by other California school districts [12] laboring under freedom of choice plans have been less than spectacularly successful in achieving any meaningful desegregation of their respective schools.

What the Alternative Plan and its advocates—four of the present five Board members [13]—offer is the hope that "establishment of unique educational alternatives at each K–6 school site" and "salesmanship" will convince enough "white parents" whose children have left the Pasadena Unified School District to return *and choose* the same "educational alternatives" that black parents do in order to accomplish an integrated school system. Hope may spring eternal, but

9. Initially, at least eight schools—Audubon, Cleveland, Edison, Franklin, Jackson, Lincoln, Madison and Washington—would have over 60 per cent black enrollment.

10. There appears to be, in logic, no distinction between de jure and de facto segregation for our purposes. "De jure" and "de facto" are only adjectives that give some attempted "legal" distinction to the aims of Brown v. Board of Education I, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and Brown v. Board of Education II, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) that "segregation denies equal educational opportunity. See also, Keyes v. School District Number One, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973), Mr. Justice Powell, concurring and dissenting.

11. The Court recognizes that conceivable circumstances exist in which that mandate could not reasonably be met. Pasadena, however, does not present such a circumstance at this time.

12. In San Bernardino, California, a freedom of choice plan attracted only 15 per cent of the Negro student enrollment—no whites participated.

In Richmond, California, a freedom of choice plan conducted over a three-year period had an 11 per cent Negro student participation—no whites participated.

13. Mr. Samuel Sheats, the only black member of the Board, vigorously opposes the Alternative Plan.

realism exposes the folly of the belief that one who left a school district because his children were forced to attend schools with Negro children would now voluntarily choose that alternative.[14]

[2, 3] There is yet another flaw in the Alternative Plan with its "mini-school" sales pitch. Mini-schools and the "unique educational alternatives" which they offer can be implemented under the Pasadena Plan. This Court does not intend to intimate that the quest for the best possible education to be made available to all the school children of Pasadena is not a laudable motive. It is the mandate of *Brown I, supra,* and *Brown II, supra,* and all the cases decided by the various courts of this land. But, the mandate is equally clear that school boards must do all they can to constitutionally accommodate the rights of minorities wherever they are found to conflict with the desires of the majority to do otherwise. Alexander v. Holmes County Board of Education, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969); Davis v. Board of School Commissioners, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971); Wright v. City of Emporia, 407 U.S. 451, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1971); Monroe v. Board of Commissioners, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 33 (1968). The evidence has not shown that the educational opportunities presented by the Alternative Plan are equal to, or superior to, those presently available under the Pasadena Plan. If those educators—many within the Pasadena Unified School District itself—who advocate that a multiracial society requires a multiracial educational setting are to be believed, the Pasadena Plan is better suited to that objective than the Alternative Plan.[15]

The Board urges the Court to abandon the Pasadena Plan because it is not succeeding educationally. The evidence offered in support of the Board's position is neither persuasive nor adequate to measure the educational benefits or inadequacies of the Pasadena Plan. Aside from the contrary evidence introduced by plaintiff-intervenor to show some educational progress, it takes little educational expertise to recognize that the Pasadena Plan has not had the cooperation from the Board that permits a realistic measurement of its educational success or failure.[16] No one can now estimate the possible results of the Pasadena Plan had it enjoyed the continued support of a Board who would act, as they profess, to "do unto others as you would have done unto you."[17] As such, the Board has not met its burden in any way sufficiently enough to have this Court rule upon this issue.

It may, perhaps, belabor the point, but, finally, the evidence shows that as much or more busing would be necessary to accomplish the ends of an integrated school system under the Alternative Plan as is currently required to achieve the same ends under the Pasadena Plan. There is, therefore, none of the fiscal advantage which was presaged by the campaign literature promising "reduced taxes—more education at less cost."

14. Presumably, these are the same white parents who helped elect Mr. Marcheschi, Dr. Vetterli, Dr. Meyers and Mr. Newton in response to the campaign promise to "STOP FORCED BUSING."

15. Mr. Ramon C. Cortines, Superintendent of Schools of the Pasadena Unified School District, stating his opinion with candor and courage in response to a direct inquiry, testified that the Pasadena Plan, though it may need some modifications, was preferable to the Alternative Plan in achieving an educationally sound plan for an integrated school system.

16. This is not the Court's plan. The Pasadena Plan was prepared by dedicated Pasadena educators, aided by the California State Department of Education's Bureau of Intergroup Relations. That their efforts have met such vocal and active resistance may be the whole tragedy of the claims of the present Board relative to its inadequacy.

17. The present Board through the testimony of Mr. Marcheschi asks this Court for the opportunity (three or more years) to prove —by implementation—that the Alternative Plan can succeed. This, the Court would assume, is with the full support of the people of Pasadena.

II. DISSOLUTION OF THE COURT'S INJUNCTION

[4] Modification of the injunction of this Court of January 23, 1970, would, in effect, leave the Board to its own devices concerning the Pasadena Plan and its continued viability as a mandate for desegregation. To grant such relief would—in light of the avowed aims of four members of a five-member Board—surely be to sign the death warrant of the Pasadena Plan and its objectives. The law does not permit such an easy abdication of a Court's constitutional responsibility. Brown v. Board of Education II, *supra*; Raney v. Board of Education, 391 U.S. 443, 88 S.Ct. 1689, 20 L.Ed.2d 727 (1968); Green v. County School Board, *supra*. Moreover, the Board's professions of good faith do not serve to alter this result. Alexander v. Hoynes County Board of Education, *supra*.

III. TERMINATION OF THIS COURT'S CONTINUING SUPERVISION OVER THE ACTIONS OF THE BOARD.

[5] The reasons set forth in Parts I and II of this opinion make clear the Court's inability to accede to this final request by the Board.

Therefore, the motions of the defendants are denied.

This opinion shall, as provided in Federal Rules of Civil Procedure Rule 52(a) be deemed to be the findings of fact and conclusions of law of the Court in this matter.

APPENDIX

PASADENA UNIFIED SCHOOL DISTRICT

December 18, 1973

THE INTEGRATED ZONE/EDUCATIONAL ALTERNATIVES PLAN A PROPOSED MODIFICATION TO THE "PASADENA PLAN"

INTRODUCTION

Because five of the District's 32 regular schools now have a majority of a minority race and an additional six schools are within a few percentage points of joining this category, certain modifications to the Pasadena Plan are mandatory. The proposed modifications are designed to insure as much continuity with the present form of public education in Pasadena as possible. The overall effect of these modifications will be to allow parents to express more freedom in choosing the location and type of education available to each of their children and to motivate schools to compete for attendance of these children.

MODIFICATIONS

(1) The first modification involves a return to the elementary system, Kindergarten through Grade 6, thereby discontinuing the current primary (K–3), elementary (4–6) organization. This change is necessary to provide a sufficient number of school sites within each zone from which parents can choose the type of education most appropriate for each of their children.

(2) The second modification involves establishment of unique educational alternatives at each K–6 school site in addition to the ongoing traditional program being taught there. Studies have shown that sufficient excess capacity exists to accomplish this easily. Each unique alternative is to be designed and placed at a particular school site so that it acts as a "magnet" to draw students from all parts of a zone, thus encouraging integration.

The following are some unique alternatives which, in addition to instruction in the basic skills, can provide exciting educational opportunities (see Exhibit A for additional information about each opportunity) for children:

1. *Alternative School Program*—Emphasizes the regular curriculum in an unstructured environment.
2. *Fundamental School Program*—Emphasizes the regular curriculum in a structured environment.
3. *A Fine and Performing Arts Program*—Will emphasize creative experiences in art, music, drama, dance and literature.

4. *An Animal and Plant Life Program*—Will emphasize first-hand experience with actual raising of crops and animals.
5. *A Daily Newspaper-Based Program*—Will use the daily newspaper as the basis for study in reading, mathematics, social science, science, art, and other areas.
6. *A School in the Community/Career Awareness Program*—Will emphasize direct experiences with institutions and activities in the community as the basis of study.
7. *A Social Science/Science Program*—Will emphasize multi-cultural studies and outdoor, ecology-oriented studies.
8. *A Foreign Language and Cultural Program*—Will emphasize the mastery of a foreign language and the understanding of its cultural setting.
9. *An Early Childhood Education Program*—Will encompass children from four (4) to eight (8) years of age and provide multiple educational experiences that may prepare them for higher achievement in subsequent grades.

The specific, unique alternatives located at each school site will be defined prior to the beginning of the 1974–75 school year.

The existing special schools, including the Fundamental School and the Alternative School, will be maintained and expanded if necessary to act as special District-wide "magnet schools". These schools have already demonstrated their ability to promote integration on a voluntary basis. Additional magnet schools may be added such as a year-round school.

(3) The third modification involves the elimination of specific elementary school attendance boundaries. In their place four racially and ethnically balanced zones, representative of the district as a whole, will be created whose boundaries coincide with the four existing areas on which the present Pasadena Plan is designed. Exhibit B shows the zones, their boundaries, and the schools contained in each zone. Any parent who lives within a zone may choose to send his child to any school within that zone. The school district will provide all required transportation. Thus, all students who are presently enrolled in our schools would be able to continue to attend the school that they now attend if their parents so choose or they would be free to choose from any other school within their zone.

(4) On the basis of providing parents with new options as to the type of education available, the ethnic balance at some sites may be altered from what it is at present. It is, therefore, proposed that if any school's ethnic profile should deviate significantly from the District-wide ethnic profile, that school would be paired with a "sister school" with an opposite ethnic make-up. District transportation would then be provided so that students from both schools would share in special educational programs covering at least one-half a school day per week. These special educational programs will be available to students on an optional basis. Examples may include cooperative art/music programs or programs similar to those alternatives outlined previously. The special programs will be designed to encourage interest and desire to participate.

UNMODIFIED FEATURES OF THE PASADENA PLAN

The four modifications presented apply to the elementary grades (K–6) only. Modifications related to junior high school and senior high school attendance areas present special problems and are now being studied by the school district administrators at the direction of the Board of Education.

Finally, all other features of the present Pasadena Plan including teacher recruitment and assignment, personnel advancement, recruitment and advancement of administrators, etc., are to remain as operating currently.

CONCLUSION

The proposed modifications are designed to demonstrate affirmative action on the District's part to stimulate integration within each zone without mandatory assignment of students. Further, the proposed modifications will allow parents to choose the type of education they want for each of their children.

The modifications will introduce the element of competition among the schools in each zone for pupil attendance, thereby introducing a critical new element to improve the quality of education in Pasadena schools.

Finally, the modifications are designed to stabilize the ethnic composition of the school district so that meaningful integration can take place.

EXHIBIT A

Every elementary school in the district will provide for each student a program in the basic skills of reading, mathematics, and language arts as well as physcial education. Additionally special programs such as, compensatory education (Title I, ESEA) mentally gifted minors (MGM), and others that are now a part of the regular school program will continue.

One of the mini-schools suggested below would be a component within the regular school.

Students would have the opportunity to attend the mini-school for instruction in subjects other than the basic skills based on their interest in that school's alternative emphasis. Students may also receive this instruction in these subjects in the regular program being taught at that school.

For example, a student living near Altadena School has a number of choices. He may attend Altadena's regular school program or its mini-school *or* he can choose the regular school program or any mini-school at any other school within that zone.

The following are brief descriptions of *some* possible mini-schools suggested to date:

1. *Fine and Performing Arts Mini-School* will provide opportunities for students to create music, dance, write and enjoy prose and poetry, as well as original plays. Students will have many opportunities to perform for the public, and to exhibit their work in the community. Extensive involvement of community resources is planned.

2. *Media/Current Events Mini-School* will use daily and weekly newspapers as the basis for study in reading, mathematics, social science, and other areas. The diversity of types of information in each newspaper makes it a good tool for instruction in many areas. Additionally, students will write, setup, and print their own newspaper on a regular basis using the techniques and equipment commonly used in the production of a daily newspaper.

3. *A Foreign Languages and Cultures Mini-School* will emphasize the mastery of a foreign language and the understanding of its cultural setting. Language specialists will give instruction for a block of time each day in French, Spanish, Russian or German, and Japanese or Chinese. In addition, time will be devoted daily to studies of the cultures and peoples represented by these languages by a teacher trained in multi-cultural studies and intergroup activities.

4. *A School in the Community/Career Awareness* Mini-School will emphasize direct experiences with institutions and activities in the community as the basis of study. Trips to various places in the community, including

provision for instruction as these sites will be central to this program. Students will not only learn about the existence of agencies, jobs, and institutions, but also how they work and how students can train themselves to qualify for a career in a variety of fields.

5. *An Animal and Plant Life Mini-School* will emphasize first-hand experiences with the actual raising of animals and crops. Facilities will be provided so that a wide varity of experiences in horticulture and husbandry may be presented. An appreciation of labor and the discovery of various phases of development of animal and plant life will be integral parts of this program.

6. *A Social Science/Science Mini-School* will emphasize multi-cultural studies as well as outdoor, ecology-oriented studies. A few foreign countries and cultures will be studied in depth and compared with our life here in the United States. These studies will include customs and life styles, government and sociology. Additionally, outdoor educational experiences will be provided many times during the school year with emphasis on the study of the environment and the impact of developed and undeveloped societies on their environment.

7. *An early Childhood Education Mini-School* will provide a design with a variety of classroom structure, educational experiences in language, reading, mathematics, music, art, science, physical activity and health that will develop a readiness base and continuum of skills in primary grades. Parent participation is essential in all phases of the program to insure the child's well-being and progress.

Claudia FROST, Individually and as the next friend of James Frost and Kristen Frost minors, and as representatives of a class of all persons who are now or may in the future be entitled to receive survivors' benefits under the Social Security Act whose benefits have been or may be reduced without a prior hearing, Plaintiffs,

v.

Caspar WEINBERGER, as Secretary of the United States Department of Health, Education and Welfare, Defendant.

No. 73-C-1383.

United States District Court,
E. D. New York.
May 3, 1974.

(reversed by HJF on SCRank CHP)

Class action to determine whether recipient of social security survivors' benefits is entitled to prereduction evidentiary hearing. The District Court, Travia, J., held that social security administration cannot constitutionally make downward adjustment in amount being paid under existing award of survivors' benefits, without affording adversely affected recipient opportunity to contest reduction at prereduction evidentiary hearing.

Judgment for plaintiffs.

1. Federal Civil Procedure ⇐181

Action to determine whether recipient of social security survivors' benefits was entitled to evidentiary hearing before reduction of benefits was maintainable as class action on behalf of recipients who had been denied such prereduction hearing. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.; Social Security Act, § 203(a), 42 U.S.C.A. § 403(a).

2. Federal Civil Procedure ⇐181

Class action on behalf of recipients of social security survivors' benefits whose benefits had been adjusted downward without prereduction evidentiary hearing was not rendered moot by grant of evidentiary hearing to named plaintiffs.

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ROGER J. GUERIN

PHILIP B. KURLAND
OF COUNSEL

October 29, 1975

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States

Re: Pasadena City Board of Education v. Spangler, No. 75-164

Pursuant to Rule 24(5), petitioners in the above-entitled cause wish to call the Court's attention to two decisions by United States Courts of Appeals, one for the Fifth Circuit and the other for the Sixth Circuit, both of which, we contend, are in conflict with the judgment of the Ninth Circuit's decision from which we seek certiorari here.

In Mapp v. Board of Education of the City of Chattanooga, Tennessee, C.A. 6th, No. 75-2100, 74-2101, the Court of Appeals held that major deviation from the trial court's proportional assignment of students, which resulted from a major decrease in the white school population, was not a violation of the trial court's desegregation order. The Ninth Circuit, to the contrary, held that a minor variation from the trial court's proportional assignment, resulting from a decrease in the white student population, did constitute a violation of the trial court's desegregation order.

In Calhoun v. Cook, C.A. 5th, No. 74-2784, the Court of Appeals held that proportional allocation of students according to race was an improper remedy where the integration process was thereby endangered by white flight and that alternative remedial orders must be considered. The Ninth Circuit, to the contrary, held that proportional allocation of students according to race was the only proper

remedy despite the diminution of the white school population and that alternative remedies could not be considered.

We submit that these conflicts among the circuits afford additional reasons why this Court should grant certiorari in this case.

Respectfully submitted,

Philip B. Kurland

Philip B. Kurland

The Chief Justice of the United States and
the Associate Justices of the Supreme
Court of the United States
Supreme Court Building
Washington, D. C.

Copies delivered by messenger to:

Honorable Robert H. Bork
Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

Fred Okrand, Esq.
ACLU Foundation of Southern California
633 South Shatto Place
Los Angeles, California 90005

Conference 10-31-75

Court CA - 9 | Voted on ....., 19...

Argued ....., 19... | Assigned ....., 19... | No. 75-164

Submitted ....., 19... | Announced ....., 19...

PASADENA CITY BOARD OF EDUCATION, ET AL., Petitioners

vs.

NANCY ANNE SPANGLER, ET AL.

DISCUSS

7/30/75 Cert. filed.

Relisted 9/9

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING	
Rehnquist, J.		✓												
Powell, J.		✓												
Blackmun, J.		✓												
Marshall, J.			✓											
White, J.			✓											
Stewart, J.			✓											
Brennan, J.			✓											
Douglas, J.														
Burger, Ch. J.											Passed on 1st vote			

Conference 11-7-75

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 75-164

Pasadena City Bd of Education

vs.

Spangler

Relist

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....														
Rehnquist, J.		✓												
Powell, J.		✓												
Blackmun, J.		✓												
Marshall, J.			✓											
White, J.			✓											
Stewart, J.			✓											
Brennan, J.			✓											
Douglas, J.														
Burger, Ch. J.		✓												

lfp/ss 4/26/76

April 26, 1976

No. 75-164 Pasadena v. Spangler

This file memorandum is being dictated at my apartment after reviewing the principal brief but without benefit of the record. The briefs by the opposing parties often seem to be arguing different cases. I now identify points as to which I need further enlightenment.

1. Petitioner's brief, apparently written by Professor Kurland, states that the 1970 decree compelled "a rigid racial balance in every school in the district", and that the 1974 District Court order compels "the annual reassignment of students to maintain racial balance" in accordance with the original decree. The 1970 decree ordered that there be "no majority of any minority" in any school. In my view, this was an absurd, as well as unlawful, order. But it was not appealed from in 1970.

I am not clear as to the present status of this portion of the order. It appears from Judge Ely's opinion that the DC, in its 1974 holding, found that the school board had violated the "no majority of any minority" portion of the court's injunction, and apparently continued the injunctive order in effect (I have not read the 1970 order). But Judge Ely (whose opinion was joined only by Judge Chambers, and in a qualified way) did not wholly approve the DC's reaffirmation. Indeed, Ely said:

> "Swann indicates that annual readjustment is not necessary once a Court has determined that there has been a full and genuine implementation which has eliminated, with some anticipated permanence, racial discrimination from the system. We must therefore expressly disapprove such portions of the record as suggest that the district judge interprets his injunction to require continuous annual redistricting. In the course of final argument, the district judge stated that to him the Pasadena plan meant . . . 'that at least during my lifetime there would be no majority of any minority in any school in Pasadena'".

In view of Ely's language, and Chambers' concurring opinion, I read CA9's court opinion as not requiring this specified racial balance indefinitely, nor as requiring an annual reshuffling of school population. Yet, unless I have missed something, CA9 leaves in effect - at least for the present and without any cutoff date - the racial balance requirement. Judge Wallace's dissent is enlightening on this issue:

> "The district judge interpreted the injunction to require 'that at least during my lifetime there would be no majority of any minority in Pasadena.' All of us disapprove of this statement but Judge Ely minimizes its significance. Although the district judge made this comment in announcing his decision from the bench, he did not depart from it in his published opinion. He allowed only impossibility of compliance as a reason for dissolving or suspending the prohibition against majority enrollments of minority students. So interpreted, the injunction transforms racial balance from a means of remedying de jure segregation into an end in itself, precisely contrary to the principles expressed by the Supreme Court." (emphasis added) (p. A 25 petition for certiorari)

Apparently respondents agree with Wallace as to the current status of the DC's order. They state one of the questions in this case to be whether the "portion of the

decree [requiring] the Board to remedy the discrimination by not allowing more than a certain percentage of a minority in any school" may now be questioned since there was no appeal from the 1970 decree? Respondents' brief p. 2.

Comment:

My tentative conclusion from the foregoing is that the injunction to maintain indefinitely a specified racial balance in every school remains in full force and effect. If so, for reasons stated in my Keyes opinion, as well as what the Court said in Swann, this is plainly invalid. It hardly need be said that all decrees in a desegregation case, which the parties themselves wish to keep alive, remain subject to judicial review and revision.

2. Petitioners argue that the 1970 order, as reaffirmed in 1974, compels "the annual reassignment of students to maintain the racial balance." Judge Ely may have thought otherwise (see above). But it seems to me that petitioners are correct so long as the command to maintain racial balance is in effect.

I know from my own experience that pupil populations never remain static - either in racial mix or in geographic location within the school district. Long before Brown, school boards in communities of any size readjusted school boundary lines annually to accommodate these changes. Thus, unless advised to the contrary after further study, I conclude that

petitionrs correctly read the result of the 1974 decree. Each year the readjustments will have to conform to the "no majority" mandate.

3. The SG's brief generally supports CA 9 and a continuation of the 1970 decree. Surprisingly, in view of past positions by the SG (Griswold's brief in Swann) the SG states "the 'no majority of any minority' provision of the 1970 decree was, in 1970 'a useful starting point in shaping a remedy to correct past constitutional violations'. But the SG states (unconvincingly in light of what I have noted above) that this portion of the DC's decree has "properly been disapproved by CA 9" (p. 28).

The most disconcerting part of the SG's brief appears to support "continuing supervision" by a District Court more or less indefinitely. Continuing supervision is "necessary to deter future acts of segregation by making the contempt power available"; it must "be maintained for a significant length of time"; and, amazingly, the SG indicates that the decree should be maintained until "long lasting effects" - e.g., the useful life of school buildings that were mis-located - have been obliterated. (p. 31, 31). I do not agree with this.

* * * * *

In general, I will adhere to my Keyes position.

L.F.P., Jr.

lfp/ss 4/26/76

April 26, 1976

file

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* * * * *

In general, I will adhere to my Keyes position.

L.F.P., Jr.

75-164 PASADENA CITY BD. v. SPANGLER Argued 4/28/76

No way S/Board can know what to do

My views remain as stated in Keys. But if I accept the majority view ~~—~~ in Keys, purporting to follow Swann, I could join an opinion in this case that Reversed as follows

1. The racial balance mandate (no majority of ~~—~~ minority students in any school) of 1970 decree was contrary to Swann, even given its most generous construction.

2. No move was made until Jan 1974 to terminate or modify the 1970 decree.

See motion A 232

3. The DC erred in not ~~—~~ terminating the R/B order.

SG views

4. CA 9 (however its meandering language may be interpreted) also erred in not voiding that order.

× × ×

5. As to the attainment of "unitary" school system, I would not overrule discretion of DC + CA 9 - but would remand

Dean Neal (Petr.) {Helpful argument, delivered well

Does not involve (i) busing or (ii) distinction bet. de jure / de facto.

Case arose on pet. to modify 1970 decree (The Pasadena Plan - 4 Zones with ~~the~~ same R/Balance, & each school was to have sub. same R/B.)

The Bd's 1974 pet. ~~for~~ requested:
~~modification~~
(1) Termination of DC supervision.
(2) If not terminated, that the 1970 order be modified.

Neal argued that a unitary system had been achieved. The DC found only one "failure" to comply with 1970 decree - the failure of 5 schools to maintain the ordered R/R.

Neal (cont.)

Not until 1974 hearing, did anyone understand the '70 order required annual reassignments to maintain the prescribed R/B. (DC has held Bd in contempt on another issue & that is pending in CA 9).

× × ×

~~Dec~~

The 1970 decree has never been modified. Despite what Ely said, CA 9 affirmed DC 1974 order ~~=~~ continuing the R/B mandate. (Neal says SG is wrong in what he says in ~~Pet~~ p 28)

× × ×

Neal says a number of cases have held ~~to~~ — following Swann — that once desegregated has been achieved ("unitary system") judicial supervision should end.

Borkin (~~for~~ SG) (Supplemental Resps)

Chambers op. controls

→ Agree S/Bd is now entitled to have judicial supervision applied

Ostrander (Resps)

(Nothing helpful)

Neal

Bd did request modification of racial balance order. See p 233 of Appendix.

TB

See Neal's Reply Brief (Answer's SG's Br p 15)

No. 75-164, Pasadena v. Spangler — Argued 4/30/76

The Chief Justice Vacate & Remand

Phil Neal's Reply Brief is best.

None of 3 ops. in CAG case is compatible with another.

The "no majority of a majority" is consistent with Swann. Problem is what to do now. entire
Not sure injunction should be lifted now.

Annual reassignment also is not required by Const. or Swann

xxxxxxxxx Stevens, J.

Out

Brennan, J. Affirm

Problems identified by C J will go away

Agree with Bork. (but not necessarily with p 28 — Do I understand Bill)

Stewart, J. Affirm

Parties have not really joined issue.

SG - p 28 - may take liberty with what CAG held - but accepting it, Potter would affirm with an opinion along lines of SG's Br p 28

White, J.

Affirm

CA9 required at least one more assignment — even chambers.

Can't agree that what Bork says on 28 is result of CA9's opinion.

Annual reassignment is not required by Swann

Marshall, J.

Affirm

Blackmun, J. ~~Vacate & Remand~~

On the "no majority" issue, agree Swann decided this against Resp.

Powell, J. Reverse & Vacate & Remand

As to the "no majority of a minority" in 1974*

Affirm

As to issue of having attained a unitary system.

Rehnquist, J. Passed

Inclined to Vacate & Remand with appropriate opinion.

* The validity of ordering this in 1970 is not before us. But DC reaffirmed it in 1974

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 3, 1976

Re: No. 75-164, Pasadena City Board of Education v. Spangler

Dear Chief:

I passed my actual vote in this case at conference on Friday, although I attempted to discuss the issues which I thought were involved. I have now had an opportunity to think more about the matter, and to go back and read the opinions below.

I am of the view that when the board sought modification of the original desegregation order in 1974, it was entitled to obtain it to the extent of a declaration that the order could not require annual re-assignment of pupils solely by reason of demographic changes in the population of the school district. I am also of the opinion that since the board did not appeal from the original decree which contained the requirement of "no majority of any minority", and since it complied with that provision of the decree for at least one year, the question of whether that provision in the original decree was consistent with Swann is now moot. If, as of 1974, annual redistricting by reason of that provision was not required, there was no live issue as to whether it was properly required in the original decree.

I think the most accurate reflection of this view is a vote to vacate the judgment of the Court of Appeals and remand to it for further proceedings. The District Court denied any relief at all, as I understand it, and petitioner was certainly entitled to some relief. The Court

of Appeals, which filed three separate opinions, although observing in dicta that the District Court was probably wrong in some of its observations, affirmed the judgment of the District Court which had denied all relief.

It is conceivable that I could join an opinion affirming which was based on the views that I have expressed, but it doesn't seem to me that such a "bottom line" is nearly as consistent with those views as a vote to vacate and remand, which is my preference.

Sincerely,

WJBrW

The Chief Justice

cc: The Conference

May 4, 1976

No. 74-164 Pasadena City Bd. of Education v. Spangler

Dear Chief:

Bill Rehnquist's letter indicating that he could join an opinion vacating and remanding this case, prompts me to supplement - and possibly - clarify what I said at Conference.

My first vote was to reverse. In my view, the District Court erred in reaffirming in 1974 its 1970 injunctive order requiring "no majority of a minority" in any school. Thus, in affirming the 1974 action of the DC, I think CA 9 also erred.

If, however, an opinion for the Court is written that makes clear any order (e.g., the DC's 1974 order) requiring an annual "reshuffling" of students is invalid, I could join a vacating and remanding of CA 9's decision.

I agree with Bill that we need not consider (indeed, it is not before us) whether the 1970 order was valid at the time it was issued.

Although I could join an opinion along the foregoing lines, I might add a sentence or two to reaffirm my basic overall position as stated in Keyes.

Sincerely,

The Chief Justice

CC: The Conference

LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 9, 1975

No. 75-164, Pasadena Bd. v. Spangler

Dear Bill,

I agree with the memorandum you have circulated in this case.

Sincerely yours,

P.S.
1.

Mr. Justice Rehnquist

Copies to the Conference

June 9, 1976

No. 75-164 Pasadena City Board of Education
v. Spangler

Dear Bill:

Please join me in your memorandum.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 15, 1976

Re: 75-164 - Pasadena City Board of Education v. Spangler

Dear Bill:

I will join in an opinion consistent with your memorandum.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 21, 1976

Re: No. 75-164 - Pasadena City Board v. Spangler

Dear Bill:

I am with you.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 22, 1976

RE: No. 75-164 Pasadena City Bd. Education v.Spangler

Dear Thurgood:

Please join me in your dissenting opinion in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 24, 1976

Re: No. 75-164 - Pasadena City Bd of Education
v. Spangler

Dear Bill:

Please join me in your opinion for the Court.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
				dissent typed draft 6/2/76			5/5/76	
Join WHR 6/16/76	Join TM 6/22/76	agree with WHR memo 6/9/76	Join WHR 6/24/76		Join WHR 6/21/76	Join WHR 6/9/76	typed draft memo 6/7/76	
				1st draft 6/25/76			2nd draft 6/10/76	
					75-164 Pasadena v. Spangler			