No. 99-7186

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LAURIE A. BREWER and JODIE FOSTER, individually and as parents and guardians of Jessica L. Haak, a minor,

Plaintiffs-Appellees

v.

THE WEST IRONDEQUOIT CENTRAL SCHOOL DISTRICT, THE URBAN-SUBURBAN INTERDISTRICT TRANSFER PROGRAM, MONROE NUMBER ONE BOARD OF COOPERATIVE EDUCATIONAL SERVICES, THERESA J. WOODSON, GRETCHEN STEPHAN and MARLENE S. ALLEN, in their individual and official capacities,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF OF THE UNITED STATES AS AMICUS CURIAE
SUPPORTING APPELLANTS URGING REVERSAL

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS URGING REVERSAL

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STATEMENT OF THE ISSUES

1. Whether the district court erred in finding that school districts do not have a compelling interest in reducing racial isolation.

2. Whether the district court erred in finding that plaintiffs had shown a likelihood of success on the merits of their claim that consideration of race in the urban interdistrict transfer program here was not narrowly tailored.

IDENTITY AND INTEREST OF THE UNITED STATES

The United States Department of Justice has significant responsibilities for the judicial enforcement of the Equal Protection Clause of the Fourteenth Amendment in the context of the desegregation of public schools, see 42 U.S.C. 2000c-6, and

for the enforcement of Title VI of the Civil Rights Act, 42 U.S.C. 2000d, which prohibits recipients of federal funds from discriminating on the basis of race, color, and national origin. The Department of Education, which enforces Title VI, 42 U.S.C. 2000d, also administers the Magnet Schools Assistance Program, 20 U.S.C. 7201 et seq., a grant program that assists local educational agencies, inter alia, in efforts to desegregate schools and minimize minority group isolation. The United States thus has an interest in the orderly development of the law regarding the use of race in a wide variety of educational contexts. The United States has authority to file this brief under Fed. R. App. P. 29(a).

STATEMENT OF THE CASE

A. Proceedings Below

Plaintiffs filed this suit on behalf of their minor daughter, Jessica Haak, on September 18, 1998, seeking a preliminary injunction (J.A. 9-22). Plaintiffs alleged that defendants had violated Jessica's right to equal protection under the Fourteenth Amendment (J.A. 16-17). Plaintiff also asserted statutory claims under 42 U.S.C. 2000d, 42 U.S.C. 1983, and N.Y. Educ. Law § 3201 (J.A. 16-20), and state common law claims for breach of contract and promissory estoppel (J.A. 15-16). After hearing argument, the district court on January 14, 1999, granted the preliminary injunction (J.A. 451-486). Defendants filed a notice of appeal on February 11, 1999 (J.A. 487).

B. Statement Of Facts

1. In 1965, the Rochester City School District (RCSD) and the West Irondequoit School District (WISD), a suburban school district outside Rochester, developed the Urban-Suburban Interdistrict Transfer Program (Program) to encourage the voluntary integration of the schools in Monroe County, New York (J.A. 138). Since 1965, five other suburban school districts have participated in the Program, allowing students in the City of Rochester to transfer to suburban schools and students from the suburbs to transfer to Rochester schools (J.A. 138). The school districts developed the Program as a voluntary response to the de facto segregation of the schools in the City of Rochester and the recognition that effective integration of the City schools would require the participation of the entire metropolitan area (J.A. 183-184). The Program is administered by the Board of Cooperative Educational Services (BOCES), a specialized school district that provides cooperative educational services to suburban school districts in Monroe County (J.A. 90).

For a number of years, the Program received federal funds under the Emergency School Aid Act of 1972 (ESAA), Pub. L. No. 92-318, §§ 701-720, 86 Stat. 354 (codified at 20 U.S.C. 1601), which provided the only substantial federal support for desegregation-related needs. After Congress eliminated ESAA (which it eventually replaced with the Magnet Schools Assistance Program of 1984 (MSAP), Pub. L. No. 98-377, 98 Stat. 1299 (codified at 20 U.S.C. 7201)), the State of New York funded the

Program (see J.A. 454-455). The State provides such aid to a "school district which accepts pupils from another school district in accordance with a voluntary interdistrict urban-suburban transfer program designed to reduce racial isolation which is approved by the commissioner in accordance with regulations adopted by him." N.Y. Educ. Law § 3602(36). The state financial aid allows students participating in the program to attend schools out of their district without paying non-resident tuition (J.A. 455).

State regulations require school districts seeking aid under the statute to submit to the Commissioner of Education a joint application for approval of their program and demonstrate "that the program will reduce racial isolation by transferring minority pupils, nonminority pupils or both on a voluntary basis between participating urban and suburban districts." N.Y. Comp. Codes R. & Regs. tit. 8, § 175.24(c)(1) (J.A. 132). The regulations define racial isolation to mean that "a school or school district enrollment consists of a predominant number or percentage of students of a particular racial/ethnic group." N.Y. Comp. Codes R. & Regs. tit. 8, § 175.24(a)(2) (J.A. 132). A minority pupil is defined as "a pupil who is of black or Hispanic origin or is a member of another racial minority group that historically has been the subject of discrimination." N.Y. Comp. Codes R. & Regs. tit. 8, § 175.24(a)(1) (J.A. 132).

According to the School Districts' joint application for state aid for the Program for the 1996-1997 school year, the

Monroe County suburban school districts' minority population is less than 10% of total student enrollment, while Rochester's population of 37,153 students is about 80% minority (J.A. 142, 456). The Program's mission statement (J.A. 138) explains its commitment to:

* Promote educational options and intercultural opportunities for children from multiple ethnic backgrounds as they attend school together.

* Maintain dedicated efforts to foster student and adult appreciation of their cultural commonalities and diversities.

* Provide experiences in multiple, non-mandated intercultural activities that will benefit students coming from varied ethnic and social backgrounds.

* Develop academic and personal challenges that correlate with the skills, abilities and experiences of both urban and suburban students.

* Enhance and improve the quality of intercultural learning for both urban and suburban students from different ethnic environments.

Under the Program, parents of students in Rochester may request a transfer to one of the participating suburban school districts, and vice versa. As the Program currently operates, only minority students are allowed to transfer from city schools to suburban schools without paying tuition (J.A. 455). The ethnic groups considered eligible for the Program include blacks, Hispanics, Asians, and American Indians (J.A. 130). White students may transfer to an urban school without paying tuition if the transfer does not have a negative effect on the racial balance of the receiving school (J.A. 455-456).

The Program's director described the Program's operation (J.A. 94-96). Usually, interested parents call the Program office and a staff member explains the criteria, including the racial criteria, for participating in the Program (J.A. 94, 457-458). The staff member will then take an application over the phone and send a confirming letter (J.A. 457). After receiving the application, the Program office collects and sorts the student records and then sends them to potential receiving schools, which determine which students will be accepted for transfer (J.A. 96, 458). For the 1996-1997 school year, 591 minority students transferred under the Program to suburban schools, and 29 white students transferred to Rochester schools (J.A. 456).

2. Plaintiffs Laurie Brewer and Jodie Foster are the parents of Jessica Haak, a white child now in the fourth grade (J.A. 25-26). In 1996, plaintiffs submitted a request on Jessica's behalf for a transfer to a suburban school under the Program (J.A. 26). Plaintiffs requested the transfer after the principal at School Number 39 in Rochester, the school Jessica has attended since first grade, suggested they apply to the Program because Jessica did so well in school (J.A. 26). There was no space available in the Program in the fall of 1996 or 1997, although Jessica's application remained on file (J.A. 459). In July 1998, Brewer received a letter informing her that there might be a space for Jessica at the Iroquois Elementary School in the WISD (J.A. 459). Jessica and her mother met with defendant

Gretchen Stephan, the assistant principal at the suburban school (J.A. 27). On August 21, 1998, the Program staff sent plaintiffs another letter announcing an orientation meeting on August 27, 1998 (J.A. 28). Defendant Theresa Woodson, the Program's director, attended the meeting and met Jessica and her mother for the first time (J.A. 98). None of the materials distributed to the students and parents at that meeting explained that only minority students would be accepted as transfers to a suburban school without cost under the Program (J.A. 28-30, 460).

After the meeting, Woodson checked Jessica's RCSD records and confirmed that she was listed as "White/Caucasian" (J.A. 460). Woodson called Stephan to let her know that Jessica was not eligible for the Program, and Stephan so informed Brewer (J.A. 460). Even though they had been told that the acceptance had been revoked, plaintiffs brought Jessica to the Iroquois Elementary School on the first day of school, September 8, 1998, hoping that the school and Program officials had changed their minds (J.A. 31, 461). School officials again told Jessica she could not attend the school (J.A. 461).

3. Brewer and Foster filed this suit on September 18, 1998, seeking a preliminary injunction (J.A. 9-22). Plaintiffs argued that denial of Jessica's transfer request on the basis of race violated her right to equal protection under the Fourteenth Amendment, as well as her statutory rights under 42 U.S.C. 2000d, 42 U.S.C. 1983, and N.Y. Educ. Law § 3201 (J.A. 16-20). Plaintiffs also alleged state law claims for breach of contract

and promissory estoppel (J.A. 15-16). Defendants, in opposing the motion for a preliminary injunction, argued, inter alia, that school districts have a compelling interest in reducing racial isolation and that the Program offers one method of reducing racial group isolation and encouraging intercultural learning (J.A. 87).

4. After hearing argument, the district court granted the preliminary injunction, addressing only the equal protection argument (J.A. 451-486). The court agreed with Brewer and Foster that a violation of Jessica's equal protection rights constitutes irreparable harm, although it made no finding of the degree of the harm (see J.A. 465). The court also made no finding that there was a difference in the education Jessica would receive at the two schools.

Considering the likelihood of success on the merits, the court concluded (J.A. 478) that it was doubtful defendants could prove a compelling interest in taking race into account in deciding whether to grant interdistrict transfer requests under the Program. The court found that the defendants allege a "compelling interest in eliminating de facto segregation, although they do not contend that such segregation exists within any of the individual participating school districts" (J.A. 467). Since the defendants did not allege that the "relative predominance of minorities with[in] the RCSD is a lingering effect of any past discrimination by the RCSD itself," the court

concluded that the only reason for the Program is eliminating racial isolation (J.A. 467).

Finding that the Program had no remedial purpose, the district court considered whether school districts have a compelling interest in diversity, asserting that racial isolation is simply the absence of diversity (J.A. 467). The district court agreed with the Fifth Circuit's opinion in Hopwood v. Texas, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996), that Justice Powell's concurrence in Regents of the University of California v. Bakke, 438 U.S. 265, 311-312 (1978), should not be viewed as the "conclusive authority" on the issue whether diversity can be a compelling interest (J.A. 471). The district court noted that no other Justice joined Justice Powell in concluding that "the attainment of a diverse student population could be a compelling state interest" justifying the use of race in medical school admissions (J.A. 470-471). Citing the decisions in, inter alia, Hopwood and Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998), the district court reasoned that diversity based solely on race was only "facial" diversity and not "true" diversity (J.A. 479-480). The court thus endorsed Hopwood's view that remedying past discrimination is the only compelling state interest that would justify racial classifications (J.A. 479-480).

The court also found that, even if diversity were a compelling interest, the Program is not narrowly tailored to meet that interest (J.A. 478). According to the district court, the

means the Program chose are "'the most drastic available' in the sense that the Program completely bars any white RCSD student from even being considered for transfer" (J.A. 480). The court did not view the Program as truly voluntary where "students of the 'wrong' skin color" are denied a benefit and "are not allowed to volunteer to participate" (J.A. 481). The "amorphous goals of the Program" were also troubling to the district court since it was not clear to the court at what point a racial or ethnic group is considered "'predominant' within a given school or school district" (J.A. 481). The court further questioned the basis on which Asian or American Indian students were determined to be minority pupils under the Program, since "[a] number of other minority groups that could claim to fit within that definition easily spring to mind" (J.A. 481-482). The court claimed the Program was arbitrary because there may be questions about who is a member of a minority group (J.A. 482). The court concluded that the Program's goal of diversity could be achieved short of making race the absolute criterion -- that selections based on "socioeconomic background, family constellation, [and] educational pedigree (or lack thereof) of the parents" could reduce racial isolation "without actually taking into account the students' race per se" (J.A. 484).

SUMMARY OF ARGUMENT

The district court erred in holding that reducing racial isolation can never be a compelling interest. For the past 40 years, courts have recognized not only the significant benefits

of integrated education, but also a school board's authority voluntarily to assign students for the purpose of integrating elementary and secondary schools. See Brown v. Board of Educ., 347 U.S. 483, 493 (1954); Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1, 16 (1971). This Court, in Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705 (2d Cir. 1979), held that a school district has a compelling interest in reducing de facto segregation and may consider race in achieving that interest. Congress also has viewed the integration of elementary and secondary schools as an important national goal and has provided funding to local educational agencies for the express purpose of reducing racial isolation. See Emergency School Aid Act of 1972 (ESAA), Pub. L. No. 92-318, §§ 701-720, 86 Stat. 354 (codified at 20 U.S.C. 1601); Magnet School Assistance Program of 1984 (MSAP), 20 U.S.C. 7201. These judicial and congressional judgments about the value of integrated schools are supported by educational and sociological research that confirms that all children, minority and white, benefit from reduced racial isolation in the schools.

Because this was a request for a preliminary injunction, the record below was limited and the case should be remanded to allow the court to make the fact-intensive inquiry whether the Program is narrowly tailored. The evidence plaintiffs presented at the preliminary injunction stage failed to show a likelihood of success on the merits on the question of narrow tailoring. Under the Program, minority children in 80% minority urban schools may

transfer voluntarily to suburban schools that are 90% white and white children in suburban schools may transfer to the predominantly minority urban schools. The usual method of assigning students is to assign them to their neighborhood school so that race is not considered at all in the vast majority of cases. The Program, which involves a small number of students, is entirely voluntary. Finally, students who do not participate in the Program are not denied an education so third parties such as Jessica suffer no appreciable harm. Under these circumstances, the district court erred in concluding that plaintiffs had demonstrated a likelihood of success on the merits.

ARGUMENT

I

THE DISTRICT COURT ERRED IN FINDING THAT THE SCHOOL DISTRICTS DO NOT HAVE A COMPELLING INTEREST IN REDUCING RACIAL ISOLATION

In this Circuit, a plaintiff seeking a preliminary injunction against the enforcement of governmental rules such as those at issue here must show irreparable harm if the relief is not granted and a likelihood of success on the merits. Velazquez v. Legal Serv. Corp., 164 F.3d 757, 763 (2d Cir. 1999); NAACP v. Town of East Haven, 70 F.3d 219, 223 (2d Cir. 1995). Because a denial of equal protection, if proven, constitutes irreparable harm, we will focus on the district court's finding that plaintiffs demonstrated a likelihood of success on the merits of their claim that denial of the transfer on the basis of race

violates Jessica's equal protection rights. Because the plaintiffs have not demonstrated likelihood of success on the merits of that claim, there has been no harm. There is no claim that assigning Jessica to her neighborhood school has caused her injury and there is no evidence that the school in WISD is better than Jessica's neighborhood school.

The district court erred in holding that avoiding racial isolation in elementary and secondary schools cannot be a compelling interest. The school districts' compelling interest in decreasing isolation is supported by prior cases, congressional policy judgments, and social science research demonstrating the benefits of integrated schools.

1. Judicial Decisions

Since 1954, the Supreme Court has recognized the educational benefits at the elementary and secondary level of sending students of different races and ethnic backgrounds to school together. In Brown v. Board of Education, 347 U.S. 483, 493 (1954), the Court discussed the importance of education in preparing children for participation in the larger society:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Relying upon social science research, Brown concluded that segregated education deprives minority children of equal educational benefits. 347 U.S. at 493-495 & n.11. The Court subsequently has recognized the benefits of integration for children of both races, specifically noting that "it should be equally clear that white as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom.'" Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 472 (1982) (quoting Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 486 (1979) (Powell, J., dissenting)); see also Milliken v. Bradley, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).[1]

The Supreme Court's approval of governmental action to reduce racial isolation has not been limited to situations in which race-conscious measures are justified as a remedy for de jure segregation. The Supreme Court has endorsed local school officials' authority voluntarily to use race or ethnicity in student assignments at the elementary and secondary level even when not required to do so to remedy past discrimination. The

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[1] The Court has recognized the importance of residential integration as well, in part because of its effect on integration in schools. See Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 110-111 & n.24 (1979) (noting relationship between residential and school segregation); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 94-95 (1977) ("This Court has expressly recognized that substantial benefits flow to both whites and blacks from interracial association and that Congress has made a strong national commitment to promote integrated housing"), citing Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Hills v. Gautreaux, 425 U.S. 284, 301-303 (1976) (acknowledging federal policy encouraging desegregated housing opportunities).

Court wrote in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971):

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities[.]

See also North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971) (school authorities have "wide discretion in formulating school policy," citing Swann, 402 U.S. at 16); Lee v. Nyquist, 318 F. Supp. 710, 712-714 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971) (striking down as unconstitutional a state statute that prohibited state education officials and appointed school boards from voluntarily taking race into account in student assignments to avoid racial isolation).

Neither the Supreme Court nor this Court has held that ending racial isolation is not a compelling interest that would justify race-conscious action. Past discrimination by the educational institution is not the only justification for considering race, as a majority of the Court held in Regents of the University of California v. Bakke, 438 U.S. 265, 320 (1978). In Bakke, the Court struck down a medical school admissions scheme that set aside a specific portion of the slots in the entering class for minorities. But a majority of the Court reversed the lower court's order barring the school from any use of race in its admissions process and found that a university

could employ race-conscious measures even though it had not engaged in prior de jure segregation. See 438 U.S. at 272 (Powell, J.); 438 U.S. at 325-326 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part). Justice Powell's opinion in Bakke specifically identified the promotion of diversity in student enrollments as a compelling interest justifying the use of race in university admissions. 438 U.S. at 311-314. As Justice O'Connor wrote in her concurring opinion in Wygant v. Jackson Board of Education, 476 U.S. 267, 286 (1986), "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."

Importantly, this Court has upheld a school system's authority to promote integration absent a predicate of prior illegal discrimination in nearly the precise circumstances presented here. In Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705 (2d Cir. 1979), this Court overturned the district court's finding that the New York City Board of Education had engaged in de jure discrimination. Applying strict scrutiny, the Court nevertheless upheld the school board's authority to implement a voluntary integration plan, holding that reducing de facto segregation is a compelling interest that would permit the school board to deny minority students transfers that would result in further racial isolation. This Court noted that "[i]t is important that as many students as possible have the

opportunity for integrated education." 598 F.2d at 720. The Court remanded the case to the district court to determine whether the particular formula for granting or denying transfers was narrowly tailored. 598 F.2d at 721; see also Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 738 F.2d 574, 579 (2d Cir. 1984) (second remand to district court to determine whether school district had sufficiently justified its determination that 50% was the "tipping point" that would result in white flight from the school system).

In light of this binding precedent, the district court's reliance on Hopwood v. Texas, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996), Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998), and other cases outside the Second Circuit is misplaced. And while the Fifth Circuit's decision in Hopwood is in our view wrong,[2] it is in any event inapplicable here because it arose in another context. In Hopwood, the court found that achieving a diverse student body to increase academic exchange of ideas can never constitute a compelling governmental interest justifying the use of race in law student selections. 78 F.3d at 944-948. Hopwood assumed that the desire to achieve diverse enrollments was based upon the assumption that individuals of different racial groups would bring different ideas and characteristics to the university. 78 F.3d at 946. The court

[2] We also note that the case is again before the Court of Appeals for the Fifth Circuit, where the University of Texas has filed a Petition for En Banc Consideration. Hopwood v. Texas, No. 98-50506 (dated Apr. 19, 1999).

rejected this rationale on the ground that use of race to achieve this diversity merely reinforced improper racial stereotypes. 78 F.3d at 945-946.

In the elementary and secondary school context, the importance of diversity in enrollments is not based on racial stereotypes or the belief that students of one racial or ethnic background will bring any particular outlook to the classroom. Rather, it is based on the belief that exposing children at an early age to children of other races fosters social education and tolerance. An integrated educational setting may disabuse students of their pre-existing notions about members of other racial or ethnic groups, including the assumption that all members of a particular group think or act in a particular way. It is through actual experience with children of different races and with different ethnic backgrounds that students best understand the differences and the similarities among people (see part I(3), infra).

The district court also misinterpreted the First Circuit's decision in Wessmann, 160 F.3d at 790, in which the court invalidated the Boston school system's admissions policy at Boston Latin School, which was based in part on the racial composition of the applicant pool. 160 F.3d at 793-794. The court of appeals there did not hold that diversity could never be a compelling interest. The court noted that "[i]n the education context, Hopwood is the only appellate court to have rejected diversity as a compelling interest, and it did so only in the

face of vigorous dissent from a substantial minority of the active judges in the Fifth Circuit * * * [who] countered that the reports of Bakke's demise were premature." 160 F.3d at 795-796. Rather than rejecting diversity as a possible compelling interest, the Wessmann court found that the evidence presented in that case was factually insufficient to demonstrate that basing admissions on the racial composition of the applicant pool satisfied compelling educational goals. That fact-bound holding is inapplicable here, where the use of race is tied to the interest in reducing racial isolation.

Finally, nothing the Supreme Court has held in other contexts governs the result here. The Supreme Court's statement in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989), that the use of race should be "reserved for remedial settings" must be viewed in the context of that case -- public contracts -- where the use of affirmative action has been justified only on remedial grounds. In Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 217 (1995), the Court made clear that the use of racial classifications by the federal government, as well as by state and local governments, was subject to strict scrutiny. While Adarand did not reach any conclusion on the question whether, and under what circumstances, the goal of diversity might be a compelling governmental interest under that standard, it did note, without criticism, that Justice Powell had applied strict scrutiny in Bakke. 515 U.S. at 218, 224. In short, the question whether a non-remedial purpose may also satisfy strict scrutiny

was not presented in either Croson or Adarand. As the Seventh Circuit wrote in Wittmer v. Peters, 87 F.3d 916, 918 (7th Cir. 1996), cert. denied, 519 U.S. 1111 (1997), "there is a reason that dicta are dicta and not holdings, that is, are not authoritative. A judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him." 87 F.3d at 919.

The last Supreme Court statement on the question presented here is thus Bakke, which held that race could be considered in the educational context absent a history of de jure discrimination. As the Supreme Court recently reaffirmed, only the Supreme Court has "'the prerogative of overruling its own decisions.'" Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)); see also Adams v. Department of Juvenile Justice, 143 F.3d 61, 65 (2d Cir. 1998) (court of appeals bound by Supreme Court precedent notwithstanding contention that rule set forth in the precedent would no longer command a majority of the Supreme Court).

2. Congressional Policy

Congress also has endorsed the voluntary and properly limited use of race in elementary and secondary school assignments to minimize racial isolation in student enrollments, finding that elimination of racial isolation has significant educational benefits. In 1972, Congress enacted the Emergency

School Aid Act (ESAA), Pub. L. No. 92-318, §§ 701-720, 86 Stat. 354 (codified at 20 U.S.C. 1601), to provide federal support for desegregation-related needs. Congress's purpose in enacting ESAA was to eliminate racial isolation in the public schools, whether or not there was a history of de jure discrimination in the school district. See S. Rep. No. 61, 92d Cong., 1st Sess. at 6 (1971); Board of Educ. v. Harris, 444 U.S. 130, 141 (1979).

After ESAA was eliminated, Congress in 1984 enacted the Magnet Schools Assistance Program (MSAP), Pub. L. No. 98-377, 98 Stat. 1299 (codified at 20 U.S.C. 4051), to continue to provide financial assistance to local educational agencies to eliminate de jure or de facto racial isolation. Congress reauthorized MSAP in 1994. See 20 U.S.C. 7201, et seq. The legislative history of both ESAA and MSAP reflects Congress's view that promoting integration in elementary and secondary schools is of the highest priority because "racially integrated education improves the quality of education for all children." H.R. Rep. No. 576, 92d Cong., 1st Sess. at 10 (1971). The Senate Report on ESAA recognized that "[e]ducation in an integrated environment, in which children are exposed to diverse backgrounds, is beneficial to both" minority and nonminority children. S. Rep. No. 61, 92d Cong., 1st Sess. at 7 (1971). "Whether or not it is deliberate, racial, ethnic, and socio-economic separation in our schools and school systems [has] serious and often irreparable adverse effects on the education of all children, be they from deprived or from advantaged backgrounds." Id. at 6. The House and Senate

Reports on the ESAA also relied on President Nixon's statements in proposing the original bill:

> This Act deals specifically with problems which arise from racial separation, whether deliberate or not, and whether past or present. It is clear that racial isolation ordinarily has an adverse effect on education. Conversely, we also know that desegregation is vital to quality education -- not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the standpoint of helping all children achieve the broad-based human understanding that increasingly is essential in today's world.

H.R. Rep. No. 576, supra, at 3; see also S. Rep. No. 61, supra, at 7. Senator Moynihan quoted portions of these statements during the 1984 Senate debates on MSAP. 130 Cong. Rec. 15,034 (1984).

In reauthorizing MSAP in 1994, Congress again made specific findings that "it is in the best interest of the Federal Government to — (A) continue the Federal Government's support of * * * school districts seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education." 20 U.S.C. 7201(5). Congress thus has established that discouraging racial isolation in the schools serves an important national interest.

3. Social Science Research

Educational research demonstrating the substantial benefits of desegregation supports these judicial and congressional judgments. Some research, for example, has shown that desegregation of schools yields enhanced achievement for African

American students, particularly when undertaken on a voluntary basis and when begun at the kindergarten or first-grade level.[3] Numerous studies have demonstrated increased rates of high school graduation, college attendance, and college graduation, and better occupational prospects among African American students who have attended integrated schools.[4] Research also indicates that, in the long term, "desegregation may help break a cycle of racial isolation," leading to better acceptance of racially mixed residential and occupational settings among both African Americans and whites.[5] As one review of the literature put it, "desegregation of schools leads to desegregation in later life -- in college, in social situations, and on the job."[6] The district court did not consider such evidence, and it is important that courts recognize the body of published research supporting the

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[3] Janet W. Schofield, Review Of Research On School Desegregation's Impact On Elementary And Secondary School Students, in Handbook Of Research On Multicultural Education 597, 599-602 (James A. Banks ed., 1995); Robert L. Crain & Rita E. Mahard, Minority Achievement: Policy Implications Of Research, in Effective School Desegregation 55, 61-67 (Willis D. Hawley ed., 1981); U.S. Commission on Civil Rights, Racial Isolation In The Public Schools 91 (1967).

[4] Schofield, supra, at 605-606; James M. McPartland & Jomills H. Braddock II, Going To College And Getting A Good Job: The Impact Of Desegregation in Effective School Desegregation 141, 146-149 (Willis D. Hawley ed., 1981).

[5] Schofield, supra, at 610; see also McPartland & Braddock, supra, at 149-151; U.S. Commission on Civil Rights, supra, at 109-112.

[6] Jomills H. Braddock II, Robert L. Crain, & James M. McPartland, A Long-Term View Of School Desegregation: Some Recent Studies Of Graduates As Adults, Phi Delta Kappan 259, 260 (1984).

value of reducing racial isolation in elementary and secondary schools.

II

THE DISTRICT COURT'S NARROW-TAILORING ANALYSIS IS FLAWED

The district court's discussion of narrow tailoring (J.A. 480-484) reflects a misunderstanding of what the analysis entails. In general, the factors that bear on the narrow-tailoring inquiry include the necessity for consideration of race and whether race-neutral alternative remedies have been considered, the flexibility and duration of the use of race, and the impact on the rights of third parties. See United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality); id. at 187 (Powell, J., concurring); see also Fullilove v. Klutznik, 448 U.S. 448, 510 (1980) (Powell, J., concurring); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507-510 (1989). Such an inquiry is inherently fact-intensive, and the evidence should be developed fully at the trial on the permanent injunction. See 63 Fed. Reg. 8021, 8022 (1998) (discussing the factual considerations governing the narrow-tailoring determination). Based on the record developed at the preliminary injunction stage, plaintiffs did not show a likelihood of success on the merits on this issue.

Although the district court suggested that race-neutral alternatives to the policy could achieve the Program's interests (J.A. 483-484), the Program was conceived as a way to integrate urban and suburban schools, and the limits on the transfers into

the Program appear necessary to ensure that the Program decreases segregation. The evidence here that RCSD schools have been losing significant numbers of white students over the years -- from a 33% minority population in 1966 to an 80% minority population in 1997 (J.A. 185, 456) -- suggests that race-neutral assignment policies have been insufficient to reduce or halt increasing levels of racial isolation.

With regard to duration and flexibility, there is little evidence in the record describing the State's process for reviewing applications under N.Y. Educ. Law § 3602, and the district court made no finding under this prong (see J.A. 480-483). Whether the Program is reviewed periodically in any meaningful way, and whether there is any flexibility in the way the Program generally operates, are issues the district court should consider fully at a trial on the merits.

Whether the Program placed an undue burden on the rights of third parties must be viewed in light of Parent Ass'n of Andrew Jackson High School v. Ambach 738 F.2d 574, 577 (2d Cir. 1984), in which this Court held that the voluntary school transfer plan's "aim 'to promote a more lasting integration is a sufficiently compelling purpose to justify as a matter of law excluding some minority students from schools of their choice.'" In addition, an assessment of the impact on third parties requires consideration of not just the Program but of the general policy governing student assignments within Monroe County. It is undisputed that, normally, students are assigned to the schools

in their neighborhood and race is not a consideration. Since the Program is quite small and was limited to only 591 students out of 37,153 students in the RCSD during the 1996-1997 school year (J.A. 456), the Program affected only 1.6% of RCSD's students. Of those individuals who, like Jessica, were not allowed to transfer under the Program, the record does not establish that those students are in fact burdened, since the burden is only that they are not able to transfer without paying nonresident tuition. None is being denied admission altogether. Plaintiffs also offered no evidence that Jessica would receive a better education at the suburban school such that the injury to her in not being allowed to transfer was significant. To the contrary, Jessica had thrived at her neighborhood school (J.A. 26, 31). See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 300 n.39 (1978)(Powell, J., concurring) (distinguishing the denial of admission to medical school from busing children to comparable schools for the purpose of voluntary integration); Martin v. School Dist. of Phila., No. 95-5650, 1995 WL 564344, at *3 (E.D. Pa. Sept. 21, 1995) (burdens on students denied transfers because of race found to be "relatively light" where no student would be denied an adequate education).

The district court's reasons for finding the Program not narrowly tailored do not support that finding. The district court suggested (J.A. 481-482) that groups other than Asians and American Indians should have been added to the list of groups eligible for the Program, but gave no indication of what those

groups should be or that the groups included in the Program do not qualify as members of a "racial minority group that historically has been the subject of discrimination." N.Y. Comp. Codes R. & Regs. tit. 8, § 175.24(a)(1). The district court also suggested that a problem arises because Program officials may first suspect that a child does not qualify for the Program by observing the child, and then confirm race or ethnicity by referring to the student's RCSD records (J.A. 482). Absent evidence that children are misidentified, the court's concerns do not present a problem with narrow tailoring. The court did suggest (J.A. 481) that the concept of "racial isolation" and what it means for an ethnic or minority group to "predominate" within a given school are amorphous concepts. In the abstract, such issues may be of concern; under the facts of this case, however, they do not appear to support a finding that the Program is not narrowly tailored. Where the RCSD schools are 80% minority and the suburban schools are 90% white, and only 600 children are involved in the Program, it is doubtful that the Program uses race more than necessary to serve the compelling interest in reducing racial isolation.

CONCLUSION

The district court's judgment should be reversed.

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CERTIFICATE OF SERVICE

I hereby certify on April 22, 1999, that I caused to be served two copies of the foregoing Brief for the United States as Amicus Curiae Supporting Appellants Urging Reversal by first-class mail, postage prepaid, on:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Based on the word-count in the word-processing system, the brief contains 6799 words.

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