

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PARENTS INVOLVED IN
COMMUNITY SCHOOLS, a Washington
nonprofit corporation,

Appellant,

v.

SEATTLE SCHOOL DISTRICT NO. 1, a
political subdivision of the State of
Washington, et al.,

Appellees.

No. 01-35450

**EMERGENCY MOTION UNDER
CIRCUIT RULE 27-3**

APPELLANT'S MOTION FOR
INJUNCTION OR OTHER ACTION
PREVENTING APPELLEE'S USE OF
ILLEGAL, RACE-BASED
ASSIGNMENT PLAN PENDING
APPELLEE'S REQUEST FOR *EN
BANC* REVIEW

APPELLANT'S MOTION FOR INJUNCTION - 1

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PARENTS INVOLVED IN COMMUNITY SCHOOLS, a Washington nonprofit corporation,)	No. 01-35450
)	
Appellant,)	EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
)	
v.)	APPELLANT'S MOTION FOR
)	INJUNCTION OR OTHER ACTION
SEATTLE SCHOOL DISTRICT NO. 1, a)	PREVENTING APPELLEE'S USE OF
political subdivision of the State of)	ILLEGAL, RACE-BASED
Washington, <u>et al.</u> ,)	ASSIGNMENT PLAN PENDING
)	APPELLEE'S REQUEST FOR <i>EN</i>
Appellees.)	<i>BANC</i> REVIEW
)	

I. RELIEF REQUESTED

On April 16, 2002, a unanimous panel of this court held that the race-based student assignment plan implemented by appellee Seattle School District violated Washington's Civil Right Act. *Parents Involved in Community Schools v. Seattle School District, No. 1*, 2002 WL 553970 (9th Cir. 2002). Appellant Parents Involved in Community Schools ("PICS") seeks an injunction, immediate issuance of the court's mandate under FRAP 41 and 9th Cir. R. 41-1, or any other action deemed appropriate by the court to prevent the School District from making student assignments using its race-based assignment plan pending action on the School District's petition for rehearing *en*

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banc. Despite this court's April 16 decision, the School District indicated in a letter to PICS' counsel that, in the absence of an order from the court prohibiting it from doing so, in the next few weeks it will assign students to high schools for the 2002-03 school year using the race-based plan. This threatened action would circumvent the court's ruling and cause irreparable harm to PICS members, and immediate court action is necessary to prevent these consequences.

II. BACKGROUND

In a suit filed in the United States District Court for the Western District of Washington on July 18, 2000, PICS challenged Seattle School District's ("the School District's") procedure for assigning students to its high schools. See Complaint for Declaratory, Injunctive, and Other Relief, ER 1 - 6. PICS alleged that the School District's race-based student assignment procedure violates the Equal Protection Clause of the Fourteenth Amendment, Title VI of the federal Civil Rights Act of 1964, and the Washington Civil Rights Act, RCW 49.60.400, and sought declaratory and injunctive relief. On April 6, 2001, the district court denied PICS' motions for summary judgment on those state and federal claims and granted the School District's motions for summary judgment. ER 671-707.

On May 1, 2001, PICS filed its notice of appeal. PICS – with the support of the School District – requested that this court expedite the appeal so that it could be resolved before student assignments were made for the 2002-03 school year. On May 21, 2001, the court granted the request for expedited review under 9th Cir. R. 27-12.

On April 16, 2002, this court held, in a unanimous decision, that the School District's race-based assignment plan was illegal under the Washington Civil Rights Act and that the Act was constitutional. Because of this disposition of the state law claim, the court did not address PICS' federal law claims. *Parents Involved in Community Schools*, 2002 WL 553970.

On April 18, 2002, by letter to PICS's counsel, the School District indicated that it will seek a rehearing *en banc*. In that same letter, the School District indicated that, because the filing of the petition for rehearing normally stays the mandate of this court pending action on the petition, the School District intends to go forward with assignments for the 2002-03 school year using the race-based plan, unless this court issues an order enjoining that course of action. Declaration of Harry Korrell ("Korrell Decl."), ¶ 3 and Ex. A thereto.

The letter further indicates that, in the normal course of events, notices informing students of their assignments are sent at the end of April. *Id.* If the School District is not enjoined from making assignments under the illegal, race-based plan, PICS members and other Seattle Public School students will likely suffer immediate and irreparable harm: the deprivation of their civil rights. They will be forced to compete for school assignments under - and likely will be assigned to schools by - an illegal, race-based student assignment plan. *See Parents Involved in Community Schools*, 2002 WL 553970, *3; ER 277-78.

While it is not yet possible to know exactly how many students will get race-based assignments if the School District proceeds as planned, several things are known: First, most high school students in the district seek to attend one of five oversubscribed schools, and thus their assignments will be determined by the one of the School District's tiebreakers. Second, if choice and assignment patterns from previous years hold true, race will be the deciding factor in as many as 300 initial high school assignments for 2002-03. (*Some* of those denied their preferred schools on account of race *may* ultimately receive a preferred assignment *at some point* before the next school year starts; others will not enroll in a public high school at all. Thus the number of students who ultimately enroll in a school to which they were assigned because of race may be significantly less than 300). ER 18, 307-08, 475.

The only way to prevent the deprivation of the civil rights of PICS members and other Seattle public school children in the 2002-03 assignment cycle is for the court either to enjoin the use of the current assignment plan pending *en banc* review or to order that the mandate issue immediately with instructions to the district court to enter the injunction.

III. AUTHORITIES AND ARGUMENT

This suit was filed in July 2000. Since that time, the School District has implemented race-based assignments for two school years, denying the children of PICS members admission to their preferred schools because of their skin color. By filing a petition for rehearing *en banc* (staying the mandate of this court) and refusing to drop race from its assignment plan for the 2002-03 school year, the School District attempts to secure for itself yet another year of noncompliance with the “remarkably clear” language of RCW 49.60.400, *Parents Involved in Community Schools*, 2002 WL 553970, *5, and (if PICS is also right on its federal law claims) another year of denying Seattle children the equal protection of the law, in contravention of the Fourteenth Amendment. If the District is allowed to proceed, the children of PICS members, and potentially hundreds of other children will suffer irreparable injury. To prevent another round of illegal, race-based assignments, the court should enjoin the use of race by the School District pending either the denial of the petition for rehearing or a decision *en banc*. (Alternatively, the court could issue its mandate immediately, and if the court decides to rehear the case *en banc*, recall the mandate at that point.)

A. The Court has the Authority to Grant the Requested Relief.

The court has inherent authority to issue any directions or orders necessary to ensure compliance with its decisions or that justice requires. *See Wessman v. Gittens*, 160 F.3d 790, 809 (1st Cir. 1998) (because of unusual circumstances and delay that remand would entail, court directed district court to enter judgment commanding plaintiff's admission to school). Courts have long recognized that they have inherent authority "to control the disposition of the causes on [their] docket with economy of time and effort for [themselves], for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936) (discussing court's power to stay proceedings in one suit while another proceeds); *see, e.g., Nevius v. Sumner*, 105 F.3d 453, 460 (9th Cir. 1996) (court of appeals has inherent power to recall its mandate), *cert. denied*, 527 U.S. 1006, 119 S.Ct. 2344, 144 L.Ed.2d 241 (1999); *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989) (court of appeals has inherent power to stay its mandate); *Pearce v. Office of Workers' Compensation Program*, 603 F.2d 763, 771 (9th Cir. 1979) (court of appeals has inherent power to transfer cases); *Wilmer v. Board of County Comm.*, 69 F.3d 406, 410 (10th Cir. 1995) (court of appeals has inherent power to modify judgment directly). In addition, the court has the discretion to issue its mandate immediately in exceptional circumstances and in the interest of justice. FRAP 41; 9th Cir. R. 41-1, Circuit Advisory Committee Note. (It may recall the mandate later, if it ultimately decides to rehear the case. *See Hawaii Housing Authority v. Midkiff*, 463 U.S. 1323, 1324, 104 S.Ct. 7, 8-9, 77 L.Ed.2d 1426 (1983) (Rehnquist, J., in chambers)).

B. Traditional Equitable Considerations Require that the School District be Enjoined from Using its Illegal, Race-Based Plan.

PICS' request for an injunction pending possible *en banc* review is governed by the same equitable considerations governing review of district court injunctions, stays of mandates, and like relief. *Cf. Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (balancing likelihood of success on petition for writ of *certiorari* and risk of irreparable harm and declining to stay mandate). An injunction may issue if the movant shows either (1) likelihood of success on the merits and possibility of irreparable injury *or* (2) that serious questions are raised and the balance of hardships tips sharply in the movant's favor. *See Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 710 (9th Cir. 1997) ("*Coalition*") (balancing likelihood of success and risk of irreparable harm in review of district court's injunction); *United States v. BNS, Inc.*, 858 F.2d 456, 464 (9th Cir. 1988) (modifying district court's injunction under the All Writs Act, 28 U.S.C. § 1651). Here, all these considerations support issuing an injunction.

- 1. PICS is almost certain to prevail on the merits of any rehearing, and it is unlikely the court will agree to rehear the case in any event.**

In this case, PICS is very likely to prevail on any rehearing of the merits of its appeal. The unanimous decision of this court's panel held that the School District's race-based assignment plan violates the "remarkably clear" plain meaning of Washington's Civil Rights Act, which is constitutional as applied here. *Parents Involved in Community Schools*, 2002 WL 553970, *5. This decision was consistent with this court's 1997 unanimous decision in *Coalition*, 122 F.3d 692, which addressed substantially similar issues.

While it is likely that PICS will ultimately prevail on the merits if this case is reheard *en banc*, it is very *unlikely* the court will agree to rehear this case. Rehearings *en banc* are rarely granted, and such rehearings are limited to cases in which the panel's decision (a) conflicts with another decision of this court or with a decision of the U.S. Supreme Court or (b) raises an issue of exceptional importance, such as a conflict with authoritative decisions of other circuits. *See* FRAP 35; 9th Cir. R. 35-1. Neither

condition is satisfied in this case involving the construction and application of a state statute to a local school district's student assignment plan. Moreover, when nearly identical legal issues were decided in *Coalition*, the court declined to rehear that case. 122 F.3d at 711.

2. If the Injunction is not Granted, PICS Members Will Suffer Irreparable Harm.

The School District has announced that, if it is not enjoined from using its race-based assignment plan while its petition for rehearing is pending, it will make another round of high school assignments for the next school year using the racial tiebreaker. Korrell Decl. ¶ 3 and Ex. A thereto. While it is very likely that children of some PICS members will suffer the consequences of the racial tie-breaker if the School District is allowed to proceed, *see Parents Involved in Community Schools*, 2002 WL 553970, *3; ER 277-78, it is certain that PICS members Hack and Miller and others, as well as thousands of other Seattle families, will have to compete for assignments under an illegal, race-based assignment system. As a matter of law, these violations of civil rights constitute irreparable harm warranting an injunction pending further proceedings. *See, e.g., Eisenberg v. Montgomery Cty. Public Schools*, 197 F.3d 123 (9th Cir. 1999) (reversing denial of preliminary injunction and directing district court to enter injunction without further hearings in school assignment case), *cert. denied*, 529 U.S. 1019, 120 S.Ct. 1420, 146 L.Ed.2d 312 (2000); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 707 (9th Cir. 1997) (being forced to compete for contracts on an unequal basis because of race is a violation of federal civil rights). After balancing PICS' likelihood of success with the near certainty of irreparable harm, the court should enter the injunction.

As explained in PICS' earlier motion requesting expedited review, in other procedural contexts courts have repeatedly recognized that student assignment cases, warrant exceptional treatment because they involve the risk of loss of fundamental civil rights. For example, in *U.S. v. Hinds County School Board*, 417 F.2d 852, 857 (5th Cir.

1969), the Fifth Circuit observed that, absent expedited treatment, “fundamental constitutional rights of many persons would be jeopardized, if not lost”¹ The same considerations warrant the issuance of an injunction here.

3. Serious Questions are Raised and the Balance of Hardships Leans Sharply in PICS’ Favor.

The second balancing test also counsels in favor of the injunction. As noted above, there are serious questions about whether the court will rehear this case *en banc* and about the School District’s chances of prevailing. In light of the unanimous decision of the panel in this case and the court’s refusal to rehear *Coalition*, there are certainly serious questions about the School District’s chances of changing the outcome of this appeal.

The balance of hardships tips sharply in PICS’ favor. If the injunction is issued now, before school assignments are announced for next fall, the only significant burden the School District will have to bear is to run its student assignment computer program without the racial tie-breaker and generate revised notices to parents and students. Rerunning the assignment program will take a “relatively short time,” and the School District’s letter indicates it is already in the process of accomplishing this, just in case the court issues the requested injunction. The production of notices to parents will take only a few weeks. Korrell Decl., Ex. A. Students and parents will receive their notices well before the end of the current school year.

The only other burden on the School District will be the loss, for 2002-03, of the “racial balancing” effects of its illegal program. As demonstrated in the briefing already submitted on the merits, in previous years a relatively small percentage of assignments

¹ In addition, see, e.g., *Kelly v. Guinn*, 456 F.2d 100, 104 (9th Cir. 1972) (expedited appeal granted in school desegregation case); *Hoots v. Pennsylvania*, 651 F.2d 177 (3d Cir. 1981) (permitting expedited appeal of school district merger); *U.S. v. Missouri*, 515 F.2d 1365 (8th Cir. 1975) (expedited appeal of school desegregation order); *U.S. v. Texas Educ. Agency*, 467 F.2d 848, 875 (5th Cir. 1972) (ordering expedition of any appeals of school desegregation order so as to avoid disruption of coming school year); *U.S. v. Bd. of Trustees of Crosby Indep. Sch. Dist.*, 424 F.2d 625 (5th Cir. 1970) (expedited appeal of deferral of desegregation order permitted).

was determined by the racial tiebreaker, and the change in the racial balance in the schools where it operated was insignificant. ER 412-21, 662; Appellant's Brief at 20-24; Appellant's Reply at 16-17. In the unlikely event the School District ultimately prevails in this litigation, it can easily return to its use of race by turning that tie-breaker back on. Thus, the potential harm to the School District if an injunction is issued is insignificant.

In contrast, the harm to PICS members if the School District proceeds would be substantial and irreparable. Simply requiring people to compete in a system that makes decisions based on race constitutes a violation of civil rights. *See Monterey Mechanical*, 125 F. 3d at 707. Moreover, this court has already found that at least two of PICS' representative families likely will be affected by the race-based policy in 2002-03 if the School District is allowed to continue making race-based assignments. *Parents Involved in Community Schools*, 2002 WL 553970, *3. Once the 2002-03 assignments are made, students will make choices about courses and activities and some may decide to leave the public school system altogether. It will be extremely difficult to unring the bell. The imminent risk of such a deprivation of civil rights tips the balance of hardships in PICS' favor and warrants an injunction pending any *en banc* review.

4. Considerations of Judicial Economy Support the Issuance of the Injunction.

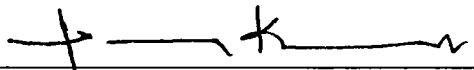
If the School District is allowed to proceed with race-based assignments despite the holding of the panel, it is likely that aggrieved parents, aware of the panel's much-publicized decision, will bring suits for damages against the School District in King County Superior Court and in the U.S. District Court for the Western District of Washington, alleging the same federal and state law claims pursued by PICS. Therefore, considerations of judicial economy also counsel in favor of enjoining the use of the racial tie-breaker pending the disposition of the School District's petition for *en banc* review.

IV. CONCLUSION

For the foregoing reasons, PICS respectfully requests that the court issue an injunction prohibiting the School District's continued use of race in high school assignments pending any rehearing of this case *en banc*. In the alternative, PICS requests that the court issue its mandate immediately with directions to the district court to so enjoin the School District or provide whatever other relief it deems appropriate to prevent circumvention of its ruling pending any rehearing.

DATED this 22^d day of April, 2002.

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