

Doe v. Kamehameha Schools et al., Civ. No. 03-00316
ACK/LEK

November 17, 2003 Court Ruling

Counsel have very ably presented their respective positions. The Court feels the parties are entitled to a ruling at this time notwithstanding the condition of my voice.

The Court appreciates that both sides have very strong emotional feelings about this case, and yet the court is confident that both sides respect that the Court must decide this case strictly in accordance with the law.

The Court emphasizes that this case involves exceptionally unique circumstances. As the Ninth Circuit stated in the Burgert decision, "the Bishop Trust is a charitable testamentary Trust established by the last direct descendant of King Kamehameha I, Princess Bernice Pauahi Bishop, who left her property in trust for a school dedicated to the education and upbringing of Native Hawaiians."

Plaintiff now challenges Kamehameha Schools admission policy under § 1981 as being racially discriminatory. The Court notes that Plaintiff does not dispute any of the facts submitted by Kamehameha Schools. Both parties agree that disposition by summary judgment is appropriate.

At the outset, it is important to note that Kamehameha Schools is a private school and receives no federal funding. No taxpayer money is involved.

From a historic perspective, it should be remembered that the Kamehameha Schools was established by Princess Pauahi before Hawaii became a part of the United States, and that the admissions policy provides a preference for Native Hawaiians, the indigenous people of Hawaii.

In her Will, Pauahi established a trust for the Kamehameha Schools, directing, among other things, that the Trustees "devote a portion of each year's income to the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood," and also

giving "unto my trustees full power to make all such rules and regulations as they may deem necessary for the government of said schools and to regulate the admission of pupils." Thus it is clear that Pauahi left to her trustees the discretion "to regulate the admission of pupils."

Charles R. Bishop, who was the chairman of the original board of trustees and who was Pauahi's husband of some 30 years, explained that it was her intent to give a preference to students of Hawaiian ancestry. Bishop explained his wife's intentions in his speech on the first Founder's Day in December 1888, concluding that "in order that her own people might have the opportunity for fitting themselves with such competition . . . these schools were provided for, in which Hawaiians have the preference." The Court finds that statement represents the core of the schools' mission. In a subsequent letter of February 11, 1897 Bishop further explained that "there is nothing in the Will of Mrs. Bishop excluding white boys or girls from the schools, but it is understood by the Trustees that only those having Native blood are to

be admitted at present" And in a letter of February 20, 1901 Mr. Bishop stated: " . . . the preference to Hawaiians of pure or part aboriginal blood applies only to education of orphans and others in indigent circumstances; but it was intended and expected that Hawaiians having aboriginal blood would have a preference Education of the Natives was the first, but not the exclusive and perpetual purpose of the Founder of the School." He went on to say "those of other races were not barred or excluded" and concluded that "it was wise to prepare for and admit Natives only and I do not think that a time has yet come when it is better to depart from that rule." Thus it is evident that the intent of Princess Pauahi, as explained through her husband Charles Bishop, was that preference be given to Native Hawaiians for admittance to the Kamehameha Schools in order that through proper education they might be competitive with new comers in maintaining their socioeconomic status, culture, and participate in the governance of their communities. It is further evident that this preference was not perpetual nor an

absolute bar to admittance of other races to the Kamehameha Schools, but only for so long as it took the schools to fulfill its responsibility in attaining the goal of educating Native Hawaiians to overcome the manifest imbalance in socioeconomic and educational disadvantages, and non-Native Hawaiians would be admitted when that goal was attained or at such earlier date when the schools has the capacity to also admit non-Native Hawaiians. In sum, it was the vision of Princess Pauahi to save her people through education.

Kamehameha Schools reviews its admission policy on a periodic basis to insure its consistency with its mission and objectives in attaining these goals. Kamehameha has most recently made such a review in 2002. As enunciated by Trustee Chairman Ing, the admission policy will remain in effect as long as the needs exceed the schools' ability to provide educational opportunities. Today the Kamehameha Schools has only approximately 4,800 spaces in the campus programs while there are approximately 70,000 Native Hawaiian children enrolled in grades K-12 throughout Hawaii. Thus while

the school has made great strides over the years in expanding its capacity to provide an education for thousands of children in Hawaii, it still is unable to enroll all Native Hawaiian children who seek admittance and accordingly has not yet reached that stage where it can also admit non-Native Hawaiian children; although currently the student body represents virtually every race, albeit with each student having some Hawaiian blood.

Former Governor of the State of Hawaii George R. Ariyoshi has stated in his Declaration that: "I look forward to the fruits of Kamehameha Schools' efforts when it educates and develops so many good Hawaiian role models that future generations of Hawaiian children need not be reminded of failures but are inspired by successes. I look forward to the day when Kamehameha Schools admissions policy is no longer needed, when Native Hawaiians are at the top of every educational and socioeconomic class. But that day is not today."

The Supreme Court ruled in the Patterson decision that claims of racial discrimination under §1981 are

subject to the same scheme of proof as applicable to Title VII cases. The Title VII framework consists of a two-step test that first looks to whether the use of race is supported by legitimate justification and then considers whether the use of race is reasonably related to that justification. The Court further notes that courts have held that the Title VII standard is not a fixed and rigid formula but rather a flexible one.

The Court reiterates that Kamehameha Schools is a private school receiving no federal funding. The Court finds that Kamehameha Schools has a legitimate justification for its admission policy and that it serves a legitimate remedial purpose by improving Native Hawaiians socioeconomic and educational disadvantages, producing Native Hawaiian leadership for community involvement and revitalizing Native Hawaiian culture; thereby remedying current manifest imbalances resulting from the influx of western civilization. Native Hawaiians continue to suffer from economic deprivation, low educational attainment, poor health status, sub-standard housing, and social dislocation. The Court

further finds that the admission policy is reasonably related to its remedial purpose. The Court notes that the basis of the claim in this case involves a statutory challenge, rather than a constitutional challenge, that the nature of the actor is private rather than the state, and that the context in which the claim arises is in the field of education rather than employment.

Historians are divided and disagree over the events surrounding the demise of the Hawaiian Monarchy in 1893; including whether United States minister John L. Stevens and United States Marines aided the insurrection and the extent to which Native Hawaiians participated on either side. Conflicting reports on these events were filed shortly thereafter; with the first report being made by former Congressman James Blount who had been appointed by President Cleveland to investigate the matter and who concluded that U.S. diplomatic and military representatives had wrongfully assisted in an overthrow. A second report was filed by Senator John Morgan, Chairman of the Senate Committee on Foreign Relations, who concluded that there was no wrongdoing on

the part of any representatives of the United States. This Court will not address the merits of these differing views of Hawaiian history.

Nevertheless, Congress has made repeated and extensive findings in numerous laws that the Hawaiian Monarchy was unlawfully overthrown with the aid of the United States, and that the United States has a resulting special trust obligation and political relationship to Native Hawaiians as the indigenous people of Hawaii. Again, the court only recounts the 1893 events as understood by Congress. In 1993 Congress issued an acknowledgment and apology known as the Apology Resolution whereunder Congress acknowledged these wrongs and the resulting socioeconomic disadvantages of Native Hawaiians and sought a reconciliation with the Native Hawaiian people.

In 2002 Congress re-enacted the Native Hawaiian Education Act granting preferences to Native Hawaiians in the field of education. Congress made findings of Native Hawaiian socioeconomic and educational disadvantages similar to those which Kamehameha schools has identified

and is likewise seeking to remedy. Indeed the House Committee on Education and Workforce, in reporting on this legislation, concluded that "unlike other indigenous populations, Native Hawaiians have a trust, established by the last Hawaiian Princess, which exists solely to educate Native Hawaiian children. The Bishop Trust is currently one of the largest charitable trusts in the world," and "the Committee urges the trust to redouble its efforts to educate Native Hawaiian children."

Thus Congress has acknowledged that notwithstanding its prior efforts to fulfill its special trust relationship with Native Hawaiians there is a continuing substantial need for educational assistance and that the parallel trust of Princess Pauahi establishing the Kamehameha Schools is a significant resource in meeting this need.

Section 1981 should be read in harmony with Congress's many findings regarding the needs of Native Hawaiians and with the laws Congress has enacted giving a preference to Native Hawaiians. The educational programs funded under the Native Hawaiian Education Act

have an inherently external focus to authorize and develop innovative educational programs to assist Native Hawaiians throughout our community, reflecting the needs and under-representation of Native Hawaiians outside of any specific school. Like Kamehameha Schools' remedial plan, the laws enacted by Congress are not designed to remedy generalized societal discrimination but rather are focused on the very specific harm caused by what Congress has identified and decided was the United State's wrongful participation in the demise of the Hawaiian Monarchy.

The Supreme Court declared in its Weber decision that "it would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who have been excluded from the American dream for so long constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." Likewise, the analysis of § 1981's application to the Kamehameha Schools remedial affirmative action plan should be

considered in consonance with Congress having determined that the United States wrongfully participated in the overthrow of the Hawaiian Monarchy and having proclaimed a policy of reconciliation with the Native Hawaiian people and enacted numerous laws for their benefit.

In sum, the Court reiterates that this case involves exceptionally unique circumstances involving a private school with a remedial race-conscious admissions policy to rectify socioeconomic and educational disadvantages of indigenous Native Hawaiians resulting from what Congress has determined as U.S. participation in the overthrow of the Hawaiian monarchy; with Congress having made legislative findings setting forth these disadvantages and seeking to remedy them, and recognizing that Kamehameha Schools admission policy and educational program are a means of attaining such remedial goal and with a House Committee Report urging Kamehameha to redouble its efforts.

The Court is mindful that these unique circumstances to some extent involve an area of unsettled law. Notably, no Court has ever addressed whether or not

§ 1981 permits the remedial use of race by a private school receiving no federal funding, especially one involving an educational preference for descendants of an indigenous people who have been disadvantaged by past history.

The recent decisions by the Supreme Court in Gratz and Grutter involved constitutional challenges to public schools in Michigan, with the Court looking at the internal composition of the student body; although recognizing the external goal of diverse racial civic participation and leadership in our society. The Supreme Court decision in Runyon involved an admission policy which barred all African Americans from a private school, but is distinguishable because of the absence of any remedial purpose. The Rice decision involved an OHA statewide election that ran afoul of the Fifteenth Amendment and involved a state actor rather than a private actor. The McDonald decision enunciated a rule that in the employment context an employer cannot discriminate against or in favor of any race; however the Supreme Court has held in Weber and following cases that

a race-based affirmative action plan is permissible where it has a legitimate justification. In view of the unchartered area of the law involved in this case, it is likely that the ultimate resolution of these issues will be made by a higher court. Nevertheless this Court is firmly convinced that the Kamehameha Schools race-conscious remedial action plan has a legitimate justification.

Because of this conviction the Court finds it unnecessary to address the question whether the admission policy also passes muster under the strict scrutiny standard.

For the foregoing reasons, the Court grants the Summary Judgment Motion of Kamehameha Schools and Denies the Summary Judgment Motion of Plaintiff. The Court will file a more detailed written order.