MEMORANDUM

THE WHITE HOUSE

WASHINGTON

November 17, 1981

TO: William Bradford Reynolds

FROM: Morton C. Blackwell

RE: Exchange of correspondence between your office and Mr. Lester S. Jung

I reviewed the letter of November 10 dispatched by Thomas M. Keeling of your office to Mr. Lester S. Jung's letter to the President.

The issue of busing has motivated many people into organizational activism. Unfortunately many opponents of busing have an almost total lack of understanding of the position and direction of the Administration on this issue.

The Attorney General and you have been doing some excellent work which would ease the concerns of many people passionately commited to their neighborhood schools.

I would suggest that you send a follow-up note to Mr. Jung and provide him with a copy of recent testimony or other position papers emanating from your office on the subject. Neighborhood school supporters might not agree with every jot and tittle of such testimony or papers, but it would open their eyes to the fact that this Administration is vastly more supportive of the neighborhood school concept than was the Carter Administration.

I have attached copies of Mr. Jung's letter and the response by Mr. Keeling.

WBR:TMK:CMC:saf
DJ 169-017-42

NOV 10 1981

Mr. Lester S. Jung, Jr.
2309 Bee Hive Place
St. Louis, Missouri 63129

Dear Mr. Jung:

Thank you for your letter dated August 27, 1981, addressed to the President which was mailed to Morton Blackwell on September 4, 1981.

Your views have been noted.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By:

Thomas M. Keeling
Acting Chief
General Litigation Section

August 27, 1981

040017

Mr. President:

After four years of the previous administration, it became obvious to this family and millions of others that this country was in need of a dynamic change. And dynamic it has been.

I praise your relentless, straight ahead efforts to bring this country back economically as well as to re-establish a proud, America, not willing to be intimidated by the Soviets, terrorists, and others threatening our recovery and being.

I have applauded your budget and welfare cuts with enthusiasm to even those liberal types who might not agree with me, but certainly admire your timing and enthusiasm.

Due to pre-election commitments, one area of the existing administration that has been a disappointment to me is the forced busing issue.

It was said in this administration that the forced busing issue was a "social" issue, and would be dealt with after the "economic" issues were dealt with.

With economic issues being dealt with for the most part, isn't it time to see some results from Terrell Bell, William French Smith, and numerous others in government to take positive action on what they admit is a counter-productive waste of money, human resources, oil reserves, and the many other negatives associated with this unpopular injustice?

It is obvious that Richard Bradford Reynolds and other Justice Department carryovers from the Carter travesty are not paying attention to the wishes of your administration and should be replaced.

In all bused areas it has caused nothing but diluted education, violence, sexual and drug promiscuity, tense learning environments, etc. to its' victims.

In recent correspondence with Paul Laxalt, Strom Thurmond, Jesse Helms, and numerous others, I was assured that these were also their sentiments and all claimed to have proposed legislative action to support quality education to all by means of the neighborhood school concept.

In St. Louis and suburbs, we are still waiting for both Houses to make some obvious efforts to uphold what they support by majority-an anti forced busing legislation.

But instead, we are faced with William Hungate, the 8th District Court of Appeals, and other areas of government "misbehaving" as if we were living in a dictatorship, by delegating where a child will attend school, unless of course, we choose private education to escape these dictates.

Personally, I would rather not be faced with that decision. I have always supported public education, since my children appear to be learning at an acceptable pace and are disciplined adequately if necessary.

Mr. President, I along with millions of others in this great country appeal to you that some positive action be taken concerning the injustice of forced busing and to re-establish quality education to all involved through the neighborhood school concept to public education.

Thank you, God Bless you and your family. Our prayers are with you.

Respectfully,

Lester S. Jung Jr.

Lester S. Jung Jr. and Family

May 19, 1982

609 Huntley Heights Dr.
Manchester, Mo. 63011

file
Busing

Morton Blackwell
Office of Public Liason, Room 191
Old Exec. Off. Bldg.
White House
Washington DC 20500

Dear Mr. Blackwell,

This is a copy of a letter that I have just sent to President Reagan. Please make sure that he is aware of my opinions.

Thank you,
Susan Tegtmeyer
Susan Tegtmeyer

May 19, 1982

609 Huntley Heights Dr.
Manchester, Mo. 63011

President Ronald Reagan
The White House
Washington DC 20510

Dear President Reagan,

Our personal freedoms are slipping away quickly! The culprits taking these freedoms away are the federal judges who act as if we live in a dictatorship rather than a democracy. I feel like it's a waste of time to vote anymore when the legislators can't or won't stand up to these tyrants and stop them.

Your platform during the presidential election included getting forced busing stopped and getting more control back on the state level. I haven't seen this happen yet and am greatly dissappointed. Please carry through with your promises. That's what got you elected.

This stupid social engineering plan of busing all the school children in the country only destroys their lives and lowers their educations. Please put a stop to it immediately!!!

Thank you,

Susan D. Tegtmeyer

Susan D. Tegtmeyer

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

Copy sent to Sally Kelley 6/16

3015

7 JUN 1982

MEMORANDUM

TO: Morton Blackwell
Special Assistant to The President
for Public Liaison

FROM: Wm. Bradford Reynolds
Assistant Attorney General WBR
Civil Rights Division

SUBJECT: Standard paragraph for responding to citizens' letters on "forced busing"

Ms. Sally Kelley of your office has requested that we provide you with a standard paragraph to be used in responding to citizens' letters on "forced busing." I assume that such a paragraph would be used to respond to general complaints or comments about busing and that any letters questioning specific court orders, which may have been issued in cases where the United States is a party, would continue to receive individual treatment, including possible referral to this Department. Set forth below is a paragraph (edited appropriately as though from the White House staff) which I have used in responding to some letters generally addressed to the "busing" or "social" issues.

> "In your letter, you express concern that the Administration is retreating from the President's earlier pronouncements in opposition to forced busing. Please rest assured that the President remains unalterably opposed to the use of forced busing and that the actions and policies of Administration officials reflect this opposition. For example, in Senate hearings on certain anti-busing measures pending in Congress, Assistant Attorney General Wm. Bradford Reynolds emphasized that "The Administration is . . . clearly and unequivocally on record as opposing the use of mandatory transportation of students as an element

> of relief in future school desegregation cases." Instead, as Assistant Attorney General Reynolds testified, the Department of Justice is now following a remedial policy in school desegregation cases that emphasizes the removal of state-enforced barriers to open access to public schools and insurance that students of all races are provided equal opportunities to obtain an education of comparable quality. Additionally, in two major busing cases currently pending before the Supreme Court, the Department of Justice reversed the position taken by the previous Administration and argued in support of anti-busing measures enacted by the states of California and Washington. As you can see, the Administration is vigorously pursuing the President's goal of eliminating forced busing from the panoply of remedial techniques used in future school desegregation cases."

A copy of the testimony referred to in the paragraph is attached in the event you wish to use this standard paragraph. Do not hesitate to call if I can be of any further assistance.

Department of Justice

STATEMENT

OF

WILLIAM BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
HOUSE OF REPRESENTATIVES

CONCERNING

SCHOOL DESEGREGATION

ON

NOVEMBER 19, 1981

Thank you for inviting me to testify on the critically important subject of school desegregation.

As you know, I testified last month before a Senate Subcommittee looking at this same question. I believe that all of us involved in the development of policy in this area and in enforcement will benefit from the thorough study now underway in the House and Senate.

Few contemporary domestic issues command as much public attention as the question of how this Administration and Congress plan to respond to the problem of unconstitutional racial segregation of our public schools. Virtually everyone, I believe, agrees with the ultimate objective -- that is, complete eradication of state-imposed racial segregation. Moreover, we all probably can agree that the achievement of this objective is central to the constitutional promise of equal protection of the laws.

In recent years, however, we have witnessed growing disenchantment by many with some of the remedies used to accomplish the constitutional imperative of eliminating racial discrimination in public schools. The testimony presented to this Subcommittee and two Senate Subcommittees underscores an increased public awareness of the need to develop enlightened and forward-looking school desegregation remedies.

I know that this Committee has before it several bills and proposed constitutional amendments dealing with the subject of school desegregation. While these proposals differ in a number of respects -- both in terms of the procedural approach suggested and in terms of the substantive relief contemplated -- all sound the same theme: compulsory busing of students in order to achieve racial balance in the public schools is not an acceptable remedy.

As a matter of Administration policy, this theme has been endorsed by the President, the Vice President, the Secretary of Education, the Attorney General, and me. The Administration is thus clearly and unequivocally on record as opposing the use of mandatory transportation of students to achieve racial balance as an element of relief in future school desegregation cases. Stating our opposition to compelled busing, however, is but a starting point in developing just and sound policies to achieve the central aim of school desegregation -- equal educational opportunity. If mandatory busing is not an acceptable tool with which to combat unconstitutional racial segregation of our public schools, it is incumbent upon all branches of government to develop reasonable and meaningful alternatives designed to remove remaining state-enforced racial barriers to open student enrollment and to ensure equal educational opportunity for all, without regard to race, color or ethnic origin.

It is in the area of developing just such meaningful alternative approaches to accomplish to the fullest extent practicable the desegregation of unconstitutionally segregated public schools that we at the Department of Justice have been concentrating our attention in recent months. I am pleased to have this opportunity to share with you the thoughts and tentative conclusions resulting from our analysis to date.

Let me note at the outset that my remarks today are directed only to the policy considerations raised by the several bills currently before the Judiciary Committee. Other questions have been raised regarding the constitutionality of legislation that seeks to restrict the jurisdictional authority of federal courts to order certain relief. Those complex constitutional issues are being carefully scrutinized by the Department of Justice. Because that review has not yet been completed, I will, for the present, place to one side all discussion relating to the constitutional implications of the bills before this Subcommittee and the Subcommittee on Courts, Civil Liberties and the Administration of Justice. Rather, I will focus solely on the remedial considerations under development by this Administration to vindicate the constitutional and statutory requirements of equal educational opportunity. I hope that this Subcommittee will find the Administration's analysis -- and the policies borne of that analysis -- useful in its deliberations in this area.

The Department's responsibility in the field of school desegregation derives, as you know, from Titles IV, VI and IX of the Civil Rights Acts of 1964, as well as the Equal Education Opportunity Act of 1974. It is important to emphasize that these statutes do not authorize the Department of Justice to formulate education policy. Nor could they, for under our federal system, primary responsibility for formulating and implementing education policies is constitutionally reserved to the states and their local school boards. In carrying out this responsibility, however, the states cannot transgress constitutional bounds, and the Department's basic mission under these federal statutes, a mission to which this Administration is fully committed, is to enforce the constitutional right of all children in public schools to be provided equal educational opportunity, without regard to race, color or ethnic origin.

In discussing with you the particulars of how we intend to enforce this constitutional right, it is important to frame the discussion in proper historical perspective. Brown v. Board of Education, 347 U.S. 483 (1954), is, of course, the starting point. In Brown, the Supreme Court held that even though physical facilities and other tangible elements of the educational environment may be equal, state-imposed racial segregation of public school students deprives minority students of equal protection of the laws. Id. at 493. Casting

aside the shameful "separate-but-equal" doctrine established some 84 years earlier in Plessy v. Ferguson, 110 U.S. 537 (1896), the Court held that state-imposed racial separation inevitably stigmatizes minority students as inferior. Id. at 494. The Court concluded, therefore, that state-enforced racially separated educational facilities are inherently unequal. Id. at 495.

One year after the initial decision in Brown, the Supreme Court, in Brown II, ordered that the Nation's dual school systems be dismantled "with all deliberate speed." Brown v. Board of Education, 349 U.S. 294, 300-301 (1955) (Brown II). The goal of a desegregation remedy, the Court declared, is the admission of students to public schools on a "racially nondiscriminatory basis." Ibid.

During the period following Brown II, state and local officials engaged in widespread resistance to the Court's decision; thus, few jurisdictions made any real progress towards desegregation. In 1968, thirteen years after Brown II, the Supreme Court's patience ran out. In Green v. County School Board, 391 U.S. 430 (1968), the Court was confronted with a "freedom-of-choice" plan that had the effect of preserving a dual system. In disapproving this plan, the Court made clear that a desegregation plan must be judged by its effectiveness in disestablishing state-imposed

segregation. Id. at 439. The burden on a school board that has operated a dual system, the Court explained, "is to come forward with a plan that promises realistically to work and promises realistically to work now." Ibid.

In neither Brown nor Green, however, did the Court assert that racial balance in the classroom is a constitutional requirement or an essential element of the relief necessary to redress state-enforced segregation in public schools. Rather, the Court held simply that the Constitution requires racially nondiscriminatory student assignments and eradication of the segregative effects of past intentional racial discrimination by school officials.

Because of the problems encountered by the lower courts in implementing the Green decision, the Supreme Court returned to the subject of a school board's remedial obligations three years later in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). Swann specifically rejected any "substantive constitutional right [to a] particular degree of racial balance" (id. at 24), and reiterated that the basic remedial obligation of school boards is "to eliminate from the public schools all vestiges of state-imposed segregation." Id. at 15. For the first time, however, the Court authorized use of mandatory race-conscious student assignments to achieve this objective, explaining that racially neutral measures, such as neighborhood zoning, may fail to counteract the continuing effects of past unconstitutional segregation. Id. at 27-28. Moreover, in light of the prevalence of bus

transportation in public school systems, the Swann Court upheld the use of mandatory bus transportation as a permissible tool of school desegregation. Id. at 29-30.

Thus, in what has proved to be the last unanimous opinion by the High Court in the school desegregation area, the first tentative step was taken down the remedial road of court-ordered, race-conscious pupil assignments and transportation. Since then, that road has been traversed more and more often by the yellow school bus.

What is interesting to note, however, is that the Swann Court spoke in measured terms, expressing reserved acceptance of busing as but one of a number of remedial devices available for use when, and these are the Supreme Court's words, it is "practicable," "reasonable," "feasible," "workable," and "realistic." The Court clearly did not contemplate indiscriminate use of busing without regard to other important, and often conflicting, considerations. Indeed, the Swann Court, emphasizing the multiple public and private interests that should inform a desegregation decree, expressed disapproval of compulsory busing that risks the health of students or significantly impinges on the educational process, made clear that busing can be ordered only to eliminate the effects of state-imposed segregation and not to attain racial balance in the schools, and tacitly admonished courts to rely on experience in exercising their equitable remedial powers.

Today, a decade after Swann, there is ample reason to heed that admonition. Justice Oliver Wendell Holmes counseled wisely, in his book The Common Law, that "the life of the law has not been logic, it has been experience." Unlike 1971, when no court had any empirical evidence on which to assess the advisability or effectiveness of mandatory busing, now we have 10 years of experience and the results of hundreds of busing decrees on which to draw in formulating current desegregation policies. It is against this backdrop that courts, legislators, and the public must -- as Swann itself signaled -- now reconsider the wisdom of mandatory busing as a remedy for de jure segregation.

Few issues have generated as much public anguish and resistance, and have deflected as much time and resources away from needed endeavors to enrich the educational environment of public schools, as court-ordered busing. The results of numerous studies aimed at determining the impact of busing on educational achievement are at best mixed. There has yet to be produced sufficient evidence showing that mandatory transportation of students has been adequately attentive to the seemingly forgotten "other" remedial objective of both Brown and Swann; namely, establishment of an educational environment that offers equal opportunity to every school child, irrespective of race, color, or ethnic origin. In his May address to the American Law Institute, Attorney General William French Smith

accurately commented on the accumulated evidence in this area in the following terms:

> Some studies have found negative effects on achievement. Other studies indicate that busing does not have positive effects on achievement and that other considerations are more likely to produce significant positive influences.
>
> In addition, in many communities where courts have implemented busing plans, resegregation has occurred. In some instances upwardly mobile whites and blacks have merely chosen to leave the urban environment. In other instances, a concern for the quality of the schools their children attend has caused parents to move beyond the reach of busing orders. Other parents have chosen to enroll their children in private schools that they consider better able to provide a quality education. The desertion of our cities' school system has sometimes eliminated any chance of achieving racial balance even if intra-city busing were ordered.

These lessons of experience have not been lost on some judges, including members of the Supreme Court, where opinion in this area is now sharply divided. For example, Justice Lewis Powell recently remarked in dissent in the Estes case:

> This pursuit of racial balance at any cost . . . is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one race schools, courts may produce one race systems. */

The flight from urban public schools has contributed to the erosion of the tax base of a number of cities, which, in turn, has a direct bearing on the growing inability of many school systems to provide a quality education to their students -- whether black or white. Similarly, the loss of parental support and involvement -- which often comes with the abandonment of a neighborhood school policy -- has robbed many public school systems of a critical component of successful educational programs. There is, in addition, growing empirical evidence that educational achievement does not depend upon racial balance in public schools.

To be sure, some communities have accepted mandatory busing, thus avoiding some of its negative effects. However, calm acceptance of mandatory busing is too often not forthcoming; and, plainly, the stronger the parental and community resistance, the less effective a compulsory student transportation plan becomes.

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*/ Estes v. Metropolitan Branches of the Dallas NAACP, 444 U.S. 437, 450 (1980) (Powell, J., joined by Stewart and Rehnquist, J. J., dissenting from dismissal of certiorari as improvidently granted).

One of the principal objections to busing is that courts -- frequently relying on the advice of experts -- have largely ignored the measured terms of the Swann decision and have employed busing indiscriminately, on the apparent assumption that the cure-all for past intentional segregative acts is to reconstitute all classrooms along strict racial percentages. Not even in a perfect educational world would one expect to find every school room populated by precise racial percentages that mirror the general school age population.

Mandatory busing has also been legitimately criticized on the grounds that it has been employed in some cases to alter racial imbalance that is in no way attributable to the intentionally segregative acts of state officials. In Keyes v. Denver School District, 413 U.S. 189 (1973), the Supreme Court held that a finding of state-imposed racial segregation in one portion of a school system creates a presumption that racial imbalance in other portions of the system is also the product of state action. To avoid imposition of a system-wide desegregation plan, which often includes system-wide busing, a school board subject to the Keyes presumption must shoulder the difficult burden of proving that racial imbalance in schools elsewhere in the system is not attributable to school authorities. In cases in which there is no independent evidence

that the racial imbalance in a challenged school can realistically be traced to the intentionally segregative acts of school officials, application of the Keyes presumption is unfair. Yet it has in the past been so used, resulting in some instances in imposition of system-wide transportation remedies encompassing not only de jure, or state-imposed, racial segregation, but de facto racial segregation as well.

Sobered by this experience, the Administration has reexamined the remedies employed in school desegregation cases. Stated succinctly, we have concluded that involuntary busing has largely failed in two major respects: (1) it has failed to elicit public support and (2) it has failed to advance the overriding goal of equal educational opportunity. Adherence to an experiment that has not withstood the test of experience obviously makes little sense.

Accordingly, the Department will henceforth, on a finding by a court of de jure racial segregation, seek a desegregation remedy that emphasizes the following three components, rather than court-ordered busing:

(i) removal of all state-enforced racial barriers to open access to public schools;

(ii) assurance that all students -- white, black, hispanic or of any other ethnic origin -- are provided equal opportunities to obtain an education of comparable quality;

(iii) eradication to the fullest extent practicable of the remaining vestiges of the prior dual systems.

To accomplish this three-part objective, we have developed, I think, a coherent, sound, and just litigation policy that will ensure fair enforcement of the civil rights laws, eliminate the adverse results attending percentage busing, and make educational issues the foremost consideration.

As part of that litigation policy, the Department will thoroughly investigate the background of every racially identifiable school in a district to determine whether the racial segregation is de jure or de facto. In deciding to initiate litigation, we will not rely on the Keyes presumption, but will define the violation precisely and seek to limit the remedy only to those schools in which racial imbalance is the product of intentionally segregative acts of state officials. And all aspects of practicability, such as disruption to the educational process, community acceptance, and student safety, will be weighed in designing a desegregation remedy.

In developing the specific remedial techniques to accomplish this three-part objective, we recognize that no single desegregation technique provides an answer. Nor does any particular combination of techniques offer the perfect remedial formula for all cases. But some desegregation approaches that seem to hold promise for success include:

voluntary student transfer programs; magnet schools; enhanced curriculum requirements; faculty incentives; in-service training programs for teachers and administrators; school closings in systems with excess capacity and new construction in systems that are overcrowded; and modest adjustments to attendance zones. The overarching principle guiding the selection of any or all of these remedial techniques -- or indeed resorting to others that may be developed -- is equal educational opportunity.

Let me add that our present thinking is to give this approach prospective application only. We thus do not contemplate routinely reopening decrees that have proved effective in practice. The law generally recognizes a special interest in the finality of judgments, and that interest is particularly strong in the area of school desegregation. Nothing we have learned in the 10 years since Swann leads to the conclusion that the public would be well served by reopening wounds that have long since healed.

On the other hand, some school districts may have been successful in their efforts to dismantle the dual systems of an earlier era. Others might be able to demonstrate that circumstances within the system have changed to such a degree that continued adherence to a forced busing remedy would serve no desegregative purpose. Certainly, if, in the wake of white flight or demographic shifts, black children are being bused from one predominantly black school to another,

the school system should not be required to continue such assignments. A request by the local school board to reopen the decree in such circumstances would be appropriate in my view, and the Justice Department might well not oppose such a request so long as we are satisfied that the three remedial objectives discussed above will not be compromised.

There is another dimension to the Administration's current school desegregation policy that deserves mention. Apart from the issue of unconstitutional pupil assignments, experience has taught that identifiably minority schools sometimes receive inferior educational attention. Whatever the ultimate racial composition in the classroom, the constitutional guaranty of equal educational opportunity prohibits school officials from intentionally depriving any student, on the basis of race, color, or ethnic origin, of an equal opportunity to receive an education comparable in quality to that being received by other students in the school district.

Deliberately providing a lower level of educational services to identifiably minority schools is as invidious as deliberate racial segregation. Evidence of such conduct by state officials might include disparities in the tangible components of education, such as the level and breadth of academic and extracurricular programs, the educational achievement and experience of teachers and administrators, and the size, age, and general conditions of physical facilities.

Indeed, Swann itself held that, independent of student assignment, where it is possible to identify a black school "simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown." 402 U.S. at 18. The Court explained that the proper remedy in such cases is to "produce schools of like quality, facilities, and staffs." Id. at 19. Despite the recognition of this constitutional right by a unanimous Court in Swann, suits have rarely been brought to redress such wrongs.

In pursuing constitutional violations of this kind, the Justice Department in no way intends to second-guess or otherwise intrude into the educational decisions and policymaking of state education officials. That function, as I have previously made clear, is reserved to the states. And in many cases substantial disparities in the tangible components of education may well be attributable to legitimate, racially nondiscriminatory factors. But when such disparities are the product of intentional racial discrimination by state officials, can it seriously be maintained that the educationally disadvantaged students are being afforded equal protection of the laws? Our future enforcement policies will be aimed at detecting and correcting any such constitutional violations wherever they occur.

In sum, the Administration remains firm in its resolve to ferret out any and all instances of unlawful racial segregation and to bring such practices to a halt. We do not believe that successful pursuit of that policy requires resort to a desegregation remedy known from experience to be largely ineffective and, in many cases, counterproductive. The school desegregation amendments that have been proposed during this Congress suggest a similar attitude on the part of a number of members of the House. To the extent that those proposals seek to restrict the use of mandatory student transportation as a tool of school desegregation, they reflect the thinking of the Administration in this area.

In closing, let me state that this Administration will tirelessly attack state-imposed segregation of our Nation's public schools on account of race, color or ethnic origin. The Department's mission continues to be the prompt and complete eradication of de jure segregation. While the relief we seek may differ in certain respects from the remedies relied upon by our predecessors, the Department of Justice will not retreat from its statutory and constitutional obligation to vindicate the cherished constitutional guaranty of equal educational opportunity.

Thank you. Mr. Chairman, I would be happy to respond to questions that you or other members of the Subcommittee may have.

N.I.E., Room 711-N
19th and M Streets, NW
Washington, DC 20208
23 September, 1982

Thank you for the material from Jim Stedman re my busing proposal.

My responses are below:

1) CRS-4 "majority to minority transfer" - this would also be vice versa.

I appreciate Mr. Stedman's research analysis concerning whether the bill would be unique in that he states: "the remedy feature of the bill sets it apart from present bills not only because this particular remedy is offered, but also because any remedy is offered."

It would be a free-standing statute (requiring only a simple majority) as opposed to an amendment.

2) CRS-5 No, the bill would not limit courts' jurisdiction, but only the use of one remedy which racially discriminates. This would be similar to Congress enacting a law allowing or disallowing capital punishment without limiting the courts' jurisdiction or ability to deal in other ways with capital crimes.

Because the objective of the bill is to end a racially discriminatory remedy, it would have to apply to all governing bodies (e.g. what good would it do to prohibit courts from using a discriminatory remedy while allowing a racist school board to discriminate in its remedy?).

Re "neighborhood school," the proposal says that one cannot be prevented from attending his/her neighborhood school, but this does not mean one necessarily has a pre-emptive right to attend the school nearest his/her home.

3) CRS-6 Yes, a school system would have flexibility to alter grade structure, etc., and thereby change the definition of "neighborhood school."

Yes, the proposal would have to be "retroactive" or it would be unconstitutional in that the law would not apply to everyone equally.

(continued)

(CRS-6 continued)

Re "majority to minority transfer," this would also be vice versa, and yes, this right would be predominant.

4) CRS-7 The bill should specify that the transfer right is predominant.

Concerning the hypothetical conflict between one's right to attend one's neighborhood school and one's right of transfer, 2 or 3 comments are in order. First, there is flexibility in the term, "neighborhood school." Second, I stressed earlier that one's right not to be prevented from attending one's "neighborhood school" is not exactly the same as saying one has an absolute right to attend his/her "neighborhood school." The potential controversy raised is a non-issue as the overwhelming evidence has shown that people choose to attend their own "neighborhood school" when they are guaranteed to their own satisfaction that they are receiving equal educational opportunities. Thus one will not see large numbers of individuals displaced from their neighborhood schools by students transferring, because even in a worse case scenario, every individual will be guaranteed to his/her own satisfation that each is receiving an equal educational opportunity in his/her "neighborhood school."

No, I do not intend the proposed solution to apply to all instances of busing for the purpose of desegregation. However, the fact of the matter is that courts have constantly expressed their disapproval of busing schemes that only result in "token integration," and thus nearly all desegregation busing orders are of some "racial balance"variety.

5) CRS-8 Even if the proposed remedy failed to "desegregate" a "discriminatory" school system, it would only be because those of every race were satisfied they were receiving an equal educational opportunity and they would feel that was most important; otherwise they would exercise their right of transfer. Besides, this is no longer a controversy as "achievement," "equal educational opportunity," etc. have been long recognized as the objectives of desegregation (e.g. blacks did not pursue court cases to gain an inferior education). To say "integration" against the will of all races in a particular situation is required by the courts is to imply that blacks could be forced to attend inferior schools and that was not the intent of Brown v. Board of Education.

(continued)

(continued)

6) CRS-9,10 and 11 - the examples covered on these pages are misleading based upon an inaccurate definition of the word, "minority." Although the proposal's purpose is primarily to end the discrimination against blacks in racial balance remedies (because blacks are usually the "minority"race), the bill would end discrimination against any race in minority in any given situation. Thus, except in those rare instances where the racial proportions are exactly equal, one race is by definition in the "minority," and in any racial-balance busing remedy, that race would bear a discriminatory burden. The importance of this fact lies in the recent Supreme Court busing case (Washington), where the Court indicated that any desegregation remedy which unfairly burdened one race (any race) should be terminated.

Yours sincerely,

Dennis L. Cuddy

Dennis L. Cuddy, Ph.D.
Senior Associate, NIE

A Solution to Forced Busing

By D. L. CUDDY

A cartoon recently showed Speaker of the House Tip O'Neill sitting on Senate anti-busing bills which had come to the House. While it is clear that the Democratic leadership in the House has serious reservations about these bills, it is equally clear from opinion polls that a majority of blacks and whites oppose forced busing. The nationally prominent black syndicated columnist for the Washington *Post*, William Raspberry, recently published a column asking whether there was not a better way of guaranteeing equal educational opportunity to those of all races.

Well (no presidential pun intended), I believe I have developed a solution that will satisfy nearly everybody, including the courts and the black leadership in this nation. Congress might simply enact the following free-standing statute, applicable retroactively so as to apply to everyone equally, entitled: "To End the Discriminatory Forced Busing of Minorities":

1. Whereas we live in an open society, nothing should be done to prevent the voluntary integration of schools;

2. Whereas, however, forced busing to achieve racial balance discriminates against minorities (defined as those of the minority race within the school system) because the minority population must be bused in inverse proportion to the majority race's population, forced busing to achieve racial balance will be prohibited and no individual of any race will be denied the right to attend her or his neighborhood school; but

3. To insure that the termination of forced busing to achieve racial balance does not result in coercive resegregation of schools and unequal educational opportunities for students of any race, any student will have the predominant first choice and free transportation right to attend a school in another neighborhood inhabited predominantly by those of another race, when a court has determined that intentional racial discrimination in educational opportunities has occurred.

At first glance, this proposal seems simplistic; but I will explain below why

Dr. Cuddy is a senior associate with the Department of Education's National Institute of Education. This article was written by Dr. Cuddy in his private capacity. No official support or endorsement by NIE is intended or should be inferred.

Mr. Cuddy believes his proposal to end arbitrary court-ordered school busing—opposed by nearly everyone—would help to guarantee black children alternative means of quality education.

CONGRESSIONAL RESEARCH SERVICE Specialist in Education has stated:

"The remedy feature of the bill sets it apart from present bills not only because this particular remedy is offered, but also because any remedy is offered."

this bill should satisfy nearly everyone concerned with this issue.

The purpose of this bill is to protect minority rights. Court-ordered racial balance busing denies blacks equal protection of the law. Because the courts do not allow "token" integration, most all forced school desegregation remedies call for system-wide balanced integration.

However, this means that if a system is 90 per cent white and 10 per cent black, then only 10 per cent of the white students must be transported, but 90 per cent of the black students must be, to achieve system-wide balanced integration. This is flagrant discrimination against blacks, just as if a court ordered 90 per cent of America's black youth drafted into the Army, but only 10 per cent of this country's white youth drafted, so that there would be an equal number of blacks and whites in the service.

The solution I propose should also satisfy the courts because they would still remain involved in determining where equal educational opportunities have been denied on the basis of race. They would not, however, have the right to burden blacks especially by findings of discrimination imputed from some affirmative action-type numbers game. But the courts would have enforcement authority regarding the "first choice and free transportation" provisions of the law if passed. Also, the courts' jurisdiction would not be limited any more than any other congressional statute (e.g. disallowing capital punishment) concerning judicial latitude would limit the courts.

The black leadership of the nation should be satisfied with my proposed solution, because unlike "freedom of choice" where blacks might be told that schools in white neighborhoods are already filled or that they might have to attend those schools at their own transportation expense, the solution I am proposing guarantees the right of all black students to attend a school in a predominantly white neighborhood even before the white students of that neighborhood may attend that school, and free transportation is guaranteed as well.

Thus, even in a worst-case scenario where a white racist school board may contemplate discriminating against blacks, with "first choice and free transportation" guaranteed, all school boards will in their own self-interest see to it that schools in predominantly black neighborhoods receive equal, if not superior, facilities, teachers and appropriations.

The key here is that the decision regarding satisfaction that equal educational opportunities are being guaranteed is in the hands of blacks themselves, and not in the hands of possibly racist school boards. Therefore, if the school in a particular black neighborhood is inferior, then *every* black student is guaranteed the right and transportation to attend a superior school in a predominantly white neighborhood.

Thus, there could be *even more integration* than under court-ordered racial balance busing. However, if black parents in a particular neighborhood feel their school is superior, then they have the right to inform a judge or anyone else of authority that he or she cannot take their children against their will and bus them, in disproportionate numbers to white students, from a superior school to an inferior one. That is not what the civil rights movement has been all about. In fact, such discriminatory action by judges amounts almost to a return to the days of slavery in this country.

If there is a case of coercive action which inhibits blacks from exercising their "first choice" rights and thereby leads to the maintenance of inferior schools in minority neighborhoods, then a judge could simply levy fines against those responsible until the court determines that all schools within the system are equal.

Because my proposal protects minority rights, allows the courts to remain involved in determining where racial discrimination in education has occurred and in eliminating such discrimination, would end the discriminatory burden on blacks of racial balance busing, would place the decision regarding satisfaction of guaranteed equal educational opportunities in the hands of blacks and whites themselves, would not disallow alternatives to forced busing (e.g. magnet schools) to end unlawful segregation, and would allow for more integration, I believe this is as close to a panacea as this nation will come regarding an issue on which the majority of all races agree.

And that agreement is that court-ordered racial balance busing is opposed by nearly everyone, and should be ended as long as there is an alternative means of guaranteeing black children equal educational opportunities, and my proposal would help do just that. If only someone in Congress will now introduce this legislation, forced busing could be ended to the satisfaction of nearly everyone involved. ■

Further to my article, "A Solution to Forced Busing" (HUMAN EVENTS, October 30), the success of this proposed solution to forced busing greatly depends on whether it would be accepted by the Supreme Court. In that regard, the Court's recent decision regarding the state of Washington's busing case offers much hope.

Writing for the Court, Justice Harry Blackmun said: "In our view, Initiative 350 must fall because...it uses the racial nature of an issue to define the governmental decision-making structure, and thus imposes substantial and unique burdens on racial minorities." In effect, the Court is saying that any desegregation remedy which unfairly burdens one race should be disallowed. And since perhaps the majority of court-ordered busing rulings involve "racial-balance" remedies which, by definition, unfairly burden minorities, it seems clear that the Supreme Court now might be ready to end forced racial-balance busing in this nation. That is why the sooner someone in Congress introduces my proposed solution, the better.

D. L. Cuddy

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

September 13, 1982

FROM : Jim Stedman
Specialist in Education
Education and Public Welfare Division

SUBJECT : Constituent's Anti-busing Proposal

This memorandum was prepared in response to your request of August 23, 1982, concerning the busing bill (entitled "To End the Discriminatory Forced Busing of Blacks") proposed by your constituent Dr. D.L. Cuddy in his paper, "A Solution to Forced Busing." As discussed with your legislative aide, Ms. Trudy Wright, this memorandum will consider the following:

(1) the proposal's similarity to bills already before the House Judiciary Committee; and

(2) questions raised by the bill that may possibly merit further consideration.

This memorandum neither endorses nor rejects Dr. Cuddy's proposal; rather, it places the proposal in the context of current legislation and identifies certain issues that may be relevant to further consideration of the bill.

The Proposal

Before considering the similarity of the proposal to current bills, it is necessary to present an outline of Dr. Cuddy's proposal as we read it. The bill presents what may be characterized as findings of fact and a series of resulting limitations of the use of mandatory busing to achieve school desegregation.

First, the bill states that because "we live in an open society, nothing should be done to prevent the voluntary integration of schools." Second, the bill presents the finding that mandatory busing for racial balance is discriminatory against blacks because they "must be bused in inverse proportion to the majority race's population." As a result of this finding, the bill would prohibit mandatory busing for "racial balance" and would establish that the right of individuals to attend their neighborhood schools cannot be denied. This, in essence, would establish a right to neighborhood attendance. Third, in order to avoid "coercive desegregation" and "unequal educational opportunities," all students would have "first choice" and free transportation to attend schools in other neighborhoods "inhabited predominantly by those of another race." This right of transfer would be afforded students only in the event a court had determined that the school system was discriminating on the basis of race.

The bill's main features are (1) the prohibition of mandatory busing to achieve racial balance; (2) the creation of a right to neighborhood attendance; and (3) the establishment of voluntary transfer as the remedy for courts to impose when they find racial discrimination in a school system.

Current Proposals in the House

Although Dr. Cuddy's bill as presented does not define a neighborhood school, we have assumed for purposes of this section that such a school is the one nearest a child's place of residence that offers elementary or secondary education at the child's appropriate grade level. Using this assumption, it appears that Dr. Cuddy's bill partially duplicates bills already before the

House. For example, H.J. Res. 28 (Representative Emerson, January 5, 1981) proposes an amendment to the Constitution providing that:

> No student shall be compelled to attend a public school other than the public school nearest to the residence of such student which is located within the school district in which such student resides and which provides the course of study pursued by such student.

Also, H.R. 2047 (Representative Moore, February 24, 1981), entitled the "Neighborhood School Act of 1981," would, among its various provisions, prohibit any court of the United States from ordering the assignment or transportation of any student to a school other than the one nearest the student's home, with certain exceptions. 1/ Parenthetically, it should be noted that it is not evident whether Dr. Cuddy's bill is proposing an amendment to the Constitution, or free-standing legislation. This issue is considered in the next section.

If one broadens the definition of the right to attend the neighborhood school to include the proposition that no child can be assigned by a court of the United States to attend a particular school on the basis of race, then the number of bills similar to this aspect of Dr. Cuddy's proposal grows significantly larger. 2/

What appears to distinguish Dr. Cuddy's proposal from most introduced in the House during the 97th Congress is the remedy feature. Dr. Cuddy would establish as a right for students in districts adjudicated to be discriminatory

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1/ H.R. 2047 is the House companion bill to S. 528 (Senator Johnston, February 24, 1981) which in a slightly modified form was approved by the Senate as an amendment to S. 951, the FY 1982 Department of Justice appropriations authorization bill. See the Congressional Rsearch Service (CRS) issue brief on school busing (IB 81010) for further details.

2/ See CRS issue brief IB 81010 for a listing of some of these legislative proposals.

what may be called "majority-to-minority" transfer. Students of the race which is in the majority in a school would have the right to transfer to any school in which their race would be in the minority. The remedy feature of the bill sets it apart from present bills not only because this particular remedy is offered, but also because any remedy is offered. It could be argued that H.R. 2047, cited above, does establish or maintain a remedy for school desegregation by not prohibiting busing altogether, but rather limiting its application. 3/

Questions

Dr. Cuddy's bill raises a number of questions that may merit some consideration. These are presented below in no particular order. Following each question is a brief discussion of it.

(1) Is the proposed bill intended to offer an amendment to the Constitution or a free-standing statute?

The 97th Congress, particularly on the Senate side, has been engaged in a lengthy debate over anti-busing legislation (the amendment to S. 951, cited above) which would impose limits on the busing that courts of the United States could order. The legislation seeks to accomplish its ends through statutory means, not by means of a constitutional amendment. Critics have charged that this is a "backdoor" effort to "amend" the Constitution without following the amending process provided in the Constitution. In addition, they argue that the legislation is unconstitutional, exceeding whatever powers under the Constitution the Congress might have to affect U.S. court jurisdiction and constitutional remedies. Supporters of the legislation, on the other hand, argue

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3/ H.R. 5200 (Representative Young, December 11, 1981) is similar in this regard to H.R. 2047.

No not limit jurisdiction only limit one remedy, just as Congress may pass law re capital punishment without limiting courts' ability to deal in other ways with capital crimes

that such legislation is clearly within the powers granted to the Congress under the Constitution and that, with regard to this specific proposal, a remedy is being limited, not removed entirely.

It would appear that Dr. Cuddy's proposal, if it is intended to be a free-standing statute, would generate much of the same sort of controversy that has marked the anti-busing debate in this Congress over S. 951. Also, the proposal would not limit a remedy, but would prohibit this specific remedy (mandatory busing) entirely, an aspect of the proposal which would generate additional debate and raise further questions about its constitutionality.

(2) Is the bill intended to apply only to courts?

It is not clear from the proposed language whether the bill is to limit only the actions of courts, or actions of State governments, or actions of local school boards as well. In addition, the bill does not specify to which courts it might apply--the lower Federal courts, the Supreme Court, or State courts? Clarifying the sweep of the proposal is necessary before one can consider its potential impact on such things as State and local control of education, or its constitutionality.

Yes

all

(3) How is the term "neighborhood school" to be defined in the context of the bill?

Although a definition of "neighborhood school" (nearest school offering the appropriate grade) was assumed in the preceding section for the purposes of comparing Dr. Cuddy's proposal to current bills, even this definition may need some refinement to address some of the more basic questions that arise in this context.

Yes, meaning courts can't prevent someone from going to his/her neighborhood school.

Would the definition of the neighborhood school permit flexibility, that is, could a school system change a child's neighborhood school by changing the grade structure in its schools? The school nearest a fifth grade child's home may in one year offer grades K-6, but, under a desegregation plan, be converted into a school offering only K-3. Would the assignment of the child to another school offering grades 4-6 but located farther from home violate the limitations in Dr. Cuddy's bill? To some families the "neighborhood school" may not necessarily be the one nearest the family's home, but rather the one in the attendance zone of which the family resides. Would Dr. Cuddy's bill permit the modification of attendance zones?

Yes

Yes

(4) Is the proposal retroactive? Yes, or would be unconstitutional in that the law wouldn't apply to everyone equally

There is no language in the bill concerning its application to school desegregation plans and court orders already entered and being implemented. The issue of retroactivity is controversial and complex. It raises questions about such things as the finality of long-standing desegregation plans, the extent to which communities might have to return to the status quo ante as they dismantle desegregation plans, and the fairness of applying different standards to different school districts.

(5) Does the right to attend one's neighborhood school conflict with the right to majority-to-minority transfer in a school district adjudicated to be discriminatory?

and vice versa

The bill does not state how a school system can guarantee these two rights when they come into conflict. For example, a school at full capacity with neighborhood children might be faced with additional children seeking entrance who are exercising their right to transfer. Although in the body of his report, Dr. Cuddy describes the majority-to-minority transfer right as predominant, the

Yes.

bill, on its face, does not make such a distinction. It should be noted that Dr. Cuddy's reading of his bill in this regard suggests that not only is the right to attend a neighborhood school not absolute, but that the bill's requirement that "nothing should be done to prevent the voluntary integration of schools" might be limited as well. A child denied a seat in his neighborhood school because another child has exercised his own right to transfer is subject to a degree of coercion perhaps not in keeping with the bill's goal of voluntary school desegregation.

(7) What is meant by the phrase "forced busing to achieve racial balance?"

This is a critical question that would perhaps be best considered in a legal analysis. Nevertheless, some points can be made here that might be helpful for a more general consideration of Dr. Cuddy's bill. The proposal would prohibit "forced busing to achieve racial balance." "Racial balance" has been described elswhere as refering "to a precise racial representativeness in a school's enrollment or other population" (such as faculty). (Meyer Weinberg, "A Practical Guide to Desegregation: Sources, Materials, and Contacts," Vol. IV of Assessment of Current Knowledge About the Effectiveness of School Desegregation Strategies, Institute for Public Policy Studies, April 1981, prepared under contract with the National Institute of Education and the Office for Civil Rights.)

Does Dr. Cuddy intend the phrase "forced busing to achieve racial balance" to apply to all instances of mandatory busing for desegregation, or only those instances in which it can be shown that a proportional balance of majority and minority children is sought in each school in a system? Dr. Cuddy's analysis of his proposal suggests that he intends the term is to encompass nearly all instances of mandatory busing, largely because he argues that "most court-ordered desegregation remedies call for system-wide balanced integration."

Actually, court-ordered school desegregation plans vary markedly from school system to school system. While some indeed reflect Dr. Cuddy's characterization of busing, few do not. It would, therefore, be possible to read the bill as affecting only some mandatory busing plans. Among the works that might be consulted in this regard is "Busing and the Lower Federal Courts" by Charles V. Dale, legislative attorney in the Congressional Research Service's American Law Division. Dale's analysis appears on pages 637-667 in the volume of hearings before the House Subcommittee on Civil and Constitutional Rights, entitled "School Desegregation" (serial no. 26, 97th Congress, 1st session).

(8) What would the proposal permit if the allowable remedy (majority-to-minority transfer) fails to desegregate a discriminatory school system?

In the event that a school system were required to offer the majority-to-minority transfer option by a court, but none or few students exercised that option and the system remained segregated, would the court or school board be permitted to employ mandatory assignment options, such as redrawing of attendance zones, or the pairing and clustering of schools? Dr. Cuddy argues that the imposition of the transfer option on a school system that wanted to remain segregated would lead to the system directing additional resources into certain schools in order to forestall children from exercising the tranfer option. This suggests that Dr. Cuddy's proposal considers the improvement of educational quality for segregated students to be a legally sufficient remedy for school segregation. This is highly controversial issue that involves debate over, among other issues, what Brown v. Board of Education (347 U.S. 483) requires of school systems to guarantee equal educational opportunities to minority group children. This controversy is being resolved in that "achievement," "equal educational opportunity" etc. are the goals. To say "integration" against the will of all races is the goal is to imply blacks could be ordered into inferior

At another point in his paper, Dr. Cuddy states that "[i]f there is a case of coercive action which inhibits blacks from exercising their 'first choice' rights and thereby leads to the maintenance of inferior schools in minority neighborhoods, then a judge could simply levy fines against those responsible until the court determines that all schools within the system are equal." This statement clearly places the desegregation of schools in a second priority position. It also finds no reflection in the language of his proposal.

(9) Do efforts to achieve a racial balance always discriminate against black children "because the minority population must be bused in inverse proportion to the majority race's population?"

This is one of the premises stated in Dr. Cuddy's proposal and from it flows his prohibition against mandatory busing for racial balance. The question of racial balance has been discussed above (question 7). The logic of this premise is explored below.

The degree to which minority group children will have to be reassigned, relative to the reassignment of white children, in an effort to achieve a strict racial balance in schools, depends upon the specific distribution of children within a particular system's schools. The burden of reassignment need not be invariably imposed unequally on blacks. In systems that are evenly divided between blacks and whites or predominantly black, the mathematical logic of reassigning children to achieve precise racial balance permits that, in the first instance, equal percentages of blacks and whites might be reassigned, and in the second instance, a smaller percentage of blacks might be reassigned. Consider the following examples. If a system with 100 white children and 100 black children had two schools, one entirely white and one entirely black, to achieve a racial balance in these two schools one of

several reassignment strategies could be followed. Half of the students in each school could be reassigned to the other--the same number and percentage of children from each race would be reassigned. Or, one of the schools could be closed and all the children of that one reassigned to the other--the burden could be either on black children or white children. Or, the enrollment of one school could be increased and the other decreased. For example, the black school's enrollment could be raised to 150. To achieve a racial balance, 25 black children would be reassigned to the white school and 75 of the white children would be reassigned to the black school. The schools would now be balanced--the former black school would have 75 blacks and 75 whites, the former white school would have 25 blacks and 25 whites. In this instance 25 percent of the blacks and 75 percent of the whites would have been reassigned.

To take another hypothetical example, in a predominantly black system with 600 students, 350 (58 percent) of them black, and 250(42 percent) of them white, 300 of the black students attend one school as do 20 of the whites. That school is 94 percent black. In the system's only other school, 50 blacks are enrolled and 230 whites. The school is 82 percent white. To balance such a system with each school having a 58 percent black and 42 percent white student body, 113 of the black students could be reassigned from the black school to the white school, and 113 of the white students could be reassigned from the white school to the black school. In the black school there would now be 187 blacks and 133 whites (58 percent black/42 percent white). In the former white school, there would be 163 blacks and 117 whites (58 percent black/42 percent white). Here the burden falls disproportionately on the white students--32 percent of the blacks were reassigned, while 45 percent of the whites were reassigned.

Clearly the variations that one might consider are endless and can be made increasingly complex. A premise that black students are likely to ride buses for desegregation purposes in disproportionate numbers may be correct given the experience with actual desegregation plans, but an effort to achieve a racial balance in a school system does not <u>mathematically</u> dictate that blacks will be reassigned in inverse proportion to their representation in the system or that they will be the group more burdened by reassignment.

This is specious as in only those rare systems of equal balance racially there would be no burden on one race or the other. Whether a system is 70% white + 30% black or 70% black +30% white, the "minority" (whether white or black) always bears a heavier burden + is thus denied the equal protection of the law based on race. In the latest Supreme Court case, the court said any remedy that unfairly burdens any race should be terminated.