No. 98-2503

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JEFFREY EISENBERG, et al.,

Plaintiffs-Appellants

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS, et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES URGING AFFIRMANCE

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MISCELLANEOUS:

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STATEMENT OF THE ISSUE

Whether the district court abused its discretion in denying the motion for preliminary injunction.

IDENTITY AND INTEREST OF THE UNITED STATES AS AMICUS CURIAE

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 in administrative proceedings, 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. 20 U.S.C. 7202. 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 files this brief pursuant to Fed. R. App. P. 29(a).

STATEMENT OF THE CASE

A. Proceedings Below

Plaintiffs Jeffrey Eisenberg and Elinor Merberg, on behalf of their son Jacob, filed this suit on August 14, 1998, seeking a temporary restraining order and/or a preliminary injunction (J.A. 8). After hearing argument, the district court denied the preliminary injunction on September 8, 1998 (J.A. 236).

B. Statement Of Facts

1. The Montgomery County Public School District (MCPS) operates a number of magnet programs that offer a specialized curriculum focus or method of instruction. These magnet programs are designed to avoid racial isolation in the schools by attracting and retaining diverse student enrollment through voluntary transfers (J.A. 108). MCPS has limited the transfer of students into or out of schools, including magnet schools, based, among other things, on the effect of the transfer on the racial compositions of the sending and receiving schools. MCPS's policy limiting some transfers between schools to take into account the effect on the school's racial profile was made in response to concerns the Department of Education's Office for Civil Rights

raised in 1981 that MCPS was "resegregating Rosemary Hills Primary School by improperly approving student transfers" of white students out of predominantly black Rosemary Hills (J.A. 98, 165). MCPS resolved the complaint by agreeing that a "Quality Integrated Education Team" would review transfer requests to ensure that school policies did not result in racial isolation in the school district (J.A. 98-99).

MCPS has reviewed its policy on transfers periodically over the years and has revised it several times (J.A. 164). Under the policy currently in effect, MCPS considers the impact of transfer requests on both the sending and receiving schools, taking into account the total number of requested transfers, school stability, school utilization/enrollment, the schools' racial/ethnic diversity profile, and the reason for the request (J.A. 17-28). To determine whether transfers would have an adverse effect on either the sending or receiving school, MCPS each year develops a profile for every school (J.A. 162). The profile chart codes the school's level of utilization, its diversity profile, and stability status (changing boundaries, etc.) (J.A. 17-22). If the proposed transfer would have no effect on utilization, stability, or the diversity of the school, the request normally will be granted. If the transfer would have an adverse effect on any of those factors, the request is denied unless the student can demonstrate personal hardship as, for example, when the student has a sibling at the receiving school (J.A. 18-19, 165).

2. Plaintiffs Jeffrey Eisenberg and Elinor Merberg (Eisenbergs) are the parents of Jacob Eisenberg, a white child who was scheduled to begin first grade in the fall of 1998 at Glen Haven Elementary School in Silver Spring, Maryland (J.A. 224). In March 1998, the Eisenbergs submitted a request on Jacob's behalf for a transfer to the pre-K through grade two science and math magnet program at Rosemary Hills Elementary School in the Bethesda-Chevy Chase area. The Eisenbergs requested the transfer because they believed that "the school environment and curriculum [at Rosemary Hills] offer [Jacob] the best opportunity for realizing his personal and academic potential" (J.A. 30). On May 15, 1998, MCPS denied the transfer request because Jacob's transfer from his neighborhood school, Glen Haven Elementary, would adversely affect that school's racial diversity (J.A. 225).

Glen Haven's white student enrollment is lower than the county-wide average and has been declining even further for the past several years (J.A. 17-21, 164, 225). Of Montgomery County's 125,000 students, 53.4% are white, 20.3% are African American, 13.2% are Hispanic, and 12.7% are Asian (J.A. 161, 164). In 1994-95, the white enrollment at Glen Haven was 38.9%, but it had dropped to 24.1% in 1997-98 (J.A. 164). In 1997-98, the rest of the student population at Glen Haven was 40.5% African American, 25% Hispanic, and 10.1% Asian (J.A. 164). Under MCPS's policy to discourage transfers that would increase the racial isolation of a school, African American and Hispanic

students generally are allowed to transfer out of Glen Haven, and white students generally are allowed to transfer into, but not out of, Glen Haven (J.A. 21). For the 1998-1999 school year, 19 white students applied to transfer out of Glen Haven (J.A. 165). MCPS granted five of the requests on personal hardship grounds (J.A. 165). Of the five requests granted, four were granted because older siblings already attended the other school (J.A. 165). If MCPS had granted the other 14 requests, Glen Haven's white student population would have declined even further.

After denying the Eisenbergs' request, MCPS notified them in late August 1998 that space had become available in another program (the Rock Creek Forest Spanish Immersion program) for which the Eisenbergs had submitted an application and for which Jacob had been on a waiting list (see J.A. 203-209). MCPS's transfer policy excludes a small number of programs within the system from the transfer screening factors, and the Spanish immersion program at Rock Creek Forest Elementary School is one of the excluded programs (J.A. 19). Although Jacob could have transferred into the Spanish immersion program, the Eisenbergs rejected the offer (J.A. 208).

3. The Eisenbergs filed this suit on August 14, 1998, seeking a temporary restraining order and/or a preliminary injunction that would order MCPS to allow Jacob to transfer to Rosemary Hills (J.A. 8). Plaintiffs argued that MCPS's denial of Jacob's transfer request on the basis of race violated his right to equal protection under the Fourteenth Amendment. According to

plaintiffs, remedying past discrimination is the only compelling interest that could justify a school district's use of race, and since there was no finding here of discrimination, MCPS could not consider race in denying transfers (J.A. 39-51).

After hearing argument, the district court denied the preliminary injunction (J.A. 224). The court agreed with the Eisenbergs that a violation of Jacob's constitutional rights per se would constitute irreparable harm, although it found that the harm would be slight in that Jacob would receive a comparable quality education at Glen Haven (J.A. 227). The court also found that granting the transfer request would impose a hardship on MCPS because it would require MCPS to grant the rest of the 14 similar transfer requests it had denied, leading to further racial isolation at Glen Haven, a possibility "of paramount * * * concern to the district" (J.A. 227). Balancing the hardships, the court concluded that this factor "slightly favors the District" (J.A. 227).

Considering the likelihood of success on the merits, the court concluded first that diversity is a compelling governmental interest, citing Justice Powell's concurrence in Regents of the University of California v. Bakke, 438 U.S. 265, 311-312 (1978) (J.A. 229-230). The district court disagreed with the Fifth Circuit's opinion in Hopwood v. Texas, 78 F.3d 932, cert. denied, 518 U.S. 1033 (1996), that Justice Powell's controlling opinion in Bakke no longer reflects the law with regard to higher education. The district court opined that "[t]he importance of a

diverse learning environment is at least as important in the context of public grade-school education" (J.A. 230). The court also agreed that MCPS has a compelling interest in avoiding the creation, through its own transfer policy, of segregative enrollment patterns that might raise an inference of discrimination (J.A. 231-232).

On the issue of narrow tailoring, the court noted that the policy does not single out any particular group but applies to any racial group that is overrepresented or underrepresented in a school affected by the proposed transfer (J.A. 232). It was also significant to the court that MCPS does not apply hard and fast numerical quotas but adjusts the criteria for allowing transfers to or from each school based on the racial composition of the county, and even then the policy can be waived depending on the personal and family reasons for the request (J.A. 233). The court doubted that any racially-neutral alternatives could achieve MCPS's interests in ensuring diversity in the schools and found that it was appropriate to use race as a factor at the beginning of children's school careers, when "the need for diversity is at its greatest" (J.A. 234). Although MCPS engages in a periodic review of the policies, the district court noted that the ultimate question of narrow tailoring could not be resolved without further factual development as to how the policy is in fact implemented (J.A. 234). At this stage and on this record, however, the court did "not believe that Eisenberg can

show a likelihood of success on the merits of his motion" (J.A. 234).

On the last factor, considering the public interest, the court found that denial of the preliminary injunction would not be contrary to the public interest because MCPS has a compelling interest in diversity in the public schools (J.A. 234). The court therefore denied the motion for preliminary injunction.

STANDARD OF REVIEW

The Eisenbergs argue that although an order denying a preliminary injunction is normally reviewed for an abuse of discretion, this Court should decide the legal issues de novo since the district court "issued a number of legal conclusions that would not be overturned by additional fact finding" (Appellants' Brief (App. Br.) at 13). Whether MCPS's transfer policy serves a compelling interest, however, and whether the policy is narrowly tailored, are fact-intensive inquiries. A proper determination of the constitutionality of MCPS's policy requires careful examination of evidence supporting the school's policy of avoiding racial isolation in elementary and secondary schools, as well as the evidence of how the policy is implemented. The correct standard of review at this stage is thus abuse of discretion since these merits issues "must await trial and findings by the district court." Faulkner v. Jones, 10 F.3d 226, 234 (4th Cir. 1993).

SUMMARY OF ARGUMENT

The district court properly denied the Eisenbergs' motion for a preliminary injunction, "an extraordinary remedy involving the exercise of a very far-reaching power." Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 811 (4th Cir. 1991). Neither this Court nor the Supreme Court has held that a school district may not consider the effect of transfers on the racial composition of the affected schools. The district court correctly held that plaintiffs did not demonstrate it was likely they would be able to prove that MCPS's policy of denying transfers of students to prevent racial isolation is unconstitutional. Since 1954, courts and Congress have agreed that reducing racial isolation in the public schools is an important national priority. This judgment is supported by substantial evidence of the educational and social benefits of exposing children at an early age to children of different races and ethnic backgrounds in an integrated educational setting. The district court therefore properly found that MCPS had demonstrated a compelling interest in considering race as one factor in its transfer determination. It also found that, at this stage, MCPS had sufficiently demonstrated that the program was narrowly tailored. The district court did not abuse its discretion in refusing to enter a preliminary injunction pending a trial on the merits.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR PRELIMINARY INJUNCTION

A. The District Court Correctly Found That The Balance Of Harms Favors MCPS

A preliminary injunction is "an extraordinary remedy involving the exercise of a very far-reaching power." Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 811 (4th Cir. 1991). In considering whether to grant such extraordinary relief, the two most important factors are irreparable harm and the harm to the defendant. Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991). "If, after balancing those two factors, the balance 'tips decidedly' in favor of the plaintiff, * * * a preliminary injunction will be granted" if the plaintiff has raised serious and substantial questions on the merits. 926 F.2d at 359 (citation omitted). The less serious the harm to the plaintiff, the stronger the showing on the merits must be. 926 F.2d at 359.

The district court, relying on MCPS's interest in preventing students from transferring out of their neighborhood schools when such transfers may result in a school that is becoming predominantly one race, correctly found that the balance of harm factor favors the school district (J.A. 227). It was important to the court that Jacob "is not being denied access to education -- the evidence is that he can receive a very comparable education at Glen [Haven]" (J.A. 227). The Eisenbergs did not demonstrate the significance to Jacob of the magnet program at

Rosemary Hills. Other than asserting that the magnet program would be a "good match" for Jacob that would help him "achieve his potential," the record does not show the difference in the education he would receive at the two schools, and there is no evidence to refute the district court's conclusion that the quality of education he would receive at Glen Haven would be comparable to that at Rosemary Hills.[1] See Benkeser v. DeKalb County Bd. of Educ., No. 1:97-CV-2369-WBH (N.D. Ga. Aug. 22, 1997) (J.A. 112-119) (denying preliminary injunction where plaintiffs could gain admission to another comparable school); 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).

B. The Eisenbergs Did Not Demonstrate A Strong Likelihood Of Success On The Merits

1. MCPS demonstrated a compelling interest in its transfer policy sufficient to withstand a motion for preliminary injunction

a. Neither the Supreme Court nor this Court has decided that an interest in integrated schools is not a compelling interest that satisfies strict scrutiny

Absent evidence of substantial harm to plaintiffs, the district court thus required a strong showing on the merits. The court here correctly found that plaintiffs failed to satisfy that burden. Racial classifications imposed by governmental entities

[1] The record also does not establish that Jacob would have been harmed in light of the alternative to Glen Haven, the Spanish immersion program, that the Eisenbergs rejected.

are subjected to strict scrutiny and "are constitutional only if they are narrowly tailored measures that further compelling governmental interests." Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995). MCPS's interest is to ensure that school policies do not result in racial isolation. Contrary to the Eisenbergs' argument, courts have not limited compelling interests to only remedial efforts.

In Adarand and in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), the Supreme Court made clear that, when challenged as equal protection violations, all racial classifications are subject to strict scrutiny. Because the classifications at issue in both Adarand and Croson were defended as necessary to remedy past discrimination, the Court's discussion of the government's interest in those cases was limited to a discussion of remedial purpose.

Neither case held, however, that only a remedial purpose could constitute a compelling interest. See Adarand, 515 U.S. at 227; id. at 258 (Stevens, J., dissenting) ("The proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court's holding today -- indeed, the question is not remotely presented in this case"). The question whether a non-remedial purpose may also satisfy strict scrutiny was not presented in either decision, and thus "remains open in the Supreme Court." Wittmer v. Peters, 87 F.3d 916, 918 (7th Cir. 1996), cert. denied, 117 S. Ct. 949 (1997). As the Seventh Circuit wrote in Wittmer, "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. As Justice O'Connor noted in her concurrence in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986), "certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other [non-remedial] governmental interests * * * to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies."

The Eisenbergs rely (App. Br. 16) on two recent cases in which this Court stated, in dicta, that racial classifications may be justified only when the use of race is necessary to remedy past discrimination. See Podberesky v. Kirwan, 956 F.2d 52, 55 (4th Cir. 1992) (Podberesky I); Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) (Podbereky II); Maryland Trooper Ass'n v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993). But, as in Adarand and Croson, neither case presented the question whether a non-remedial purpose might also establish a compelling interest, and based on the opinions, apparently no evidence on that issue was presented to the courts. The Podberesky I court specifically declined to address the suggestion of an amicus that the scholarship program at issue there could be justified by a compelling interest in promoting student diversity, finding that diversity did not appear to be the purpose of the program. See

956 F.2d at 56 n.4. Maryland Troopers concerned promotional goals imposed by a consent decree in settlement of an action alleging employment discrimination, see 993 F.2d at 1074-1075, and the court did not discuss any justification other than the need to remedy past discrimination. Cf. Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 213-215 (4th Cir. 1993) (although finding the evidence in that case insufficient to support a compelling interest in diversity, the court did not decide the issue whether "achieving a greater racial diversity within the police department is a compelling state interest that might justify awarding promotions on the basis of race").

b. Prior cases support the school district's authority to prevent racial isolation in the public schools

MCPS has a compelling interest in ensuring that its transfer policy does not result in the resegregation of the Montgomery County schools, nullifying the efforts made over the last 45 years to ensure that children are not confined to one-race schools. Since 1954, the Supreme Court repeatedly has stressed the importance of promoting racial and ethnic integration, particularly in the context of education. In Brown v. Board of Education, 347 U.S. 483, 493 (1954), the Supreme Court recognized 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 adversely affects the education of minority children. 347 U.S. at 493-495 & n.11; see also, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 472 (1982) ("it should be equally clear that white as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom,'" quoting Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 486 (1979) (Powell, J., dissenting)); Milliken v. Bradley, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

Because of the benefit of integrated public education, 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 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).

The Court's approval of governmental action to promote integration has not been limited to situations in which race-conscious measures are justified as a remedy for de jure segregation. In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the Court struck down an 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 University from any use of race in its admissions process. 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 controlling 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."

This Court similarly has held that a school system has authority to promote integration independent of its obligation to remedy prior discrimination. Martin v. Charlotte-Mecklenburg Board of Education, 626 F.2d 1165 (4th Cir. 1980), cert. denied, 450 U.S. 1041 (1981), upheld a plan requiring the reassignment of students on the basis of race to avoid schools becoming predominantly minority. The plan initially had been implemented in accordance with a court-approved desegregation plan, but was subsequently independently adopted by the Board of Education. This Court did not base its holding on a court's authority to order such a plan as a remedy for de jure discrimination. The Court instead held that a school has independent authority -- unrelated to any finding of prior de jure segregation -- to take race-conscious steps to integrate a school. "The School Board is vested with broad discretionary powers over educational policy and is well within its powers when it decides that as a matter of policy schools should not have a majority of minority students." 626 F.2d at 1167 (citing Swann, 402 U.S. at 16). In Riddick v. School Board of Norfolk, 784 F.2d 521 (4th Cir.), cert. denied, 479 U.S. 938 (1986), this Court also approved the school board's consideration of race as "an effort on the board's part to gerrymander the school assignment lines to result in the maximum amount of integration possible." 784 F.2d at 540. The court "agree[d] * * * that Norfolk's neighborhood school assignment plan is a reasonable attempt by the school board to keep as many white students in public education as possible and so achieve a

stably integrated school system." 784 F.2d at 543. See also Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 738 F.2d 574, 579 (2d Cir. 1984) (school board's goal of promoting integrated schools survived strict scrutiny as a matter of law).

c. Congress has made eliminating racial isolation in the public schools a national priority

Congress has endorsed the use of race in elementary and secondary school assignments to minimize racial isolation in student enrollments and has found elimination of racial isolation to have 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 (1972)), which provided the only substantial federal support for desegregation-related needs. Congress's clear 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 receiving financial assistance. See 86 Stat. 354; S. Rep. No. 61, 92d Cong., 1st Sess. at 6 (1971). As the Supreme Court held in interpreting ESAA in Board of Education v. Harris, 444 U.S. 130, 141 (1979):

> A reading of the Act in its entirety indisputably demonstrates that Congress was disturbed about minority segregation and isolation as such, de facto as well as de jure, and that, with respect to the former, it intended the limited funds it made available to serve as an enticement device to encourage voluntary elimination of that kind of segregation. * * * Congress' concern was stated expressly to be about "minority group isolation and improving the quality of education for all children." The stated purpose of the legislation was the elimination of this isolation.

After ESAA was eliminated, Congress in 1984 enacted the Magnet Schools Assistance Program (MSAP), Pub. L. No. 98-377, 98 Stat. 1299 (originally codified at 20 U.S.C. 4051 (1984)), to continue to provide financial assistance to local educational agencies to eliminate racial isolation. MSAP is still in effect, as Congress reauthorized the program in 1994. See 20 U.S.C. 7201, et seq.

The legislative history of both ESAA and MSAP reflects Congress's recognition 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 also relied on President Nixon's statements in proposing the bill that became ESAA:

> 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.[2] The House Report concluded that racial isolation in the nation's public schools was widespread, and that it was "time for the rhetoric of the Federal Government calling for the integration of our schools to be backed up by sufficient funds to assist them in striving for this goal." H.R. Rep. No. 576, supra, at 4; accord S. Rep. No. 61, supra, at 6 (citing statistics on racial isolation in public elementary and secondary schools).

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 implementing court-ordered desegregation plans and school districts seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education;
> >
> > (B) ensure that all students have equitable access to quality education that will prepare such students to function well in a culturally diverse, technologically oriented, and highly competitive, global community; and
> >
> > (C) maximize the ability of local educational agencies to plan, develop, implement and continue effective and innovative magnet schools that contribute to State and local systemic reform.

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[2] Senator Moynihan quoted portions of these statements during the 1984 Senate debates on MSAP. 130 Cong. Rec. 15,034 (1984).

20 U.S.C. 7201(5). Congress also found that "where magnet programs are implemented for only a portion of a school's student body, special efforts must be made to discourage the isolation of * * * students by racial characteristics." 20 U.S.C. 7201(4)(A)(ii).

Based on these findings, Congress reenacted MSAP in 1994 and stated as its first purpose "the elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority students." 20 U.S.C. 7202. Congress has thus consistently found that discouraging racial isolation in the schools serves an important national interest.

d. The congressional and judicial determinations that avoiding isolation in public schools is an important national goal are supported by substantial evidence

These judicial and congressional judgments about the importance of integration in elementary and secondary classrooms are supported by educational research that demonstrates the substantial benefits of desegregation. 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

[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, (continued...)

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]

In opposing the preliminary injunction, MCPS cited two articles to support its argument that integrated schools serve important educational and social purposes: Jomills H. Braddock II and James M. McPartland, Social Psychological Processes That Perpetuate Racial Segregation: The Relationship Between School And Employment Desegregation, 19 J. of Black Studies, No. 3, 267,

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[3](...continued)
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).

285 (1989); and William Trent, Outcomes Of School Desegregation: Findings From Longitudinal Research, 66 J. of Negro Educ., No. 3, 255, 257 (1997) (J.A. 73). Both articles cite data supporting the hypothesis that desegregated schooling leads individuals to choose integrated contexts in other aspects of their lives, including the work place. Other data show that school desegregation creates more positive reactions to future interracial situations. Braddock & McPartland at 285.

The Eisenbergs did not dispute the validity of any of this research, but argued that such benefits are irrelevant for equal protection purposes as a matter of law (App. Br. 20). Although the validity of such studies and the weight to be accorded to them may be challenged at the trial on the merits, whether the research supports the compelling interest is a factual determination. There is thus sufficient evidence at this stage to support the district court's determination that a compelling interest supports MCPS's transfer policy.[7]

2. The evidence at this stage supports the district court's judgment that MCPS's use of race is narrowly tailored

Determining whether MCPS's policy is narrowly tailored also is a fact-intensive inquiry, and before any decision on its constitutionality is made, the details of how the program

[7] Although the Court of Appeals in Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998), found that the school system had not demonstrated a compelling interest in its particular race-based admissions policy at Boston Latin School, the court did not hold that diversity could not be a compelling interest as a matter of law. Rather, the court reviewed the specific evidence presented at the trial on the permanent injunction and found it factually insufficient to demonstrate a compelling interest.

operates in practice must be developed at a trial on the merits. In general, the factors that bear on the narrow tailoring inquiry include the necessity for the relief and whether alternative remedies have been considered, the flexibility and duration of the relief, and the impact of the relief 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); Croson, 488 U.S. at 507-510.

Although the district court found there were no race-neutral alternatives to the policy that would achieve MCPS's interests -- and plaintiffs did not suggest any -- whether MCPS considered other ways to prevent the loss of white enrollment at Glen Haven is an issue to be explored at trial. It should be noted, however, that the magnet program was conceived as a race-neutral way to integrate the public schools (J.A. 108), and that the limits on the transfers into the program are a way to ensure that the program decreases segregation (see J.A. 109, 162-163). In addition, the transfer requests of 19 white students out of Glen Haven (J.A. 165), a school that has been losing significant numbers of white students generally (J.A. 164), supports a finding that race-neutral policies alone will not prevent racial isolation.

With regard to duration and flexibility, the yearly review in which MCPS engages (J.A. 162) appears to be for the purpose of readjusting the numbers to reflect the racial profile of the

total enrollment in the county. The evidence in the record, however, also shows that the policy itself, which allows for waivers in cases of personal hardship, is reviewed "on an ongoing basis, and has been revised several times since it was first developed" (J.A. 164). Further development of the evidence at trial may reveal the ways in which MCPS has reconsidered the transfer policy, how MCPS determined the transfer policy is necessary, and whether MCPS considered other methods that might be equally effective in achieving integration.

Whether MCPS's policy is narrowly tailored with regard to its impact on third parties requires consideration of not just its transfer policy, but of its general policy governing how it assigns its 125,000 students to various schools within the district. It is undisputed that, in Montgomery County, normally students are assigned to the schools in their neighborhood, and race is not a consideration (J.A. 161). Thus, the only students affected by the transfer policy are the small percentage of students who want to transfer into or out of their neighborhood schools. Since MCPS received 3,500 transfer requests in the 1998-1999 school year (J.A. 225), at most 2.8% of the system's students are affected by the transfer policy, and only those few whose transfers involve schools with diversity codes are affected by the racial aspect of that policy. And of those individuals affected by the transfer policy, the record does not establish to what degree those students are in fact burdened, since the burden is that imposed by not being able to transfer to their program of

choice, as opposed to being denied admission to the system altogether. See Parent Ass'n of Andrew Jackson High School, 738 F.2d at 577 (school transfer plan whose aim was to promote a more lasting integration survived strict scrutiny as a matter of law even though some students were excluded from schools of their choice) (citing Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 598 F.2d 705, 719-720 (2d Cir. 1979)). The district court here found that Jacob was not being denied a quality education, and consequently, any burden imposed is slight and outweighed by MCPS's interest in integrated schools.

C. Denial Of The Preliminary Injunction Is In The Public Interest

This factor depends on the merits. Since the district court correctly found that MCPS demonstrated a compelling interest in integrated schools, denial of the preliminary injunction is in the public interest.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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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 6485 words. If the court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word printout.

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Rebecca K. Troth

CERTIFICATE OF SERVICE

I hereby certify on January 19, 1999, that I caused to be served two copies of the foregoing Brief for the United States as Amicus Curiae Supporting Appellees Urging Affirmance by first-class mail, postage prepaid, on:

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