Sixty Years After Bolling v. Sharpe: Public Education and the DC Federal Courts

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Good afternoon, everyone, and thank you for coming to this program on *Sixty Years After* Bolling v. Sharpe.

When Steve Pollak and Geoff Klineberg first approached me about doing the historical introduction today, the tentative subtitle they gave me was "The Role of the DC Circuit Courts in Ensuring the Success of Public Education in the District of Columbia." I have to say that as a professor of education law, that subtitle struck me as a little ambitious in terms of its expectations for the DC Circuit courts. I thought about going back to them and suggesting that they add a question mark or two: "The Role of the DC Circuit Courts in Ensuring the Success of Public Education in the District of Columbia??"

I didn't do it, but as it happens, they changed the subtitle themselves, so the event you are now attending is called much more generally "Public Education and the DC Federal Courts," without any affirmative claims about the court's role in ensuring success in the schools—so we can easily, within the scope of our title, open this question up for interrogation: *Have* the courts played a role in ensuring the success of public education in the District? If so, in what ways? If not, why not?

By way of opening up this inquiry, in my role of setting the stage for the fascinating panel that's to come, I want to do three things. First, I want to give you some basic facts about the ways the courts have been involved in DC schools over the last century or so. Second, I want to talk a little bit about competing narratives that we might

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see these basic facts in. Third, and finally, I'll step back and ask what we might take away from all of this.

First: Some basic facts about the way the courts have been involved in DC schools over time. In order to do this, let me begin by saying something about the way DC schools were organized back in the 19th century, when the District first came into existence. Almost immediately after the District was chartered in 1802, a public school system began—but it was for white students only, and eventually because of financial problems it became for poor white students only.[1] There was a black school system, but it was entirely privately run, started by former slaves and supported by private contributions. In 1862, Congress passed a law—remember, Congress was running most of the District's business at this point—mandating that all children in the District, black and white, between the ages of 6 and 14, receive some small amount of public education—but the structure of funding and governance for black and white schools remained entirely separate.

In 1906, after lots of conflict about the running of the public schools, Congress set up a nine-member Board of Education, and to ensure their independence, made the judges in the DC district court appoint the Board members. Now this raises all sorts of fascinating separation of powers problems, but notwithstanding those complexities, this was an arrangement that lasted until 1968. So you can see how during the rise and

[1] For more detail on the history in this paragraph and the next, see Mark David Richards, *Public School Governance in the District of Columbia: A Timeline*, 16 WASH. HIST. 23 (2004); Steven J. Diner, *The Governance of Education in the District of Columbia: An Historical Analysis of Current Issues*, *in* STUDIES IN D.C. HISTORY AND PUBLIC POLICY 1-52 (1982).

flowering of the civil rights movement, because of this appointment power, the DC courts were involved in quite political questions about the running of the DC schools.

Aside from this most untraditional way in which the DC district court was involved in the school system, of course, the federal courts have also been involved in much more traditional Article III ways through the resolution of cases and controversies. Let me now tell you about five different categories of such cases over time.

One such category is a series of desegregation cases. In 1950, in a case called *Carr v. Corning*, the federal courts in DC had actually said that separate was perfectly equal, and that evidence of overcrowding in black schools and empty space in white schools, and of shortened days and double shifts in black schools and regular-length days with only one set of students in white schools wasn't evidence of inequality at all.[2] On the strength of this decision, the district court in other cases went on to affirm segregation on public playgrounds;[3] reaffirm segregation in the schools in its own decision from the bench in *Bolling v. Sharpe* (which didn't even merit a written opinion, the issue was so obvious to the court);[4] and, while it did make the District of Columbia public schools bring black deaf children back from Maryland, where the District had been sending them to be educated, it nonetheless reaffirmed the propriety of separating black deaf children from white deaf children in the only institution in the District that served deaf children at all.[5]

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[2] Carr v. Corning, 182 F.2d 14 (D.C. Cir. 1950).
[3] Camp v. Recreation Bd., 104 F. Supp. 10 (D.D.C. 1952).
[4] Brief for Petitioners at 7 Bolling v. Sharpe, 347 U.S. 693 (1954) (No. 8), 1952 WL 47278 at 7.
[5] Miller v. Bd. of Educ., 106 F. Supp. 988 (D.D.C. 1952).

So that's one set of cases handled by the DC Circuit courts. We might actually call them segregation cases, rather than desegregation cases.

Then of course in 1954, the Supreme Court strikes down separate but equal under the Equal Protection Clause in *Brown*.[6] But there was a legal problem, in that the Equal Protection Clause applies only to states. The Fourteenth Amendment says "No *state* shall … deny to any person within its jurisdiction the equal protection of the laws." And that doesn't apply to the District, which is not a state. So the Supreme Court in *Bolling v. Sharpe* holds that the Due Process Clause of the Fifth Amendment, which *does* apply to the District, incorporates the Equal Protection Clause, and that segregation in public education is an arbitrary deprivation of liberty in violation of the Due Process Clause.[7] "It would be unthinkable," the Supreme Court said, "that the same Constitution" that "prohibits the states from maintaining racially segregated public schools" "would impose a lesser duty on the Federal Government."[8]

So that's what gives rise to the next category of public school cases the DC Circuit courts have been involved in, and that is what we might call the implementation of the Supreme Court's desegregation mandate. Here the leading case is *Hobson v. Hanson*.[9] A week after *Bolling v. Sharpe*, the DC public schools announced their intention to comply with the Supreme Court's order.[10] Unlike in some school systems, there was no massive resistance to the prospect of school desegregation.

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[6] Brown v. Bd. of Educ., 347 U.S. 483 (1954).
[7] Bolling, 347 U.S. at 694-95.
[8] *Id.* at 695.
[9] Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).
[10] Diner, *supra* note 1, at 38.

But at the same time, the school system did not, shall we say, totally embrace the prospect of true integration. So, for example, for a while it permitted white children to get out of going to integrated schools and to transfer to schools that were basically all white because of neighborhood location if the white children simply demonstrated some kind of "psychological upset" at the prospect of attending an integrated school.[11] The school system also created certain "optional zones" that permitted children in the zone to attend either of two schools, one of which was located near public housing and public transportation and was predominantly black, and the other of which was located in a wealthier neighborhood accessible only by car and was basically all white.[12] You can imagine the segregative effect that these optional zones had. And then famously, the school system created a rigid tracking program, under which children were assigned in the early grades to one of four tracks, ranging from the euphemistically named "Special Academic" at the bottom to Honors at the top.[13] While in principle there was supposed to be movement permitted between the tracks over the course of a child's education and in any given year for one child between classes, in practice a track was pretty much fixed from day one, and the distribution of students into the tracks correlated pretty tightly with neighborhood median income and with race.

In 1967, Judge Skelly Wright writing for the District Court in DC struck these practices down, again under the Equal Protection component of the Due Process Clause that the Supreme Court had identified in *Bolling*.[14] (As an aside, why was Judge Wright, a member of the Circuit Court of Appeals, deciding this case in the District Court? Well,

[11] Hobson, 269 F. Supp at 415.
[12] *Id.*
[13] *Id.* at 442-492.
[14] *Id.* at 495-498.

remember that the judges on the District Court were tasked with appointing members of the Board of Education, so there was a perceived conflict in the regular District Court judges assessing the constitutionality of decisions made by their appointees.[15])

In any event, Judge Wright held unconstitutional quite a number of policies and practices of the school system, and he ordered a lot of changes to these practices.[16] He ordered the abolition of the tracking system. He ordered the school system to come up with a new student assignment plan that would maximize integration. He ordered busing on a voluntary basis for children from overcrowded schools east of Rock Creek Park—that is, effectively black schools—to underpopulated schools west of Rock Creek Park—that is, effectively white schools. And he ordered immediate "substantial integration" of teachers at racially segregated schools and the presentation of a plan to fully integrate the teaching staff.

Several years later, in 1970, some parents came back to court to try to stop a couple of the Board of Education's redistricting decisions on the grounds that they would thwart integration efforts, and Judge Wright ordered that the Board in some instances stop and in other instances reconsider its plans.[17] Shortly after that, in 1971, in response to a separate motion, Judge Wright issued a new decision finding continuing substantial discrimination in resource distribution between schools that were still either predominantly white or predominantly black, and ordering rough equality.[18] The Board

[15] Hobson v. Hansen, 265 F. Supp. 902, 931-32 (D.D.C. 1967) (Wright, J., dissenting).
[16] Hobson v. Hansen, 269 F. Supp. at 514-517.
[17] Hobson v. Hansen, 320 F. Supp. 720 (D.D.C. 1970); Hobson v. Hansen, 320 F. Supp. 409 (D.D.C. 1970).
[18] Hobson v. Hansen, 327 F. Supp. 844 (D.D.C. 1971).

of Education declined to appeal these various decisions.[19] So this is the second category of DC federal court involvement in the DC schools—the implementation of school desegregation.

The third category turns to special education for children with disabilities. You all may have heard something about the primary federal statute today that creates a right to education for children with disabilities, the Individuals with Disabilities Education Act, or the IDEA.[20] You may not know that the procedural and substantive rights set forth in the IDEA are modeled after the procedural and substantive rights provided in the remedial decision of a 1972 case called *Mills v. Board of Education of the District of Columbia*.[21] In *Mills*, the parents of seven children with disabilities brought a class action to require the DC public schools to admit them and educate them, rather than keeping them out of the schools entirely or refusing to teach them after they were admitted. At the time of the lawsuit, there were an estimated 22,000 school-aged children with disabilities in DC, and somewhere between 12,000 of them and 18,000 of them were not being served either at all or in any way calculated to meet their needs.

The school system admitted they had a legal obligation to serve these children and admitted that they were not doing so, so the real dispute was about the remedy. The school system said that it was impossible to provide the relief the plaintiffs wanted unless Congress appropriated millions of extra dollars for special education in DC, or unless the District diverted millions of dollars from the existing education budget, which it said would be unfair to children outside the plaintiff class. The Court rejected this protest,

[19] Smuck v. Hansen, 408 F.2d 175, 176-77 (D.C. Cir. 1969).
[20] Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. (2012).
[21] Mills v. Bd. of Educ., 348 F. Supp. 866 (1972).

saying that whatever funds were available had to be "expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom."[22] The Court then ordered that the District "provide to each child of school age a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disturbance or impairment."[23] It also required that the District put in place a series of procedural protections for students in their initial educational placements, any proposed change to those placements, and in any disciplinary hearings.

As I just mentioned, the *Mills* framework from 1972 became the basis for the federal law, originally called the Education for All Handicapped Children, now called the IDEA, that Congress passed in 1975.[24] Fast forward 22 years later to 1997, when two different groups of plaintiffs filed class actions against the District, alleging both that the District was failing to hold timely administrative hearings and issue hearing officer determinations under the IDEA and that the District was failing to implement these determinations and other settlement agreements. These cases were consolidated as the *Blackman-Jones* litigation.[25] And thus began the second chapter in federal court involvement in special education in the District.

Now because the case is still ongoing, I'm not going to say too much more about it here, other than to note that there are almost three thousand docket entries in the case,

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[22] *Id.* at 876.
[23] *Id.* at 878.
[24] Act of Nov. 29, 1975, Pub. L. No. 94-142, 89 Stat. 773.
[25] Consent Decree, Blackman v. D.C., No. 1:97-cv-01629-PLF (D.D.C. Aug. 24, 2006), Doc. 1873.

which gives you a sense of its scope and longevity. The parties have for years been operating under a Consent Decree overseen by a court-appointed monitor.[26]

There have also been other special education class actions during this time—one about special education services for incarcerated youth;[27] one about providing transportation services for children with disabilities and payments to their service providers;[28] and another about identifying and serving preschool children with disabilities.[29] So that's the third category of case in which the DC Circuit Courts have been involved—special education in the District.

The fourth category of cases are other class actions seeking to effect major structural change outside the context of desegregation or special education. Again, there's a pending case in this regard that because it is pending we'll be steering clear of – a lawsuit challenging DCPS's decision to close certain schools that were underutilized.[30] There have been other cases in this category in historical memory. For example, a case in the mid-1990s attempted to get the District to live up to its obligations under the federal grant program to provide services for homeless children.[31] Also in the mid-1990s—although maybe these cases are cheating a little bit for the purposes of our program today because the cases were filed in DC *superior* court rather than in the *federal* courts—there were cases in which superior court judges ordered the District to remedy thousands of fire

[26] Report of the Monitor for the 2012-2013 School Year, Blackman v. D.C., No. 1:97-cv-01629-PLF (D.D.C. Feb. 3, 2014), Doc. 2428.
[27] J.C. v. Vance, No. 03-CV-00971 (D.D.C. filed May 2, 2003).
[28] Petties v. D.C., 268 F. Supp.2d 38 (D.D.C. 2003), *vacated* No. 95-0148 (PLF), 2012 WL 6696928 (Dec. 19, 2012).
[29] D.L. v. D.C., 845 F. Supp.2d 1 (D.D.C. 2011), *vacated* 713 F.3d 120 (D.C. Cir. 2013).
[30] Smith v. Henderson, No. 13-420 (JEB), 2014 WL 3555310 (D.D.C. July 18, 2014); Smith v. Henderson, No. 13-420 (JEB), 2013 WL 2099804 (D.D.C. May 15, 2013).
[31] Lampkin v. D.C., 879 F. Supp. 116 (D.D.C. 1995).

code violations in the District's schools,[32] and separately ordered compliance with a District law mandating the staffing of nurses in the schools.[33] So again, these are examples of court involvement in major structural change outside the context of desegregation and special education.

The fifth and final category of cases I'd call individual or one-off cases, where individual students, parents, or teachers file a claim alleging some kind of individual wrong. Often, though not always, it is a challenge under the IDEA to some aspect of the child's individual special education services.

So those are some facts, a description of some ways the courts have been involved in the DC public schools. Now let me turn to competing narratives about how we might see those facts in connection with the question I began with: The extent to which the DC circuit courts have played a role in ensuring the success of public education in the District**.** I have four different narratives that I'll offer, though I'm sure there are others, so this doesn't purport to be all-inclusive.

One narrative says that yes, the courts have played a positive role in this regard. Let's start by going back to when District Court judges appointed members of the Board of Education. From the beginning they ensured some representation for women and African-Americans on the board.[34] You could say that this was a good thing, to ensure some diversity in decision-making on the Board. In the cases and controversies realm, *Hobson v. Hansen* ended a rigid, racially segregated tracking system; tried to more generally to make the District live up to its desegregation obligations; and tried to fix the

[32] Parents United v. Kelly, No. 92-3478 (D.C. Super. Ct. filed Mar. 3, 1992).
[33] Kelly v. Parents United, 641 A.2d 159 (D.C. App. 1994), *amended on reh'g in part*, 648 A.2d 675 (D.C. App. 1994).
[34] Diner, *supra* note 1, at 14.

inequitable distribution of resources across schools. *Mills* and its progeny found a constitutional and a statutory hook to require an education for thousands of the District's most vulnerable students, and laid the groundwork for the IDEA to do the same for millions of students nationwide.

Under this narrative, one might say that the federal courts provide a backstop—when the legislative process is not working, when the political bodies won't do what's right, the judicial process can valuably be invoked. As Judge Wright wrote in the main opinion in *Hobson*, "It would be better far indeed for these great social and political problems to be resolved in the political arena by other branches of government. But these are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance."[35] One might usefully add "statutory obligations" to that resounding phrase as well.

But there's a counter-narrative that would say that the courts' involvement has been more negative. For that narrative, let's go back to *Carr v. Corning* and the other segregation cases. Even aside from the Court's acceptance of separate but equal as the constitutional order, it's pretty shocking to see the Court dismiss vivid evidence of inequality between the black schools and the white schools, which the dissent marches through in painstaking and painful detail.[36] And although the historical instigation for this event today is the 60th anniversary of *Bolling v. Sharpe* in the Supreme Court, as I've said, the DC federal courts did nothing in the way of promoting the success of DC public schools in that case.

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[35] Hobson v. Hansen, 269 F. Supp. 401, 517 (D.D.C. 1967).
[36] Carr v. Corning, 182 F.2d at 24-30 (D.C. Cir. 1950) (Edgerton, J., dissenting).

So under this narrative, to go back to Judge Wright's words, you can ask the judiciary to accept the responsibility of assisting in a solution, but you're not always going to win. Even after the Supreme Court reversed the lower court decision in *Bolling*, it's not as though all members of the federal judiciary in DC embraced it with open arms. To the contrary, there is some compelling evidence that the judges of the District Court refused to reappoint members of the Board of Education who were advocates for desegregation.[37] The judges also kept strict black-white quotas on their appointments to the Board, even as demographics in the city and the school system shifted to become more and more majority black.[38] Under this more negative narrative of court involvement, even *Hobson v. Hansen* can be read in a different light. The court based some of its findings leading it to strike down the tracking program on the problem of what it called "low self-esteem" linked to, and I quote, "the traumas suffered simply because of being Negro."[39] And the court also seemed to endorse its limited busing plan in part because white children would remain in the majority in their schools.[40]

The third narrative suggests that there are institutional competence limitations on what courts can do to promote success in the schools. Just as one example of these limits, contrast these two judicial statements. Here's the *Corning* dissent, which would have struck down the District's segregated school system as unconstitutional back in 1950. The dissent wrote, "It is sometimes suggested that due process of law cannot require what law cannot enforce. No such suggestion is relevant here. When United States courts

[37] Diner, *supra* note 1, at 37-38.
[38] *Id.* at 35.
[39] *Hobson*, 269 F. Supp. at 482.
[40] *Id.* at 509.

order integration of District of Columbia schools they will be integrated."[41] And here's Judge Wright in one of the *Hobson* opinions 20 years later: "Neither this court nor the school board can do anything, of course, to eliminate segregation which arises from the migration of white children to private or suburban schools."[42] The *Hobson* opinions may have been ambitious in a lot of ways, but in this acknowledgment of some institutional competence limitations on the court in effecting change in the schools, Judge Wright may have grasped an important reality.

The last narrative I'll mention questions the court's relevance in promoting success in the District's schools. A lot of important changes in the governance of the District's schools have come entirely outside the process of judicial involvement. For example, major education reforms in 1995, with the creation of charter schools in the District,[43] and in 2007, with the move to mayoral control over the schools,[44] were the product of legislation, not litigation. So for that matter was the 1968 Act that finally got rid of the process of judicial selection of the members of the Board of Education, after a lawsuit had failed to have the process declared unconstitutional.[45] The U.S. Department of Education is another external, non-judicial source of control, including the Office for Civil Rights, which oversees compliance with various federal anti-discrimination laws, as well as a series of offices overseeing DC's receipt of millions of dollars in grant money

[41] *Carr*, 182 F.2d at 33 (Edgerton, J., dissenting).
[42] *Hobson v. Hansen*, 320 F. Supp. 720, 727 (D.D.C. 1970).
[43] District of Columbia School Reform Act of 1995, D.C. CODE § 38-1800.01 et seq. (2014).
[44] Public Education Reform Amendment Act of 2007, D.C. CODE § 38-171 et seq. (2014).
[45] *Hobson v. Hansen*, 256 F. Supp. 18 (D.C. Cir. 1966); District of Columbia Elected Board of Education Act, Pub. L. No. 90-292, 82 Stat. 101 (1968).

under the IDEA, No Child Left Behind, and Race to the Top, among other programs.[46] Then there are local policies and programs, such as the multi-million dollar facilities upgrades going on now,[47] and the District's major commitment to preschool,[48] which may be its most successful desegregation program yet, all of which have had nothing to do with the courts. And, of course, what actually happens in the classroom is a critical part of what ensures success in education, and it's a part from which the courts are pretty much absent.

So let me now end by asking what we should take away from all of these facts and competing narratives. *Have* the courts played a role in ensuring the success of public education in the District? We're about to hear our distinguished panelists give their take on this question, and I'm eager to hear what they have to say, as I'm sure you are, too. My own answer is "Yes, but." Yes, because sometimes the judicial backstop really is needed… *but* it's not always going to work, *and* sometimes even if it does there are limitations on what it can achieve, *and* there is a lot of important reform work that can't be achieved through litigation at all. If you think of yourself as having a hammer, then everything starts to look like a nail. But the 21st century education lawyer has to have a much more expansive set of tools than just the hammer of litigation—which may

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[46] *See*, *e.g.*, Administrative Class Complaint, U.S. Dep't Educ., *available at* http://www.nwlc.org/sites/default/files/pdfs/2013_6_27_dcps_complaint_final.pdf (June 13, 2013); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2015: ANALYTICAL PERSPECTIVES (2014) at 260-64, tbls. 15-10 – 15-14, *available at* http://www.gpo.gov/fdsys/pkg/BUDGET-2015-PER/pdf/BUDGET-2015-PER.pdf.

[47] D.C. PUB. SCH., A CAPITAL COMMITMENT: 2017 STRATEGIC PLAN (2012).

[48] W. STEVEN BARNETT ET AL., THE STATE OF PRESCHOOL 2013 8 (Nat'l Inst. for Early Educ. Research ed., 2013).

sometimes be necessary, but is rarely going to be sufficient. I will stop there and turn things over to our panel.