PACIFIC LEGAL FOUNDATION

April 24, 2015

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Re: Segregated Field Trips

Dear Dr. Schmidt and Members of the Board of School Trustees:

It has come to the attention of Pacific Legal Foundation that the South Bend Community School Corporation (District) has "postponed" a series of field trips that only students of a certain race are allowed to attend. I write to encourage you to permanently cancel all discriminatory school activities. The classification and differential treatment of students according to their race or ethnicity for the purpose of attending racially segregated school events is harmful to students, and may expose the District to liability for violations of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The District's Segregated Activities Harms Students

The District made its decision to postpone future segregated field trips after allowing one such field trip. One newspaper article describes other District functions where students have been chosen to attend based on their race. *See* Kim Kilbride, *South Bend school district postpones field trips for*

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black third-graders, South Bend Tribune (April 21, 2015) (describing two other segregated events).[1] These activities unquestionably harm students. In the context of public schooling, segregation is the deliberate operation of a school system to "carry out a governmental policy to separate pupils in schools solely on the basis of race." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6 (1971). In *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), the Supreme Court "held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, *because government classification and separation on grounds of race themselves denoted inferiority.*" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (citing *Brown*, 347 U.S. at 493-94) (emphasis added).

Separating students on the basis of race is as abhorrent today as it was over sixty years ago when *Brown* was decided. *See Parents Involved*, 551 U.S. at 720 ("It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954."); *see also Rice v. Cayetano*, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."). Conducting segregated field trips to reinforce the notion that students of a certain race are performing poorly in school is discrimination. Such action denotes inferiority, and sends a signal to students that they are judged by the color of their skin, and not on their merit. Additionally, prohibiting other students from attending school events simply on the basis of race deprives those students of equal educational opportunities. The reported adverse reaction from parents of all races who spoke out against the District's disparate treatment provides further evidence that the segregated field trips are harmful.

Segregated Field Trips Violate the United States Constitution

The Equal Protection Clause mandates that, "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)), the Court stated that free people "should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons."

> [T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," and subject to the "most rigid

[1] *Available at* http://www.southbendtribune.com/news/local/keynews/education/south-bend-school-district-postpones-field-trips-for-black-third/article_1728eb05-aee6-5088-823f-80c8bcce21c6.html (last visited Apr. 24, 2015).

> scrutiny," and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose.

Adarand, 515 U.S. at 216 (citations omitted). "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978)).

The Supreme Court has repeatedly held that "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect," and subject to "strict scrutiny." *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419, 186 L. Ed. 2d 474 (2013); *Johnson v. California*, 543 U.S. 499, 505-06 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). In order to satisfy this searching standard of review, the District would be forced to demonstrate that its decision to classify on the basis of race for the purpose of determining which students may attend racially segregated field trips is a "narrowly tailored" means of furthering a "compelling" government interest. *Fisher*, 133 S. Ct. at 2419.

In evaluating the use of racial classifications in the school context, the Court has recognized only two interests that are "compelling." The first is the interest in remedying the effects of past intentional discrimination. *Parents Involved*, 551 U.S. at 720. The second is the interest in achieving student body diversity in the context of higher education. *Grutter*, 539 U.S. at 328. The second interest does not apply here, because the District is neither an institution of higher education, nor seeking to achieve a diverse student body. Even if the District could claim an interest in diversity for its segregated program, the admissions program at issue in *Grutter* "focused on each applicant as an individual, and not simply as a member of a particular racial group." *Parents Involved*, 551 U.S. at 722. Like the University of Michigan undergraduate admissions plan struck down in *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003), the District's selection of students to attend certain field trips "do[es] not provide for a meaningful individualized review" of each student, but instead relies on racial classifications to select students in a "nonindividualized, mechanical" way. *Parents Involved*, 551 U.S. at 723 (citing *Gratz*, 539 U.S. at 276, 280 (O'Connor, J., concurring)).

The District also cannot prove that it has a compelling interest in remedying the effects of its own past intentional discrimination. To claim the segregated field trips furthers that interest, the District would have to demonstrate "a 'strong basis in evidence for its conclusion that remedial action was necessary.'" *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)). Establishing a "strong basis in evidence" requires proper findings regarding the extent of the government unit's past racial discrimination. *Croson*, 488 U.S. at 510. The findings should "define the scope of any injury [and] the necessary remedy," *id.* at 505, and must be more than "inherently unmeasurable claims of past wrongs," *id.* at 506. Assertions of general societal discrimination are plainly insufficient. *Id.* at 499; *Wygant*, 476 U.S. at 274 (plurality

opinion). Thus, the District has no interest in remedying past discrimination, because—aside from the current segregated activities—there is no evidence or judicial finding that the District has been intentionally discriminating against students on the basis of race.

The purpose of the field trips seems to be a sincere desire to motivate students from disadvantaged backgrounds and close the so called "achievement gap." But the Constitution does not permit race-based government decisionmaking simply because a school district claims a remedial purpose and proceeds in good faith with arguably pure motives. *Grutter*, 539 U.S. at 371 (Thomas, J., concurring in part and dissenting in part) (citing *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in judgment)). Even if the District could show a compelling interest in helping minority students achieve higher test scores, the remedial action would have to be narrowly tailored. It is doubtful that a few racially segregated field trips to college campuses are a proper constitutional remedy for poor academic performance.

Narrow tailoring requires the District to conduct a "serious, good faith consideration of workable race-neutral alternatives." *Grutter*, 539 U.S. at 339. Narrow tailoring also requires that the reviewing court verify that it is "necessary" for the District to use race. *Fisher*, 133 S. Ct. at 2420; *see Croson*, 488 U.S. at 507 (plurality opinion) (race-conscious remedy was not narrowly tailored where "there does not appear to have been any consideration of the use of race-neutral means"); *Wygant*, 476 U.S. at 280 n.6 (narrow tailoring "require[s] consideration" of "lawful alternative and less restrictive means"). Here, the District could easily choose students to attend the college field trips based on race-neutral criteria, such as grades, or socio-economic status. If the District wants to raise the academic performance of its students, remedial action should be geared towards better instructional methods for all students throughout the school year, rather than efforts targeting students from one racial group. If student motivation is a problem, the District should employ race-neutral measures that inspire all students together, not in groups divided by race which only foster animosity.

Violations of the Equal Protection Clause are actionable under 42 U.S.C. § 1983. Section 1983 provides a remedy for deprivation of any rights, privileges, or immunities secured by the Constitution. The Supreme Court has held that Congress intended

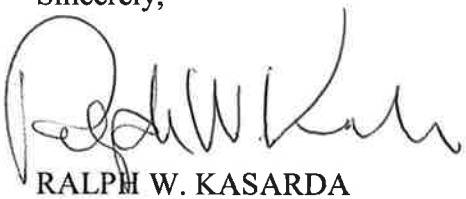
> municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.

Monell v. Dep't of Soc. Services of the City of New York, 436 U.S. 658, 690 (1978).

We urge you not to risk the scarce resources available for public education by using practices that violate the Constitution. If you have any questions, about this letter, please do not hesitate to contact me at (916) 419-7111, or rwk@pacificlegal.org.

Thank you for your immediate attention to this matter.

Sincerely,



RALPH W. KASARDA
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