14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281

In the Matter of Isidore Balaban et al., Appellants,
v.
Max J. Rubin et al., Constituting the Board of Education of the City of New York, et al., Respondents.

Court of Appeals of New York
Argued April 2, 1964;
Decided May 7, 1964.

CITE TITLE AS: Matter of Balaban v Rubin

HEADNOTES

Schools

segregation--plan for establishment of new junior high school, which resulted in school population of approximately one-third negro, one-third Puerto Rican and one-third non-Puerto Rican white, did not violate statute (Education Law, § 3201), which provides that no one shall be refused admission into or excluded from any public school on account of race, creed, color or national origin--zoning was not arbitrary, capricious or unreasonable.

(1) Section 3201 of the Education Law provides that: "No person shall be refused admission into or be excluded from any public school in the state of New York on account of race, creed, color or national origin." Junior High School 275, located in the borough of Brooklyn, was authorized by the Board ***194** of Estimate of the City of New York for the purpose of relieving overcrowding in several existing junior high schools. The first zoning map for the new school was rejected by the Board of Education because of the failure so to draw the zone as to prevent any measure of *de facto* segregation of negro and Puerto Rican students. Under that plan the enrollment would have been 52egro, 34% Puerto Rican and 14% non-Puerto Rican white. A new proposal was then formulated with the result that the school population would be approximately one-third negro, one-third Puerto Rican and one-third non-Puerto Rican white. The statute is in no way violated by this plan, nor was there any other legal impediment to its adoption. The plan excludes no one from any school and has no tendency to foster or produce racial segregation

(2) The question whether there is an affirmative constitutional obligation to take action to reduce *de factor* segregation is not in this case.

(3) The zoning is not arbitrary, capricious or unreasonable. The Board of Education has express statutory power to select a site for a new school and to "determine the school where each pupil shall attend" (Education Law, §§ 2556, 2503, subd. 4, par. d). There are no oppressive results of the choice here made by the board.

Matter of Balaban v. Rubin, 20 A D 2d 438, affirmed.

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered March 10, 1964, which (1) reversed, on the law, an order of the Supreme Court at Special Term (Edward G. Baker, J.; opinion 40 Misc 2d 249), entered in Kings County in a proceeding brought under article 78 of the former Civil Practice Act for an order nullifying the zoning plan adopted by respondents insofar as it included the area bounded by Rockaway Parkway, East 93rd Street, Church Avenue and the Bay Ridge Division of the Long Island Rail Road, which area, prior to the adoption of said plan, was within the zone of Junior High School 285 in the Borough of Brooklyn and further declaring that the area bounded as above stated should be within the zone of said Junior High School in the Borough of Brooklyn, and (2) dismissed the petition which sought the relief granted at Special Term. The findings of fact implicit in the decision of Special Term were affirmed.

POINTS OF COUNSEL

Frank H. Gordon and *Edward Robin* for appellants.
I. Respondents' use of race and color as criteria in assigning children to public schools violated the anti-discrimination laws and the Constitution of the State of New York. (*Beck Shoe Corp. v. Johnson*, 153 Misc. 363; *Brandenburg v. Metropolitan* ***195** *Package Store Assn.*, 29 Misc 2d 817; *Hughes v. Superior Court*, 339 U. S. 460; *Matter of Holland v. Edwards*, 307 N. Y. 38; *Cooney v. Katzen*, 41 Misc 2d 236; *Hobson v. York Studios*, 208 Misc. 888; *Williams v. Deer's Head Inn.*, 4

Misc 2d 281; *Cassell v. Texas*, 339 U. S. 282; *Matter of Vetere v. Allen*, 41 Misc 2d 200; *Brown v. Board of Educ.*, 347 U. S. 483.)

II. Respondents' use of race and color as criteria in assigning children to public schools violated the Fourteenth Amendment to the Constitution of the United States. (*Meyer v. Nebraska*, 262 U. S. 390; *Brown v. Board of Educ.*, 349 U. S. 294; *Goss v. Board of Educ.*, 373 U. S. 683; *Stell v. Savannah-Chatham County Bd. of Educ.*, 220 F. Supp. 667, 318 F. 2d 425; *Muir v. Louisville Park Theat. Assn.*, 347 U. S. 971; *Mayor v. Dawson*, 350 U. S. 877; *Holmes v. Atlanta*, 350 U. S. 879; *Gayle v. Browder*, 352 U. S. 903; *New Orleans City Park Improvement Assn. v. Detiege*, 358 U. S. 54; *Progress Development Corp. v. Mitchell*, 182 F. Supp. 681, 286 F. 2d 222; *Brown v. Allen*, 344 U. S. 443; *Green v. School Bd. of City of Roanoke, Va.*, 304 F. 2d 118; *Plessy v. Ferguson*, 163 U. S. 537.)

III. Respondents violated their own criteria for determining a school zone. (*Securities Comm. v. Chenery Corp.*, 318 U. S. 80; *Accardi v. Shaughnessy*, 347 U. S. 260.)

Leo A. Larkin, Corporation Counsel (*Seymour B. Quel* and *Benjamin Offner* of counsel), for respondents.

I. The zoning plan adopted by the Board of Education does not violate petitioners' constitutional rights. (*Brown v. Board of Educ.*, 347 U. S. 483; *Bolling v. Sharpe*, 347 U. S. 497; *Cooper v. Aaron*, 358 U. S. 1; *Taylor v. Board of Educ. of New Rochelle*, 191 F. Supp. 181, 294 F. 2d 36, 368 U. S. 940; *Bell v. School City of Gary, Ind.*, 213 F. Supp. 819, 324 F. 2d 209; *Williamson v. Lee Opt. Co.*, 348 U. S. 483; *Goss v. Board of Educ.*, 373 U. S. 683; *Green v. School Board of City of Roanoke, Va.*, 304 F. 2d 118; *Armour & Co. v. Wantock*, 323 U. S. 126; *Gomillion v. Lightfoot*, 364 U. S. 339.)

II. The zoning plan adopted by the Board of Education does not violate the Civil Rights Law or the Education Law. (*Woollcott v. Shubert*, 217 N. Y. 212; *Williams v. Deer's Head Inn.*, 4 Misc 2d 281; *People ex rel. Cisco v. School Bd.*, 161 N. Y. 598; *Johnson v. City of New York*, 274 N. Y. 411; *People v. Ryan*, 274 N. Y. 149; *Chittenden Lbr. Co. v. Silberblatt & Lasker*, 288 N. Y. 396.) ***196**

Robert L. Carter, Barbara A. Morris, Jawn A. Sandifer and *Joan Franklin* for the National Association for the Advancement of Colored People, *amicus curiæ*.

I. Segregated schools are educationally inferior. (*Brown v. Board of Educ.*, 347 U. S. 483; *Cooper v. Aaron*, 358 U. S. 1; *Railway Mail Assn. v. Corsi*, 326 U. S. 88.)

II. The elimination of the segregated school is mandated by *Brown v. Board of Educ.* (*Branche v. Board of Educ. of Town of Hempstead*, 204 F. Supp. 150; *Blocker v. Board of Educ. of Manhasset, N. Y.*, 226 F. Supp. 208.)

III. The construction of section 3201 of the Education Law as consonant with efforts by school authorities to eliminate *de facto* school segregation is required if serious doubt as to the law's constitutionality is to be avoided. (*Goss v. Board of Educ.*, 373 U. S. 683; *Watson v. Memphis*, 373 U. S. 526; *Peterson v. Greenville*, 373 U. S. 244; *Johnson v. Virginia*, 373 U. S. 61; *Burton v. Wilmington Parking Auth.*, 365 U. S. 715; *Boynton v. Virginia*, 364 U. S. 454; *Henderson v. United States*, 339 U. S. 816; *Gayle v. Browder*, 352 U. S. 903; *Strauder v. West Virginia*, 100 U. S. 303; *Shelley v. Kraemer*, 334 U. S. 1; *Steele v. Louisville & N. R. R. Co.*, 323 U. S. 192; *Sweatt v. Painter*, 339 U. S. 629; *McLaurin v. Oklahoma State Regents*, 339 U. S. 637; *Gomillion v. Lightfoot*, 364 U. S. 339; *Hughes v. Superior Court*, 339 U. S. 460.)

Leo Pfeffer, Murray A. Gordon, Joseph B. Robison and *Carol Weisbrod* for American Jewish Congress, *amicus curiæ*. Respondent school officials acted within their constitutional and statutory powers in drawing zone lines for Junior High School 275 so as to prevent racial segregation in the school. (*People ex rel. Cisco v. School Bd.*, 161 N. Y. 598; *Railway Mail Assn. v. Corsi*, 326 U. S. 88; *Plessy v. Ferguson*, 163 U. S. 537; *Hirabayashi v. United States*, 320 U. S. 81; *Civil Rights Cases*, 109 U. S. 3; *Goss v. Board of Educ.*, 373 U. S. 683.)

OPINION OF THE COURT

Chief Judge Desmond.

The question for decision: Will the courts hold invalid the adoption by a board of education of a "zoning plan" for a new public school because the board in addition to other relevant matters took into account, in delimiting the zone, the factor of racial balance in the new school? Stating the issue in another form: Does an otherwise lawful and reasonable districting plan for a newly instituted ***197** school become unlawful because it is intended to, and does, result in an enrollment which is one-third negro, one- third Puerto Rican and one-third non-Puerto Rican white?

Special Term answered the posed query in the affirmative, holding that the zone so established violated section 3201 of the Education Law. That statute which is the only basis for Special Term's outlawry of the challenged districting reads thus: "No person shall be refused admission into or be excluded from any public school in the state of New York on account of race, creed, color or national origin." The court reasoned this way: since the children on whose behalf this proceeding was brought would, had not the new school (Junior High School 275) been built, attend a different school (Junior High School 285) in their own "neighborhood", their

assignment to No. 275 was, according to Special Term, an exclusion from No. 285 and so violative of section 3201.

The Appellate Division saw the case quite differently. Section 3201, said the majority, was on its face and from its history and plain purpose, an anti-segregation statute only, a repealer of an old New York law (L. 1894, ch. 556, tit. 15, § 28) which had authorized separate schools for Negroes. The earlier statute had been held constitutional in 1900 in *People ex rel. Cisco v. School Bd. of Borough of Queens* (161 N. Y. 598) and section 3201 was a legislative overruling of the *Cisco* ruling (see, also, Penal Law, § 514, and Civil Rights Law, §§ 40, 41). If, wrote the Appellate Division majority in the present case, section 3201 is to be construed so as to invalidate a zoning plan because the plan accomplishes integration, then section 3201 has been turned into a segregation law -- a result exactly opposite to its purpose. Emphasizing the obvious, the court remarked that: "Boundary lines for attendance at a new school must be fixed somewhere" and that "A zone for a new school must necessarily take away part of the zone or zones theretofore established for already existing schools." Two of the Appellate Division Justices, concurring for reversal, came to the same result by a simpler route. The board, says the concurring opinion, acted reasonably and "within the limits of sound discretion". The zoning, they found, was "not forced solely by racial considerations". If, they said, the racial factors are disregarded, other considerations "point ***198** irrevocably to the placement of the children in the very school which the board has selected". Since, then said the concurring Justices, application of all other appropriate and available criteria dictated the same result, "It is unnecessary to this decision to consider the right of the Board of Education to inquire into the race or color of the children".

The facts are not in dispute. The new school is Junior High School 275 located in the Brownsville section of Brooklyn and authorized by the city's Board of Estimate for the purpose of relieving overcrowding in several existing junior high schools. The task of preparing a zoning map for the new facility was first assigned to a Dr. Blodnick, Assistant Superintendent for Local School Districts 41 and 42 (the new school is in District 42). The Blodnick plan received some community support but higher officials of the Board of Education rejected it for several reasons, one of them being the failure of Dr. Blodnick so to draw his zone as to prevent any measure of *de facto* segregation of negro and Puerto Rican students into the new building. Under that first plan the enrollment would have been 52% negro, 34% Puerto Rican and 14% non-Puerto Rican white.

A new proposal was then formulated by Assistant Superintendent of Schools Turner who was also head of the Central Zoning Unit. He modified Dr. Blodnick's districting map by excluding a northerly part with a heavy negro population and including a predominantly white area where reside petitioners' 2 children and some 49 other white children on whose behalf the proceeding is brought. The Turner modification was adopted by the Board of Education with the result that new Junior High School 275's population will be approximately one-third negro, one-third Puerto Rican and one-third non-Puerto Rican white. The children whose parents are contesting the Turner zoning live within walking distance of new School 275 and nearer to -- or at least no farther from -- School 275 than School 285. The latter building, petitioners assert, is in their residential "neighborhood" which contrasts to the part-slum, part-deteriorated residence area and part-high-rise apartment "neighborhood" in which was built new Junior High School 275. It should be mentioned that all the children scheduled for admittance into School 275 will be in their first ***199** year of junior high school so that no one is being transferred from one school to another.

There can be no doubt (since *Brown v. Board of Educ.*, 347 U. S. 483) that *de jure* segregation is unconstitutional. The question, however, as to whether there is an affirmative constitutional obligation to take action to reduce *de facto* segregation is simply not in this case. The issue, we repeat, is: May (not must) the schools correct racial imbalance? The simple fact as to the plan adopted and here under attack is that it excludes no one from any school and has no tendency to foster or produce racial segregation.

Therefore, we hold, section 3201 of the Education Law is in no way violated by this plan, nor was there any other legal impediment to its adoption.

If, applying the conventional (CPLR 7803, subd. 3) test of an administrative ruling, we look to see whether the Turner zoning is arbitrary, capricious or unreasonable, the answer must again be in the negative. The Board of Education has express statutory power to select a site for a new school and to "determine the school where each pupil shall attend" (Education Law, §§ 2556, 2503, subd. 4, par. d). There are no oppressive results of the choice here made by the board. No child will have to travel farther to new School 275 than he would have to go to get to his "neighborhood" school.

The order should be affirmed, without costs.

Van Voorhis, J.

(Dissenting).

That race was a material factor, indeed the dominant factor and controlling consideration in redrawing the boundary lines of these school zones, is too clear to be denied. The petition so alleges, and the answer admits it. As is stated in the majority opinion in this court, the result was to obtain an enrollment of one-third white children in Junior High School 275 instead of 14% white under the original plan. The avowed purpose and reason for drawing the boundary lines in the manner ultimately approved by the Board of Education was to achieve a larger proportion of white children in comparison with the Negroes and Puerto Ricans.

This, as it seems to me, is the reverse of anti-discrimination. The principle of anti-discrimination is that each person shall be treated without regard to race, religion or national origin. ***200** It is discrimination to admit a person because he is a Negro or a Pole, Catholic, Anglo-Saxon, Jew, and so on. If persons can legally be admitted because they belong to any of these groups, then they can be excluded for the same reason. Such a result would be contrary to the equal protection clause of the Federal and State Constitutions (U. S. Const., 14th Amdt. § 1; N. Y. Const., art. I, §11), as well as sections 313 and 3201 of the New York State Education Law, section 40 of the Civil Rights Law and section 290 of the Executive Law. This signifies more than that school boards cannot be compelled to correct racial imbalance; it means that they are not permitted to do so by law if that involves admitting or excluding groups on account of race, religion or national origin. If school children, employees, tenants or others can be admitted because they are Negroes, they can also be admitted because they are Aryans, and they or other racial groups can be excluded on the same basis. Color is not the only factor in integration. It would be hopeless for any school board or other governing body to try to assemble an ideal amalgam by admitting the right quotas or other proportions of cultural, religious or ethnic groups. The principle is not unlike that enunciated in *Hughes v. Superior Ct.* (339 U. S. 460, 464) where the Supreme Court said that to prevent a State from banning picketing to hire more Negroes "would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities." If Negroes could legally be admitted because they are Negroes, it follows that they could be excluded for the same reason: and similarly with Jews, Catholics, Protestants, Italians, northern Europeans or any other ethnic or religious group.

So long as these distinctions are obliterated, for the purpose in question, integration and anti-discrimination are served. Just so soon, however, as the tables are turned, and the position taken that any of these multiform groups are to be promoted in competition with other groups, it becomes discrimination ***201** not integration. This is recognized by the farsighted members of all of the minority groups in condemning the quota system, which it closely resembles.

On May 4, 1964 the United States Supreme Court denied an application for certiorari to review *Bell v. School City of Gary, Indiana* (324 F. 2d 209, affg. 213 F. Supp. 819). What was involved in that case explicitly appears from the opinion of the District Judge, whose judgment was affirmed by the Federal Court of Appeals and declined to be reviewed by the Supreme Court. It makes clear that there is no essential difference between whether the result is attained by drawing the boundaries of new districts, altering the boundaries of existing districts, or transferring students from one district to another, if it be done on account of race. The charge in the *Bell* case was that a new school district was laid out and boundaries changed of existing school districts, and children "bussed" from one school district to another for the purpose of maintaining segregated schools. The major contention of the plaintiffs therein, as stated by the trial court, was "that the defendant, by the manner in which it has drawn its school district boundaries, has purposely and intentionally maintained a segregated school system thereby depriving a majority of the Negro students in Gary from attending schools with white students. The Board, on the other hand, specifically denies that there has been any intentional segregation of the races in the Gary school system. As a matter of fact, the School Board and its staff insist that they are color blind, so far as the races are concerned, in the administration of the Gary school system. They maintain no records on the basis of race, or color". Transfers of students were permitted on request of the student or parent, "the reason for the transfer request is considered and is allowed or denied depending upon the apparent reasonableness and desirability of the transfer and no racial factors are considered in allowing or disallowing a transfer."

The neighborhood school was described as being a long and well-established institution in American public school education, "almost universally used, particularly in the larger school systems" and, in the *Bell* case, the court said further: "With the use of the neighborhood school districts

in any school ***202** system with a large and expanding percentage of Negro population, it is almost inevitable that a racial imbalance will result in certain schools."

Although the holdings of the trial court and Federal Court of Appeals in the *Bell* case were that the educational authorities were not required to redistrict or change their student transfer arrangements, this was for the reason that they had not taken race into account in laying the boundaries or providing for student transfers between school districts. That is exactly what the Board of Education of the City of New York did do in the present instance. It makes no difference in legal effect that Negroes considered themselves aggrieved in the *Gary, Indiana*, case and that the objectors here are whites. The Constitution and statutes forbid racial discrimination, which applies equally to white or nonwhite. The principle of the Gary school decision applies to this situation. There the acts of the educational authorities were upheld for the reason that the distributions made were not actuated by race as a factor. The same principle, as it seems to me, requires that the school zoning by the board in this case should be annulled because it acted on the basis of racial distinction.

In *Brown v. Board of Educ.* (347 U. S. 483, 349 U. S. 294) it was held that segregation of white and negro children in the public schools of a State denied the equal protection of the laws if it was done on the basis of race. This was, as stated in the opinion, for the reason that Negroes "had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race." Under the reasoning of that decision, it likewise denies the equal protection of the laws to make the admission or exclusion of children depend upon their color regardless of whether their color be white or black.

Both Special Term and the Appellate Division assumed jurisdiction, treating this as a justiciable question, and both held that race was a material factor in the shaping of these school districts in Brooklyn in the manner done by the board. In view of the decisions that the courts have jurisdiction of districting where violation of the equal protection clause of the Fourteenth Amendment is involved (*Baker v. Carr*, 369 U. S. 186; *Y. M. C. A. v. Simon*, 370 U. S. 190), it seems to me that ***203** we are confronted with the responsibility of making a judicial determination concerning whether race, religion, national origin or other similar considerations can operate as decisive factors in the creation or alteration of school zones or districts and in other aspects of the administration of the educational system of the State.

I concur in the memorandum opinion by Baker, J., at Special Term, except that I base my conclusions also upon the State and Federal Constitutions and upon the other New York State statutes above mentioned.

The order appealed from should be reversed and the judgment of Special Term reinstated.

Judges Dye, Fuld, Burke, Scileppi and Bergan concur with Chief Judge Desmond; Judge Van Voorhis dissents in a separate opinion.

Order affirmed.

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