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BREWER V. WEST IRONDEQUOIT CENTRAL SCHOOL DISTRICT 212 F.3D 738 (21 CIR. 2000)

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FACTS

Jessica Haak is a fourth grader[1] who wanted to attend a better school. She applied to the Urban-Suburban Interdistrict Transfer Program ("the Program") so she could transfer from the urban Rochester (New York) City School District, where she resided, to the neighboring suburban Irondequoit District.[2] The Program denied Jessica's transfer because she is white and therefore did not meet the Program's definition of a minority student.

Six New York school districts, including Rochester City and Irondequoit, voluntarily participate in this Program to achieve the goal of reduced racial isolation within their boundaries.[3] The Program allows only minority students to transfer from schools in the urban districts to suburban districts, which are typically wealthy and white. Only non-minority students may transfer from suburban schools to the urban districts, including the Rochester District.[4] The Program began in 1965 "to reduce, prevent and eliminate minority group isolation in the schools of Rochester and Monroe County through voluntary desegregation."[5] Although Program documents identify its goals as, "Reducing Minority Group Isolation; Encouraging Intercultural Learning; Promoting Academic Excellence; [and] Fostering Responsible Civic Leadership," the District Court found that "the main purpose of the Program is to reduce what is described as 'racial isolation' within the population of the participating school districts."[6]

According to New York Education Law Regulations ("the Regulations") "racial isolation" exists when "a school or school district enrollment consists of a predominant number or percentage of students of a particular racial/ethnic group."[7] The Regulations define a "minority pupil" as a student "who is of Black or Hispanic origin or is a member of another racial minority group that historically has been the subject of discrimination."[8] Thus, to participate in the exchange program, districts must show 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."[9] Despite the stated goal of reducing racial isolation, no reference to the student's race

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1. Brewer v. West Irondequoit Central Sch. Dist., 212 F.3d 738, 741 (2nd Cir. 2000).
2. *Brewer*, 212 F.3d at 741.
3. 212 F.3d at 741.
4. *Id.*
5. *Id.* at 742.
6. Brewer v. West Irondequoit Central Sch. Dist., 32 F. Supp. 2d 619, 621 (W.D.N.Y. 1999).
7. N.Y. COMP. CODES R. & REGS. tit. 8, § 175.24(a)(2) (1999).
8. N.Y. COMP. CODES R. & REGS. tit. 8, § 175.24(a)(1) (1999).
9. N.Y. COMP. CODES R. & REGS. tit. 8, § 175.24(c)(1) (1999).

existed in the Program's materials, application, acknowledgment letter, or brochures.[10]

In 1998, the Irondequoit School District accepted Jessica Haak into the Program and sent her a letter of acceptance, even after the school's assistant principal realized that Jessica was white.[11] Nevertheless, before Jessica completed her transfer, another school administrator questioned her minority status after she had met Jessica and verified her race as "Caucasian/White" in the Rochester District Records.[12] The school then revoked Jessica's acceptance to the Program because she was not a minority.[13]

Jessica Haak moved for a preliminary injunction to permit her transfer.[14] Haak claimed that the withdrawal of her transfer violated her rights under the Fourteenth Amendment,[15] and constituted illegal discrimination under federal[16] and state[17] law.[18] The district court granted the injunction and ordered Haak's transfer, stating that to deny her transfer because she is not a minority student would violate her equal protection rights.[19] The district court used strict scrutiny analysis because the Program treated similarly situated individuals differently on the basis of racial classification.[20] To withstand this level of judicial scrutiny, the school district must identify a compelling state interest and prove that the transfer policy was narrowly tailored to achieve that interest.[21] The court doubted that the Program could demonstrate a compelling state interest and further reasoned that, even with a compelling state interest, the racial classification used in the Program was not sufficiently tailored to pass constitutional muster.[22]

HOLDING

The United States Court of Appeals for the Second Circuit vacated the preliminary injunction granting Haak's transfer and remanded the case for a

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10. *Brewer*, 212 F.3d at 742.
11. *Id.* at 743.
12. *Id.*
13. *Id.*
14. Brewer v. West Ironedequoit Central Sch. Dist., 32 F. Supp. 2d 619, 634 (W.D.N.Y. 1999).
15. The Fourteenth Amendment states, in part, "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.
16. 42 U.S.C. § 2000d; 42 U.S.C. § 1983.
17. N.Y. EDUC. LAW § 3201 (McKinney 1995).
18. *Brewer*, 212 F.3d at 741.
19. *Brewer*, 32 F. Supp. 2d at 632-633.
20. *Brewer*, 212 F.3d at 745.
21. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).
22. *Brewer*, 32 F. Supp. 2d at 633.

trial on the merits.[23] The court stated that Haak had not met the requisite heightened standard necessary for a mandatory preliminary injunction.[24]

ANALYSIS

The Court of Appeals reviewed the preliminary injunction de novo, and examined the written record for an abuse of discretion.[25] The court noted that in most circumstances, a party seeking a preliminary injunction must show both irreparable harm and a likelihood of success on the merits to succeed.[26] The Court of Appeals, however, applied a significantly higher standard that requires a "clear" or "substantial" showing of a likelihood of success.[27] This higher standard applies whenever the injunction sought would be "mandatory" and would "provide the movant with substantially all the relief sought, and that relief cannot be undone even if the defendant prevails at a trial on the merits."[28] The injunction at issue was mandatory for two reasons. First, it would allow Haak to transfer to the school of her choice, which she could not do except through the Program.[29] Second, while Haak contended she was only attacking the Program as it applied to her, "it is clear that the survival of the Program is at stake."[30] The court stated that if school districts allowed non-minority students such as Haak to transfer, the Program would no longer work toward reducing racial isolation and would lose its funding.[31] Thus, because the injunction would allow Haak to transfer, thereby altering the status quo and providing her with all of the relief sought, it was properly characterized as mandatory.[32]

The Court of Appeals agreed that the plaintiff demonstrated irreparable injury by alleging that the school district deprived her of a constitutional right.[33] In turning to the likelihood of Haak's potential success on the merits, the court applied strict scrutiny analysis, as is required when reviewing government classifications based on race.[34] To survive this most stringent

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23. *Brewer*, 212 F.3d at 743.
24. 212 F.3d at 743.
25. *Id.*
26. *Id.* (quoting Forest City Daly Hous., Inc. v. Town of North Hempstead, 175 F.3d 144, 149 (2d Cir. 1999)).
27. *Brewer*, 212 F.3d at 744.
28. *Id.* (quoting Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996)).
29. *Brewer*, 212 F.3d at 744.
30. *Id.* at 744.
31. *Id.*
32. *Id.*
33. *Id.* at 745.
34. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 225-226 (1995).

review, the challenged classification must serve a compelling governmental interest and be narrowly tailored to further that interest.[35]

The Court of Appeals agreed with the district court that the central purpose of the program was to reduce racial isolation.[36] The district court, however, made no findings as to whether racial isolation even existed in participating school districts.[37] On appeal, the defendants contended that de facto segregation was present, but claimed that they had not developed the argument in the lower court because the plaintiff had not contested the issue.[38] The defendants argued that plaintiff, in effect, conceded that reducing racial isolation was a compelling state interest,[39] and instead chose to argue that the Program was overbroad.

The Court of Appeals could not conclude that the plaintiff met her burden to demonstrate a clear likelihood of success on the merits because a substantial question existed as to whether de facto segregation in fact existed in the participating school districts.[40] The court believed that both parties should be given an opportunity to address this factual issue during a trial on the merits.[41] The Court of Appeals further determined that serious questions existed as to whether the goal of reducing racial isolation was a compelling government interest.[42]

The Program was enacted in 1965 to counter racial segregation in the county schools, which had resulted from the public school policy that each student has only the right to attend the school in the district in which he or she lives.[43] This policy, compounded with segregated living patterns, created a pattern of de facto segregation.[44] The court noted that the Program may be justified if, in fact, de facto segregation exists and the alleviation of that racial isolation is a compelling state interest.[45]

In Parent Association of *Andrew Jackson High School v. Ambach*[46] (*Andrew Jackson II*), the Court of Appeals explicitly stated that reducing de facto segregation served a compelling government interest.[47] Andrew Jackson

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35. *Brewer*, 212 F.3d at 745.
36. 212 F3d at 745.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 746.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 738 F.2d 574 (2d Cir. 1984) (Andrew Jackson II).
47. *Andrew Jackson II*, 738 F.2d at 577, 579 (2d Cir. 1984). *See also* Parent Ass'n. of Andrew Jackson High Sch. v. Ambach, 598 F.2d 705, 712-713 (2d. Cir. 1979) (Andrew Jackson I) (affirming a

High School (New York) developed a plan that permitted both white and minority students to transfer out with certain limitations.[48] Minority students could transfer to schools in which white students exceeded fifty percent of the student population, and white students could transfer to schools with less than fifty percent white students.[49]

The Court of Appeals for the Second Circuit previously held in *Parent Association of Andrew Jackson High School v. Ambach*[50] (*Andrew Jackson I*) that the school board's "goal of ensuring the continuation of relatively integrated schools for the maximum number of students . . . survived strict scrutiny as matter of law."[51] Despite the strong similarities between the *Andrew Jackson* decisions and the Haak case, the parties neglected to discuss this precedent in the district court.[52] The Court of Appeals determined that because the district court did not distinguish the *Andrew Jackson* precedent, it was bound in this case by the previous decision that reducing racial isolation and de facto segregation could be a compelling state interest.[53] Consequently, the Court of Appeals concluded that plaintiff had not clearly demonstrated a likelihood of success on the merits, because a compelling state interest may exist in a program with the goal of reducing racial isolation and de facto segregation.[54] The court based its conclusions on: "(1) the binding authority of the *Andrew Jackson* cases; (2) the absence of a Supreme Court decision dealing with permissible race-based justifications in the educational context; and (3) the lack of a clear majority from the Supreme Court regarding permissible justifications for race-based classifications generally."[55]

The second requirement of the strict scrutiny test is that the action be narrowly tailored to achieve the stated government interest.[56] While the district court found that the Program was not narrowly tailored to the alleged interests at stake, the Court of Appeals believed that the record was insufficient to make such a conclusion.[57] The Court of Appeals determined that the proper question for the district court was "whether the Program is narrowly tailored to achieve its primary goal of reducing racial isolation resulting from de facto

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district court's finding that what panel labeled de facto segregation of the school "resulted from population changes" in the surrounding neighborhoods).

48. *Andrew Jackson II*, 738 F.2d at 577.

49. *Id.*

50. Parent Ass'n. of Andrew Jackson High Sch. v. Ambach, 598 F.2d 705 (2d. Cir. 1979) (Andrew Jackson I).

51. *Andrew Jackson I*, 598 F.2d at 717-720.

52. *Brewer*, 212 F.3d at 749.

53. 212 F3d at 749.

54. *Id.* at 753.

55. *Id.* at 752.

56. *Id.* at 745.

57. *Id.* at 752.

segregation."[58] If reducing racial isolation is a constitutionally permissible goal, as was found in the Andrew Jackson cases, then the most effective means of achieving that goal would be to make decisions based on race.[59] Given the plaintiff's substantial burden in seeking the mandatory injunction, the Court of Appeals decided that the district court must again examine the Program, first to determine whether the goal of reducing racial isolation is compelling and then to determine whether the Program is narrowly tailored to achieve that objective.[60] The Court therefore vacated the preliminary injunction of the district court and remanded the case to the district court.[61]

Judge Parker concurred with the majority opinion and agreed that the injunction should be vacated.[62] In his concurrence, however, he expressed serious reservations about the continued existence of the Program.[63] The Program has operated for 35 years during which the minority pupil population in the Rochester City School District has risen from 25.6 percent to 80 percent.[64] The number of minority students transferring according to the Program in the 1998-1999 school year was approximately 580, while only 29 white students had transferred from the suburban schools to the Rochester District.[65] The total enrollment of the Rochester District is close to 36,000.[66] Judge Parker noted that the Program had, at best, a negligible impact in reducing the racial isolation of the school populations.[67] Thus, even if at its inception the Program served a compelling government interest, it is difficult to see how the interest remains justified in light of the limited effect of the Program.[68] Judge Parker concluded that the Program may no longer be a compelling government interest and the constitutionality of its existence should be questioned.[69] Judge Miner dissented, finding that "[w]hen it is apparent as it is here that the narrow tailoring requirement of the strict scrutiny test is unfulfilled, a preliminary injunction must issue."[70]

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58. *Id.*
59. *Id.*
60. *Id.* at 753.
61. *Id.*
62. *Brewer*, 212 F.3d 738, 755 (Parker, J., concurring).
63. *Id.* at 755 (Parker, J., concurring).
64. *Id.* (Parker, J., concurring).
65. *Id.* (Parker, J., concurring).
66. *Id.* (Parker, J., concurring).
67. *Id.* (Parker, J., concurring).
68. *Id.* (Parker, J., concurring).
69. *Id.* (Parker, J., concurring).
70. *Id.* at 758 (Miner, J., dissenting).

CONCLUSION

The United States Court of Appeals for the Second Circuit was correct in rejecting the plaintiffs' request for a mandatory injunction. In one sense, Jessica's hopes of transferring were doomed from the beginning. The injunction ordering Jessica Haak's transfer acted contrary to the stated goals of the Program. If the Court of Appeals upheld the injunction, the Program would have lost its financial support and ceased to operate, leaving Jessica without funding with which to transfer. The only way that Jessica's transfer could have been allowed was if the Court of Appeals found the Program unconstitutional. With such an outcome, however, there would remain no foundation on which to base her transfer. It is for this reason that the plaintiff could not show a clear or substantial likelihood of success on the merits and, as such, Jessica's injunction could not have been granted.

The Court of Appeals concluded that the plaintiff had not demonstrated a clear likelihood of success on the merits. Racial classification may be justified if a compelling state interest is found in reducing racial isolation and de facto segregation. By remanding the case, the Court of Appeals allows for the continued use of programs to combat the racial isolation discussed in the case. The holding is important because it not only recognizes that reducing de facto segregation and racial isolation may be a compelling government interest, but further leaves open the possibility for use of race qualifications in such instances of compelling government interest.

Reducing racial isolation can be a compelling government interest sufficient to surpass equal protection claims. While reducing de facto segregation and increasing the diversity of the classroom is important, it seems the true motivation for inner city students to transfer is an opportunity for a better education. Starting with the premise that it is unconstitutional to treat equals as unequals, it seems clear that the Program is in violation. A poor black student and a poor white student are equally disadvantaged, economically and educationally, by living in the inner-city. To allow one to transfer out of the school district and not the other treats two similarly situated individuals differently. This is a clear violation of equal protection. The Program should be structured so that an economically disadvantaged person is allowed to transfer to a better schooling environment regardless of race. This type of program however would only be useful if the goal was to provide better educational opportunities for inner-city students. The goal here is to reduce racial isolation, which necessarily requires a consideration of race.

On closer inspection, however, it seems that a poor white and a poor black are not similarly situated. A poor black suffers the same level of economic

poverty but suffers an additional handicap solely by virtue of race. The historical discrimination and lingering social stigma associated may be crippling, especially when starting from an economically disadvantaged position. This is not to say that inner-city whites do not also need educational assistance and better schooling, only that inner-city blacks suffer more than just economic depression.

Finally, it does not seem entirely appropriate for race to be the sole deciding characteristic in a program; however when race coincides with a greater societal problem such as racial isolation, such qualification may be necessary.

Summary and Analysis Prepared by:
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