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Does the Equal Educational Opportunities Act of 1972 permit a "Rollback" of court-ordered or agency-induced busing or desegregation already in effect at the time of its enactment?

You have asked for our views as to whether the Equal Educational Opportunities Act of 1972 (specifically section 406) can be characterized as authorizing a "rollback" of court orders (relating to desegregation and/or busing) or desegregation plans already in effect at the time of its enactment. Although that section may be subject to varying interpretations, we think it clear, at least in some instances, it does authorize a "rollback". In reaching this general conclusion we have examined the White House Press Releases including the text of the President's speech to the Nation, the fact sheet on busing, the text of the President's message to the Congress, and the text of the Equal Educational Opportunities Act of 1972.

1. Presidential statements and releases.

In both his speech to the Nation and his message to the Congress, the President repeatedly refers to the need to stop "new busing" and "more busing', to "freeze" additional busing. The President does, however, also refer to the evils of busing orders already in effect as they relate to the children who are being bused under those orders.

In discussing his proposals, the President never refers to section 406, either expressly or indirectly, but instead talks in more general terms about the evils of busing, past

and future. We think the overriding tone of both the message and the speech, as they relate to the corrective legislation proposed, can reasonably be characterized as focusing on the need to deal with new busing.

There are indications in references to the Student Transportation Moratorium Act of 1972 that only new busing is to be dealt with by that proposal. 1/ But the Equal Educational Opportunities Act, in section 406 as discussed below, provides that the court orders and Title VI plans, in effect at the time of its enactment, can be reopened, and shall be modified to conform with its provisions; this is ostensibly an attempt to limit busing and remedies for desegregation, which is already in effect, as a remedy for past equal protection violations.

2. Section 406 of the Equal Educational Opportunities Act of 1972 (EEO Act).

The language of section 406 of the EEO Act reads:

> "On the application of an educational agency, court orders or desegregation plans under Title VI of the Civil Rights Act of 1964 in effect on the date of enactment of this Act and intended to end segregation of students on the basis of race, color, or national origin shall be reopened and modified to comply with the provisions of this Act."

1/ In discussing the Student Transportation Moratorium Act of 1972, the White House fact sheet states that "Any plan currently implemented pursuant to court orders or Title VI compliance remains in effect." Technically, under that Act, it does remain in effect, since the moratorium is only for new orders (see fact sheet, p. 1). Additionally, the President's message to Congress, in discussing the need to enact the Moratorium Act, states: "For these reasons--and also for the sake of the additional children faced with busing now--I urge that Congress quickly [approve the Moratorium Act]." (Emphasis added.) Message to Congress, p. 15. This also recognizes that the Moratorium Act will not deal with orders and plans that are already effective.

This ostensibly clear language becomes somewhat ambiguous, and certainly confusing upon closer examination. We think there is initially a problem as to the breadth of the term "court orders". Elsewhere in the Act, there is reference to court orders involving transportation as a remedy for equal protection (section 407) and court orders requiring the desegregation of a school system (section 408). Therefore, it appears reasonable to interpret the term "court orders" to include both of these; in addition, any desegregation plan implemented under Title VI of the Civil Rights Act of 1964 could be reopened. Thus, a court order could be reopened even if it did not include a busing mandate.

The provision is clear that any order or plan in effect at the date of enactment of the Act "shall be reopened" upon application by an educational agency. Any court order or desegregation plan, no matter how long it had been effective, could be reopened under this provision.

3. Provisions of the EEO Act to be applied upon a reopening and modification of an order under section 406.

The crucial provision in section 406 is that which states that there shall be a modification of the existing order or plan "to comply with the provisions of [the] Act." The question of whether as a result of a modification there has been a rollback is thus largely a semantical and a factual one, depending on the specific provision with which we are dealing. We think it clear, as a general proposition, that since the effect of the Act is to define and in some instances circumscribe the ability of the specified entities of the United States to remedy violations of equal protection, there will be instances where the reopening and modifying of previous orders and plans may be reasonably characterized as a rollback. Obviously, a closer examination of the particular provisions of the Act is appropriate.

Section 402 sets out a priority listing of remedies available for a denial of equal educational opportunity or

equal protection, and requires specific findings by the court, department or agency as to the efficacy of correcting the denial. We therefore think that for any order or plan, reopened under section 405, to be able to comply with this section, there would have to be a complete redetermination of the various facts involved, and an examination of whether the remedy presently being used could be effectively replaced by one of "greater" priority. This, of course, would not necessarily in all cases result in a rollback, since the remedy mandated as a replacement would probably be just as effective as the one presently being used (e.g., 402(a) would work just as effectively as 402(b)). This illustrates the semantical nature of the question of rollback, since some might argue that any increase in the priority of the remedy under section 402 is a rollback.

The problem would become acute, however, where the reopening is of an existing order involving the busing of students, since by definition under the Act, busing is the lowest priority remedy. The court would first need to see if another remedy under section 402 would be effective; assuming it would not (as obviously would sometimes be the case), the question is whether the court would then need to examine the order in light of the transportation provisions in section 403. That section quite clearly says that as to children in the sixth grade or below, the average daily distance traveled, number of students transported, and time for travel cannot be greater than the corresponding average for the preceding school year. If, for example, the court were examining an order, implemented in the school year in which the EEO Act was passed, which increased the busing (either in time, number, or distance) of the year before, the court would ostensibly have to conclude it violated section 403(a)(1) since it would be an increase over the prior school year. 2/

2/ A similar problem would not really exist in cases involving transportation of students in the seventh grade or above, because of the proviso in subsection (b) requiring clear and convincing evidence that a section 402 remedy is inadequate in order for the court to be able to permit the busing. Therefore the rollback problem would not be as acute here, since the substitute remedy would have to be as effective as the busing that was presently being implemented.

Thus, we would have a situation where busing is the only adequate remedy, but the Act would prohibit its use; by anyone's definition, this would probably be a rollback.

The busing limitations in section 403 are expressed in terms of the average time, distance, and number "for any school year . . . over the comparable average for the preceding school year." This raises a question as to the meaning of "the preceding school year." Three interpretations of this language seem possible.

First, the controlling date could be the year preceding the entry of the original court order requiring increased busing, which would in most cases violate section 403 because there would have been an increase. This interpretation might also lead to some anomalous results, because of the provision in section 406 allowing a reopening only of orders "in effect" on the date of enactment of the Act. For example, assume that in 1970-71, a plan or order was implemented requiring a large increase in busing over the previous year. Thereafter, in 1971-72, a new order is entered, which rescinds the existing one, and the order involves only a small increase over the 1970-71 figures. Thus, referring to the year previous to the presently effective order, a rollback of the increase of 1971-72 could be ordered, but the large increase of the 1970-71 order could not be rolled back, since that order was no longer in effect.

A second possible interpretation could be that the controlling date was the year preceding the enactment of the EEO Act. A third possible interpretation could be that the controlling date was the year preceding the reopening. Of course, in many cases, probably most, the year of the date of enactment and reopening would be the same. Under either of these two interpretations, there would be a lesser likelihood of a large rollback, because orders in effect for a period longer than one year prior to the reopening or the enactment would not be subject to modification; orders implemented within one year previous to the enactment or the reopening would be.

A crucial element as to the applicability of section 403 to existing orders involving busing is the provision that no court, etc., "shall, pursuant to section 402, order the implementation of a plan" that would increase busing. It could be argued that this language means that the court, etc., that ordered the busing must have been acting pursuant to or applying the remedies of section 402, which a court acting before the enactment of the Act would obviously not have been. Therefore, under this interpretation, section 403 would not be a provision of the Act contemplated by section 406; and if no remedy under section 402 (which is clearly contemplated by section 406) were adequate, the busing would have to remain in effect. However, since section 406 states that the modification of orders and plans in effect shall be in compliance with all of the provisions of the Act, without listing exceptions, we think a more reasonable interpretation would be that busing under existing orders would be subject to the limits of section 403. In conjunction with this argument the word "court" in section 403 could be said to refer to the court which considers the reopening under section 406. Therefore, section 403 would tell that court that it could not order implementation of a plan that would increase busing over the previous year. Technically, the reopening in the reviewing court would stay the plan that is in effect; the reviewing court would violate section 403 by ordering that the plan be continued, and might be said to be "reimplementing" the plan.

Section 404 is another provision to which a reopening and modification under section 406 might reasonably be required to conform. Section 404 provides that in the formulation of remedies under sections 401 and 402, the lines drawn by a state in subdividing its territory into separate school districts, shall not be ignored or altered except where the lines were drawn to promote segregation. It should be noted that there is here, as above, the problem as to whether section 406 would require application of this section to a plan or order already in effect, since the language arguably applies only where the original court was formulating a remedy under section 401 or 402. We would disagree here, as above, with such a construction, and think that an

interpretation of total applicability of the EEO Act is more reasonable and likely.

Section 404 was obviously drafted to deal with the pending court order in Richmond mandating the establishment of a metropolitan school system disregarding the existing separate county and city school districts. If the order in that case, or a similar one, was to be implemented before enactment of the EEO Act (and section 406 was interpreted to require conformity with section 404), modification of the order would obviously be required, and could probably be fairly characterized as a rollback.

4. Conclusion.

Section 406, when read in conjunction with section 403, becomes unclear and ambiguous. Therefore, the legislative history becomes relevant in interpretation; we do not think, however, that the general statements of the President to the effect that he proposes to deal only with future busing could be regarded as controlling. They might be argued to have some weight in determining the intention to require conformity, upon a section 406 reopening, with the busing provisions of section 403. Since we regard it as an open question (although we think a determination that section 403 is applicable is more likely), we would be wary of leaving it to the courts in the future. Disregarding the policy questions, we think that since the legislative history is still to be built, and the opportunity for amendment is still present, action at this point should be taken if clarification of the matter is desired.

We do think it clear that in the event a desegregation order (which does not include busing) is reopened under section 406, it must be modified to conform to section 402 priorities, which, of course, as we stated above, creates a semantical problem as to whether there has been a rollback.