ATTACHMENT 3
Brief for the United States as Amicus Curiae
Eisenberg, et al., v. Montgomery County Public Schools, et al.
In the United States Court of Appeals
for the Fourth Circuit

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).