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NO. 72712-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES COURT OF
APPEALS
FOR THE NINTH CIRCUIT

IN

PARENTS INVOLVED IN COMMUNITY SCHOOLS, a Washington
nonprofit corporation,

Plaintiff - Counter-Defendant-
Appellant,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,

Defendants - Counter-Claimants-
Appellees.

ANSWER OF PARENTS INVOLVED IN COMMUNITY SCHOOLS
TO AMICUS CURIAE BRIEF OF URBAN LEAGUE OF
METROPOLITAN SEATTLE

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I. INTRODUCTION.

The Urban League of Metropolitan Seattle (the “League”) argues that the Washington Constitution prohibits school segregation, which can be prevented in Seattle only by using race-based admissions criteria as the School District’s racial tiebreaker; therefore, a statute prohibiting use of the racial tiebreaker is unconstitutional. A neat syllogism, if the premises were true, but they cannot be true unless “segregation” is defined to require nothing more than insufficient racial balance. While that is the most glaring flaw in the argument, the League’s brief is misleading in several ways. It misstates the position of Parents Involved in Community Schools (“Parents”), it makes unsupported and erroneous assumptions about the law, it relies on *non sequitur* and conjecture, and it contradicts the League’s own plan for improving Seattle schools.

II. MISSTATEMENT OF PARENTS’ POSITION.

According to the League, Parents assert a legal right to play in a school band and to attend a neighborhood school. League Br. at 6, 12, 15. What Parents actually claim is a right not to be excluded from a school band, or from a neighborhood school, solely on the basis of race. After all, Rosa Parks had no right to ride in the front of the bus, but she did have a right not to be forced to the back of the bus due to her race.

The League also says “PICS wants this Court to now hold that WASH CONST. art. 9, § 1 creates a mandatory duty on the State to do *nothing*” about race. League Br. at 18-19. On the contrary, Parents contend that the Washington Civil Rights Act creates a mandatory duty on the State not to discriminate or grant preferences on the basis of race in the operation of public schools, and that this duty is consistent with, if not compelled by, WASH. CONST. art 9, § 1.

III. ERRONEOUS ASSUMPTIONS.

The League’s argument rests on its prediction of “resegregation,” but the League does not define school segregation as the courts do, namely, the operation of a dual system in which children of different races are required to attend different schools. See Parents’ Opening Br. at 31; Parents’ Reply Br. at 23-24. Instead, the League equates segregation with insufficient racial balance. See League Br. at 2, 15, 16. This definition is explicit in the two reports on which the League relies for Seattle data. League Br. at 15. The Report from the Lewis Mumford Center measures segregation by an

Index of Dissimilarity . . . which captures the degree to which two groups are evenly spread among schools in a

given city. Evenness is defined with respect to the racial composition of the city as a whole.¹

Using that definition the report said that “segregation” of schools in the Seattle-Bellevue-Everett area increased by 12.3% between 1990 and 2000.² (The report does not address the Seattle School District by itself.)

The Report of the Harvard University Civil Rights Project uses “exposure indices” to calculate the “racial isolation” of black students from white students; this is the percentage of white students in a school of “typical” black students. The racial isolation of white students is also calculated; it is the percentage of black students in the school of the “average white student.”³ While citing no increase in the racial isolation of Seattle’s *black* students, the report indicated a 7% increase in the racial isolation of *white* students between 1986 and 2000.⁴ The report explained, however, “[t]his measure is not a measure of discrimination or of the feasibility of desegregation in a given district — just of the actual level of interracial exposure that existed in 2000-2001.” *Id.* at p. 4. In fact, the

¹ *Choosing Segregation: Racial Imbalance in American Public Schools, 1990–2000*, Report by Lewis Mumford Center (2002) p. 2 at <http://mumford1.dyndns.org/cen2000/SchoolPop/SPReport/p1.html>.

² *Id.* at p. 7.

³ E. Frankenberg & C. Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*, Civil Rights Project, Harvard University (2002) pp. 3-4 at http://www.law.harvard.edu/civilrights/publications/reseg_disgtricts02/Race_in_American_Public_Schools1.pdf.

⁴ *Id.* at p. 8

index does not measure even the level of “interracial exposure” because it ignores all races but white and black. For example, in 2000-01, Ballard High School had the smallest proportion of black students (10.8%), but a minority enrollment of 43.6%. Parents’ Opening Br., Appendix A.

These are the data on which the League relies to prove “resegregation” of Seattle high schools. The effect of the League’s definition of “segregation” is to assume that which is to be proved. In so doing, the League ignores both the definition of segregation used by the courts and the uncontroverted evidence in this case that (i) Seattle high schools are racially diverse and will remain so without the racial tiebreaker and (ii) Seattle neighborhoods are also diverse and, according to the 2000 census and testimony of school officials, are becoming more so. See Parents’ Opening Br. at 15-21, 31 & Appendix A; Parents’ Reply Br. at 23-24.

The League also assumes that WASH. CONST. art. 9 § 1 prohibits both *de jure* and *de facto* school segregation. No one suggests that the Seattle schools are segregated *de jure*, but if a school district of Washington State were thus segregated, the state constitution, like the federal Equal Protection Clause, would seem to require race-based pupil assignments to the extent necessary to cure the district’s violation of its constitutional duty not to discriminate on account of race. *De facto*

segregation, however, means a dual school system resulting from residential patterns and involving no constitutional violation by school authorities. See Parents' Opening Br. at 31. The Equal Protection Clause does not require school authorities to use racial classifications for any purpose except remediation of a constitutional violation.⁵ See Parents' Opening Br. at 36-38. There is likewise no reason why the Washington constitutional prohibition against racial distinctions should compel a school district to adopt such distinctions for any purpose other than to cure an existing or previous violation of the constitution. Especially is that so if — as the League would have it — segregation is defined as racial imbalance. Were the Washington constitution to require use of racial distinctions to remedy “segregation” as defined by the League, every school district in the state would have a legal duty to use race-based assignments to achieve adequate racial balance (which would have to be defined by future decisions of this court).

In any event, *de facto* segregation is not an issue in this case, because according to the evidence and the judicial definition of segregation, Seattle high schools are in fact not segregated *de facto* and

⁵ This exception is necessary to integrate segregated schools. If all white children attend one school and all black children another, it is impossible to integrate the two schools without assigning some white children to the formerly all-black school, and *vice versa*.

there is no evidence that they are at risk of becoming so. See Parents' Opening Br. at 15-16 & Appendix A; Parents' Reply Br. at 23-24.

IV. *NON SEQUITUR* AND CONJECTURE.

The League says that racial imbalance in housing means racial imbalance in schools and similarly that neighborhood schools mean segregated schools. League Br. at 16. This could be true only if students were assigned to neighborhood schools. Yet Seattle high school students may select any school in the system and, if the selected school is oversubscribed, the student is nonetheless able to attend a school classified by the School District as racially balanced. See Parents' Opening Br. at 3, 19-20. The League contends that racial imbalance leads to inferior education because white communities are wealthier. League Br. at 16. That is a *non sequitur* as applied to different schools in the same school district, since all of them are supported by the same tax base.

The League brief is also replete with conjecture. For example, it states that neighborhood schools are of no value to blacks. League Br. at 17. What about blacks living near Garfield or Franklin, two of the five over-subscribed schools and both located south of downtown?

But the most significant conjecture, which permeates the League's entire brief, is that without the School District's racial tiebreaker its high schools will become racially segregated. The evidence is quite to the

contrary, though completely ignored by the League. In fact, Seattle high schools are diverse; race-based assignments are not necessary to achieve diversity or prevent isolation; students have access to balanced schools without the tiebreaker; and the tiebreaker's effect on racial diversity is trivial. Parents' Opening Br. at 15-21 & Appendix A.

V. THE LEAGUE CONTRADICTS ITSELF.

Although the League's brief argues that the School District's racial tiebreaker is necessary to prevent segregation in Seattle high schools, a committee of the League proposed to the Seattle school board a comprehensive alternative assignment plan that did not include the racial tiebreaker. ER 376-85. Under that plan a student would have priority for admission both to a school in her neighborhood and to a school with a magnet program for which she was qualified. Unfortunately, this plan was never formally discussed in any board meeting and some board members actually refused to read it. ER 504, 514, 573, 643. Of course, there are many other ways to promote genuine diversity without using race, *e.g.*, assignment policies based on family income or other socio-economic criteria.

VI. CONCLUSION.

The League's argument starts with the plausible contention that WASH. CONST. art. 9, § 1 prohibits segregated schools. But such a


prohibition applies to Seattle high schools only if they are segregated or would become segregated without the use of race-based admissions criteria. This state of affairs does not and will not exist unless we accept the League's definition of "segregation" to include, not only the operation of a dual system but also the toleration of racial imbalance, *i.e.*, less racial balance than is deemed adequate. (The determination of what is adequate would presumably be made in the first instance by school officials and ultimately by the courts.)

The constitutional result of the League's definition of "segregation" is that WASH. CONST. art. 9, § 1 requires all public schools in the state to be racially balanced according to some predetermined formula. Which is preposterous.

RESPECTFULLY SUBMITTED this 10th day of October, 2002.

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