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THIRD PARTY LIABILITY FOR INJURIES IN THE WORKPLACE
(87-619)

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DEFENDING AGAINST AN ENVIRONMENTAL PERSONAL INJURY CLAIM*

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I. COMMON PLAINTIFF'S THEORIES

A. In order to avoid Workmen's Compensation Act exclusivity provisions

1. Intentionally inflicted injuries
2. Dual capacity doctrine

B. General

1. Negligence
2. Strict liability
3. Breach of express and implied warranties
4. Breach of contract
5. Wrongful death
6. Loss of consortium
7. Intentional infliction of emotional distress
8. Manufacturer's product liability
9. Misrepresentation
10. Failure to warn
11. Unfair trade practices

II. DEFENSES: PROCEDURAL STEPS

A. Use motions whenever possible to limit case, to define issues, to educate judge.

1. Fed. R. Civ. P. 11.
Consider filing Fed. R. Civ. P. Rule 11 motion, particularly if plaintiffs' claim has no apparent scientific or medical support. But see Glaser v. Cincinnati Milacron Inc. ____F. 2d.____(3rd. Cir. 1986) (reversing allowance of Rule 11 motion)

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*Apologia: because the topic is so broad and so difficult to define, this outline does not purport to be exhaustive or, indeed, anything more than illustrative.

2. Statute of Limitations.

Motions to dismiss on statute of limitations grounds may be fruitful. You may need limited discovery first and you should consider asking the Court initially to limit all discovery to these limitations issues. The chief complexity will be the Massachusetts discovery rule under which the statute of limitations does not begin to run until the plaintiffs had reason to know they were injured, which may not occur until years after the accident, incident, or exposure which allegedly caused the injury. Franklin v. Albert, 411 N.E.2d 458 (Mass. 1980). You will need to carefully review plaintiffs' deposition testimony and medical records to determine date of first symptomology or manifestation. You may need an affidavit from your expert on the point.

The question of which statute of limitations applies may need some careful research. For example, there is a specific exception to the Massachusetts Wrongful Death Act for actions against employers. See M.G.L. c. 229 §2. Such actions are governed by a separate statute of limitations. See M.G.L. c. 229, §6C

There may also be a statutory requirement that death have occurred within a certain time period after the injury, which may also provide grounds for motions to dismiss. See e.g., Mass. St. 1979, c. 164 §1.

4. Summary Judgment.

Particularly in light of the U.S. Supreme Court's recent trilogy of summary judgment decisions, defendant should consider whether the weaknesses in plaintiffs' case permit summary judgment. See Celotex Corp. v. Catrett, ____ U.S. ___, 91 LEd 2d 265 (1986); Anderson v. Liberty Lobby, Inc. ___ U.S. ___ 91 LEd2d 202 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., ____ U.S. ____, 106 S. Ct. 1348 (1986).

Celotex reversed the court of appeal's reversal of the district court's entry of summary judgment for a defendant manufacturer where plaintiff alleged that her husband's death was caused by exposure to asbestos. Defendant's summary judgment motion was based on plaintiff's failure to produce admissible evidence of exposure to the defendants product.

Summary judgment may be appropriate, for example, where plaintiff's medical causation evidence is novel or unsupported by the medical literature. Key for any defense lawyer in an environmental personal injury case is familiarity with Judge Weinstein's order in the Agent Orange case, granting summary judgment to defendants as to the claims of those Vietnam veterans and their families who opted out of the class and the class settlement. See In re Agent Orange Product Liability Litigation, MDL 381(JBW) (E.D. N.Y. May 8, 1985), on appeal. Judge Weinstein found much of the plaintiff's medical evidence, including expert testimony to be inadmissible.

5. Protective Orders.
Important to limit plaintiff's use of discovered materials in order to avoid trying your case in the press. See Anderson v. Cryovac, 805 F.2d 1(1st Cir. 1986) (on appeal by Boston Globe from protective order)

B. Pre-trial

1. Phased Trials.
Seek separate trials on separate liability phases of case, not just separate trials on liability and damages. This may help keep the emotional impact of plaintiff's case in proper perspective and help focus on objective evidence. An initial phase might be to try the issue of whether plaintiffs were in fact exposed to chemical X, and, if so what was the amount of exposure? There is ample precedent for this approach. For example, in the Woburn

toxic tort case, Anderson v. Cryovac, (D. Mass.), Judge Skinner divided case into 4 phases: (a) Did chemicals from defendants' plants reach wells G & H and was it as a result of defendants' negligence; (b) Did these chemicals cause plaintiffs' leukemia and, if so, damages; (c) Did those chemicals cause plaintiffs' other injuries; (d) Punitive damages. See also bifurcation or phasing orders in Agent Orange and New Bedford Harbor PCB pollution cases.

2. Motions in Limine

Attempt to get rulings on key evidence points before trial. You may wish to challenge the proffer of opinion testimony by plaintiffs' expert by motion in limine. Several of the well known plaintiffs' experts in toxic tort litigation have, when challenged, been disqualified.

3. Voir dire of potential jurors

Because of pervasive public fear of toxic substances in the environment, you should attempt to persuade the court to ask appropriate voir dire questions. See Kaowili v. Raymark Industries, Inc. ____P.2d____(Hawaii 1986) (reversing because voir dire questions to potential jurors implied plaintiff's death was caused by inhaling asbestos fibres.)

III. SUBSTANTIVE DEFENSES

A. Some Legal Defenses

1. Scope of duty of care

The circumstances of your case may give rise to a more limited duty of care. Eg. Physician who is independent contractor to corporation's medical department is accused of malpractice by deceased employee's family. Corporation's duty of care may extend no further than duty to have selected physician with due care.

2. Compliance with pertinent statutory standards.
Note that such compliance in many cases will only be evidence of due care, but it may set the case up for a summary judgment motion.

3. Preemption.
In appropriate cases (e.g. warning labels), argue preemption by applicable federal statute. See Silkwood v. Kerr McGee Corp. 464 U.S. 238 (1984).

4. Misuse defense.
If product is used contrary to warning label or instructions, a misuse defense may be available. See comment i to Section 402A of Restatement of Torts (2d); Uptain v. Huntington Lab Inc., ___ Col. ___ (1986).

5. Strict liability.
For elements of strict liability claim under Massachusetts law see Clark-Aiken Co. v. Cromwell Wright Co., Inc., 367 Mass. 70 (1965), which adopts the Restatement of Torts (2d) §§519 and 520. It is for the court, not the jury, to initially determine whether an activity is abnormally dangerous. The jury's role is to determine if plaintiffs were damaged and if that damage is causally related to the activity. In determining whether an activity is abnormally dangerous, the court must consider the six Restatement Factors:

a. existence of a high degree of risk;
b. likelihood of great harm;
c. inability to eliminate the risk through reasonable care;
d. extent to which the activity is not a matter of common usage;
e. inappropriateness of the activity to the locality; and

f. value of the activity to the community.

For cases helpful to defendants, see United States Electric Light Co. v. Deliso Construction Co., 315 Mass. 313 (19__); Kaufman v. Boston Dye House, Inc., 280 Mass. 161 (1932).

6. Unavoidably Unsafe Product.
This is a defense to strict liability claim and is described in comment k to §402A of Restatement of Torts (2d).

7. Learned Intermediary Rule
If product is "unavoidably unsafe", (e.g. certain drugs) it must be properly prepared, marketed, and warning notice given. Restatement of Torts §402A, Comment k. Issues arise as to who should receive the warning. If warning given to physicians or others who are a learned intermediary", it may suffice. Swarze v. McNeil Laboratories, Inc., ____F. 2d ____ (5th Cir. 1987).

B. Some Fact - Based Defenses

1. Contributory negligence/comparative fault

2. Assumption of risk

3. State of the art
This is a common defense in asbestos exposure cases and argues that, given the state of scientific knowledge at the time, it was not and could not have been forseeable that the substance would cause injury. Note the interplay with the Restatement strict liability factors.

4. Causation in Fact: Medical Causation
a. Exposure. Was plaintiff in fact exposed to the substance? Are there other routes of exposure for chemical agent

allegedly involved? Were exposure levels less than OSHA approved workplace exposure levels?

b. "Dose response" evidence. The exposure to the allegedly toxic substance suffered by the plaintiff may have been so small that it could not have caused the disease claimed. See e.g. Thompson v. Southern Pacific Transportation Co., ___ F. 2d ___ (5th Cir. 1987) (reversing verdict because insufficient evidence to establish link between exposure level and disease).

c. Medical literature. Importance of review of medical literature and particularly epidemeological studies to prove or disprove associations between exposure and claimed illness.

d. Alternate Causes. Has plaintiff been exposed to other substances known to cause injuries alleged? E.g. If death was from lung cancer, was plaintiff a heavy smoker?

e. No Injury. There are an increasing number of "damage to immune system" claims brought by paintiffs using "experts" from the clinical ecology school of thought. This school holds that exposure to chemicals damages the body's immune system and makes any and every disease more likely. But a jury may find that plaintiffs' "injury" is no more than run-of-the-mill illnesses, like colds and coughs, shared in common by the population. This was a key theme in the defense victory in the California Aerojet water contamination case.

IV. DAMAGES

In addition to damages sought for actual injuries, plaintiffs frequently seek damages for increased risk of future injuries. This issue has not been directly addressed by the Supreme Judicial Court.

Be aware of punitive damages possibilities and of large awards in toxic exposure cases (E.g. $12.7 million and actual damages to 100 residents of Hardeman County Tennessee in Velsicol case, Sterling v. Velsicol Chemical Co., ___F.2d___(W.D. Tenn. 1986)

V. MISCELLANEOUS

Insurance
Insurer may refuse to defend or pay costs of judgment if "environmental" tort is involved, arguing that event was not "sudden and accidental" and not an "occurance."

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FEDERAL CIVIL PRACTICE: Making the Transition from State Court Practice

(90-606)

MASSACHUSETTS CONTINUING LEGAL EDUCATION, INC.
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FEDERAL COURT MOTION PRACTICE
IN THE DISTRICT OF MASSACHUSETTS

by Sandra Lynch
Dan Lindsey
Foley, Hoag & Eliot

I. Introduction.

A. General purposes of motion practice.

1. To prevail at the earliest stage possible and thereby spare your client time and money (even arguing motions for injunctive relief, you have an early chance to argue the merits of the case and frame it to your benefit).

2. To narrow the scope of the issues to be litigated (which should ultimately result in the savings of time and money).

B. Local Rule 17: "Motion Practice."

1. 1.17(a)(1): all motions must be filed with supporting memoranda and with any affidavits and other documents that the moving party intends to submit.

2. 17(a)(5): supporting memoranda shall not exceed twenty double-spaced pages.

3. 17(a)(2): the nonmoving party will have fourteen days to file an opposition to the motion, along with a supporting memorandum and with any affidavits and other documents that the nonmoving party intends to submit.

4. 17(c): either party may include in its motion a request for an oral hearing.

5. 17(d)-(e): the court may then grant a hearing, as per Rule 17(d), or it may

rule on the motion for summary judgment based solely on the papers submitted. Rule 17(e).

II. Injunctions. Federal Rule of Civil Procedure ("Rule") 65.

A. Preliminary injunctions. Rule 65(a).

1. Purpose.

a. Developed historically as an equitable remedy to be used in the absence of strict legal remedies.

(1) Generally precluded by comprehensive administrative scheme. See, e.g., Sampson v. Murray, 415 U.S. 61 (1974) (no injunction for discharged government employee absent exhaustion of administrative remedies).

(2) Precluded if strict legal remedies are unavailable because statute of limitations has run. See, e.g., Graffals Gonzales v. Garcia Santiago, 50 F.2d 687 (1st Cir. 1977) (dismissal of § 1983 action for reinstatement to job where plaintiff did not bring action within applicable limitation period).

b. Generally (but not always) functions to preserve the status quo pending the outcome of litigation.

2. Procedure.

a. While motions for preliminary injunctions are usually filed with the complaint, Rule 65 allows the plaintiff to file separately.

b. Rule 65(a)(2) permits the court to consolidate a preliminary injunction hearing with a hearing on the merits (defendants may want to seek consolidation where plaintiff's motion for an injunction is weak on the merits).

3. The general (Planned Parenthood) standard.

A court will grant injunctive relief if it finds all of the following:

a. that the plaintiff will suffer irreparable injury if the injunction is not granted;

b. that such injury outweighs any harm which granting injunctive relief would inflict on the defendant;

c. that plaintiff has exhibited a likelihood of success on the merits;

d. that the public interest will not be adversely affected by granting the injunction.

Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981), quoting Women's Community Health Center, Inc. v. Cohen, 477 F.Supp. 542, 544 (D. Me. 1979)

4. Factor 1 of the Planned Parenthood standard: irreparable injury.

a. Must be noncompensable; otherwise, courts will wait and grant relief if and when liability is determined.

(1) Generally, the injury must be something that money damages can't remedy. See, e.g., Castro

v. United States, 755 F.2d 399 (1st Cir. 1985) (plaintiffs seeking reinstatement in their former jobs denied preliminary injunction; money damages were adequate remedy, even though they were unable to obtain other employment).

(2) However, injunctive relief may be appropriate if it appears that there can be no accurate determination of monetary damages. See, e.g., Bi-Rite Enterprises, Inc. v. Bruce Miner Poster Co., Inc., 616 F. Supp. 71 (D. Mass. 1984) (difficulty of proving monetary damages in publicity rights dispute helped plaintiff to establish irreparable injury).

(3) In addition, an injunction is in order where monetary harm may be so great as to cause bankruptcy or other severe financial loss. See, e.g., Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (allegations of substantial loss of business and bankruptcy indicate irreparable harm).

(4) Courts are most willing to grant injunctions when constitutional rights, especially First Amendment rights, are at stake. See, e.g., Elrod v. Burns, 427 U.S. 347 (1976) (injunctive relief appropriate where plaintiff employees' First Amendment rights of association were being harmed by defendant's employment policies).

b. The injury must be demonstrable and immediate to be irreparable.

(1) The injury cannot be speculative. See, e.g., Mass. Coaltion of Citizens v. Civil Defense Agency, 649 F.2d 71 (1st Cir. 1981) (denial of injunction seeking modification of nuclear evacuation plan for handicapped).

(2) The injury must be immediate. See, e.g., Smith & Wesson v. United States, 782 F.2d 1074 (1st Cir. 1986) (no irreparable harm where gun manufacturer's failure to win government contract did not bar it from bidding on future contracts).

c. Demonstrating the threat of irreparable injury with concrete facts is essential.

(1) Courts will demand hard factual evidence of imminent injury before granting an injunction. (In Massachusetts, federal courts are stricter than state courts on this score.) See, e.g., Donnelly v. Boston College, 401 F.Supp. 1 (D. Mass. 1975) (injunction should not be granted on basis of unsubstantiated, conclusory allegations).

(2) To get at the facts, federal (but not state) courts will generally conduct an evidentiary hearing on a motion for injunctive relief. See, e.g., Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029 (1st

Cir. 1982) (courts hearing motions for preliminary injunctions are urged to develop all the facts).

(3) Plaintiff's delay in seeking injunctive relief will undermine its assertion of irreparable injury. See, e.g., Castro v. United States, 755 F.2d 399 (1st Cir. 1985) (plaintiff's year-long delay in seeking preliminary injunction suggests no irreparable injury).

5. Factor 2 of the Planned Parenthood standard: balancing of the equities.

a. Where potential harm to the defendant given the injunction outweighs potential injury to the plaintiff absent the injunction, no injunctive relief will issue. See, e.g., Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029 (1st Cir. 1982) (harm to shareholders of defendant corporation could be irreparable if tender offer were consummated in violation of state Take-Over Act if, contrary to the plaintiff's contention, that Act turned out not to be preempted by federal law).

b. Where the potential injury to plaintiff is greater, the injunction will issue even in a novel or uncertain area. See, e.g., Ordway v. Hargraves, 323 F.Supp. 1155 (D. Mass. 1971) (expulsion of pregnant high school student enjoined; importance of continuing plaintiff's education greatly outweighed hardship to defendant).

6. Factor 3 of the Planned Parenthood standard: probability of success on the merits.

   a. Plaintiff has burden of demonstrating probability of success on the merits.

      (1) May be difficult where there are significant factual disputes and/or novel legal theories. See, e.g., Spencer Cos. v. Armonk Industries, 489 F.2d 704 (1st cir. 1973) (no injunction given major factual dispute as to materiality of defendant's misrepresentation and associated problems concerning applicability of securities law).

      (2) If injunction depends on alleged statutory violation, court will require thorough examination of underlying purpose of statute and establishment of a prima facie case. See, e.g., EEOC v. Tufts Institute of Learning, 421 F.Supp. 152 (D. Mass. 1975) (alleged sex discrimination in violation of Equal Employment Opportunity Act).

      (3) Plaintiff's legal theory may involve some allocation of burden of justification or production to defendant. See, e.g., Ordway v. Hargraves, 323 F.Supp. 1155 (D. Mass. 1971) (expelled high school student entitled to injunction in absence of justification of policy barring pregnant students from attending school).

b. Probability of success on the merits s usually the most important factor.

(1) While all four factors "must be considered, the probability-of-success component has loomed large in cases before this court." Massachusetts Association of Older Americans v. Sharp, 700 F.2d 749, 751 (1st Cir. 1983).

(2) Indeed, the finding on probability of success will often (especially in constitutional cases) influence the findings on the other three factors. See, e.g., Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006 (1st Cir. 1981).

(3) In addition, "the more serious the harm to defendant of issuing a preliminary injunction, the stronger must be the showing that plaintiff will probably succeed." A-Copy, Inc. v. Michaelson, 599 F.2d 450, 451 (1st Cir. 1978).

7. Factor 4 of the Planned Parenthood standard: the public interest.

a. Public interest can tip the balance in plaintiff's favor. See, e.g., City of Boston v. Hills, 420 F.Supp. 1291 (D. Mass. 1976) (public interest in providing affordable housing contributed to judgment that HUD was entitled to an injunction to force Boston to implement HUD's rent levels for low-income housing).

b. Or, the public interest can cut against plaintiff's request for injunctive relief. See, e.g., Lewis v. Richardson, 428 F.Supp. 1164 (D. Mass. 1977) (court denied cities' motion to enjoin federal grant distributions to other cities, since federal defendants were presumed to be promoting national interests greater than those of the plaintiff cities).

B. Temporary restraining orders ("TRO's"). Rule 65(b).

1. Similar to a preliminary injunction.

a. To maintain the status quo (until the court is able to hear a motion for a preliminary injunction).

b. Standards governing issuance of TRO are same as those applicable to motions for preliminary injunctions. See, e.g., Quincy Cablesystems, Inc. v. Sully's Bar, Inc., 640 F.Supp. 1159 (D. Mass. 1986).

c. As with motions for a preliminary hearing, a motion for a TRO can be accompanied by a full evidentiary hearing.

2. But different.

a. Can be granted ex parte.

b. So, only effective for 10 days, unless court grants a 10-day extension.

3. Defense options.

a. Contest TRO when initially requested.

b. Contest TRO after granted and after giving plaintiff two days' notice.

c. Contest extension, if plaintiff seeks one.

d. Wait until hearing on the preliminary injunction.

Motions to dismiss. Rule 12.

A. Grounds for dismissal.

1. Rule 12(b) provides seven grounds for dismissal, of which 12(b)(6) and 12(b)(1) are the most significant.

2. In addition, a defendant may file a motion to dismiss for noncompliance with Rule 8 ("General Rules of Pleading"). See, e.g., Martin v. Hunt, 29 F.R.D. 14 (D. Mass. 1961) (court granted motion to dismiss where plaintiff presented rambling and verbose complaint containing mostly irrelevant material).

3. Defendant accused of fraud may move to dismiss on the grounds that "the circumstances constituting fraud" were not "stated with particularity" by the plaintiff as required by Rule 9(b) ("Pleading Special Matters"); plaintiff, however, is entitled to some discovery before dismissal. See New England Data Services, Inc., v. Becher, 829 F.2d 286 (1987) (district court should have afforded plaintiff a meaningful opportunity for discovery before dismissing a civil RICO action alleging mail and wire fraud on the grounds of failure to plead with sufficient particularity).

B. Procedure.

1. The defendant may move to dismiss at any point during the answer period, which is the 20-day period following the service of the summons and complaint. Rule 12(a).

2. In addition, "a district court may, in appropriate circumstances, note the inadequacy of the complaint and, on its own initiative, dismiss the complaint." Literature, Inc. v. Quinn, 482 F.2d 372, 374 (1st Cir. 1973).

C. Rule 12(b)(6): dismissal for "failure to state a claim upon which relief can be granted."

1. Purpose.

   a. To test the legal sufficiency of a complaint.

   b. Thus, the court can only consider facts alleged in the complaint; if the court does consider outside facts, then 12(c) provides that the motion shall be treated as a (Rule 56) motion for summary judgment. See, e.g., O'Brien v. DiGrazia, 544 F.2d 543, 545 n.2 (1st Cir. 1976), cert. denied, 431 U.S. 914 (1977).

   c. Likewise, the court should allow the plaintiff to amend a complaint which is deficient for technical reasons only; such a dismissal (unlike other 12(b)(6) dismissals) is not a judgment on the merits. See, e.g., DiPerri v. Federal Aviation Administration, 671 F.2d 54, 59 n.4 (1st Cir. 1982).

2. The general (Conley) standard.

a. The court should grant a 12(b)(6) dismissal if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U. 41, 45-46 (1957).

b. This standard is met if it is clear that the law provides no relief for the specific actions alleged by the plaintiff. See, e.g., Williams v. City of Boston, 599 F.Supp. 363 (D. Mass. 1984), aff'd, 784 F.2d 430 (1st Cir. 1986) (no constitutional right to adequate police protection hence no § 1983 claim).

c. A 12(b)(6) motion is especially appropriate when there is no factual dispute but only a dispute as to statutory interpretation. See, e.g., Roeder v. Alpha Industries, 814 F.2d 22 (1st Cir. 1987) (RICO and Securities Exchange Act).

3. The (Parratt) standard for § 1983 claims.

a. The 12(b)(6) standard for § 1983 claims is set forth in Parratt v. Taylor, 451 U.S. 527, 535 (1981). See, e.g., Chiplin Enterprises v. City of Lebanon, 712 F.2d 1524, 1526-27 (1st Cir. 1983).

b. According to this standard, the plaintiff must show

(1) that the conduct complained of was committed by a person acting under color of state law, and

(2) that the plaintiff was deprived of rights, privileges, or immunities secured by the constitution or laws of the United States. Id.

4. Interaction of 12(b)(6) and Rule 8.

a. Rule 8(a)(2)'s requirement of no more than "a short and plain statement of the claim showing that the pleader is entitled to relief" limits the rigor with which Rule 12(b)(6) can be applied. See, e.g., Harper v. Cserr, 544 F.2d 1121, 1122 (1st Cir. 1976) (allegations concerning plaintiff's disappearance from state hospital with defendant official's knowledge sufficient to withstand motion to dismiss and to permit further evidentiary development).

b. Indeed, defendant may obtain a Rule 8 dismissal if plaintiff fails to present a simple, concise, and direct statement of its claims. See, e.g., Newman v. Commonwealth of Massachusetts, 115 F.R.D. 331 (D.Mass. 1987) (dismissal appropriate where complaint's complexity, unnecessary detail, and lack of organization made defendant's task in answering unnecessarily difficult).

c. Still, plaintiff cannot rely unreasonably on the "notice pleading" framework of the Federal Rules but must allege specific facts to support any conclusory allegations. See, e.g., Johnson v. General Electric, 840 F.2d 132, 138 (1st Cir. 1988) (Title VII claim dismissed because plaintiff, who had been denied a promotion, did not allege specific facts which would "support a finding that he would have been treated differently had he not been black").

5. Presenting affirmative defenses through a 12(b)(6) motion to dismiss.

   a. Like most (but not all) courts, First Circuit courts have allowed defendants to raise affirmative defenses in 12(b)(6) motions. See, e.g., Diaz-Buxo v. Trias Monge, 593 F.2d 153, 154 (1st Cir.), cert. denied, 444 U.S. 833 (1979) (res judicata); Holden v. Boston Housing Authority, 400 F. Supp. 399 (D. Mass. 1975) (statute of limitations); Gaffney v. Silk, 488 F.2d 1248, 1250-51 (1st Cir. 1973) (official immunity).

   b. If, in making its affirmative defense, the defendant must raise facts outside those contained in the pleadings, then the motion will be treated as one for summary judgment. Rule 12(c). See, e.g., O'Brien v. DiGrazia, 544 F.2d 543, 545 n.2 (1st Cir. 1976), cert. denied, 431 U.S. 914 (1977).

6. Effect of 12(b)(6) motion on other 12(b) motions to dismiss.

   a. Rule 12(g) allows defendant to consolidate its 12(b)(6) motion with other 12(b) motions to dismiss.

   b. If defendant makes a 12(b)(6) motion to dismiss and fails to include other 12(b) grounds for dismissal, defendant automatically waives those defenses, except for 12(b)(1) (lack of subject matter jursidiction) and 12(b)(7) (failure to join a necessary party). Rule 12(g)-(h).

D. Rule 12(b)(1): dismissal for "lack of jurisdiction over the subject matter."

1. Procedure.

   a. Rule 12(h)(3) specifies that a 12(b)(1) motion can be raised _at any time_.

   b. The parties may engage in discovery on the jurisdictional issue, the court may hold a hearing, and the court may consider any evidence relating to jurisdiction in whatever form, including affidavits and depositions. _See_, e.g., _Jackson v. Sargent_, 394 F. Supp. 102, 165 n.1 (D. Mass.), _aff'd sub nom. Jackson v. Dukakis_, 526 F.2d 64 (1st Cir. 1975).

2. Purpose.

   a. To respect the limited jurisdiction of the federal court system.

   b. Thus, unlike substantive 12(b)(6) dismissals, a 12(b)(1) dismissal does not address the merits of the case. _See_, _e.g._, _Bell v. Hood_, 327 U.S. 678, 682 (1946) (failure to state a sufficient legal claim calls for a 12(b)(6) judgment on the merits rather than a dismissal for lack of subject matter jurisdiction).

   c. However, because a "wholly insubstantial and frivolous" complaint can be dismissed for lack of subject matter jurisdiction, _Bell_

v. Hood, 327 U.S. 678, 682-83 (1946), the dividing line between 12(b)(1) and 12(b)(6) motions is sometimes hazy. See, e.g., Chiplin Enterprises, Inc. v. City of Lebanon, 712 F.2d 1524 (1st Cir. 1983) (district court should have dismissed on 12(b)(6) grounds rather than on 12(b)(1) grounds).

E. Motions to dismiss in class actions.

1. Rule 23(e) adds an extra dimension to dismissal in the context of class actions by stating that a "class action shall not be dismissed or compromised without the approval of the court": court approval is necessary even when it is the named plaintiffs who seek to dismiss or settle a claim. See also Rule 41(a).

2. In addition, Rule 23(e) requires that "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." (There is no similar notice requirement under Massachusetts state law.)

IV. Discovery motions.

A. Two golden rules.

1. Do everything you can to work out discovery problems with opposing counsel before seeking help from the judge (or magistrate).

2. If you can't work it out, make sure that when you do see the judge (or magistrate), you can show that you tried.

B. Local requirements for bringing a discovery motion.

1. Local Rule 16(d) requires the movant to arrange for a conference prior to the motion hearing in a "good faith effort to narrow the areas of disagreement to the greatest possible extent."

2. The court clerk cannot file a motion for discovery unless the movant includes a certificate stating that the parties have made genuine efforts to settle the problem but have not been able to do so. The certified statement must also include the details of those efforts. Local Rule 16(d).

3. In Massachusetts, federal district court discovery motions are automatically referred to magistrates unless the judge specifies otherwise. Magistrates Rule 8.

C. The authority of courts to define the scope of discovery.

1. Courts can limit the scope of discovery by issuing protective orders under Rule 26(c), provided that they are given specific justification for doing so. See, e.g., Anderson v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986) (findings of good cause for protective orders must be based on particular factual demonstration of potential harm, not on conclusory statements).

2. Courts may grant a discovery conference upon motion by one of the parties, but that party must include in its motion, *inter alia*, a statement that the parties have made a genuine effort to resolve the issues which they now bring before the court. Rule 26(f).

3. Rule 37 grants courts wide discretion to enforce discovery, including the power to dismiss a claim if the plaintiff does not cooperate. See, e.g., Farm Construction Services, Inc., v. Fudge, 831 F.2d 18 (1st Cir. 1987) (trial court is not necessarily required to attempt less severe sanctions before turning to sanction of dismissal for failure to comply with discovery order).

V. Motions for summary judgment. Rule 56.

A. Purpose.

1. To avoid an evidentiary hearing (and the attendant costs and delay) where there is no genuine factual dispute relevant to the legal controversy.

2. Can also be used to narrow the scope of issues to be tried. Rule 56(d).

3. The Supreme Court has recently declared that summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2555 (1986).

B. Procedure.

1. Either side can bring a motion for summary judgment.

2. Can be brought

a. by the plaintiff 20 days after the complaint is filed, up until 10 days before the hearing;

b. by the defendant once the complaint is filed, up until 10 days before the hearing.

3. The court will consider affidavits and all products of discovery (i.e., admissions, answers to interrogatories, and depositions) in making its decision.

C. Use of affidavits by either party.

1. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Rule 56(e).

2. Courts interpret Rule 56(e) strictly, according to the Federal Rules of Evidence. <u>See</u>, <u>e.g.</u>, <u>Adickes v. S.H. Kress & Co.</u>, 398 U.S. 144, 159 n.19 (1970) (hearsay statement in deposition not proper support for summary judgment); <u>Gillentine v. McKeand</u>, 426 F.2d 717, 722 (1st Cir. 1970) (motion for summary judgment denied because affidavit going to question of value merely expresses an opinion and does not negate existence of "genuine" issue of fact).

3. Courts may be reluctant to rely on affidavits in motions for summary judgment where a party's state of mind is a material issue or element of a claim or defense. <u>See</u>, <u>e.g.</u>, <u>Gual Morales v. Hernandez Vega</u>, 579 F.2d 677 (1st Cir. 1978) (summary judgment improper where questions exist concerning existence of conspiracy); <u>but see</u> <u>Schuler v. Polaroid</u>, 848 F.2d 276 (1988) (court granted defendant's motion for summary judgment in age

discrimination case where plaintiff failed to rebut testimony that his discharge was based on age-neutral factors).

4. Objections to form or substance will be treated as waived unless raised by a timely motion to strike. See, e.g., Lacey v. Lumber Mutual Fire Insurance Co., 554 F.2d 12304, 1205 (1st Cir. 1977) (by failing to move to strike plaintiff's affidavit in support of summary judgment motion in trial court, defendants waived objections to its adequacy and could not raise their attack on appeal).

D. The standards for summary judgment.

1. The moving party's burden. Rule 56(c).

   The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (emphasis added)

2. The non-moving party's burden. Rule 56(e).

   When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials or his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. (emphasis added)

E. Interpretation of the standards: the Supreme Court trilogy (Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986))

1. The moving party's burden.

a. Material facts.

Material facts are those "that might affect the outcome of the suit under the governing law." Andersen v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

b. Genuine issue as to any material fact.

(1) A genuine issue exists if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Liberty Lobby, 477 U.S. at 248. This standard "mirrors the standard for a directed verdict." Id. at 250. See also Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. 574, 587 (1986) ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'").

(2) In determining whether a genuine issue exists, "the judge must view the evidence presented through the prism of the substantive evidentiary burden." Liberty Lobby, 477 U.S. at 254 (emphasis added). If the defendant moves for summary

judgment, then the court must decide whether the plaintiff could prove its case to a reasonable jury based upon the evidence in the record.

(3) Although the judge must take into account the plaintiff's substantive evidentiary burden in ruling on a motion for summary judgment, it remains the jury's function to make credibility determinations, weigh the evidence, and draw inferences from the evidence. Hence, the judge must believe the nonmoving party's evidence and draw all inferences in its favor. Id. at 255.

c. Showing that there is no genuine issue as to any material fact.

(1) On issues where the nonmoving party bears the burden of proof at trial, "the burden on the moving party may be discharged by 'showing'--that is, pointing out to the District Court--that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325.

(2) Thus, the moving party does not have to produce any affidavits or other affirmative evidence to negate the nonmoving party's claim. Id.

2. The nonmoving party's burden.

a. The nonmoving party may not rest upon its pleadings once the moving party has carried its burden under Rule 56(c). Rule 56(e).

b. Rather, the nonmoving party must produce affirmative evidence on issues where it carries the burden of proof at trial to successfully defend a motion for summary judgment. Celotex, 477 U.S. at 322-23.

c. If the factual context of a case makes the nonmoving party's claim implausible, it "must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." Matsushita, 475 U.S. at 587 (emphasis added).

d. If the nonmoving party cannot produce affirmative evidence at the time the motion is made, it may invoke Rule 56(f), which allows the court to continue or even to deny the motion for summary judgment. Celotex, 477 U.S. at 326 ("Any potential problem with such premature motions can be adequately dealt with under Rule 56(f)...if the nonmoving party has not had an opportunity to make full discovery.")

3. Cumulative effect of the trilogy: improving defendant's ability to obtain summary judgment.

   a. Celotex allows defendant merely to "point out" to the court the absence of a fact necessary to prove plaintiff's case, thus shifting the burden to plaintiff under 56(e).

b. Matsushita allows defendant to argue that a reasonable jury could not find for the plaintiff where plaintiff's claim is implausible and the evidence produced is not sufficiently persuasive to overcome the implausibility.

c. Liberty Lobby allows defendant to remind the court that any heightened evidentiary standard to be used at trial must be taken into account in ruling on the summary judgment motion.

F. Motions for summary judgment in Massachusetts state court: slightly harder to obtain than in federal court, unless the Supreme Judicial Court moves to adopt the trilogy.

1. The "genuine issue" threshold which the nonmoving party must satisfy in order to avoid summary judgment is lower. See, e.g., Attorney General v. Bailey, 386 Mass. 367, 370 (1982), cert. denied, 459 U.S. 970 (1982) ("A court should not grant a party's motion for summary judgment merely...because it appears that the adversary is unlikely to prevail at trial.") (citing authority omitted).

2. The moving party must produce affirmative evidence showing there is no genuine issue even where the nonmoving party bears the burden of proof at trial. See, e.g., Bailey, 386 Mass. at 371; see also Community National Bank v. Dawes, 369 Mass. 550, 554 (1976).

3. State courts appear more willing to deny summary judgment on the grounds that an affidavit offered by the nonmoving party conflicts with earlier deposition

testimony. <u>See</u> <u>Guenard v. Burke</u>, 387 Mass. 802, 812 (1982) ("we recognize that there may be <u>instances</u> in which an affidavit denying deposition testimony may not fairly raise a genuine issue of material fact") (emphasis added); <u>compare</u> <u>Perma Research And Development Co. v. Singer Co.</u>, 410 F.2d 572, 578 (2nd Cir. 1969) ("If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.")

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AVOIDING AND LITIGATING WRONGFUL TERMINATION CASES: Claims, Defenses and Damages

(88-620)

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WRONGFUL TERMINATION CLAIMS, DEFENSES AND DAMAGES: LIABILITY IN CONTRACT

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I. Introduction

The Massachusetts courts, as in numerous jurisdictions across the country, have recognized exceptions to the traditional theory that an employment at-will may be terminated at any time by either the employer or the employee for any reason, or for no reason (assuming, of course, the termination is not otherwise violative of any applicable state or federal statute). Several of these exceptions emerge from contract analysis -- the courts have implied a covenant of good faith and fair dealing into the employment contract and have implied the existence of a contract from oral promises or from statements included in a company handbook or personnel manual.

II. Fortune v. National Cash Register Co., 373 Mass. 96 (1977).

In Fortune, the S.J.C. first recognized an exception to the traditional theory that an employment at-will may be terminated at any time. The court held that a written contract for an at-will employment contains an implied covenant of good faith and fair dealing.

Massachusetts law of wrongful termination in the absence of an express contract stems from Fortune.

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* Credit for preparation of these materials should go, with my thanks, to Caroline Hendel at Foley, Hoag & Eliot; thanks also to my partner Joe Ambash for his assistance.

III. Implied Covenant of Good Faith and Fair Dealing

A. Generally

1. Massachusetts courts will recognize an implied covenant of good faith and fair dealing in the situation in which the employer discharges the employee in order to deprive him or her of sales commissions or benefits already earned. See, e.g., Maddaloni v. Western Mass. Bus Lines, Inc., 386 Mass. 877 (1982); Fortune, supra; Cataldo v. Zuckerman, 20 Mass. App. Ct. 731, 741, rev. denied, 396 Mass 1103 (1985). To assert a claim under this doctrine, a plaintiff must establish facts that (1) he or she actually was deprived of an "identifiable, future benefit . . . reflective of past services," see McCone v. New England Tel. & Tel. Co., 393 Mass. 231, 233-235 (1984), quoting Gram v. Liberty Mutual Insurance Co., 391 Mass. 333, 335 (1984) (Gram II), and (2) that the employer terminated the plaintiff in bad faith for the purpose of depriving him or her of some reasonably expected future benefit based on his or her past services, Fortune, 373 Mass. at 105, or terminated him or her without good cause. See Gram v. Liberty Mutual Insurance Co., 384 Mass. 659, 672 (1981) (Gram I).

Discharges in "bad faith" include conduct by the employer which is contrary to the notion of "good faith"; is consistent with the description of "bad faith" as set out in the Restatement (Second) of Contracts; or which constitutes fraud, deceit or misrepresentaion. See A. John Cohen Insurance Agency, Inc. v. Middlesex Insurance Co., 8 Mass. App. Ct. 178 (1979).

2. Limitations

Such liability requires overreaching or extreme or outrageous motives and a potential windfall to the employer, but no specific public policy violation. The absence of good cause to discharge an employee does not alone give rise to an enforceable claim. See, e.g., McCone v. New England Telephone & Telegraph Co., 393 Mass. 231 (1984) (even if the employer's use of a statistically determined distribution curve resulted in arbitrary, bad faith performance evaluations which led to constructive termination of the employees, the employees failed to state a claim for relief based on loss of salary increases and corresponding pension benefits); Tenedios v. Wm. Filene's Sons Co., Inc., 20 Mass. App. Ct. 252 (1985) (evidence that employee was fired arbitrarily and was injured in her expectations of future wages does not, without more, result in employer liability for wrongful termination); Siles v. Travenol Laboratories, Inc., 13 Mass. App. Ct. 354 (1982) (insufficient evidence of employer's bad faith in termination of at-will salesman following customer complaints concerning salesman's conduct). An employer has no duty to give a reason for discharging an employee at-will and is not liable for breach of the implied covenant for refusing to give a reason or for giving a reason that is factually insupportable. Cort v. Bristol-Meyers, 385 Mass. 300 (1982). See also Richey v. American Automobile Association, 380 Mass. 835, 839 (1980).

Claims of an employee who is subject to a collective bargaining agreement for breach of an implied covenant are barred by failure to exhaust collective bargaining grievance procedures. See Bertrand v. Quincy Market Cold Storage & Warehouse Co., 728 F.2d 568 (1st Cir. 1984).

In a recent interpretation of the covenant of good faith and fair dealing, Bally v. Northeastern University, Civil Action No. 87-1178 (Massachusetts Superior Court, November 30, 1987) (Connolly, J.), the court ruled on the plaintiff's claim that Northeastern's drug testing program constituted a breach of contract in violation of both public policy and the covenant of good faith and fair dealing in changing the terms of his athletic eligibility on the basis of unlawful criteria. The court stated that where the relations between student and university are governed by contract principles, "the issue is whether the actions of the university are in keeping with the reasonable expectations of students attending the school." The court found that Northeastern, in instituting the drug testing, breached no contractual duty because in its rules and regulations it explicitly reserved the right to make changes in its program. (The court, however, did find that the drug testing program violated the Mass. Civil Rights Act and the plaintiff's rights of privacy.)

Some claimants attempt to bring demotion claims under the wrongful termination doctrine. That approach was rejected by the Supreme Judicial Court in McCone, supra at 233 n.7. See also Riley v. Cameron and Colby, Inc., Civil Action No. 86-2287-C (D.Mass. Aug. 31, 1987), slip op. at 8, n.2 ("The implied covenant identified in Fortune only applies to terminations, not demotions.")

3. Damages

Recovery in these cases is limited to "identifiable future benefits reflective of past services." Even in the absence of overreaching or a public policy violation, an employee discharged without cause is entitled to "reasonably ascertainable future compensation based on his past services." Gram I. Commissions on future endorsements and consequences of any anticipated future inflation are not included in the measure of damages. Gram II. See also Rosen Co. v. International Tel. & Tel. Co., 16 Mass. App. Ct. 929 (1983); Kravetz v. Merchants Distributors, Inc., 387 Mass. 456 (1982).

In a recent case, a federal magistrate allowed a plaintiff to amend his wrongful discharge complaint to add a count alleging that the employer discharged the plaintiff in order to defeat his right to exercise a stock option. If the stock option were found to have vested prior to the plaintiff's discharge, it might constitute an "identifiable future benefit reflective of past service." Mompoint v. Lotus Development Corp., Order on Motion to Amend (Magistrate Collins) No. 85-1664-N (D. Mass. Feb. 9, 1987).

B. Discharges That Are Contrary to Public Policy

1. Generally

The discharge of an employee for reasons offensive to public policy violates the implied covenant of good faith and fair dealing. In De Rose v. Putnam Management Company, Inc., 398 Mass. 205 (1986), the S.J.C. held that an employee at-will who was terminated in reprisal for his testifying at the criminal trial of another employee stated a cause of action for wrongful discharge even where the employer gained no financial advantage.

2. Limitations

The public policy exception covers terminations "in retaliation for performing an important and socially desirable act, exercising a statutory right or refusing to commit an unlawful act," but not terminations which are merely viewed as "bad, unjust or unkind." Glaz v. Ralston Purina Co., 24 Mass. App. Ct. 386, 389 (1987). The discharged employee has no common law right of action where an adequate statutory remedy exists. In Melley v. Gillette Corp., 19 Mass. App. Ct. 511 (1985), aff'd, 397 Mass. 1004 (1986), the court held that the remedy for an at-will employee who asserts wrongful termination on grounds of age discrimination lies exclusively in a claim brought under G.L. c. 151B. See Sereni v. Star Sportswear Manufacturing Corp., 24 Mass. App. Ct. 428 (1987) (claim of wrongful termination based on age discrimination preempted by G.L. c. 151B), rev. denied, 400 Mass. 1107 (1987). Mouradian v. General Electric Co., 23 Mass. App. Ct. 538 (1987), rev. denied, 399 Mass. 1105 (1987); Mathias v. Beatrice Foods Co., 23 Mass. App. Ct. 915 (1986). But see Stepanischen v. Merchants Dispatch Transportation Corp., 722 F.2d 922 (1st Cir. 1983) (In case of non-union railway employee alleging wrongful discharge for union activities, discharge motivated by anti-union animus would violate public policy and could support recovery under Massachusetts law protecting at-will employees from bad faith termination.)

In a very recent case, the Supreme Judicial Court held that no common law cause of action is available to an employee discharged because of a disability because the public policy relevant to discharge of a disabled employee as expressed by the Legislature (in G. L. c. 149, §51B; c. 152, §75A) provides no civil relief for an individual allegedly discharged because of a disability. Federici v. Mansfield Credit Union, 399 Mass. 592, 595-597 (1987).

In Treadwell v. John Hancock Mut. Life Ins. Co., 666 F. Supp. 278 (D. Mass. 1987), plaintiff argued that his discharge breached a promise enforceable under the doctrine of promissory estoppel and that such conduct constitutes a violation of public policy. The court stated that plaintiff's theory would turn a simple breach of contract into a violation of public policy and dismissed plaintiff's claim. The court further explained that because a cause of action for breach of contract is available on a promissory estoppel claim, no new cause of action need be created to remedy the alleged wrong.

The S.J.C. has not yet determined whether an action under the Massachusetts Civil Rights Act is prohibited if a claim is actionable under G.L. c. 151B. See O'Connell v. Chasdi, 400 Mass. 686 (1987). However, the First Circuit has affirmed dismissal of a public policy wrongful discharge claim where the MCRA afforded relief, applying the Melley rationale. Grubba v. Bay State Abrasives, 803 F.2d 746 (1st Cir. 1986). See also Riley, supra, slip op. at 11 (dismissing wrongful discharge claim based upon alleged violation of policy actionable under MCRA).

The Appeals Court has held that a plaintiff alleging wrongful discharge on the basis of age discrimination could not bring a claim under the Mass. Civil Rights Act because G.L. c. 151B provided the exclusive remedy for such claims. Sereni v. Star Sportswear Manufacturing Corp., 24 Mass. App. Ct. 428 (1987). In Mouradian v. General Electric Co., 23 Mass. App. Ct. 538, 543 (1987), the Appeals Court stated that where "the only 'right[ ] secured by the . . . laws of the commonwealth' (the operative words of c. 12, §11H, in this instance) is the right which could have been enforced under the procedures established by c. 151B . . . [the Civil Rights Act] does not create an independent right to vindicate an alleged wrong . . . " In rejecting the plaintiff's attempt to circumvent G.L. c. 151B by using the Civil Rights Act, the court noted that, on the facts pleaded, it was "dubious" whether the plaintiff alleged the requisite "threats, intimidation, or coercion" to state a claim under the Civil Rights Act. The court stated "[o]therwise . . . every routine reassignment or transfer in employment could be a violation of G.L. c. 12, §§11H and 11I." See Crews v. Memorex Corp., 588 F. Supp 27 (D. Mass. 1984) (Mass. law does not recognize a common law action for discharge in violation of the public policy against age discrimination); Ferrante v. Western Electric Co., No. 81-3004-Z, slip op. at 7-8 (D. Mass. April 29, 1983)

3. Damages

The S.J.C. has not yet decided whether it will accept the tort measure of damages in public policy cases.

In De Rose, 398 Mass. 205, because the case was tried on a contract theory, the S.J.C. did not discuss the possible scope of tort damages for public policy violations. The court's discussion of contract damages was unclear: "We express no opinion as to the proper measure of contract damages in a case such as this." 398 Mass. at 213. In De Rose, the court held that Massachusetts does not permit punitive damages.

Presently pending before the S.J.C. is the case of Mello v. Stop and Shop Companies (No. 4517). The plaintiff and the amici argue that the tort measure of damages is necessary in cases of wrongful discharge in violation of public policy. They suggest that only the tort measure of damages serves the two-fold purpose of adequate compensation to the employee and adequate deterrence to the employer. The S.J.C. also has before it the case of Hobson v. The McLean Hospital Corporation (No. 4561), in which the plaintiff seeks damages for emotional distress and punitive damages on her tort claim of discharge in violation of public policy.

IV. Other Situations of Implied-in-fact Contracts

A. Employee handbooks

The Appeals Court held that where an employee at will is required to sign an employment manual, the terms and conditions contained in the manual are a part of her employment contract at the time of discharge. On the basis of this analysis, the court stated it was unnecessary to decide whether the evidence warranted a finding that the employer had acted in bad faith at the time of the discharge. Garrity v. Valley View Nursing Home, Inc., 10 Mass. App. Ct. 822 (1980).

In contrast, in Taylor v. Hercules, Inc., 780 F.2d 171 (1st Cir. 1986), the court held that an employee who retired and received pension benefits after the employer sold its plant was not entitled to severance pay on the basis of a pamphlet describing typical benefits available to employees. The pamphlet, the court held, was not controlling where it was compatible with a handbook containing a description of the actual dismissal plan in effect at the employee's location, even if the employee did not actually receive the handbook.

In Spiegel v. Trustees of Tufts College, Civil Action No. 86-3330-S (D. Mass. July 30, 1987) the court (Skinner, J.) dismissed claims of breach of contract based on language in the Tufts faculty handbook holding that the language was merely descriptive of the tenure process.

In the Hobson case before the S.J.C., the plaintiff argues that the by-laws of the hospital constitute a contract between her and the hospital. The resolution of this case may clarify the law regarding implied-in-fact contracts.

B. Implied Terms

The S.J.C. has shown a reluctance to imply a term without mutual assent. In Bernard v. Cameron & Colby Co., 397 Mass. 320 (1986), an independent contractor alleged that her employer had breached an implied term of her employment contract to provide her a smoke-free work environment. The contract had no express provision requiring the employer to provide a smoke-free environment. The S.J.C. held that the plaintiff failed to provide sufficient evidence that the implied term she sought was "fixedly desired" by both parties. She did not show that her preference was raised at the time the contract was entered into or implicitly agreed to by the employer. "Mere knowledge" on the part of the employer of an employee's preference is not tantamount to mutual assent.

V. Promissory Estoppel/Reliance

In Riley v. Cameron and Colby, Inc., Civil Action No. 86-2287-C (D. Mass. August 31, 1987), Judge Caffrey determined that an agreement on a yearly salary can indicate the parties' intent that the employment should continue for at least a year, and thus that the parties had a contract for a term of employment for at least one year if such an intent were supported by other evidence. The court found the other supporting evidence in Riley's allegations that he was specially qualified and sought after, that the employment arrangement involved considerable financial assistance by the company and considerable personal dislocation by Riley, that specific vacation allotments had been agreed to for the first two years of Riley's employment, and that defendants promised that Riley would be promoted after six months. The court held that the circumstances could warrant a finding of a contract of employment for a specific term and that, as a result, whether there was such a contract is a question of fact for the jury. The court denied the defendants' motion for summary judgment.

VI. Just Cause in Cases of Employment for a Definite Period of Time

In the recent case of Klein v. Harvard, Civil Action No. 86-380 (Mass. Appeals Court, December 28, 1987), the Appeals Court discussed "just cause" for termination of an employee employed for a definite period of time. In that case, Harvard hired the plaintiff to serve as administrative director of the department of health policy and management at Harvard's School of Public Health until a new chairman of the department was appointed. The plaintiff was subject to removal "for grave misconduct or whenever . . . [her] duties are not satisfactorily discharged." Slip op. at 6. The plaintiff's relationship with certain faculty members in the department was strained, and some of the faculty members found the plaintiff "difficult to work with, not helpful to them in carrying out their employment obligations, and, in general, not a good administrator." Slip op. at 3. The plaintiff, at one point, sent a memorandum to the department's executive committee complaining about one faculty member's ability and personality.

The court construed the terms allowing removal for "not satisfactorily discharg[ing]" her duties as allowing discharge for "just, good, or due cause." Slip op. at 6. On the facts, the court found that the plaintiff's dismissal was for cause. As a result, despite the fact that the dean failed to recite the cause with specificity in his letter of dismissal, there was no breach of plaintiff's employment contract. The court noted that the plaintiff, based on a meeting with the dean a few days before her dismissal, knew why her employment was terminated.

READY FOR TRIAL:

Final Stages of Pre-Trial Preparation

Presented by

The Massachusetts Bar Association's
Civil Litigation Section
February 15, 1990

MBA

Materials By:

Kenneth R. Berman
Sandra L. Lynch
Regina E. Roman
Michael D. Weisman
Richard M. Zielinski

B. THEMES OF CASE AND PREPARATION OF WITNESSES*

by Sandra L. Lynch
Foley, Hoag & Eliot

Themes Of Case

I. Introduction

It is imperative that you boil your case down to several key themes, each of which could be stated in a simple, declarative sentence. The themes must be consistent with each other. Alternate pleading may be allowed at law but it may kill you with a jury.

II. Development Of Themes

Think about your case and try to describe its strongest arguments. Then, field-test your assumptions (but protect privilege). Some methods of field-testing:

A. Talk to Non-Lawyers. Use friends, cab drivers, anyone who isn't a lawyer and who doesn't habitually tell you what you want to hear. Try to explain the case and why you should win. Then ask them what questions they have, what facts they think important, who they think should win and why.

B. Set up mock-juries. In your own office assemble a group of office staff, assign another lawyer to argue the other side, do a closing or opening statement, and then ask the sort of questions described above.

C. Hire formal jury consultants

1. to set up mock juries

2. to do survey work

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* Grateful acknowledgement is given to Nan Seuffert for her assistance.

Highly recommended is Richard Zielinski's Article "Prepare Your Witness For Trial," 35 The Practical Lawyer No. 1 at 71.

3. to do psychological assessment of impact of the

III. Refine Your Themes.

You want to make your story a simple, credible one. Remember that it is more difficult to learn by hearing t by seeing, and that you should repeat themes orally and ways to express them visually. Keep themes simple, and for opportunities to use them.

IV. Consistency in Use of Themes.

A. State the themes clearly in the opening statement. visuals.

B. Each witness exam should repeat the themes.

C. Return to the themes in your closing.

Preparation of Witnesses

I. Introduction

A. Witness preparation, next to picking the themes of yo case, may be the single most important step in trial preparation.

B. Your witnesses must be prepared for both direct and cross examination and must be prepared as to how they app as well as to what they say.

II. General Points

A. Witness loyalty. You should try to build a relations with your witness long before trial. The lawyer who will handle the witness at trial should prepare the witness.

B. Individual v. group preparation. Lawyers have differ styles. Individual preparation is less likely to result manufactured memory, but may result in inconsistencies between witnesses.

III. Preliminary Preparation

A. Be aware of witnesses' questions and fears and try to meet them.

B. Logistical considerations.

C. Explanation of trial process.

D. Take witness to courtroom to see it.

IV. Appearance, Demeanor and Communication Skills

A. Counsel witness about appropriate attire.

B. Candid, sincere, eye contact?, demeanor off the stand. Consider whether you should videotape your witness and show tape to witness.

C. Teach witness to speak slowly, loudly and clearly.

V. Substantive Testimony

A. Working Up the Testimony

1. Fundamental points/ themes/ elements of cause of action. The testimony should tell a story, one which is inherently credible.

2. Talking over testimony. Tell the witness the reasons for his/her testimony and the role it plays on direct.

3. Role-play testimony.

B. Documents

Before starting work with your witness assemble every document pertinent to the witness. Unless there is a strong reason not to do so, be sure your witness is familiar with every such document. If your opponent has the document, count on any inconsistencies between the document and the testimony being paraded.

C. Depositions

Same as above.

D. Explain rules and limitations of direct.

E. Refreshing recollection on the stand

1. memory lapse natural when testifying. Be sure witness understands that if he/she does not recall, the truthful answer is to say that.

2. Techniques for dealing with memory loss
   a. leading question
   b. present recollection refreshed
   c. past recollection recorded

3. Tell witness that 75% memory is outstanding.

F. Cross-Examination

1. Remind witness ɔe candid and polite to oppos counsel, refra.. from arguing or making sarcast remarks.

2. Acquaint witness with impeachment techniques
   a. attack witness' ability to appreciate oath.
   b. attack witness' perception, memory or ability to communicate.
   c. prior inconsistent statement.
   d. evidence of bias, prejudice or corruption.
   e. prior criminal convictions
   f. attacking witness' character

3. witness to keep "themes" of case in mind,not to attempt to ousmart opposing counsel, and to testify truthfully at all times.

G. Redirect Examination

Let witness know that you have an opportunity to question her after cross to clarify misimpressions and/or reemphasize one or two key points of testimony.

H. Correcting Testimony

Let witness know that she may correct inadvertent misstatements in testimony, even if examiner has moved on and that this is preferable than having misstatements brought up on cross.

VI. <u>Experts and Non-Party Witnesses</u>

A. Experts (to be discussed in detail later in outline)

1. Experts should revisit scene.

2. Expert should review their own and other experts' reports carefully.

3. Opinions must use language of "reasonable certainty."

4. Discuss concerns with qualifications.

B. Non-Party Witnesses

1. Use above guidelines as much as possible.

2. Where a witness has been subpoenaed and documents requested, ask for opportunity to meet with witness and review documents prior to trial.

3. Treat courteously.

4. Conversations with non-party witnesses are not privileged.

5. Consider request for reimbursement and effect on credibility.

The Boston School Desegregation Case

by Sandra L. Lynch

The Boston school desegregation case is probably the most publicized and least understood case in the history of our Commonwealth. And the lack of understanding has not been confined to lay persons. The following analysis makes it clear that given the attitude of the Boston School Committee, Judge Garrity could hardly have rendered any other decision.

For the last five years the Boston Public Schools have been the site for a struggle over vindication of black school children's rights to equality under the Constitution. The Boston school desegregation case has become a potent symbol to the nation, though a symbol of different meanings to varied groups. This article is about that case, which began in March, 1972, under the name of *Tallulah Morgan v. John Hennigan.*[1]

Background

The quest for equality of educational opportunity for the black residents of Boston started almost two hundred years before the complaint was filed in the *Morgan* case. In 1787, the black residents of Boston presented a petition to the Massachusetts General Court which complained that while there were public schools for white children, there were no schools that would accept black children:

> . . . we are of the humble opinion that we have the right to enjoy the privileges of free men. But that we do not will appear in many instances, and we beg leave to mention one out of many, and that is of the education of our children which now receive no benefit from the free schools in the town of Boston, which we think is a great grievance, as if by woeful experience we now feel the want of a common education. We, therefore, must fear for our rising offspring to see them in ignorance in a land of gospel light when there is provision made for them as well as others and yet can't enjoy them, and for not other reason can be given this they are black. . . .
> We therefore pray your Honors that you would in your wisdom some provision would be made for the free education of our dear children.[2]

In the early 1800s, separate schools for black children were established in Boston. In 1849, in the case of *Roberts v. City of Boston,*[3] a black child sued under a statute prohibiting unlawful exclusion of children from public school instruction. The plaintiff school child was denied admission to the white school nearest her home and could go only to the more distant black school. Charles Summer, a leading abolitionist, represented the plaintiff and argued that "the separation of children in the public schools of Boston, on account of color or race, among children in the public schools, is in the nature of caste, and is a violation of equality."[4] Chief Justice Shaw, for the Supreme Judicial Court, upheld the system of separate schools, finding it not unreasonable on a separate but equal theory.

In 1854 the Massachusetts legislature overruled the *Roberts* decision by enacting a statute which prohibited the use of race or color as a qualification for admission to public schools.[5] The theory of the *Roberts* opinion, that separate but equal schools were not inherently unequal, was not discredited until the 1954 Supreme Court decision in *Brown v. Board of Education.*[6]

By 1965, the Boston school system contained 45 schools which were majority non-white. The Massachusetts Board of Education, which will be referred to simply as the State Board, appointed a committee to study the effects of racial segregation in the state's public schools. The committee issued the Kiernan Report, which concluded that racial imbalance in the public schools was educationally harmful and should be eliminated. As a result of the Kiernan Report, and out of a national climate of resurgence of interest in civil rights, the Massachusetts

1. See *Morgan v. Hennigan,* 379 F. Supp. 410 (D. Mass. 1974). Plaintiffs were represented by counsel from the Center for Law & Education; Foley, Hoag & Eliot, and others. The School Committee has been represented at different times by counsel from the Boston law firms of Hale & Dorr; DiMento & Sullivan; Goodwin, Proctor & Hoar, and others.

2. The petition is quoted in R. Kluger, *Simple Justice* (1976), at the Introduction to Part I.

3. 59 Mass. (5 Cush.) 198 (1849).

4. *Id.* at 202.

5. Mass. Acts of 1854, c. 256, §1, now G.L. c. 76, §§5, 16.

6. 347 U.S. 483 (1954). The *Roberts* case had established the separate but equal doctrine in Massachusetts almost 50 years before the Supreme Court accepted the doctrine in *Plessy v. Ferguson,* 163 U.S. 537 (1896).

legislature in 1965 passed the Racial Imbalance Act.[7]

The Act declared it to be the policy of the Commonwealth to promote racial balance in the public schools. When an annual census revealed the existence of racially imbalanced schools in a system, that system's school committee was required to submit to the State Board a plan to eliminate the imbalance. A school was deemed to be imbalanced when its racial composition was more than 50% non-white. Under the operation of this law, the question of whether there was intent to segregate was immaterial. The obligation to eliminate the racial imbalance was triggered by the statistics in the census.

The Boston School Committee immediately and unsuccessfully attacked the law as unconstitutional.[8] The State Board and the Committee locked into a series of adversary administrative and court proceedings which continued over many years, as the State Board attempted to force the Committee into compliance with the law. Massachusetts thus presented an unusual configuration—the Commonwealth had voluntarily undertaken to remedy segregation in its schools beyond the requirements of the U.S. Constitution and had arrayed its forces, the State Board, represented by the Attorney General, against segregated schools. The more usual posture was for the state and local authorities to be in complicity in perpetuating segregated schools.[9]

The efforts of the State Board were of limited success. As the Supreme Judicial Court noted, "Despite continuous activity and voluminous debate, the problem of racial imbalance which the statute sought to correct [had] not been resolved but [had], in fact, become aggravated by the Boston schools."[10] In 1973, the Supreme Judicial Court affirmed an order of the State Board requiring the Committee to implement a racial balance plan in September, 1974.[11]

That racial balance plan was implemented in September, 1974, both under order of the Supreme Judicial Court, operating under the state Racial Imbalance law, and as an interim remedy adopted by the federal district court, which found, on June 21, 1974, that Boston's segregated schools violated the U.S. Constitution.[12]

In the summer of 1974, after the State Board had been, for the first time, successful in forcing Boston and Springfield[13] to implement racial balance plans, the legislature amended the Racial Imbalance law.[14] The amendments restricted the power of the State Board to require racial balance in the schools, but did authorize the Board to provide funds for voluntary integration through magnet programs and magnet schools. In a curious twist of fate, while the amendments did not stop the integration of the Boston public schools, they did give the State Board the necessary tools to support, and help insure the success of, the heart of the federal desegregation plan: the magnet schools.

The Desegregation Case: Liability

Driven by inequities in the educational offerings available to black students, and by the slow pace of enforcement of the Racial Imbalance Act, black parents and children in 1972 brought suit in federal court against the Boston School Committee for violation of the Fourteenth Amendment. The State Board and Commissioner of Education were also named as defendants on the theory that they had not exercised their powers to prevent the Committee's segregative acts.

The Boston Public Schools were indisputably segregated. At least 80% of the schools had racial compositions sharply out of line with the composition of the system as a whole.[15] The majority of black students attended schools that were more than 70% black.[16] The segregation affected teachers as well: some 75% of Boston's black teachers taught in majority black schools, while some 81 schools in the system had never had a black teacher.[17] The question facing the federal court was whether the Boston School Committee had intentionally and purposefully caused or maintained this racial segregation in violation of the Fourteenth Amendment. The Committee maintained that the school segregation was caused by residential segregation and that it had simply followed a constitutionally permissible policy of neighborhood schools.[18] The defense was explicitly rejected by the court.

Later in 1974, after reviewing the district court's findings of liability, the U.S. Court of Appeals for the First Circuit stated, "in light of the ample factual record and precedents of the Supreme Court, we do not see how the court could have arrived at any other conclusion."[19] Before describing the factual record briefly here, some often misunderstood or ignored facts about the case should be identified. Desegregation in Boston involves neither the disruption of a neighborhood school system nor the busing of students where there was little before. The record in the case establishes that the Boston School System for the most part was not a neighborhood school system and that there was large scale transportation of students prior to desegration.

The federal court examined the Committee's actions in six areas and found constitutional violations in each: (1) facilities, utilization and new structures; (2) districting and redistricting; (3) feeder patterns; (4) open enrollment and controlled transfers; (5) faculty and staff; and (6) vocational and examination schools. Only a portion of these findings will be reviewed here.

A Byzantine melange of rules and exceptions governed the assignments of students to schools in Boston. Admis-

7. M.G.L. c. 15, §§1I-J, c. 71, §§37C-D.
8. *School Committee of Boston v. Board of Education*, 352 Mass. 693 (1967).
9. See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974); *United States v. Texas*, 447 F.2d 441 (5th Cir.), *cert. denied*, 404 U.S. 1016 (1971).
10. *School Committee of Boston v. Board of Education*, 302 N.E.2d 916, 918 (1973).
11. *Ibid.*
12. See footnote 1 *supra*.
13. *School Committee of Springfield v. Board of Education*, 365 Mass. 215 (1974).
14. Mass. Acts of 1974, c. 636.
15. *Morgan v. Hennigan*, 379 F. Supp. at 424.
16. *Ibid.*
17. *Id.* at 425.
18. *Id.* at 415.
19. *Morgan v. Kerrigan*, 509 F.2d 580, 598 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

sion to high school was determined not by where the student lived, but by where the student attended intermediate school. These feeder patterns were manipulated by the Committee in racially discriminatory ways.[20] At the simplest level, such manipulation funneled students from several majority black intermediate schools to the same high school, to create a black high school, while white students were funneled to white high schools. The combination of feeder patterns and the selective opening of middle schools created two separate, segregated grade structures. Most white students entered a grade 10-12 high school on completion of ninth grade, while black students tended to be funneled from grade 6-8 middle schools to grade 9-12 high schools.[21] The changes in feeder patterns made by the Committee over the years were, with one exception, for the purpose of promoting racial segregation.[22]

At the intermediate and elementary school levels, attendance was nominally determined by geographic districts for each school. Five of the intermediate schools also received students by way of feeder patterns. District lines were at times redrawn and gerrymandered to perpetuate segregation. Lines were sometimes drawn to force students of one race to travel many blocks to a school when another school, predominantly of another race, was closer.[23] At the elementary level, there was also the device of multi-school districts. Of six schools in one such district, five were more then 90% white, while the sixth was 81% black.[24]

These geographic districts hardly constituted the exclusive method of determining where students went to school. Superimposed over the assignment system was a general open enrollment system, which was used to allow white students to move away from their district schools which had a substantial percentage of black students. Such white students were, of course, bused. In one year, over 6700 students attended schools out of their districts and at least 1028 of the transfers were easily identifiable as being segregative.[25] Initial efforts by black students, through Operation Exodus, to use open enrollment to attend white schools were met by locked doors and, in some schools, the unbolting and removal of extra seats from the floor to eliminate available seats.[26] Under pressure from the State Board, the Committee moved from open enrollment to a controlled transfer system, then riddled that system with exceptions.

The federal court found that the Committee's asserted neighborhood school policy was "so selective as hardly to have amounted to a policy at all. The neighborhood school has been a reality only in areas of the city where residential segregation is firmly entrenched."[27]

As for busing, prior to desegregation approximately one-third of the system's students, or over 30,000 students, were transported to school.[28] Busing was also a device used by the Committee to create and maintain segregated schools. Two examples illustrate this point. In 1970 the Committee opened the Weld School in the 98% white neighborhood of Roslindale. The school did not receive white students from the neighborhood, but was filled predominantly with minority students who were bused in from distances of 1½ to 2 miles. Parents of the black children were given no choice about the busing, although there were nearer seats available for their children in two predominantly white schools.[29] Similarly the Committee alleviated some overcrowding at the 91% white Cleveland junior high school by assigning students to an already overcrowded and distant white South Boston High School.[30] The white students were bused to South Boston although there were closer schools, black schools, with available seats. On several occasions the Committee proposed to the State Board and to the Supreme Judicial Court that racial imbalance in the Boston schools be remedied by busing black students to the suburbs.

In addition to proving deliberate segregative acts, the plaintiffs established that such practices resulted in predominantly black schools being staffed with less experienced and qualified teachers, to the detriment of black students. Teacher resources were disproportionately allocated in Boston in a way that denied black students equal educational opportunity.[31] The plaintiffs' concern with the quality of instruction in the classroom as well as with the racial composition of the classroom would become an important element in the remedial stages of the case.

The strength of the evidence indicating that the Boston School Committee had violated the Fourteenth Amendment needs to be understood in another context as well. While the Boston case did not involve a classic *de jure* case of state or local law mandating segregated education, it also was not a typical Northern case on the *Keyes* model. In *Keyes v. School District No. 1, Denver, Colo.*,[32] the Supreme Court held that where the plaintiffs make a *prima facie* showing of intentionally segregative school board actions in a meaningful portion of the system, the burden shifts to the defendants to prove that other segregated portions of the system are not also the result of intentionally segregative actions.[33] The *Keyes* burden-shifting principle was applied in Boston only to the vocational and examination schools. In each of the other five areas examined by the court, the plaintiffs proved intentional segregation. The court found that the Boston School Committee had "knowingly carried out a systematic program of segregation affecting all of the city's students, teachers, and school facilities and have intentionally brought about and maintained a dual system."[34]

The Court also found that the State Board and Commissioner had done everything within their limited authority to compel the Committee to comply with the law. The

20. 379 F. Supp. at 441–449.
21. *Id.* at 448.
22. *Id.* at 446.
23. *Id.* at 423.
24. *Id.* at 427.
25. *Id.* at 452.
26. *Id.* at 450.
27. *Id.* at 473.
28. *Id.* at 424.
29. *Id.* at 429.
30. *Id.* at 426.
31. *Id.* at 461–463.
32. 413 U.S. 189 (1973).
33. *Id.* at 208.
34. 379 F. Supp. at 482. One interesting aspect of the case is that while much of the proof of intent to segregate was by indirect evidence and inference, there was much direct evidence. The Boston School Committee had kept transcripts of their meetings, and the plaintiffs made ample use of the transcripts at trial.

Court retained the state defendants in the case to assist in the formulation and execution of remedies.

As an interim remedy, pending the development of a system-wide desegregation plan, the federal court ordered the Committee to implement the state racial balance plan. This plan became known as Phase I of desegregation in Boston.

Remedy: The Desegregation Plan

Having found the entire school system to be unconstitutionally segregated, the federal court was obliged to enforce a system-wide remedy. The Phase I plan, fashioned within the limits of the Racial Imbalance law, did not go far enough to meet the constitutional requirement that segregation be eliminated "root and branch."[35] In the Fall of 1974, the Court established general standards in accordance with the case law for a system-wide, or Phase II, plan and required the Committee to file a plan by December 16, 1974, to be implemented the following September. The order that the School Committee file a desegregation plan is standard in federal desegregation cases. Deference is given to local school authorities who are most familiar with the characteristics of their system and so in the best position to draft a plan. Only on default by school officials of their obligation to proffer an acceptable plan does the district court assume the task of fashioning a plan.[36] Staff members of the Boston School Department drafted a system-wide desegregation plan.

However, a majority of the School Committee repudiated the staff plan and did not file any other plan with the court. Explaining his action, School Committee Chairperson John Kerrigan testified:

> I ran for office stating that I would never vote for a plan that involved the busing of school children. It is unfortunate that is the way our society exists, the way housing patterns are laid out, but the only way you are going to desegregate city schools is through forced busing . . . I can't vote for a plan that includes the forced busing of school children. The hypocrisy in that statement is that there is no way it can be done without the forced busing of children.[37]

The Committee members were held in contempt for their failure to comply with the court orders.

This episode demonstrates an area of divergence between theory and reality in desegregation law. In theory federal courts should not have to devise desegregation remedies because local officials will meet their obligation to remedy unconstitutional conditions, and will do so by applying their expertise to the problem of drafting a plan in light of local conditions. In practice several factors may operate to prevent the court and other parties from having the benefit of a good faith effort at desegregation remedies by local school officials. Some of these factors have operated with particular force in Boston. For example, the Boston School Committee members perceived it to be in their political interests to oppose desegregation, so there was no willingness on their part to propose and bear the responsibility for a plan. It was these same defendants who had acted intentionally to produce and maintain segregated schools over the years. To have them devise remedies was akin to having the fox guard the chicken coop. The attitude of the Committee made it difficult for the staff of the school department to carry out the court orders, even were they so inclined. The repudiation by the Committee of the plan produced by the staff carried an implicit message to the personnel of the Boston School Department that the people who paid their salaries were not interested in seeing desegregation accomplished. This attitude of the Committee carried over to implementing the plan, so the federal court was forced not only to devise a plan but to get into the details of implementation.

The extraordinarily lengthy and complex character of the remedial proceedings in the Boston case is explained partly by the phenomena outlined above and partly by the number of parties who entered the case at the remedial stage. In addition to the original three parties, the plaintiffs, the Committee, and the State Board, new parties entered including the Mayor of Boston, the Boston Public Facilities Commissioners, the Boston Teachers Union, the Administrators Union, the Home and School Association, and a Hispanic parents group, El Comite. After the Committee defaulted on submission of a plan, several of the parties submitted proposed plans or comments on plans. Eventually the Committee members purged themselves of contempt by submitting a plan, albeit a freedom-of-choice plan, which is a discredited device that could not work in Boston.

The desegregation plan adopted by the court for Phase II drew from the various plans submitted and was adapted from a plan recommended to the court by a panel of masters. The plan was unusually creative, minimizing busing, encouraging voluntary integration, and concerned with its effects on education.

At the heart of the plan is a magnet school system, composed of schools with special programs or emphases, designed to attract students on a voluntary basis to desegregated facilities. The plan divides the school system into eight geographically based community districts and a ninth city-wide magnet school district. Students may choose to attend either a particular magnet school or to remain in their local community district. If a student opts for the community district, the student is assigned, on a desegregated basis, to a particular school within the district. The district lines for the community districts are themselves drawn to achieve desegregation, with the range of racial compositions of the districts varying, in 1974, from 46% white to 66% white, and with East Boston forming its own district.

The structure of the plan thus gives parents and students a greater than usual degree of choice, and in so doing emphasizes voluntary desegregation. When the students who chose to attend particular magnet schools to which they are bused are placed to the side, only some

35. *Green v. School Board of New Kent County*, 391 U.S. 430 (1968).

36. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971).

37. *Morgan v. Kerrigan*, 401 F. Supp. 216, 226 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir. 1976), *cert. denied sub nom. Morgan v. McDonough*, —U.S.—, 44 U.S.L.W. 3719 (June 14, 1976). This is the order containing the Phase II plan and descriptions of the plan are drawn from that opinion.

21,000 students were bused under full desegregation, as opposed to 17,000 bused under the Phase I racial balance plan. Within the community districts the bus travel time averaged 10 to 15 minutes each way.

To an almost unique degree, the Boston plan was designed to enhance the educational opportunity provided to all students while it accomplished desegregation. The magnet schools were one step. The university pairings were another. At the invitation of the court, many Boston area universities, colleges, cultural institutions, and businesses volunteered to be paired with individual public schools. Such pairings are supported by funds provided by the State Board of Education pursuant to G.L. c. 71, §§371-J. Many of the paired institutions assisted in developing the new magnet programs. Some helped in equalizing the services at schools that had been unequal. The pairings also helped to avoid discriminatory or racially stereotyped instruction. During the 1976-1977 school year, 104 external agencies participated in pairings affecting almost 50,000 students.[38] The pairings have generally been successful in assisting the schools.

District Court Judge W. Arthur Garrity's orders in the Boston case were somewhat novel in their attention to the educational aspects of desegregation. His approach has been followed in subsequent cases, and the United States Supreme Court recently upheld the power of federal desegregation courts to remedy the educational impact of segregation though orders such as ones requiring remedial reading programs, in-service teacher training, and revision of testing procedures.[39] As one commentator has stated,

> The ramifications of a dual school system extend throughout its schools, so relief must be similarly diverse. Students are entitled to attend a school system free of discrimination and its consequences, not simply from one which segregation itself has been removed.[40]

The court's orders in Boston have provided the hope of better, as well as desegregated, education.

Another key component of the plan was its structure of parent, student, and citizen councils at each level of the school system. Such councils had become a traditional part of desegregation plans coming from the Fifth Circuit, but were used more extensively in Boston. The councils monitor compliance and report to the Court, as well as assist the desegregation process. The councils have faced difficulties in getting information from a reluctant school department but have, to some extent, opened up the school system to greater parent and student involvement.

The Phase II plan was implemented in the 1975-1976 school year. Some revisions were made in the subsequent years to attempt to fully accomplish a unitary system. Orders in the case have been appealed to the United States Supreme Court at least five times and to the Court of Appeals for the First Circuit many more times. In each instance, the district court's orders have been upheld. Throughout the remedial proceedings there has been a pattern of obstruction of the court orders, a pattern which led to the placing of one school into receivership. After reviewing the pattern of obstruction, the U.S. Commissioner on Civil Rights recommended that the entire school system be placed into receivership.[41]

In 1976 the district court was led to state:

> Some parties have encouraged a popular misconception that, if only sufficient pressure can be brought against the plaintiffs, the school department, members of monitoring councils and the court, the plan may be set aside by the trial court. . . . The urgent need, in our opinion, is not official reaction to crises, however commendable that may be, but official acceptance of the constitutional necessity and inevitability of public school desegregation and public commitment by elected officials to support school administrators and teachers and parents and students who are doing their best to bring it about.[42]

In 1977 the inevitability of desegregation, in its fourth year in Boston, seems to have taken hold.

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38. Superintendent's Annual Report, p. 35, filed in *Morgan* on July 20, 1977.

39. *Milliken v. Bradley*, 45 U.S.L.W. 4873 (June 27, 1977).

40. Leubsdorf, *Completing the Desegregation Remedy*, 57 B.U.L. Rev. 39 (1977).

41. *Desegregating the Boston Public Schools: A Crisis in Civic Responsibility*, U.S. Commission on Civil Rights (August, 1975).

42. Memorandum and Orders Modifying Desegregation Plan, pp. 2-4 (May 3, 1976).

C H A P T E R 15

Education Law

SANDRA L. LYNCH*

§15.1. Introduction. School desegregation, the crucible for racial equality in our nation, generated much heat, some light, and continued hope for improvement in the Boston schools during the *Survey* year. While the Boston schools underwent the transition to a unitary school system, Springfield peacefully integrated its elementary schools. Throughout the Commonwealth, the special education system was subjected to a far reaching transformation as a new special education law, chapter 766 of the Acts of 1972,[1] went into effect.[2] These, and other steps surveyed here, marked the beginnings of meaningful alterations in the state's educational system. In evaluating these beginnings, it is true as Justice Frankfurter once stated, that "[o]nly the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms."[3]

A. Desegregation

§15.2. Overview. On June 21, 1974, United States District Court Judge W. Arthur Garrity, Jr. held that the Boston School Committee and the Superintendent of Schools had violated the constitutional rights of black students by purposefully creating and maintaining a segregated school system.[1] As interim relief for the first year of desegregation, the federal district court adopted the racial balance plan ordered implemented as a matter of state law by the Supreme Judicial Court.[2] Thus began the struggle between the parties over the proper

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§15.1. [1] G.L. c. 71B, §§ 1-14.

[2] Acts of 1972, c. 766 went into effect on September 1, 1974. *Id.* § 23.

[3] Cooper v. Aaron, 358 U.S. 1, 25 (1958) (Frankfurter, J., concurring).

§15.2. [1] Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass.), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied,* 421 U.S. 963 (1975) [hereinafter cited as *Morgan*].

[2] Partial Judgment and Interlocutory Order, Morgan v. Henningan, 379 F. Supp. at 484. *See* School Comm. v. Board of Educ., 1973 Mass. Adv. Sh. 1315, 302 N.E.2d 916 (*Boston III*).

remedy for the violation of the plaintiffs' constitutional rights. In the face of continued resistance by the School Committee defendants to the remedies it ordered, the federal court fashioned a second phase desegregation plan of unusual flexibility that would address both education and race. In the process of forging the final plan, the court considered five models submitted to it and from these formulated the Phase II plan.

The following four sections focus upon the events leading to the formulation of the district court's Phase II plan. The first discusses the contempt order levied against three members of the Boston School Committee. The second examines the proposed plans submitted to the district court. The third deals with the Phase II plan promulgated by the court. Finally, the fourth section discusses the orders involving teacher desegregation.

§15.3. The Contempt Order. Due to disobedience of its orders, the federal court found three members of the School Committee in contempt of court and later considered whether the School Committee should be placed in receivership.[1] School authorities have an affirmative obligation to proffer acceptable remedies to bring about a unitary school system when there has been a finding of unconstitutional segregation.[2] In such cases, it is common for courts to require local school authorities to submit proposed desegregation plans.[3] The Boston school desegregation case was no exception. On October 31, 1974, Judge Garrity entered an order establishing a filing date and

§15.3. [1] Following extensive hearings in Boston commencing in June, 1975, the U.S. Civil Rights Commission found that the Boston School Committee's compliance with the court's desegregation order was so minimal as to amount to obstruction of the orders and therefore recommended that the Committee be placed into receivership. "Desegregating the Boston Public Schools: A Crisis in Civic Responsibility," Report of the U.S. Civil Rights Commission, 52-64 (August 1975). The court ordered the parties to submit memoranda by September 26, 1975 on whether there had been such minimal compliance by the Committee, and, if so, to make recommendations on what action the court should take. *Morgan*, Transcript 8/29/75 at 56-64. The Committee filed a reply memorandum and the matter is pending. There is precedent for such a receivership. In one school desegregation case, Turner v. Goolsby, 255 F. Supp. 724, 731 (S.D. Ga. 1966), the local school committee was placed in receivership and the state superintendent of schools was made the receiver. *See generally* Note, *Receivership as a Remedy in Civil Rights Cases*, 24 RUTGERS L. REV. 115 (1969).

[2] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971); Green v. County School Bd., 391 U.S. 430, 439 (1968).

[3] Brown v. Board of Educ., 349 U.S. 294, 299 (1955) (*Brown II*); United States v. Board of School Comm'rs, 503 F.2d 68, 72 (7th Cir. 1974). *See also* Adams v. Mathews, 403 F.2d 181 (5th Cir. 1968); Vaughns v. Board of Educ., 355 F. Supp. 1034, 1037-38 (D. Md. 1972).

setting forth standards for a school desegregation plan.[4] The order required that the plan be filed by December 16, 1974 and stated: "[T]he plan shall be approved by vote of the defendant school committee before submission to the court."[5] Other parties and community groups were given until Januray 20, 1975 to file criticisms of the School Committee's plan or to file alternative plans.[6]

The Committee, however, did not meet the deadline established by the court. It refused, by a three to two vote, to approve the plan prepared by the staff of the Boston School Department (December 16 plan). Nor did the School Committee approve any other plan for filing with the court. Counsel for the School Committee nevertheless filed the staff plan with the court and then sought leave to withdraw from the case.[7] Plaintiffs filed motions for criminal and civil contempt against the three members of the School Committee who had voted not to approve the plan for filing.

In preparation for the hearing of these contempt motions, the court issued a procedural order requiring the three School Committee members to file in writing the answers to five questions concerning their willingness to comply with court orders and to take affirmative steps toward desegregation.[8] The virtually identical answers filed by

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[4] Among the standards established were these:

> Taking into account the safety of students and the practicalities of the situation, the student desegregation plan shall provide for the greatest possible degree of actual desegregation of all grades in all schools in all parts of the city. In drafting the plan, the defendants shall utilize as a starting point and keep in mind the goal that the racial composition of the student body of every school should generally reflect the ratios of white and black students enrolled at that grade level of schools, elementary, intermediate and secondary, throughout the system.

Morgan, Order Establishing Filing Date and General Contents of Desegregation Plan at 2-3 (Oct. 31, 1974).

[5] *Id.* at 5.

[6] *Id.* at 6.

[7] *Morgan,* Motion for Leave to Withdraw as Counsel, filed Dec. 17, 1974. Leave to withdraw was granted a month later when new counsel for the Committee entered an appearance.

[8] The order was issued orally on December 18, 1974, and confirmed by written order on December 23, 1974. The questions were as follows:

> (1) What affirmative steps, if any, will you take to promote the peaceful implementation of the state court plan currently in effect?
>
> (2) Will you vote to take the steps necessary to implement a citywide desegregation plan, as outlined in the eleven timetables included in section VII of the plan submitted December 16, 1974, such as approval of contracts for transportation of students and for changes in and repairs of facilities?
>
> (3) Will you obey and carry out future orders of the court concerning implementation of a citywide student and faculty desegregation plan, such orders as are now being formulated or may in the future be approved by the court?
>
> (4) To what extent, if at all, has your commitment made in the letter of November 11, 1974 from Secretary Winter of the School Committee to the Department of Health, Education and Welfare that "the Boston public schools presently are, and

the three essentially stated that although they would obey all lawful orders of the court, they would take no affirmative steps beyond what the court had ordered.[9] At the hearing on the contempt motion, new counsel for the School Committee conceded that there had been disobedience, but argued that there was no contempt because the disobedience was insubstantial and had resulted in no harm to the plaintiffs, and because a plan had, in fact, been filed.[10] The court held the three Committee members in civil contempt but denied the motion for criminal contempt.[11]

Specifically, the court held that the three had violated its October 31, 1974 order in two respects: (1) they had not approved a citywide desegregation plan on or before December 16, 1974, and (2) they had not submitted a plan to the court.[12] In censuring the School Committee's disobedience, the court relied on the recent opinion of the Supreme Judicial Court in *Springfield School Committee v. Board of Education*[13] that "[a] plan submitted without approval by a school committee is a clear indication that full effort and commitment has not been made toward developing a viable solution to the problem at hand."[14]

Thus, the disobedience was not insubstantial. As the federal court noted, "[i]f such a course of conduct should become habitual or should be ignored by the Court as simply something that is not important, the Court believes that there never, ever would be a desegregation plan for this city formulated and implemented."[15]

Furthermore, the court found two categories of damage to the plaintiffs. First, the plaintiffs had a constitutional right to have in-

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will continue to be, in full compliance with these orders of the Federal Court for the desegregation of the Boston public schools. The Boston public schools will comply with all future modifications of the order," been changed or abandoned?

(5) In view of the decision and opinion of the Court of Appeals dated December 19, have you changed your position regarding approval of the December 16th desegregation plan and, if so, in what way?

Morgan, Orders in Preparation for Civil Contempt Hearing at 1-2, Dec. 23, 1974.

[9] *Morgan*, Transcript 12/27/74 at 42-47.

[10] *See* McNeil v. United States, 236 F.2d 149 (1st Cir. 1956).

[11] *Morgan*, Transcript 12/27/74 at 90.

[12] *Id.* at 95. One court, defining the elements of civil contempt, has stated that it "may be predicated upon a finding of 'clear and convincing' evidence that there was a lawful order and violation of that order." United States v. Greyhound Corp., 363 F. Supp. 525, 570 (D. Ill. 1973).

[13] 1974 Mass. Adv. Sh. 657, 311 N.E.2d 69.

[14] *Id.* at 665, 311 N.E.2d at 75. The federal court also reiterated another point contained in the School Committee opinion: if the school committee did not adopt a plan submitted to the court as its own, it would be free to appeal the court's actions, regardless of what plan the court adopted. *See id.* at 665-66, 311 N.E.2d at 75. *Morgan*, Transcript 12/27/74 at 25-26.

[15] *Morgan*, Transcript 12/27/74 at 96.

volved in drafting the plan the resources that are available only from local school officials.[16] Secondly, approximately $1.9 million available to Boston under the federal Emergency School Assistance Act[17] would be withheld until the Committee was in compliance with court orders.[18]

The court found that the harm to the plaintiffs could be remedied, and the contempt purged, if each contemnor voted "at a meeting of the Boston school committee to 'authorize' the prompt submission to the court of a citywide student desegregation plan. As a matter of law, such a plan will have been submitted by the defendant school committee."[19] No longer did the court require "approval" of a plan; "authorization" would suffice. Unless the contempt was so cured by January 7, 1975, sanctions would be imposed.[20] The contemnors' motion for a stay of this order was denied by the district court,[21] which denial was affirmed on appeal.[22]

At a meeting of the Boston School Committee on January 7, 1975, the contemnors voted to direct the staff to amend the December 16, 1974 plan so that it did not employ "forced busing" and to submit that amended plan to the court. The court found that this vote purged the contempt so long as the amended plan was filed by January 20, 1975.[23] The Committee did file a plan, thereby curing the contempt.

§15.4. Developing the Phase II Desegregation Plan. By early February, 1975, four desegregation plans had been filed with the court: the December 16 plan, the School Committee plan, the plaintiffs' plan, and the Home & School Association plan. In addition, extensive commentary had been filed on all of the plans by all parties and by some community groups. Although none of these plans was adopted by the court, they greatly influenced the shape of the final plan.

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[16] *Id.* at 96-97. As noted in Brown v. Board of Educ., 349 U.S. 294, 299 (1955) (*Brown II*): "School authorities have the primary responsibility for elucidating, assessing, and solving [desegregation] problems."

[17] 20 U.S.C. §§ 236, 240 (1970).

[18] *Morgan,* Transcript 12/27/74 at 97.

[19] *Morgan,* Memorandum and Order as to Sanctions for Civil Contempt (December 30, 1974) at 4.

[20] *Id.* The proposed sanctions included payment of a daily fine by the contemnors, their exclusion from any School Committee action pertaining to the desegregation of Boston's public schools, and regarding the two contemnors who were members of the bar, possible suspension from federal practice for the duration of the contempt. *Id.* at 4-5. *See* Local Rule 5(d), Rules of the United States District Court for Massachusetts.

[21] *Morgan,* Order on Motion for Stay of Order Pending Appeal (January 3, 1975).

[22] Morgan v. Kerrigan, 509 F.2d 618 (1st Cir. 1975).

[23] *Morgan,* Memorandum and Conditional Order as to Three Defendants' Civil Contempt (Jan. 8, 1975).

Three of these plans[1] were referred by the court to a panel of masters composed of two attorneys and two educators, to conduct hearings and make recommendations to the court.[2] For the reasons explained below, the masters rejected all of these plans and developed their own plan. After the masters submitted their recommended plan, it appeared that the plan was based on erroneous factual data that seriously affected the degree of desegregation it achieved.[3] Although the court adopted most of the suggestions contained in the masters' plan, it modified the masters' plan in several respects, finding that the district lines recommended in the masters' plan could "result in the sort of residential instability that could destroy in a few years the desegregation accomplished initially."[4] The plans before the court and the action taken on them were as follows.

December 16 Plan. The December 16 plan was the original plan developed by the School Department staff, rejected by the majority of the School Committee, yet filed by counsel. The plan divided the city into six zones.[5] Parents would be given the choice of different kinds of schools within each zone: (1) at the elementary level, traditional, open space, or ungraded; (2) at the intermediate level, flexible cluster or traditional, with limited enrollment magnet programs to be developed at each school; and (3) at the high school level, district high schools with individual magnet programs and citywide thematic high schools.[6] Such parental choice would be exercised through a program option system of selecting a school within the zone in which the pupil lived or of selecting a citywide school.[7] The plan did not define any particular ranges of acceptable racial compositions for district schools within which parental choices would be honored or denied and which would ensure integration of the schools. The plan also suggested that Charlestown and East Boston be excluded from any requirement of desegregation.[8]

The court, after consideration of the December 16 plan, found that

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§15.4. [1] The court ruled the Home & School Association plan unacceptable as a matter of law. *Morgan*, Transcript 2/5/75 at 65. See text at notes 28-36 *infra*.

[2] Morgan v. Kerrigan, Memorandum of Decision and Remedial Orders, 401 F. Supp. 216, 227 (D. Mass. 1975), *aff'd*, Nos. 1184, 1194, 1197, 1212 (1st Cir., Jan. 14, 1976). *See* FED. R. CIV. P. 53(c).

[3] For instance, the Masters' plan projected the racial composition of the West Roxbury District to be 80 percent white. In fact, the District as drawn was 92 percent white. 401 F. Supp. at 236.

[4] *Id.* at 237.

[5] Dec. 16 plan at V-1 to V-126.

[6] *Id.* at IV-1 to IV-67. Although some of these different educational approaches existed in Boston, the majority would have to be developed.

[7] *Id.* at VI-1 to VI-20.

[8] *Id.* at V-59.

the plan prepared by the masters, as modified by the court, was "preferable for reasons of feasibility."[9]

School Committee Plan. The School Committee plan relied entirely on voluntary parental choice to accomplish desegregation. The complex assignment process in this plan involved five different sequential steps. First, parents who chose for their children to remain in their current "racially mixed" schools would be allowed to do so.[10] Second, parents could choose to send their children to a citywide magnet or alternative school that was "guaranteed" to be integrated,[11] although the plan did not specify how. Third, parents and students could subscribe to magnet schools within their zones.[12] Fourth, parents could enroll their children in "cross racial" schools in a zone.[13] Fifth, any remaining parents and students would be given the choice of attending any school in the zone within which they lived.[14] If such zonal schools were "racially isolated,"[15] students from those schools would participate on a part time basis in third-site integrated programs.[16] The degree of integration was, therefore, entirely to be determined by the pattern of choices made by parents, except for the periods of attendance at third-site resource centers.

The masters and the court found that the School Committee plan was basically a "freedom of choice" plan.[17] Such plans are constitutionally unacceptable where there are more effective methods of desegregation reasonably available.[18] Experience both elsewhere[19] and with voluntary programs in Boston[20] has demonstrated that the School Committee plan would be ineffective in achieving desegregation in schools. The federal district court found that the addition of

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[9] 401 F. Supp. at 229.

[10] "Racially mixed" schools were defined as schools whose racial compositions were plus or minus 15 percent of the citywide school racial composition. School Committee plan VI-5 to VI-8, VI-24 (filed Jan. 27, 1975).

[11] *Id.* at VI-9.

[12] *Id.* at VI-10.

[13] "Cross racial" schools were defined as schools located in neighborhoods that are predominantly white or predominantly minority. *Id.* at VI-11 to VI-21.

[14] *Id.* at VI-22.

[15] "Racially isolated" schools were defined as schools whose race composition varied more than 15 percent from the racial composition of the entire zone at that level of schools (*i.e.* elementary, intermediate, high schools). *Id.*

[16] Elementary students would spend one day a week at such a center; middle school students would spend one day every two weeks; the time for high school students was not defined. *Id.* at IV-72.

[17] 401 F. Supp. at 228.

[18] *Id. See, e.g.,* Green v. County School Bd., 391 U.S. 430, 441 (1968).

[19] *See, e.g.,* Hall v. St. Helena Parish School Bd., 417 F.2d 801 (5th Cir. 1969).

[20] Morgan v. Hennigan, 379 F. Supp. at 456.

third-site resource centers did not save the plan.[21] Judge Garrity rejected the School Committee plan, since it did not promise realistically to desegregate the public schools.[22]

The Plaintiffs' Plan. The plan submitted by the plaintiffs was a student assignment plan that contemplated the assignment of students to particular schools by attributing specific geocodes[23] to certain schools, school pairs, or clusters within the six zones set forth in the December 16 plan.[24] The plan used the existing citywide schools as citywide schools and did not propose any new ones.[25] It did not propose development of additional magnet programs, but noted that the Committee remained free to do so.[26] Although such a plan would desegregate the schools, it was rejected by the court, which found its own plan to be more feasible.[27]

The Home & School Association Plan. The Home & School Association plan[28] continued the racial balance plan then in effect and added to it only certain of the other schools in the city.[29] There was some dispute whether these additonal schools would, in fact, have been desegregated under the Association's plan.[30]

The Home & School Association plan did not purport to be a citywide desegregation plan. The Association argued that despite the court's earlier ruling that the unconstitutional segregation was systemwide, the remedy must be limited to those areas of the city where specific examples of purposeful segregation by the School Committee had been proven.[31] In support of this theory, the Association relied on language in *Milliken v. Bradley*[32] that the extent of the remedy must

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[21] 401 F. Supp. at 228. Such programs, whereby pupils of different races meet several times a week to participate in special educational programs have been seen as devices to avoid adoption of an effective desegregation plan. Keyes v. School Dist. No. 1, 380 F. Supp. 673, 682 (D. Colo. 1974). *See also* United States v. Texas Educ. Agency, 467 F.2d 848, 872 (5th Cir. 1972).

[22] 401 F. Supp. at 228-29.

[23] "Geocodes" are the 800 plus areas, each several blocks in size, into which the school department has divided the city for planning purposes. *Id.* at 240 n.12.

[24] Plaintiffs' plan at 1.

[25] *Id.*

[26] *Id.* at 2.

[27] 401 F. Supp. at 229.

[28] The Home & School Association is an organization of parents of children in the Boston Public Schools, teachers, and other interested persons. It was allowed to intervene in the remedial proceedings only as to issues related to the desegregation of students and the formulation of a student desegregation plan. *Morgan,* Order Allowing Intervention, Dec. 27, 1974.

[29] Home & School Ass'n plan at 6.

[30] *See Morgan,* State Defendants' Commentary on Home & School Ass'n Plan (filed Feb. 3, 1975).

[31] *Morgan,* Brief of Boston Home & School Ass'n with Respect to the Proper Scope of the Court's Remedial Decree (filed Feb. 20, 1975).

[32] 418 U.S. 717, 744-45 (1974).

be limited to the extent of the liability.[33] The Association sought to introduce evidence on patterns of racial and ethnic separatism in Boston to support its premise that segregation in the public schools resulted from many nongovernmental factors, including residential segregation.[34]

The federal district court rejected the Home & School Association plan and its legal theory, stating that the very issue the Association sought to litigate in the remedial proceedings—the extent of the segregation and its cause—had been litigated and determined in the liability proceedings.[35] The segregation was systemwide, and the obligation of the School Committee was to remedy the segregation on a systemwide basis.[36] Consequently, the plan was rejected as a matter of law.[37]

§15.5. The Court's Phase II Plan. The desegregation plan promulgated by the court on May 10, 1975 (the "Phase II plan") combined parental choice with mandatory assignments,[1] attempted to preserve a sense of community by creating community districts each with a citizen advisory council,[2] and brought the resources of the area's colleges and universities to bear on remedying the educational deprivations attendant to segregation.[3] The court's exercise of its equitable powers in fashioning the Phase II plan was promptly challenged by the School Committee as a usurpation of its authority.[4]

The plan divided the city into eight geographic districts, called community school districts.[5] With the exception of the East Boston district,[6] each of the districts extended from the largely black center of the city to the largely white periphery of the city. The projected ra-

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[33] *Morgan*, Transcript 2/5/75 at 24-25.
[34] *Id.* at 17-18.
[35] *Id.* at 66.
[36] *Id.* at 73.
[37] *Id.* at 65-74. *See* 401 F. Supp. at 227.

§15.5. [1] Memorandum of Decision and Remedial Orders, Morgan v. Kerrigan, 401 F. Supp. 216, 249 (D. Mass. 1975), *aff'd*, Nos. 75-1184, 1194, 1197, 1212 (1st Cir., Jan. 14, 1976).
[2] *Id.* at 248.
[3] *Id.* at 247.
[4] Morgan v. Kerrigan, No. 75-1184, 1194, 1197, 1212 (1st Cir., Jan. 14, 1976) [hereinafter cited as *Morgan Slip Opinion*].
[5] The districts are primarily named for the areas of the city they encompass:

(1) Brighton—Mission Hill	(5) Dorchester
(2) Jamaica Plain	(6) South Boston
(3) West Roxbury	(7) Madison Park
(4) Hyde Park	(8) East Boston

401 F. Supp. at 253.
[6] The East Boston district was left as a geographically separate white district. Nevertheless, the conversion of several East Boston schools to citywide magnet schools will result in some integration in East Boston. *Id.* at 238.

cial compositions of these seven districts ranged from 61 percent to 40 percent white, from 48 percent to 33 percent black, and from 25 percent to 4 percent other minorities.[7]

In addition to the community districts, there was established a citywide magnet school district.[8] Included in the citywide district were those schools with special entrance requirements such as Boston Latin School, Boston Latin Academy, and Boston Technical High School. Both the citywide and community district schools were required to provide bilingual education and to accommodate students with special needs.[9]

The Boston School Department was required to assign students to schools in accordance with the framework established by the court and under its supervision.[10] The assignment process was initiated by sending an application form to all parents, who provided data about the students and chose between assignment to the community school district in which they lived and assignment to a specific citywide school.[11] These choices were to be honored by the School Department as much as possible within the racial percentage guidelines established for the schools.[12] The permissible racial composition range for schools in community districts was a 25 percent variation from the racial composition of the district.[13] For the citywide schools, the permissible range was a 5 percent variation from the systemwide percentages of 51 percent white, and 49 percent black and other minority.[14]

In additon, a timetable was set for the School Department to complete the student assignments, to assign faculty, to make facility changes, to formulate a transportation plan, and to develop a safety plan.[15]

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[7] The projected racial compositions for the districts were as follows:

District	*White %*	*Black %*	*Other Minority %*
1	44	33	23
2	45	40	15
3	56	39	5
4	61	35	4
5	45	48	7
6	53	33	14
7	40	35	25
8	95	3	2

[8] *Morgan*, Memorandum of Decision and Remedial Orders, Pt. II, 12-41 (June 5, 1975). 401 F. Supp. at 256. Magnet schools have been used as a desegregation device in other cities. *See, e.g.*, Hart v. Community School Bd., 512 F.2d 37, 54-55 (2d Cir. 1975).

[9] 401 F. Supp. at 252.

[10] *Id.* at 257-58.

[11] *Id.*

[12] *Id.* at 261.

[13] *Id. E.g.*, District 1 is 44 percent white. When 44 percent is multiplied by 25 percent, the range of alteration is 11 percent. Thus District 1 may range between 33 percent and 55 percent white.

[14] *Id.* at 262.

[15] *Id.* at 269-70.

According to the court's estimates, the transportation required in implementing the Phase II plan would not be overly burdensome. The court estimated that its plan would involve the mandatory transportation of approximately 21,000 students;[16] in the years prior to desegregation, approximately 30,000 students required daily transportation.[17] Within the community school districts, the plan stated that the average trip would be less than 2.5 miles, and the longest trip 5 miles.[18] The average travel time was set at between 10 and 15 minutes, and the longest travel time at approximately 25 minutes.[19]

In formulating the Phase II plan, the federal district court was guided by Supreme Court decisions establishing remedial requirements for segregated school systems. As the Supreme Court held in *Green v. County School Board,*[20] any desegregation plan must promise "realistically to work, and to work *now*"[21] and must eliminate racial discrimination "root and branch."[22] Toward this end, courts may alter student assignment plans and attendance zones and may order student transportation.[23] Although racial ratios may be used as a starting point in fashioning a remedy, the Constitution does not require the attainment of a particular fixed mathematical norm.[24] A presumption exists, however, against schools in the same school system whose racial compositions are substantially disproportionate.[25] The continuance of such schools may be justified only if, in view of the "practicalities of the situation," the greatest effort towards actual desegregation has been made.[26] The fear of "white flight" is not acceptable as a reason for achieving "anything less than complete uprooting of the dual public school system."[27] The court's plan was challenged on appeal as misapplying these standards.[28]

One of the more controversial aspects of the assignment plan was the requirement that the entering seventh and additonal ninth grade classes at the three examination schools, Boston Latin School, Boston Latin Academy, and Boston Technical High School, be 35 percent black and hispanic.[29] The School Department was to select minority

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[16] *Id.* at 263.
[17] *Id.* at 239.
[18] *Id.* at 263.
[19] *Id.*
[20] 391 U.S. 430 (1968).
[21] *Id.* at 439.
[22] *Id.* at 438.
[23] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
[24] *Id.* at 24-25.
[25] *Id.* at 26.
[26] Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971).
[27] United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 490-91 (1972). *See also* Wright v. Council of the City of Emporia, 407 U.S. 451 (1972).
[28] *See Morgan Slip Opinion.*
[29] 401 F. Supp. at 258.

students on the basis of SSAT scores,[30] grade-point averages, or class standings, or combinations of these.[31] This procedure was challenged by some parties as impermissibly establishing racial quotas, in contravention of the prohibition in *Swann v. Charlotte-Mecklenberg Board of Education*[32] on the use of "fixed mathematical norms."[33] The federal court's order, however, provided only a partial, interim remedy to the segregation that exists at the examination schools in that it would initially desegregate only the seventh grade of schools having grades seven through twelve.[34] In other school desegregation cases, courts have prohibited student assignment plans based on achievement tests, finding that such programs frustrate the establishment of a unitary school system.[35]

The court's plan also involved parents in the desegregation process, by creating several citizen advisory councils to assist with the implementation and monitoring of the plan. During the first phase of desegregation, Racial-Ethnic Parents' Councils and Students' Councils were established at each school affected by the state plan.[36] The Parents' Councils elected a Citywide Parents Advisory Council (CPAC).[37] The second stage of desegregation brought with it further citizen participation, in the form of the Citywide Coordinating Council (CCC) and the Community District Advisory Councils (CDAC).[38]

The CCC is the primary body monitoring implementation on behalf of the court.[39] The CCC, composed of approximately forty members, is divided into an executive committee and six subject-matter committees.[40] The functions assigned to the CCC were to provide accurate information on the desegregation process to the public, to monitor all phases of implementation including safety procedures and training programs, to act as a community and district council liaison, and to meet with the School Committee and Superintendent at least

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[30] Secondary School Aptitude Test, a product of the Educational Testing Service of Princeton, New Jersey. The SSAT is the method that has been used since the 1972-73 school year to select entrants to the examination schools. Morgan v. Hennigan, 379 F. Supp. 410, 467-68 (D. Mass. 1974), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied,* 421 U.S. 963 (1975).

[31] 401 F. Supp. at 258.

[32] 402 U.S. 1 (1971).

[33] *Morgan Slip Opinion* at 36-39.

[34] 401 F. Supp. at 258.

[35] Lemon v. Bossier Parish School Bd., 444 F.2d 1400, 1401 (5th Cir. 1971); United States v. Sunflower County School Dist., 430 F.2d 839, 841 (5th Cir. 1970).

[36] 401 F. Supp. at 248.

[37] *Id.* at 267.

[38] *Id.* at 265.

[39] *Id.* at 266-67.

[40] *Id.* at 265. The six committees are Public Information, Monitoring, Community Liaison, District Council Liaison, Education Programs, Public Safety and Transportation.

once a month.[41] It was specifically ordered not to comanage or make policy for the Boston Schools.[42] In addition, the CCC is empowered to conduct hearings, to hold public meetings, to make written reports, to inspect school facilities, and to bring unresolved problems to the attention of the court.[43]

The plan also established nine Community District Advisory Councils, one for each district, to act as advisory groups to school department personnel and to monitor implementation of the plan on the district level.[44] Each council is composed of parents, students, school staff, and others concerned with the educational process in the district.[45] Such multiracial councils have been used in other desegregation cases to assist in the monitoring and implementation of the program.[46] A body similar to the CCC was established in *Keyes v. School District No. 1*,[47] the Denver desegregation case.

The court's plan also drew upon the resources of local universities and businesses.[48] At the court's request, a number of Boston-area universities and businesses volunteered to be "paired" with Boston schools to help develop magnet[49] and other specialized programs in both the citywide and the district schools.[50] The Boston School Committee was ordered to use its best efforts to enter into contracts with the universities.[51]

Several rationales support this involvement of outside educational institutions with the Boston public schools. The heart of the Phase II plan is the magnet school system, whose success depends upon its ability to attract students.[52] It was expected that the university pairings would add substantially to the magnetism of these schools by improving the quality of education and developing innovative programs.[53] In

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[41] *Id.* at 265-66.

[42] *Id.* at 265.

[43] *Id.* at 266-67.

[44] *Id.* at 267.

[45] *Id.*

[46] *See, e.g.*, Carr v. Montgomery County Bd. of Educ., 377 F. Supp. 1123, 1140 (M.D. Ala. 1974), *aff'd*, 511 F.2d 1374 (5th Cir. 1975); Valley v. Rapides Parish School Bd., 313 F. Supp. 1193, 1206 (W.D. La.), *modified on other grounds*, 434 F.2d 144 (5th Cir. 1970).

[47] 380 F. Supp. 673 (D. Colo. 1974).

[48] 401 F. Supp. at 249.

[49] Both the December 16 and the Committee plans relied heavily on the use of magnet programs, a device the court incorporated into its own plan. *See* Dec. 16 plan at IV-39; School Committee plan at IV-33.

[50] 401 F. Supp. at 259.

[51] *Id.* at 247. The initial funding for the development of these programs was provided by the State Board of Education pursuant to Act of 1974, c. 636, §§ 1, 8.

[52] 401 F. Supp. at 235.

[53] *Id.* The establishment of magnet schools has been recognized as a viable tool for remedying a segregated school system. *See* Hart v. Community School Bd., 512 F.2d 37, 54-55 (2d Cir. 1975).

addition, the involvement of the universities should assist achieving the goal of equalization of the facilities and services available to all students.[54] The universities will also assist in fashioning remedial programs to counteract the adverse educational effects of segregation.[55]

Three parties[56] appealed from the court's Phase II plan, arguing that the plan exceeded the district court's remedial discretion. In *Morgan v. Kerrigan*,[57] the First Circuit upheld the plan formulated by Judge Garrity. The arguments advanced by the appellants embraced two theories: (1) that the district court was not empowered, by virtue of the Equal Educational Opportunities Act of 1974,[58] to fashion its own plan, since the masters' plan was constitutionally sufficient;[59] and (2) that the court's plan created quotas in contravention of the requirements of *Swann*.[60]

The Equal Educational Opportunities Act of 1974 (the "Act") mandates that courts impose "only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws."[61] The Act sets forth an order of priority to be followed in implementing specific remedies and directs the court to make findings as to the efficacy of the measures considered in structuring a desegregation plan.[62] In addition, the Act specifically provides that it "is not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States."[63]

In considering the application of the Act to the Boston school case, the First Circuit first examined the effect of the Act on the district court's duties and powers. After noting that the Act places much reliance on findings and assessments made by the judge and that the statute disavows any intent to encroach upon the judicial obligation to enforce the Constitution, the appellate court concluded:

> By explicitly leaving the district court the power to determine the adequacy of remedies, the Act necessarily does not restrict the

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[54] 401 F. Supp. at 234. *See* United States v. Wilcox County Bd. of Educ., 454 F.2d 1144 (5th Cir. 1972); Henry v. Clarksdale Municipal Separate School Dist., 409 F.2d 682, 685 n.5 (5th Cir. 1969).

[55] 401 F. Supp. at 235. *See* United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 394 (5th Cir. 1967).

[56] The defendant School Committee, the defendant Mayor, and the intervenor Home & School Ass'n.

[57] Nos. 75-1184, 1194, 1197, 1212 (1st Cir., Jan. 14, 1976).

[58] 20 U.S.C. § 1701 *et seq.* (Supp. IV 1974).

[59] *Morgan Slip Opinion* at 13.

[60] *Id.* at 34.

[61] 20 U.S.C. § 1712 (Supp. IV 1974).

[62] *Id.* §§ 1713, 1714.

[63] *Id.* § 1702(b).

> breadth of discretion of that court to determine what scope of remedy is constitutionally required. Thus the Act manifests a purpose not to limit judicial power but to guide and channel its exercise.[64]

The Act, then, does not restrict the power of the court to fashion appropriate remedies, but guides the court by instructing that less drastic measures be considered and, if possible, implemented prior to resorting to compulsory busing.[65]

The First Circuit then considered whether Judge Garrity had paid heed to the considerations required by the Act. The appellate court found that the district court had followed the mandates of the statute: referring to the Act, Judge Garrity had made specific findings that the transportation and other methods utilized in his plan were necessary to remedy effectively the violation of constitutional rights.[66] Since the district court had thus purported to be guided by the Act, the First Circuit considered whether the court's findings and conclusions were sufficiently supported. In holding that they were, the appellate court noted that the court's plan effected a greater degree of desegregation than did the masters' plan.[67] The First Circuit's conclusion reflects the difficulties inherent in establishing the specific point at which a remedy satisfies the constitutional minimum:

> When we ask ourselves whether a slight increase of maximum percentage of planned white enrollment at some schools, or leaving some elementary schools unaffected, or adding a few more magnet schools would achieve the constitutional minimum with less compulsory busing, we realize that the concept of this minimum cannot be identified with precision. Whatever prescription may be adopted by a judge, after months and years of consideration, it is doubtless always possible to make a case that something less will do. We have no basis for holding that the court exceeded its obligation to do all that it feasibly could to extirpate the effects of the constitutional violations over the years.[68]

The district court, then, had properly exercised its equitable powers in promulgating the Phase II plan and had not violated the Equal Educational Opportunities Act of 1974.

Appellants also argued that the district court had impermissibly relied upon racial quotas and percentages, particularly those set for the citywide schools. In rejecting this contention, the First Circuit found that the district court had employed the percentages properly, as a

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[64] *Morgan Slip Opinion* at 16.
[65] *Id.*
[66] *Id.* at 16-17. *See* 401 F. Supp. at 263-64.
[67] *Morgan Slip Opinion* at 18-20.
[68] *Id.* at 20.

starting point in establishing a school desegregation plan for Boston.[69] The appellate court also approved the plan's provision that the enrollment at each citywide magnet school fall within 5 percent of the citywide racial composition. The establishment of such a narrow range was permissible, in view of the special role of the magnet schools in the desegregation plan. Since attendance at the specialized schools was voluntary, their efficacy as a desegregation tool would be minimal if the schools became racially identifiable.[70]

The district court's plan was also challenged by the Home & School Association as being too broad in scope, the Association arguing that the court had not confined the remedy to segregation resulting solely from illegal official action.[71] The First Circuit upheld the district court's rejection of the Association's remedial theory, finding that it would fail to vindicate the students' constitutional rights[72] and that introduction of evidence relating to the cause of the segregation in Boston would be improper at this stage of the proceeding.[73]

§15.6. **Teacher Desegregation.** In furtherance of its goal of dismantling the dual school system in Boston, the federal district court issued faculty desegregation orders as well as the student desegregation plan. In *Morgan v. Hennigan,*[1] the opinion on liability, the court held that the hiring and assignment of faculty and staff for the Boston school system had been done on an unconstitutional basis.[2] Specifically, the court held that (1) the School Committee had "knowingly pursued policies resulting in racial segregation of teachers and administrative personnel, thereby reinforcing the racial identifiability of schools and increasing the racial segregation of students;"[3] (2) the Committee had "knowingly pursued policies resulting in less qualified, less experienced, and lower paid teachers in predominantly black schools;"[4] and (3) the Committee had "violated the constitutional right of public school students to have the school system operated free of racial discrimination in the recruiting, employment, and promotion of teachers and staff."[5]

Having thus determined that segregation existed among the faculty and staff, as well as among the students, the federal court held hear-

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[69] *Id.* at 34-35.
[70] *Id.* at 36.
[71] *Id.* at 20.
[72] *Id.* at 26.
[73] *Id.* at 28.

§15.6. [1] 379 F. Supp. 410 (D. Mass.), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied,* 421 U.S. 963 (1975).
[2] 379 F. Supp. at 456.
[3] *Id.*
[4] *Id.*
[5] *Id.*

ings to determine what remedial action was appropriate.[6] At this stage, the Boston Teachers Union, the collective bargaining representative for most Boston school teachers, was allowed to intervene solely to participate in the formulation of remedial orders concerning teacher hiring, transfer, and promotion procedures.[7]

In Boston, three categories of teachers were employed: permanent, provisional, and temporary substitutes.[8] Provisional teachers, who were uncertified and employed on the basis of yearly contracts, had somewhat fewer rights and benefits than permanent teachers.[9] Temporary substitutes were hired on a daily basis to fill in at a rate of compensation lower than that for provisionals.[10]

The court's orders involved increasing the number of black teachers at both the permanent and provisional levels. On July 31, 1974, the court issued interim orders concerning teacher hiring and desegregation prior to the opening of schools in September, 1974.[11] The court ordered that 280 new permanent teachers be hired, on the basis of one black permanent teacher to each white permanent teacher hired until all qualified blacks had been hired.[12] Within this group, priority was to be given to those who were on eligible lists for the position and who had been provisional teachers with satisfactory ratings. After the permanent teachers had been hired, qualified provisionals[13] were to be hired on a one-to-one basis. The Committee was also directed to recruit additional black candidates. Finally, the School Committee was required to transfer white and black teachers, to reduce the concentration of black teachers in black schools, and to increase the number of experienced teachers in those schools.[14]

On the intervenor Union's appeals from these orders, the First Circuit upheld the lower court's orders as a permissible remedy to rectify the pervasive violations of the constitutional rights of black school children.[15] The court of appeals rejected the Union's arguments that the relief must be limited to that necessary to vindicate the rights of black teachers and applicants who had been discriminated against.[16]

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[6] Morgan v. Kerrigan, 509 F.2d 599, 600 (1st Cir. 1974).

[7] *Id.*

[8] 379 F. Supp. at 457.

[9] *Id.*

[10] *Id.*

[11] On July 31, 1974, the court issued its orders orally; on August 9, 1974, a written order was filed.

[12] "Qualified" was defined as a person having a Massachusetts teaching certificate pursuant to G.L. c. 71, § 38G, or who had been a provisional teacher with a satisfactory rating. *See* 509 F.2d at 600.

[13] The qualification for provisional teachers was a college degree. *See* 379 F. Supp. at 457.

[14] *See* 509 F.2d at 600. Oral order, July 31, 1974.

[15] 509 F.2d at 600-01.

[16] *Id.* at 600 n.3.

On January 28, 1975, the district court entered further orders on faculty recruitment and hiring, which supplanted the earlier interim orders.[17] In its orders, the court established a 20 percent hiring goal for black teachers, continued the system of employing one black teacher for each white teacher hired, required an affirmative recruitment program until there is a 25 percent black faculty, and ordered the filing of periodic progress reports.[18]

The 20 percent hiring goal established by the court represented the percentage of blacks in Boston's population. In setting the figure, the court adopted neither the plaintiffs' position nor the position of the School Committee and Union. The plaintiffs had argued that, under the precedent of *United States v. Texas Education Agency*,[19] the hiring goal for black teachers should equal the black student population, or 35 percent.[20] The Committee and Union had contended that, since the minimum qualification for teachers was a college degree, the black teacher hiring goal should equal the percentage of black college graduates in Boston or in the Northeast, respectively 5.25 percent and 4.24 percent.[21] In using the percentage of blacks in the city's population as the basis for the hiring goal, the court followed a pattern often used in employment discrimination cases.[22] On appeal, the First Circuit held that the district court had not abused its discretion in basing the hiring goal on the population percentage of blacks.[23]

B. Other Developments

§15.7. **Racial Balance.** The Legislature amended the Commonwealth's racial balance law, sections 37C-37J of chapter 71 of the General Laws, during the summer of 1974, just prior to the implementation of state court-ordered racial balance plans in Boston[1] and Springfield.[2] The amendments, chapter 636 of the Acts of 1974, significantly weakened the racial balance law as a tool to achieve racial

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[17] *Morgan*, Memorandum and Orders on Faculty Recruitment and Hiring (Jan. 28, 1975).

[18] *Id.*

[19] 467 F.2d 848, 873 (5th Cir. 1972) (*en banc*).

[20] *Morgan*, Memorandum and Orders on Faculty Recruitment and Hiring (Jan. 28, 1975) at 3.

[21] *Id.*

[22] Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1026 (1st Cir. 1974); NAACP v. Allen, 493 F.2d 614, 617 n.3 (5th Cir. 1974); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

[23] Morgan v. Kerrigan, No. 75-1097 (1st Cir., Jan. 26, 1976), slip opinion at 6.

§15.7. [1] School Comm. v. Board of Educ., 1973 Mass. Adv. Sh. 1315, 302 N.E.2d 916 (*Boston III*).

[2] School Comm. v. Board of Educ., 1974 Mass. Adv. Sh. 657, 311 N.E.2d 69 (*Springfield II*).

balance in public schools.[3] A school committee is no longer required to formulate a racial balance plan upon certification by the Board of Education that racial imbalance exists in the schools within that committee's jurisdiction.[4] The amendments provide that a school committee of a system with racially imbalanced schools must prepare a balance plan only if it cannot satisfy a request to transfer a nonwhite child from an imbalanced school to a "racially isolated" school or vice versa for a white child.[5] Although the amendments did not restrict the methods a school committee might use in its balance plan, the statute now circumscribes the authority of the state Board of Education by providing that the only measures the Board of Education may require a local school committee to include in its plan are "additions to existing school buildings, use of leased or portable facilities, and changes in use of school buildings."[6]

Relying on these amendments, the Springfield School Committee brought a motion to vacate the order in *Springfield II*[7] that required implementation of a particular racial balance plan in Springfield. In *School Committee v. Board of Education* ("*Springfield III*"),[8] the Supreme Judicial Court rejected the attempted rescision of the balance plan and held that any action by the Legislature or the school committee that would rescind racial balance attained in Springfield would violate the United States and Massachusetts Constitutions.[9] The Court declared chapter 636 unconstitutional to the extent that its application would rescind the implementation of the Springfield racial balance plan.[10] The attempt of the school committee to revoke the plan, in reliance upon chapter 636, was found unconstitutional.[11]

The *Springfield II* decision required the school committee to remedy the racial imbalance existing in five elementary schools by implementing the "Task Force" plan. This plan divided the city into six districts, altering attendance zones and requiring some transportation of students.[12] The methods used in that plan to achieve balance were not methods contained in the amendments to the racial balance law. Prior to the suit, it appeared that the school committee was complying with

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[3] Acts of 1974, c. 636. For a discussion of litigation under the racial balance law in prior years see Sticklor, *Education Law*, 1974 ANN. SURV. MASS. LAW § 20.2-.3, at 538-44.

[4] Acts of 1965, c. 641.

[5] A "racially isolated" school is defined as a school in which not more than 30 percent of the students are nonwhite. G.L. c. 71, § 37D.

[6] G.L. c. 15, § 1I.

[7] *Springfield II*, 1974 Mass. Adv. Sh. 657, 311 N.E.2d 69.

[8] 1974 Mass. Adv. Sh. 2031, 319 N.E.2d 427, *cert. denied*, 421 U.S. 947 (1975) (*Springfield III*).

[9] *Id.* at 2046-47, 319 N.E.2d at 434.

[10] *Id.* at 2047, 319 N.E.2d at 434.

[11] *Id.*

[12] *Springfield II*, 1974 Mass. Adv. Sh. at 659, 311 N.E.2d at 72.

the order and proceeding in accordance with the Task Force plan.[13] Shortly after the Legislature amended the racial imbalance law, the Springfield School Committee directed its staff to cease implementation of the Task Force plan[14] and filed a motion with the Single Justice of the Supreme Judicial Court to vacate the final decree after rescript that had been entered in *Springfield II*.[15] The school committee contended that the amending of the racial balance law had vitiated the legal grounds of the *Springfield II* order.[16] An intervenor group of school children and their parents opposed the motion to vacate.[17] At an extraordinary summer sitting, the full Court heard oral argument on August 22, 1974, and that same day issued an order denying the motion to vacate.[18] Basing its decision on federal and state constitutional grounds,the majority of the Court held that "[i]f the school committee at this stage, in reliance on c. 636, attempts to rescind the implementation of the Task Force plan, it would constitute State action serving to continue segregation in the schools and thus 'significantly . . . [involve] the State' in . . . racial discrimination."[19] The Court found that the committee had taken a number of steps toward implementation of the Task Force plan and thus created a new *status quo*.[20] If the preexisting school structure of racial segregation were resurrected, the segregation would be state imposed and thus unconstitutional under both the fourteenth amendment to the United States Constitution[21] and the first and tenth articles of the Declaration of Rights of the Massachusetts Constitution.[22]

The committee argued that any action it took pursuant to chapter 636 could not be unconstitutional, because there had been no finding that the segregation in Springfield schools was *de jure* segregation.[23] The majority, however, found that whether the original segregation was *de facto* or *de jure* was irrelevant since "[s]tate action which would cause a return of the preexisting segregation would itself be an act of *de jure* segregation."[24] Thus, a state may not undertake a voluntary program of desegregation, act under that program to create a new

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[13] *Springfield III*, 1974 Mass. Adv. Sh. at 2039, 319 N.E.2d at 431.

[14] *Id.* at 2041-42, 319 N.E.2d at 432.

[15] *Id.* at 2032, 319 N.E.2d at 428.

[16] *Id.* at 2042, 319 N.E.2d at 432-33.

[17] *Id.*, 319 N.E.2d at 433. Over the objections of the Massachusetts Board of Education, the Attorney General in the name of the Board of Education, supported the motion to vacate. *Id.*

[18] *Id.* at 2043, 319 N.E.2d at 433.

[19] *Id.* at 2057, 319 N.E.2d at 438, *quoting* Opinion of the Justices, 1973 Mass. Adv. Sh. at 1031, 298 N.E.2d at 844.

[20] 1974 Mass. Adv. Sh. at 2057, 319 N.E.2d at 438.

[21] U.S. CONST. amend. XIV. *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

[22] MASS. CONST. pt. I, arts. I & X.

[23] 1974 Mass. Adv. Sh. at 2049, 319 N.E.2d at 435.

[24] *Id.* at 2050, 319 N.E.2d at 435.

desegregated *status quo*, and then deliberately provide for a rescision of the program and a return to a segregated condition.

In support of its decision, the majority opinion relied on a long line of cases holding the rescision of voluntarily adopted desegregation plans unconstitutional,[25] and on a series of decisions starting with *Reitman v. Mulkey*.[26] In *Reitman*,[27] the United States Supreme Court invalidated an amendment to the California constitution that forbade any state agency from interfering with the right of any person to sell, lease, or rent real estate to whomever he chose.[28] Analyzing the "historical context," "immediate objective," and "ultimate effect" of the amendment, the Court in *Reitman* found that the amendment did not put the state in a neutral position, but provided substantial state encouragement to acts of private discrimination in violation of the fourteenth amendment.[29] Applying the *Reitman* analysis in *Springfield III*, the Supreme Judicial Court found that the school committee's proposed application of chapter 636 would similarly be, in effect, an authorization to discriminate.[30]

The majority opinion resolved the constitutional issue without deciding the question whether the Legislature intended chapter 636 to affect existing racial balance plans. In concurring, Justice Quirico found it unnecessary to reach the constitutional issues, relying on rules of statutory construction and of equitable relief to find that there was no intent that the statute operate retroactively to affect existing plans.[31] In any event, Justice Quirico concluded, it would not be an appropriate exercise of equitable discretion to permit the committee to revert to its past policy "of questionable constitutionality."[32] After the Court's decision, the racial balance plan was successfully and peacefully implemented in Springfield.

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[25] *Id.* at 2048-49, 319 N.E.2d at 435. The Court relied upon the following cases: Bradley v. Milliken, 433 F.2d 897, 904 (6th Cir. 1970), 484 F.2d 215 (6th Cir. 1973), *rev'd on other grounds*, 418 U.S. 717 (1974); Keyes v. School Dist. No. 1, 303 F. Supp. 289, 295 (D. Colo. 1969), 313 F. Supp. 90 (D. Colo 1970), 445 F.2d 990 (10th Cir. 1971), *aff'd in part, modified in part*, 413 U.S. 189 (1973); Martin v. Evansville-Vanderburgh School Corp., 347 F. Supp. 816, 820 (S.D. Ind. 1972); Oliver v. Kalamazoo Bd. of Educ., 346 F. Supp. 766, 780 (W.D. Mich.), *aff'd*, 448 F.2d 635 (6th Cir. 1971).

[26] 1974 Mass. Adv. Sh. at 2053-57, 319 N.E.2d at 437-38. The decisions relied upon by the Court were: Lee v. Nyquist, 402 U.S. 935 (1971); Reitman v. Mulkey, 387 U.S. 369 (1967); Opinion of the Justices, 1974 Mass. Adv. Sh. 545, 310 N.E.2d 348; Opinion of the Justices, 1973 Mass. Adv. Sh. 1027, 298 N.E.2d 840.

[27] 387 U.S. 369 (1967).

[28] *Id.* at 371.

[29] *Id.* at 373, 380-81.

[30] 1974 Mass. Adv. Sh. at 2056-57, 319 N.E.2d at 438.

[31] *Id.* at 2059-63, 319 N.E.2d at 439-40 (Quirico, J., concurring).

[32] *Id.* at 2062, 319 N.E.2d at 440.

§15.8. Special Education: Chapter 766. The implementation of a progressive and comprehensive new special education law, chapter 766 of the Acts of 1972, in September 1974, marked an attempt by the Commonwealth to insure delivery of adequate educational services to special needs children. Chapter 766 was a clear break from prior programs and was expressly designed to remedy past inadequacies and inequities.[1] The Legislature found that "past methods of labeling and defining the needs of children have had a stigmatizing effect and have caused special education programs to be overly narrow and rigid, both in their content and their inclusion and exclusion policies."[2]

Chapter 766 repealed the profusion of prior special education programs[3] and funding provisions in favor of a broader, more fluid program for identifying and providing adequate programs for children with special needs. Local school systems[4] are required by Chapter 766 to screen for and identify children with special needs, to diagnose and evaluate such needs, to propose an educational program to meet such needs, to provide for the implementation of such a program, and to make annual assessments of the adequacy of each child's program.[5]

The statute establishes core evaluation teams composed of teachers, doctors, and other specialists to diagnose a child's particular needs.[6] It outlines eleven possible categories of educational programs,[7] many of which require the services of support personnel. Because of the statute's emphasis on "mainstreaming" special needs children into regular classes as much as possible, retraining of teachers is often required. These new procedures and services, at the heart of chapter 766, represented major "start up" costs to cities and towns. In order to assist in meeting these initial costs, the Legislature appropriated

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§15.8 [1] Acts of 1972, c. 766, § 11, *adding* G.L. c. 71B, §§ 1-14.

[2] *Id.* This stigmatization effect has been challenged as being so detrimental as to raise due process issues. Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 293-95 (E.D. Pa. 1972).

[3] Acts of 1972, c. 766, § 8. For instance, G.L. c. 69, §§ 28, 28A, 28B, provided for "deaf" and hearing-impaired students; G.L. c. 71, § 46, provided for "mentally retarded" children; G.L. c. 71, §§ 46A, 46M, provided for "physically handicapped" children; and G.L. c. 69, §§ 32-34, provided for "visually handicapped" children.

[4] Although the responsibility for provision of services rests in most instances on local school systems, the statute placed responsibility on the Massachusetts Department of Education for education of school-age children in institutions under the control of the Departments of Mental Health, Public Health, and Youth Services. G.L. c. 71B, § 12.

[5] *Id.* § 3.

[6] *Id.*

[7] *Id.* § 2.

$26 million for "up front" grants to cities and towns, with specified amounts going to each.[8]

§15.9. Special Education: Application of Appropriated Funds. In *Board of Education v. Assessor of Worcester,*[1] the Supreme Judicial Court held that funds provided to cities and towns under a special $26 million disbursement[2] could be used only in the implementation of new special education programs pursuant to chapter 766.

By section 24 of chapter 431 of the Acts of 1974, the Legislature had authorized the $26 million "in order to meet the costs to be incurred by the cities and towns in the implementation of" chapter 766. Section 24 further directed:

> The amount granted herein to each city or town shall be held as a separate account by the treasurer of such city or town and shall be expended by the school committee of such city or town for special education programs pursuant to [G.L. c. 71B] without further appropriation . . . provided, that where appropriations have been made in cities and towns to implement the provisions of said [c. 766], the amount by which the grant to each city or town as set forth in this section exceeds the amount appropriated . . . shall be applied without further authorization by the board of assessors to reduce the current tax rate of such city or town.[3]

The Board of Education of the Commonwealth informed local school superintendents that the $26 million was to be used to support new special education programs over and above these supported during the 1973-74 school year.[4] Worcester's share of the $26 million "up front" grant appropriated by the Legislature was $983,322.[5] For the 1975 fiscal year, the Worcester School Committee had budgeted $2,366,000 for special education, of which $268,541 was for new and expanded programs to implement chapter 766.[6] The Worcester School Department directed the town treasurer to deposit the entire $983,322 in a separate special education account.[7] The city assessor, however, applied the entire $983,322 to reduce the Worcester tax rate

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[8] Acts of 1974, c. 431, § 2, line item 7028-0304, § 24. The disbursements were called "up front" grants because they constituted, in essence, a beginning-of-the-fiscal-year "loan" against the state reimbursements usually made to cities and towns in the following fiscal year. The "up front" grant amounts were, thus, deducted from the amount due such city or town during the subsequent fiscal year[s] under G.L. c. 58, § 18A.

§15.9. [1] 1975 Mass. Adv. Sh. 2626, 333 N.E.2d 450.
[2] Acts of 1974, c. 431, § 24.
[3] *Id.*
[4] 1975 Mass. Adv. Sh. at 2628, 333 N.E.2d at 452.
[5] Acts of 1974, c. 431, § 24.
[6] 1975 Mass. Adv. Sh. at 2628, 333 N.E.2d at 452.
[7] *Id.*

and the funds were not applied to special education.[8] The assessor maintained that the pertinent sum was the entire special education budget of $2,366,000, which exceeded the $983,322 and therefore allowed him to use Worcester's entire share of the $26 million to reduce the tax rate.[9]

The issue in the ensuing litigation was whether monies allocated by chapter 431 of the Acts of 1974, for implementation of chapter 766, "must be spent for new and expanded programs over and above those supported in prior years, or whether such monies may be used to reduce the tax rate where the total special education budget of a particular city exceeds the amount so allocated."[10] The Supreme Judicial Court held that chapter 431 funds are to be spent only for new and expanded programs to implement chapter 766[11] and ordered the city to return $714,781 to the city treasurer for deposit in a separate special education account.[12]

The holding was based on a three-part analysis: statutory construction, administrative interpretation, and legislative history. The Court rejected the assessor's argument that the phrase "the implementation of" chapter 766 included the costs of preexisting programs established under laws repealed and replaced by chapter 766.[13] Although chapter 766 incorporated former provisions for special education programs, the Court found that the purpose of the statute was the establishment of new comprehensive and innovative programs of evaluation and placement of special needs children: "The hallmark of the statute is its creativity and the new and expanded programs it provides. These innovative programs have become synonymous with c. 766 itself."[14] The Court also gave weight to the consistent administrative interpretation given the statute by the Department of Education, which had maintained that the funds appropriated by the Legislature were to be used only in support of new special education programs.[15] Finally, the Court found persuasive a report prepared by the Office of the Secretary of Education and used by the Legislature.[16] The report projected that the costs of the initial year of implementation of chapter 766 would be $40,000,000, of which $14,000,000 reflected anticipated growth in existing programs. The remaining $26,000,000 represented additional costs of chapter 766. The Court concluded

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[8] *Id.*
[9] *Id.* at 2631-32, 333 N.E.2d at 453.
[10] *Id.* at 2628, 333 N.E.2d at 452.
[11] *Id.* at 2636, 333 N.E.2d at 454.
[12] *Id.*
[13] *Id.* at 2631-32, 333 N.E.2d at 453.
[14] *Id.* at 2632, 333 N.E.2d at 453.
[15] *Id.* at 2634, 333 N.E.2d at 454.
[16] *Id.* at 2634-35, 333 N.E.2d at 454.

that because it was this amount that had been appropriated by the Legislature in chapter 431, the Legislature had intended that the money be used to establish new special education programs, pursuant to chapter 766.[17] The funds, then, were not intended to reimburse the towns for maintaining existing programs nor were they meant to reduce the tax rate.[18]

§15.10. Students' Rights. In *Goss v. Lopez*,[1] the United States Supreme Court established procedures that public schools must follow before temporarily suspending a student. Recognizing that, where a state has established and maintained a public school system, a student has an "entitlement" to public education, the Supreme Court held that this interest was protected by the due process clause of the fourteenth amendment.[2] The entitlement may not be withdrawn on grounds of misconduct unless minimum procedures are followed that are designed to determine whether the misconduct has in fact occurred.[3]

The Court held that a student facing a temporary suspension of up to ten days must be given oral or written notice of the charges, an explanation of the basis for the accusation, and an opportunity to present his or her version of the facts.[4] In addition, unless the student's continued presence at the school endangers persons or property or threatens disruption of the academic process, the hearing must take place before the suspension.[5] In emergency situations, the Court held, the hearing may be held after the suspension, but must follow as soon as practicable.[6] Finally, the Court noted that suspensions for more than ten days or expulsions may require more formal procedures.[7]

The decision was based on a finding that suspensions infringed both "liberty" and "property" interests protected by the fourteenth amendment.[8] In addition to the loss of education during the suspension period, the Court found significant the effect a record of suspension has on a student's peers and on future educational or employment opportunities.[9] Such effects were not, in the Court's opinion, insubstantial.[10]

The requirements established by *Goss* do not appear to be burdensome. In most cases, there need be no delay between the time

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[17] *Id.* at 2635-36, 333 N.E.2d at 454.
[18] *Id.* at 2636, 333 N.E.2d at 454.

§15.10. [1] 419 U.S. 565 (1975).
[2] *Id.* at 574.
[3] *Id.*
[4] *Id.* at 581.
[5] *Id.* at 582.
[6] *Id.* at 582-83.
[7] *Id.* at 584.
[8] *Id.* at 574-75.
[9] *Id.*
[10] *Id.* at 576.

notice is given and the time of the hearing.[11] *Goss* does not require school officials, in making temporary suspensions, to give the student an opportunity to have counsel, to confront and cross-examine witnesses, or to call his or her own witnesses,[12] but allows officials to do so if they wish.

§15.11. School Officials: Liability for Damages. During the *Survey* year, the United States Supreme Court determined that public school committee members have no absolute immunity from payment of damages in civil rights actions[1] brought against them by students. In *Wood v. Strickland*,[2] the Supreme Court held that where students sue school committees of public schools in federal court for violation of their constitutional rights,

> a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[3]

The case before the Court involved the suspension and eventual expulsion of three high school students because they had "spiked" the punch at a school-related function.[4] Two of the students sued the local school board for damages and injunctive relief, claiming that their constitutional rights to due process of law had been infringed.[5] The Supreme Court did not decide whether there had been a violation of the students' constitutional rights, or whether damages should be awarded against the school committee, but sent the case back to the lower court to decide these questions in light of certain standards set forth in the *Wood* opinion.[6]

The standard for determining whether school committee members in a particular case will be immune from damage suits under section 1983 of title 42 of the United States Code, the Supreme Court said, has elements of both an "objective" and a "subjective" test of good faith:

> The official himself must be acting sincerely and with a belief that

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[11] *Id.* at 592.

[12] For a discussion of these requirements in the context of expulsions, see Boykins v. Fairfield Bd. of Educ., 492 F.2d 697, 701-02 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

§15.11. [1] Actions pursuant to 42 U.S.C. § 1983 (1970).

[2] 420 U.S. 308 (1975).

[3] *Id.* at 322.

[4] *Id.* at 311-13.

[5] *Id.* at 309-10.

[6] *Id.* at 327.

> he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitutional rights, a school board member . . . must be held to a standard of conduct based not only on permissible intention, but also on knowledge of the basic, unquestioned constitutional rights of his charges.[7]

Thus, a school committee member must act "sincerely and with a belief that he is doing right" and must also know "the basic, unquestioned rights" of the students. This does not mean, the Court stated, that school committees must predict the development of the law of students' rights.[8] The Court concluded that an award of damages would be proper "only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."[9]

Thus, although good faith is available to a school official as a defense in a section 1983 action, the maintenance of good faith is to be measured by the official's regard of the student's constitutional rights. Four members of the Court dissented from the Court's articulation of this standard, finding that it imposed upon public school officials a higher standard of care than that to which other officials are held.[10] Justice Powell criticized the Court's decision as requiring public school officials to have knowledge of what are "unquestioned constitutional rights."[11] The correct standard, he continued, was that school officials be required to act reasonably and in good faith, in view of the attending circumstances.[12] In practice, it is reasonable to read *Wood* together with *Goss v. Lopez*[13] as establishing that school officials who suspend students without following the procedures set forth in *Goss* run a high risk of paying damages to the students, should the students choose to sue in federal court for violation of their civil rights.[14]

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[7] *Id.* at 321-22.
[8] *Id.* at 322.
[9] *Id.*
[10] *Id.* at 327 (Powell, J., dissenting in part).
[11] *Id.* at 329.
[12] *Id.* at 330.
[13] 419 U.S. 565 (1975). See discussion of *Goss* at § 15.10 *supra*.
[14] Students may sue for damages under state law for unlawful exclusion from public school or from "the advantages, privileges or courses of study" of a public school. G.L. c. 76, § 16.

§15.12. Elementary and Secondary Education Act of 1965: Title III. In *School Committee v. Anrig,*[1] a case of first impression, the United States Court of Appeals for the First Circuit held that state educational agencies passing upon applications from local school systems for federal funds pursuant to Title III of the Elementary and Secondary Education Act of 1965[2] must meticulously follow the procedures set forth in the Act and attendant regulations. The court vacated and remanded a decision by the Massachusetts Department of Education denying Title III funding to a proposal submitted by the town of Monson on behalf of sixteen communities constituting the "Monson Cooperative," because the procedures developed by that department departed from those set forth in the Act.[3]

Title III was enacted, in part, "to encourage the adoption of new or improved educational ideas, practices, and techniques in elementary and secondary schools throughout the nation."[4] The Act, as amended in 1968,[5] provides for distribution of federal funds to local school systems by the state educational agency—here, the Massachusetts Department of Education. Available funds are allotted to the states by the United States Commissioner of Education according to a statutory formula.[6] To be eligible for such funds, a state must submit to the Commissioner a state plan that complies with the Act and regulations promulgated thereunder.[7] Grants may then be made to local educational agencies pursuant to the state plan.[8]

Although the state selects the programs that will receive the federal grants, the selection process must comply with the procedures established in Title III and the regulations promulgated pursuant to the Act. Title III requires the establishment of a broadly representative advisory council to review and make recommendations to the state educational agency on each application for a grant.[9] A panel of experts, who are neither members of the advisory council nor employees of the state agency, must also be established to review all grant applications prior to their disposition.[10]

The First Circuit found that, in attempting to accommodate these

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§15.12. [1] 520 F.2d 577 (1st Cir. 1975).

[2] 20 U.S.C. §§ 841-47 (1970).

[3] 520 F.2d at 581. The proposal was designed to assist the participant communities in implementing Acts of 1972, c. 766.

[4] S. Rep. No. 726, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. Code Cong. & Ad. News 2730, 2747. The purposes for which grants may be awarded under Title III are set forth in 20 U.S.C. § 843 (1970) and 45 C.F.R. §§ 118.21-118.27 (1975).

[5] Pub. L. No. 90-247, Title I, § 131 (Jan. 2, 1968).

[6] 20 U.S.C. § 842(a)(2) (1970).

[7] 20 U.S.C. § 844a (1970); 45 C.F.R. §§ 118.6-118.20 (1975).

[8] 20 U.S.C. § 844 (a) (1970).

[9] 20 U.S.C. § 844a(a) (1970).

[10] 45 C.F.R. § 118.23(c) (1975).

requirements to administrative ease, the state agency adopted procedures that fell short of what the law required.[11] The state agency had established a team of five readers, four employees of the Department and one outside expert, as its panel of experts. This panel rated the Monson proposal and transmitted it with a negative recommendation to the chairman of the advisory council. The chairman submitted to the advisory council a list of those proposals approved for recommendation, not including the Monson proposal. The advisory council approved the list of proposals recommended for funding without discussion of any of the rejected proposals, including the Monson proposal.[12] The Monson proposal was thus rejected by the Department of Education. Monson sought review, claiming that the procedures used by the state did not comport with the requirements of Title III.[13]

The case raised issues of the tolerable limits of administrative interpretation of statutory procedural requirements. The Department of Education argued that, because it was the agency charged with administration of the program, its interpretation of the procedures required by the Act should be accorded deference.[14] The First Circuit, reviewing the legislative history of Title III, found that the statute lodged in the states the authority to disburse federal funds, but that that authority was specifically limited, both procedurally and substantively.[15] The court stated that, given those limitations, it would be anomalous "to permit the states to develop widely varying interpretations of the very strictures imposed to limit state discretion in the use of federal funds."[16]

Specifically, the court rejected the argument that the advisory council could delegate its function of reviewing and making recommendations regarding "each application for a grant"[17] to its chairman.[18] Such a system defeated the function of the advisory council, which was "to introduce a heterogeneous array of perspectives into the grant award process."[19] The court also rejected the agency's argument that the required panel of outside experts means a "roster" of experts from which one could be chosen to be on the team of readers.[20] The language of the regulations and the "Commissioner's determination that the diversity of lay interests represented by the advisory council

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[11] 520 F.2d at 581.
[12] *Id.* at 579.
[13] *Id.* at 578. The federal court had jurisdiction under 20 U.S.C. § 844a(f).
[14] 520 F.2d at 579.
[15] *Id.* at 580.
[16] *Id.*
[17] 20 U.S.C. § 844a(a)(2)(C) (1970).
[18] 520 F.2d 580.
[19] *Id.*
[20] *Id.*

should be supplemented by diverse professional assessments"[21] both required that each application be reviewed by a panel of at least three outside experts.[22]

§15.13. Aid to Parochial Schools: Constitutionality.[1] In *Meek v. Pittenger,*[2] the United States Supreme Court again grappled with the question of what public assistance can be provided to nonpublic, church-related elementary and secondary schools without violating the first amendment. The Court found unconstitutional two Pennsylvania statutes providing for the supplying of instructional materials and auxiliary services to parochial schools,[3] but upheld a statute authorizing textbook loans to pupils of nonpublic schools.[4]

The statutes under consideration in *Meek* authorized the Commonwealth of Pennsylvania to: (1) lend directly to the nonpublic schools certain instructional materials and equipment;[5] (2) provide in-school auxiliary services, such as counseling, testing, psychological services, speech and hearing therapy, and services for exceptional or disadvantaged children, to children attending nonpublic elementary and secondary schools;[6] and (3) lend textbooks without charge to children at-

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[21] *Id.* at 581.
[22] *Id.*

§ 15.13. [1] The author would like to acknowledge the assistance given by Rhoda Schneider, Esq., with this section.

[2] 421 U.S. 349 (1975).

[3] *Id.* at 373, 388. *Meek v. Pittenger* was an appeal from the judgment of a three judge district court. That court had upheld all challenged provisions of the Pennsylvania statutes except for the provision providing for the loan of instructional materials, which the district court invalidated insofar as the statute provided for the loan of materials that could be used for religious purposes. Meek v. Pittenger, 374 F. Supp. 639, 662 (E.D. Pa. 1974). Justice Stewart announced the judgment of the Court, which affirmed the district court's decision that the textbook loan provision was constitutional, but reversed the district court's determination that the provisions providing for auxiliary services and instructional material not capable of diversion to sectarian use were also constitutional. 421 U.S. at 349. Justices Blackmun and Powell joined in Justice Stewart's opinion. In a separate opinion, Justice Brennan, joined by Justices Douglas and Marshall, concurred in the reversal of the district court, but dissented from that portion of Justice Stewart's opinion affirming the constitutionality of the textbook provision. *Id.* at 373. Justice Brennan opined that consideration of the factor of divisive political potential in assessing the constitutionality of the statutes through which the state attempted to aid nonpublic schools would compel the conclusion that all of the challenged statutory provisions offend the establishment clause of the first amendment. *Id.* at 385. Justice Rehnquist, joined by Justice White, concurred in the judgment insofar as the textbook loan program was upheld, but dissented from the Court's reversal of the district court. *Id.* at 387-88. In a separate opinion, Chief Justice Burger also concurred in the affirmance of the district court but dissented from the Court's condemnation of the programs providing equipment and auxiliary services to nonpublic schools, as children attending nonpublic schools were thus penalized by being denied secular benefits solely because they attend sectarian schools. *Id.* at 386-87.

[4] 421 U.S. at 373, 385.

[5] Act 195, PA. STAT. ANN., Tit. 24, § 9-972 (1972).

[6] Act 194, PA. STAT. ANN., Tit. 24, § 9-972 (1972).

tending nonpublic elementary and secondary schools, so long as the books were acceptable for use in any public elementary or secondary school in Pennsylvania.[7]

The Court applied a three-part test to determine if the statutes met the objectives of the establishment clause.[8] First, the statute in question must have a secular legislative purpose. Second, it must have a primary effect that neither advances nor inhibits religion. Third, the statute and its administration must avoid excessive government entanglement with religion.[9] A statute that fails any one of these tests is unconstitutional.

In *Meek*, the Court acknowledged that the Pennsylvania statutes had a secular legislative purpose: the extension of certain educational benefits to all schoolchildren, whether attending public or nonpublic schools.[10] Nonetheless, in its analysis of the three main provisions of the statute, the Court determined that two of the provisions failed the two other parts of the establishment clause test.

The provision of the statute allowing for the direct loan of instructional materials and equipment to nonpublic schools was struck down on the grounds that it had the direct effect of advancing religion.[11] The Court reasoned that the aid involved was substantial, not incidental, and it flowed directly to the nonpublic schools themselves, most of which were church-related or religiously affiliated.[12]

The "auxiliary services" provision of the statute was struck down on the grounds that it created an excessive entanglement between the state and religion, because the services were to be provided by public school personnel on the premises of the nonpublic school.[13] The Court reasoned that excessive entanglement in the affairs of the religious school would be required for Pennsylvania to be certain, as it must be under the first amendment, that the personnel did not in any way advance the religious mission of the church-related schools in which they provided services.[14] This provision also violated the Constitution: because annual appropriations funded the program, the provision offered "opportunities for political fragmentation and division along religious lines."[15]

Only the textbook loan provision of the statute was upheld by the Court, on the grounds that it merely made available to all children the

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[7] Act 195, PA. STAT. ANN., Tit. 24, § 9-972 (1972).

[8] 421 U.S. at 358. *See* Committee for Public Educ. v. Nyquist, 413 U.S. 756, 772-73 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[9] 421 U.S. at 358.

[10] *Id.* at 359, 363, 368.

[11] *Id.* at 366.

[12] *Id.*

[13] *Id.* at 370-71.

[14] *Id.* at 372.

[15] *Id.*

iliary services" provision of the Pennsylvania statute, which the Court struck down on the grounds of excessive entanglement largely because the services were to be provided on the premises of the nonpublic school.[25]

Although it is true that, under the program prototypes for day schools and residential schools,[26] services may be provided to children with special needs within a nonpublic school, such placement will occur only when the public school system that is legally responsible for the provision of special education cannot provide a program meeting a child's special needs. The chapter 766 programs are thus distinguishable from the "auxiliary services" provision struck down in *Meek.* In addition, where a child must be placed in a nonpublic school, such placement is in the nature of a contract for services, and does not involve the same excessive entanglement as did the Pennsylvania statute.[27] In a recent decision, the Wisconsin Supreme Court upheld the constitutionality of a similar provision in the Wisconsin special education law providing for the placement of special needs children in private schools where local public educational services were inadequate.[28]

Secondly, the Supreme Court in *Meek v. Pittenger* expressly refrained from ruling on the authority of the state to enact a comprehensive program to make free special education services available to all students, whether they attend public or nonpublic schools.[29] Thus, the constitutionality of a comprehensive special education law such as chapter 766 was not decided by the Court. There are indications in the decision, however, that a law such as chapter 766, particularly with the constitutional safeguards that are built into the statute and regulations, would be sustained by the Court even though it makes some services available to students attending nonpublic schools. For example, the Court said:

> It is, of course, true that as part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities—secular and nonideological services unrelated to the primary, religious-oriented educational function of the sectarian school. The indirect and incidental benefits to church-related schools from those programs do not offend the constitutional prohibition against establishment of religion.[30]

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[25] 421 U.S. at 371.
[26] C. 766 Regs., *supra* note 24, ¶¶ 502.5, 502.6.
[27] 421 U.S. at 372.
[28] State *ex rel.* Warren v. Nusbaum, 64 Wis. 2d 314, 219 N.W.2d 577 (1974).
[29] 421 U.S. at 368 n.17.
[30] *Id.* at 364-65.

Similarly, the Court noted that the provision of the Pennsylvania statute providing for diagnostic speech and hearing services "seems to fall within that class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools."[31]

It is likely that special education services provided to children with special needs in accordance with the provisions of chapter 766 and its regulations would be viewed by the Court as "general welfare services" that are secular, nonideological, and "unrelated to the primary, religious-oriented educational function of the sectarian school," and thus would be constitutional.

§15.14. **Legislation.** In a Legislature largely concerned with the state budget, few major pieces of educational legislation were passed. Significant legislation that would have altered the state school financing system,[1] that would have placed students on school committees,[2] and that would have provided for metropolitan school integration programs[3] had not, by early October, 1975, received favorable action.

The Legislature did amend various sections of chapter 71 of the General Laws to accord faculty of public schools greater procedural protections and benefits. Chapter 199 of the Acts of 1975 extended to assistant principals the procedural requirements of section 42A regarding demotion of principals and supervisors, and defined "demotion" to include reduction of salary contrary to the provisions of section 43 and transfers without a teacher's consent to nontenured positions. Chapter 316 of the Acts of 1975 amended the provision in section 42D allowing a teacher to be suspended by reducing the period of suspension from seven days to five days. Chapter 349 of the Acts of 1975 extended to school nurses the benefits of section 41A, which allows leaves of absence for career enhancement to certain school personnel. Finally, chapter 337 of the Acts of 1975 extended to principals the provisions of section 43A for judicial review of dismissals and demotions of teachers and superintendents, and included removal from a position as a reviewable action. Chapter 337 also altered the language of section 43A concerning the scope of review from "de novo" hearings to "[t]he court . . . shall hear witnesses, review such action, and determine whether or not upon all the evidence such action was justifiable."

Several changes were made in the provisions of chapter 71 that

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[31] *Id.* at 371 n.21. This provision, however, fell with the invalidation of the auxiliary services statute, because the Court discerned no intent that the Legislature would have passed the law solely to provide for the speech and hearing services. *Id.*

§15.14. [1] 1975 Session, House No. 128.

[2] 1975 Session, House No. 134.

[3] *See, e.g.*, the Daly-Sullivan Bill, 1975 Session, House No. 2439.

concern students. The sections allowing private schools students to obtain public school health services—section 57—and textbooks—section 48—were limited by chapters 480 and 562, respectively, of the Acts of 1975, to those students attending private schools that do not discriminate in entrance requirements on the basis of race or color. In addition, section 13, which requires the teaching of high school courses at the request of twenty students and parents, was liberalized by chapter 305 of the Acts of 1975: a course may now be offered at the request of parents of twenty pupils or a number of pupils equivalent to 5 percent of the high school enrollment, whichever is less.[4] Finally, chapter 371 of the Acts of 1975 added section 34O to chapter 71, establishing parent advisory committees to school committees on sex education courses.

Two new statutes affected collaboratives and a third was addressed to regional school aid. Chapter 323 of the Acts of 1975 amended section 4E of chapter 40 of the General Laws to allow school committees to designate a person other than a school committee member—as previously required—to sit on the educational collaborative board. Chapter 323 also amended section 4E to change the position of collaborative treasurer from being the treasurer of the largest town in the collaborative to an elected position. The second statute, chapter 436 of the Acts of 1975, amended section 56 of chapter 41 of the General Laws to allow school committees participating in regional school district collaboratives to prepay tuition to the collaborative.[5] Finally, a corrective statute, chapter 436 of the Acts of 1975, was enacted to ensure that all regional school districts would get some state aid.

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[4] In a June, 1975 decision, the Supreme Judicial Court held that a school committee was obliged to offer a driver education course under this statute. Johnson v. School Comm., 1975 Mass. Adv. Sh. 2018, 330 N.E.2d 478.

[5] On its face, the statute appears to be limited to those collaboratives involving regional school districts.