The Burger Court Opinion Writing Database

Board of Education of City School District of New York v. Harris

444 U.S. 130 (1979)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 19, 1979

Re: 78-873 - Board of Education of City School District of City of New York v. Harris

Dear Harry:

I join.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 2, 1979

Re: Board of Education v. Harris, No. 78-873.

Dear Harry,

The following are the comments I promised.

The Board of Education's principal argument, as I understand it, has been that § 706(d)(1)(B) contemplates two different standards of discrimination with respect to educational personnel: a stricter test governing demotions and dismissals, and a more relaxed test covering hiring, promotion or assignment. Support for this interpretation is drawn from the literal language of the provision -- which explicitly links demotions and dismissals with the concept of disproportionality -- and from the legislative history, which treats the demotions and dismissals clause separately from, and more stringently than, the clause dealing with hiring, promotion, and assignment.

The distinction between standards is fairly unmistakeable in the few relevant shreds of legislative history, as you point

out. [1] My recollection is that there was consensus at conference that the provision does embrace two discrimination standards, both pegged to "effects" rather than to "intent." As your opinion quite correctly points out, teacher assignments are governed by a rebuttable "effects" test. By contrast, the higher standard for demotions and dismissals amounts to an irrebuttable -- i.e., a "per se" -- "effects" test.

Because the Board rests so heavily upon its "two standards" argument, would it not be advisable to dispose of that contention explicitly? At page 12, you suggest that "[u]nless a solid reason for a distinction exists, one would expect that, for such closely connected statutory phrases, a like standard was to apply to assignment of employees." (Emphasis added.) On page 13, you indicate that "[i]f Congress had intended to make a sharp distinction between the two phrases of what became § 706(d)(1)(B), it would not have described disproportionate

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[1]Not only in the portions quoted in your opinion, but also in the following passage from the Senate Labor Committee Report (at p. 19): "The phrase 'disproportionate demotion or dismissal of instructional or other personnel from minority groups' is not modified or in any way diminished by the subsequent phrase 'or otherwise engaged in discrimination based upon race, color or national origin. . ..'"

minority staff reduction as 'per se' a violation of 'this provision.'" (Emphasis added.) As I understand these passages, you suggest that the provision may comprehend two standards, yet hold that the standards do not radically differ. That, of course, comports with the conference consensus that the two standards are variations on the "effects" theme. My thought is only that it might be helpful to sharpen our focus on the differing standards problem. This would entail frankly acknowledging that there are two standards in the provision, but explaining that they correspond respectively to rebuttable and irrebuttable impact tests. Indeed, the "per se" language in the Senate Labor Committee report provides some support for reading the demotions and dismissals clause as precluding any rebuttal or excuse for materially disproportionate demotions or dismissals. In contrast, the "effects" test governing hiring, promotions and assignments is the customary standard that would permit the school board to justify a marked racial imbalance.

Let me suggest the changes in your opinion that would accomodate these thoughts if you find them helpful. Starting at page 13, line 9, a possible substitute paragraph might read as follows:

"If there is a distinction between the two phrases, however, it is not inconsistent with the general impact orientation of § 706(d)(1)(B). For the impact approach itself embraces at least two separate standards: a rebuttable disparate impact test and a stricter irrebuttable disproportionate impact test. To the extent that the 'demotion or dismissal' clause sets a higher standard for school boards to meet, it corresponds to the irrebuttable impact test. Indeed, another passage of the Senate Committee report states:

> "For the purposes of this bill, disproportionate demotion or dismissal of instructional or other personnel is considered discriminatory and constitutes per se a violation of this provision, when it occurs in conjunction with desegregation, the establishment of an integrated school, or reducing, eliminating or preventing minority group isolation." S. Rep. No. 91-61, ~~Id.,~~ at 18-19.

The reference to a per se violation strongly suggests that there was to be no excuse for a significant disparity in treatment of the races with respect to demotions or dismissals,

"when [the disparity] occurs in conjunction with desegregation, the establishment of an integrated school, or reducing, eliminating or preventing minority group isolation." (Emphasis added.) In contrast, the rebuttable impact test governing hiring, promotion, and assignments, permits the school board to justify apparently disproportionate treatment.

---

*The authors of the ~~bill~~ report were aware, of course, of massive firings of black teachers in the South. S. Rep. No. 92-61, at 18."

The opinion would then resume at the penultimate line on page 13.

My suggested paragraph, you will note, omits quotation of that portion of the Senate Report that explains that local agencies are ineligible for funds if they "cause to occur, or permit to exist, those activities described in clauses (A), (B), (C), or (D)." The "permit to exist" language is temptingly close to an endorsement of an impact test, but the difficulty

is that § 706(d)(1)(D) -- which is one of those activities that may not be "permit[ted] to exist" -- is admittedly an "intent" provision. The "permit to exist" phraseology is therefore unlikely to bear much argumentive weight.

Sincerely,

Bill

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 8, 1979

RE: No. 78-873 Board of Education of the City School District of the City of New York v. Harris

Dear Harry:

I am delighted to join your opinion for the Court in this case.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

October 30, 1979

Re: No. 78-873, Board of Education, New York City v. Harris

Dear Harry,

I expect to circulate a dissenting opinion in due course.

Sincerely yours,

P. S.

Mr. Justice Blackmun

Copies to the Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-873

Board of Education of the City School District of the City of New York et al., Petitioners, *v.* Patricia Roberts Harris, Secretary of Health, Education, and Welfare, et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[November —, 1979]

MR. JUSTICE STEWART, dissenting.

The Court holds that the Emergency School Aid Act of 1972 (ESAA)[1] renders ineligible for ESAA funding any school district whose faculty assignment policies have resulted in racial disparities, even in the total absence of any evidence of intentional racial discrimination. I disagree. It is my view that a school district is ineligible to receive ESAA funds only if it has acted with a racially discriminatory motive or intent in its faculty assignment policies.

I

The controversy in this case turns on the proper construction of § 706 (d)(1)(B) of ESSA, which provides:

> "No educational agency shall be eligible for assistance under this chapter if it has, after June 23, 1972—
>
> . . . . .

[1] 20 U. S. C. §§ 1601-1619. In 1978, Congress re-enacted ESAA with amendments not material here and recodified the statute at 20 U. S. C. §§ 3191-3207. See Education Amendments of 1978, Title VI, Pub. L. No. 95-561, 92 Stat. 2252, 2268. The provision at issue here, former § 706 (d)(1)(B), is now codified at 20 U. S. C. A. § 3196 (c)(1)(B)

SEE PAGES:
1, 3, 4, 6, 7, 9-10

Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 26 NOV 1979

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-873

Board of Education of the City School District of the City of New York et al., Petitioners, v. Patricia Roberts Harris, Secretary of Health, Education, and Welfare, et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[November —, 1979]

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST join, dissenting.

The Court holds that the Emergency School Aid Act of 1972 (ESAA) [1] renders ineligible for ESAA funding any school district whose faculty assignment policies have resulted in racial disparities, even in the total absence of any evidence of intentional racial discrimination. I disagree. It is my view that a school district is ineligible to receive ESAA funds only if it has acted with a racially discriminatory motive or intent in its faculty assignment policies.

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The controversy in this case turns on the proper construction of § 706 (d)(1)(B) of ESSA, which provides:

> "No educational agency shall be eligible for assistance under this chapter if it has, after June 23, 1972—
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> . . . . .

[1] 20 U. S. C. §§ 1601–1619. In 1978, Congress re-enacted ESAA with amendments not material here and recodified the statute at 20 U. S. C. §§ 3191–3207. See Education Amendments of 1978, Title VI, Pub. L. No. 95–561, 92 Stat. 2252, 2268. The provision at issue here, former § 706 (d)(1)(B), is now codified at 20 U. S. C. A. § 3196 (c)(1)(B)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

October 31, 1979

Re: No. 78-873 - Board of Education of the City School District of the City of New York, et al., v. Patricia Roberts Harris, Secretary of HEW, et al.

Dear Harry,

Please join me.

Sincerely yours,

Mr. Justice Blackmun.

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 8, 1979

Re: No. 78-873 - Board of Education of the City School District of New York v. Harris

Dear Harry:

Please join me.

Sincerely,

T.M.

T.M.

Mr. Justice Blackmun

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 26 OCT 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-873

Board of Education of the City School District of the City of New York et al., Petitioners, *v.* Patricia Roberts Harris, Secretary of Health, Education, and Welfare, et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[October —, 1979]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents a narrow, but important, issue of statutory interpretation. It concerns a school district's eligibility for federal financial assistance under the 1972 Emergency School Aid Act (ESAA or the Act), Pub. L. 92-318, 86 Stat. 354, as amended, 20 U. S. C. §§ 1601–1619.[1] Because the federal funds available under the Act are limited, educational agencies compete for those funds.

/3

I

By § 702 (a) of the Act, 86 Stat. 354, 20 U. S. C. § 1601 (a), Congress found "that the process of eliminating or preventing minority group isolation and improving the quality of educa-

[1] The Act was technically repealed but then immediately re-enacted, with amendments not material here, by Title VI of the Education Amendments of 1978, Pub. L. 95-561, 92 Stat. 2252, 2268, effective Sept. 30, 1979. The re-enactment is recodified as 20 U. S. C. §§ 3191–3207. Because they govern this case and have been used throughout the litigation, the statutory references herein are to the 1972 Act, as amended, and to the old Code sections.

STYLISTIC CHANGES and p. 19

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 30 OCT 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-873

Board of Education of the City School District of the City of New York et al., Petitioners, *v.* Patricia Roberts Harris, Secretary of Health, Education, and Welfare, et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[October —, 1979]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

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[1] The Act was technically repealed but then immediately re-enacted, with amendments not material here, by Title VI of the Education Amendments of 1978, Pub. L. 95-561, 92 Stat. 2252, 2268, effective Sept. 30, 1979. The re-enactment is recodified as 20 U. S. C. §§ 3191-3207. Because they govern this case and have been used throughout the litigation, the statutory references herein are to the 1972 Act, as amended, and to the old Code sections.

November 6, 1979

Re: No. 78-873 - Board of Education v. Harris

Dear Bill:

I shall be glad to make the change you have suggested in your letter of November 5. I am sending this to the printer today.

Sincerely,

HAB

Mr. Justice Brennan

STYLISTIC CHANGES
+ pp. 13, 14, and 17

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 5 NOV 1979

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–873

Board of Education of the City School District of the City of New York et al., Petitioners, *v.* Patricia Roberts Harris, Secretary of Health, Education, and Welfare, et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[October —, 1979]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents a narrow, but important, issue of statutory interpretation. It concerns a school district's eligibility for federal financial assistance under the 1972 Emergency School Aid Act (ESAA or the Act), Pub. L. 92–318, 86 Stat. 354, as amended, 20 U. S. C. §§ 1601–1619.[1] Because the federal funds available under the Act are limited, educational agencies compete for those funds.

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[1] The Act was technically repealed but then immediately re-enacted, with amendments not material here, by Title VI of the Education Amendments of 1978, Pub. L. 95–561, 92 Stat. 2252, 2268, effective Sept. 30, 1979. The re-enactment is recodified as 20 U. S. C. §§ 3191–3207. Because they govern this case and have been used throughout the litigation, the statutory references herein are to the 1972 Act, as amended, and to the old Code sections.

November 9, 1979

Re: No. 78-873 - Board of Education v. Harris

Dear John:

I am not entirely sure that I understand the source of your difficulty described in your letter of October 29. In an endeavor to accommodate you, however, would the enclosed new version of the paragraph at the top of page 19 of my recirculation of November 6 meet your difficulties?

Sincerely,

HAB

Mr. Justice Stevens

pp 1, 19 & 20

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 13 NOV 1979

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–873

Board of Education of the City School District of the City of New York et al., Petitioners, *v.* Patricia Roberts Harris, Secretary of Health, Education, and Welfare, et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[October —, 1979]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents a narrow, but important, issue of statutory interpretation. It concerns a school district's eligibility for federal financial assistance under the 1972 Emergency School Aid Act (ESAA or the Act), Pub. L. 92–318, 86 Stat. 354, as amended, 20 U. S. C. §§ 1601–1619.[1] Because the federal funds available under the Act are limited, educational agencies compete for those funds.

I

By § 702 (a) of the Act, 86 Stat. 354, 20 U. S. C. § 1601 (a), Congress found "that the process of eliminating or preventing minority group isolation and improving the quality of educa-

[1] The Act was technically repealed and simultaneously re-enacted, with amendments not material here, by Title VI of the Education Amendments of 1978, Pub. L. 95–561, 92 Stat. 2252, 2268, effective Sept. 30, 1979. The re-enactment is recodified as 20 U. S. C. §§ 3191–3207. Because they govern this case and have been used throughout the litigation, the statutory references herein are to the 1972 Act, as amended, and to the old Code sections.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 14, 1979

MEMORANDUM TO THE CONFERENCE:

Re: No. 78-873 - Board of Education v. Harris

I shall eliminate the words "and was not sustained" that appear at the end of the first paragraph of Part V of the fourth draft of the opinion. This is on page 20.

HAB.

pp. 12, 14-16, 18, 20-21

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

5th DRAFT

Recirculated: 20 NOV 1979

SUPREME COURT OF THE UNITED STATES

No. 78–873

Board of Education of the City School District of the City of New York et al., Petitioners, *v.* Patricia Roberts Harris, Secretary of Health, Education, and Welfare, et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[October —, 1979]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents a narrow, but important, issue of statutory interpretation. It concerns a school district's eligibility for federal financial assistance under the 1972 Emergency School Aid Act (ESAA or the Act), Pub. L. 92–318, 86 Stat. 354, as amended, 20 U. S. C. §§ 1601–1619.[1] Because the federal funds available under the Act are limited, educational agencies compete for those funds.

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[1] The Act was technically repealed and simultaneously re-enacted, with amendments not material here, by Title VI of the Education Amendments of 1978, Pub. L. 95–561, 92 Stat. 2252, 2268, effective Sept. 30, 1979. The re-enactment is recodified as 20 U. S. C. §§ 3191–3207. Because they govern this case and have been used throughout the litigation, the statutory references herein are to the 1972 Act, as amended, and to the old Code sections.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 10, 1979

MEMORANDUM TO THE CONFERENCE

Re: No. 78-873 - Board of Education v. Harris

Lower court developments discovered since my initial draft was circulated make the following footnote changes desirable.

1. The first sentence of footnote 13 on page 20 of the slip opinion should read as follows:

> "We find the reasoning of the District Court in Robinson v. Vollert, 411 F. Supp. 461, 472-475 (SD Tex. 1976), rev'd, 602 F.2d 87 (CA5 1979), upon which the Board also relies, clearly distinguishable."

2. The second sentence of the second paragraph of footnote 2 on page 2 of the slip opinion should read as follows:

> "In a subsequent proceeding provoked by the Secretary's denial of a waiver to petitioner Board for the fiscal year 1978-1979, the Court of Appeals for the Second Circuit upheld the decision of the District Court to remand the case to HEW for reconsideration. Board of Education of the City of New York v. Harris, ___F.2d ___ (CA2 1979)."

I assume these changes will be acceptable, but, if not, please advise me.

HAB.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 29, 1979

78-873 Board of Education v. Harris

Dear Harry:

In accord with my vote at Conference, I will await the dissent.

Sincerely,

L. Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Confernce

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 19, 1979

78-873 Board of Education v. Harris

Dear Potter:

Please join me in your dissent.

Sincerely,

Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 20, 1979

Re: No. 78-873 - Board of Education v. HEW

Dear Potter:

Please join me in your dissent in this case.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 29, 1979

Re: 78-873 - Board of Education v. Harris

Dear Harry:

Except for the paragraph discussing "proof of impact" at pages 18-19, I am prepared to join your opinion. Since petitioner has not questioned in this Court the adequacy of the prima facie case--assuming that impact is the right standard--or the lower courts' rejection of its justification, I do not believe we should express any opinion on these evidentiary questions. Perhaps a slight change merely describing the evidence and indicating that no question has been raised in the petition would take care of my problem.

Respectfully,

JPS

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 9, 1979

Re: 78-873 - Board of Education of City School District of City of New York v. Harris

Dear Harry:

Please join me.

Respectfully,

JPS

Mr. Justice Blackmun

Copies to the Conference