IN THE SUPREME COURT OF THE UNITED STATES

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, ET AL., Petitioners,	:	
v.	:	No. 78-873
PATRICIA ROBERTS HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., Respondents.	:	

Washington, D. C.,

Wednesday, October 10, 1979.

The above-entitled matter came on for further oral argument at 10:03 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOSEPH F. BRUNO, ESQ., Assistant Corporation Counsel, New York City, 100 Church Street, New York, New York 10007; on behalf of the Petitioners

WADE H. McCREE, JR., ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; on behalf of the Respondents

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, you may resume where you left off yesterday.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS (Continued)

MR. McCREE: Mr. Chief Justice, and may it please the Court:

The concessions that petitioner makes in his brief and those my brother Mr. Bruno made in his argument yesterday affirm the accuracy of the government's statement of the question in its brief. We stated the question to be whether the Emergency School Aid Act authorizes the Department of Health, Education, and Welfare to withhold the special funds provided under that statutory program from a school district whose faculty assignment policies have a disparate racial impact nost justified by educational needs, without a showing that they violate the equal protection clause.

We argued yesterday that section 1605(d)(1)(B) which is the statutory provision providing for disqualification of certain school districts, establishes a result test for the disproportionate demotion or dismissal of faculty or other personnel, and this of course requires us to focus on the second clause which provides "or otherwise engaged in discrimination based upon race, color or

national origin in the hiring, promotion or assignment of employees."

And of course, the construction that the Court accords to this clause will determine the validity of the regulation which petitioner admits has not been adhered to by its school board.

We suggest that there is no reason why racially disparate hiring, promotion or assignment should produce a result different from disproportionate demotion or dismissal to justify the requirement of a motive for one and not for the other. And we have endeavored to --

QUESTION: Maybe you and we would agree with you, but maybe Congress didn't. That is the question, isn't it?

MR. McCREE: That is indeed the question, Mr. Justice Stewart, and I have tried to surmise why the Congress used different language in these two instances. And I think the best argument that occurs to me at this time is as follows: The attention of the Congress was focused upon what had been de jure separate school systems in the South which, of course, were dual school systems and were duplicative in so many respects. There was the white school and there were, as were known in those days, the "colored schools," and there were principles for each, administrative personnel for each, as well as instructional

personnel or faculty, and the Congress was concerned that in the dismantlement of dual systems that black employees or minority employees would be disproportionately fired.

For example, if the system had 40 white principals and 10 black principals for a total of 50, and it ended up that it just needed 40 once the separate system was to be dismantled, the Congress focused its attention to the situation which might result in the firing of all 10 black principals, and therefore the language "disproportionate dismissal."

QUESTION: Or demotion.

MR. McCREE: Seems appropriate. However, one has difficulty with a concept such as disproportionate hiring. What does disproportionate hiring mean? I have difficulty with that. Does this mean that if 5 candidates present themselves, 4 of one race and 1 of another, that to hire any other than a 4-to-1 ratio would be disproportionate? This does not make sense to me in terms of whether the candidates had the skills that were needed at the time -- one might be a Latin teacher, an English teacher, a French teacher, and so on.

I have even more trouble with the notion of disproportionate assignment if it means in proportion to what? In proportion to the number of people in the school system? And I don't think the Congress wanted to establish a quota

in the establishment of schools and the hiring and promotion and assignment of course looks towards establishment and not disestablishment. And for that reason it would seem to used the phrase "otherwise discriminate" allows more latitude in the establishment and ongoing conduct of a school district. And that satisfies me as a sufficient reason for using different language, but still having a results test, and as the regulation provides, the results test is met if the discrimination in hiring or assignment results in the school being identified as a school for children or for students of a particular race, color, or national origin.

QUESTION: General McCree, would you say that the word "discriminate" means treat differently?

MR. McCREE: I think that is what it means; I think that is exactly what it means. But that doesn't mean discriminate in the sense of a constitutionally impermissible discernment of who the persons were, because obviously they have to discern who they are to avoid the disproportionate dismissal or demotion. So discrimination occurs in that process, too. And yet it is conceded that that is a results test.

QUESTION: Wouldn't you say, Mr. Solicitor General, that the word "discriminate" or "engage in discrimination,"

to use the statutory language, standing alone implies some kind of an intention? I mean, if you had discriminatory effect, then that would have its own meaning, but "engage in discrimination," doesn't that imply intent?

MR. McCREE: Well, I think it certainly implies awareness or discernment. Discrimination means to be aware of a difference, and it doesn't necessarily mean to implement. I can discriminate between colors or among colors: That doesn't mean I am going to do anything about it.

QUESTION: But that is a consciousness and awareness.

MR. McCREE: I just have a capacity to know, it's an awareness. And again we're talking about a results test and it would just appear that the Congress used that phrase, "otherwise discriminate," to mean otherwise produce a result that would show that the statutory purpose which of course was to eliminate the distinction between de jure and de facto and to protect the children from the harmful result from racial isolation, as was stated in the congressional statement of purpose.

QUESTION: Mr. Solicitor General, may I ask you a sort of basic question about the statute so I can have it a little, a little better understanding of the whole scheme. Literally it seems to provide that if there is a violation

of any one of these subparagraphs, the educational agency shall never be eligible for assistance. It says, "No educational agency shall be eligible for assistance under this chapter if it has after the set date engaged in any of these practices" -- is that the way the agency reads it, or is a school board permitted to correct violations and then become eligible, even though it was in fact in violation for a period after June 23, 19-- --

MR. McCREE: It is quite the latter, Mr. Justice Stevens. The school board may apply for a waiver of the condition of eligibility, and if the waiver is granted, the school aid monies are paid forthwith.

QUESTION: And the basis for a waiver is that the situation is --

MR. McCREE: To correct the situation would render them ineligible but for the waiver system.

QUESTION: So that in the case before us, we've had a stay in effect, as I understand it, for some years on the disbursement of the funds that they're trying to get.

MR. McCREE: Three and a half million dollars.

QUESTION: Whatever. But if in the years that have gone by since this case started they had corrected the situation in the teacher assignments, then presumably they could become eligible in the future, is that right? So

they may still get their money, even if they lose this lawsuit?

MR. McCREE: That is exactly my understanding. As a matter of fact, there is a companion case called Polfield which involves an ongoing dialogue between the Department of Health, Education, and Welfare and the school board.

There is also another case that involves a request for a waiver and the rejection of the request of the waiver because of the Department's determination that the ineligibility demonstrated in this case had not been successfully removed. And in all of these cases the funds that had been preliminarily set aside are still there.

QUESTION: Let me turn, if you will, to the consequences of the Department's determination that there is a violation; the consequence is what?

MR. McCREE: The consequence is that the school board then does not receive the funds requested, but the school board may request a waiver of eligibility.

QUESTION: That is under regulations, I take it?

MR. McCREE: Well, the regulation --

QUESTION: Well, in any event it's available, the waiver procedure is available.

MR. McCREE: The waiver procedure is available.

QUESTION: Let me take the next step in my inquiry. If the consequence is to take this money away from the board of education, the next consequence is that what is regarded as a bad situation may become worse, is that not so?

MR. McCREE: Well, it could be if it were the policy of the Department of Health, Education, and Welfare to punish, but it isn't at all. These are funds in addition to funds that the school board would otherwise have, and the funds are made available to assist the school in achieving the congressional goals here, which are to eliminate what in the North was called de facto segregation because of the congressional finding that it was harmful to the children who were in that kind of situation. We mention in our brief a quotation from Senator Stennis which -- I would like to read this. This is on page 18 of our brief.

I beg your pardon; I said Senator Stennis, it was Senator Eastland who says, quote:

"I have never been able to understand ho 10-year-old colored student in a public school in Har , Watts, or South Chicago is expected to look around and se othing but black faces in his classroom and say to himself 'This kind of racial separation does not hurt me because e State of Illinois does not have a law requiring me to attend all black schools. I should not feel hurt by this

racial separation because it is a result of housing patterns that just accidentally happened.'"

So this legislation was intended to relieve that situation as well as one where a state statute mandated it, and we submit that a school board that wishes to participate in doing that, even if the courts could not compel him to do it --

QUESTION: But the adverse consequences, to some extent, falls on the very people Congress intended to benefit; is that not so?

MR. McCREE: Oh, yes, I would think so. But the economic reality is that all school boards are desperately in need of funds and these funds are available and they can be obtained, and the waiver process is there.

As part of the history of this --

QUESTION: Mr. Solicitor General, you can get money under this program for more than one thing, I take it?

MR. McCREE: Oh, yes, for several different kinds --

QUESTION: And you might be using some of it for -- discriminatorily, and another part of it not? If you had several programs going, some of it might not --

MR. McCREE: It might happen that way, except the Department of Health, Education, and Welfare monitors it and

endeavors to --

QUESTION: But if they find that certain money is being used in a discriminatory manner and they cut it off, it doesn't mean that they cut off any other money?

MR. McCREE: Oh, no, the school raises its own money from its own --

QUESTION: No, but I mean, what if Federal money is being used for two or three different things?

MR. McCREE: Well, I think Title VI might come into play at that point.

QUESTION: You mean the school board, then, is completely ineligible for any funds; is that it?

MR. McCREE: Well, if the school board is guilty of constitutionally prohibited discrimination --

QUESTION: Well, yes, but you don't suggest that it has to be to be in violation of this statute?

MR. McCREE: Not to be in violation of ESAA.

QUESTION: What if it is in violation of this statute in a certain way, in using certain funds, but it's getting other funds for other programs under this same statute?

MR. McCREE: Well, then one would have to look to the authorizing provisions and provision for ineligibility if any in that other statutory scheme.

QUESTION: Well, under this statute -- would all

funds under this statute have to cease if a certain use of some of the funds is in a discriminatory manner?

MR. McCREE: Funds under this statute would, as I understand it, but not necessarily under other statutory -- I don't read it to say that.

QUESTION: Am I not correct in understanding that all of the funds under this statute are intended to correct the effects of discrimination in the past, and so forth, are they not? That's what this whole program is, is it not?

MR. McCREE: Well, if I understand the Court to use discrimination to mean de facto as well as de jure.

QUESTION: Right, right. It's intended to promote integration of the school system.

MR. McCREE: It's to, if I might -- yes, my answer is yes, and 1601(b)(1), or 1601(a) and (b), where the congressional purpose is set out, in (a) it says, "Congress finds that the process of eliminating or preventing minority group isolation and improving the quality of education for all children requires additional funds," and in (b), "to meet the special needs incident to the elimination of minority group segregation and discrimination among students," so it's corrective and goes beyond, as we understand it.

As we argued yesterday, we believe that we have here just a question of statutory interpretation and for the

reasons that we set forth in our brief, we believe that it makes sense to apply a results test to the second clause of 1605(d)(1)(b), as well as to the first clause, where concededly a results test is required.

I would like to conclude my argument by making a reference to the amicus brief. We think this, at the very last part of the amicus brief, it is pointed out that in 1977, I believe it is, under the educational amendment act, this ESAA statute was reenacted, and at the time it was reenacted, the Congress was aware of the regulation that is under attack here, and there was some discussion of the regulation and of its effect, and nonetheless the statutory language was not changed, which at least would give us some indication that this was not contrary to congressional intent in the first instance.

QUESTION: It wasn't aware of the Second Circuit judgment in this case, because that hadn't occurred yet.

MR. McCREE: That is correct, Your Honor. It was not aware of that. But it was aware of the regulation. On page 42 of the amicus brief, I believe there's a discussion of it and there's a reference to Senator Javits who, of course, represents the state in which the school district here is involved, and he was aware of this at that time.

And so, we believe that the Secretary is appropriately

interpreting the statutory authority for his regulations and that the regulations are reasonably calculated to carry out the congressional intent and purpose and for these reasons and the other reasons set forth in our brief, we respectfully ask that the Court affirm the decision of the Court of Appeals for the Second Circuit.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solici or General.

Mr. Bruno, you have about four minutes left.

ORAL ARGUMENT OF JOSEPH F. BRUNO, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. BRUNO: Mr. Chief Justice, may it please the Court, I have just three or four points. It is our position in considering the Solicitor's construction of Section 1605 (d)(1)(B) that we look at the congressional history and we look specifically at Senate Report 92-61 which provides us with great insight into what Congress intended.

Again, the Solicitor in discussing why or perhaps why Congress would have a different standard for demotions and dismissals as opposed to assignment of staff, the Solicitor ignores the clear legislative history stated in 92-61 and by Senator Mondale, which I read yesterday, which it makes it very clear this is a particular concern they had that the

motion in conjunction with desegregation orders.

In response to Justice Stevens' question about waiver, the waiver is irrelevant to this case because we contend we are eligible unless they find intentional discrimination.

I will also note that they withhold waiver unfairly, and I will just -- the ESAA 2 case, the case that is pending on this issue, it's in the Second Circuit and is awaiting decision.

QUESTION: Well, is it not likely that in a situation where the possible violation is in a gray zone, is uncertain, that an adjustment is negotiated and a waiver of any claims of the Secretary are --

MR. BRUNO: Let me tell you how they construe it. We -- and the ESAA 2 case deals with next year's funding which we were also held to be ineligible for -- the position of HEW is -- we negotiated an agreement with HEW, a memorandum of understanding which was the subject of the Cawfield case that General McCree indicated which was upheld. We negotiated that agreement, that is a phased program that will take several years to implement the changes that HEW would like us to implement, and we have agreed to that.

However, they withhold funding to us under the

ESAA statute, under the waiver because they contend that a waiver is not available to you until you have eliminated all of these defects, not that you have reached agreement and you are eliminating them, until you have reached that elimination. So we are now out of ESAA funding under their eligibility and under their waiver for several years down the road until we have concluded this agreement which they have approved with us.

Lastly, I would like to just note that the key word is discrimination in subdivision (d), it is the key word in subdivision (b). Both subdivision (d), HEW concedes, is an intent test. We argue that it is an intent test in subdivision (b). The language around discrimination, we contend, is simply in one way it is used engaged in discrimination, another it is in order to avoid participation so as to discriminate.

That is clarification language, we believe, of Congress, maybe somewhat unartfully drawn, but the word "discimination" having very definite meaning, and Congress said so during the debates.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 10:26 o'clock a.m., the above-entitled case was submitted.)