# A Legal Roadmap from Desegregation to Diversity in America's Public Schools

*Take a 4-wheel drive, it's going to be a bumpy ride*

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## I. THE LEGAL TERRAIN

The United States Supreme Court in *Brown v. Board of Education*[1] ordered America's schools to journey to desegregation "with all deliberate speed." In the ensuing years, schools strolled towards desegregation,[2] but the pace picked up with the passage of the Civil Rights Act of 1964 and active desegregation enforcement by the United States Department of Justice. Schools became increasingly integrated thereafter, so that by 1988, 43% of black students attended majority white schools in the United States. Unfortunately, history reveals that 1988 was also the high water mark for public school integration. Segregation in the public schools began to resurface, and by 1996 integration levels were equal to that of the 1960's.[3]

[1] 347 U.S. 483 (1954)

[2] " 'All deliberate speed' has turned into a soft euphemism for delay." *Alexander v. Holmes County Board of Education*, 396 U.S. 1218, 1219 (1969).

[3] Justice Breyer summarized America's journey to school integration in *Parents Involved in Community Schools v. Seattle School Dist.* No. 1, 551 U.S. 701, 805 (2007) (Breyer, J., dissenting): "Overall these efforts brought about considerable racial integration. More recently, however, progress has stalled. Between 1968 and 1980, the number of black children attending a school where minority children constituted more than half of the school fell from 77% to 63% in the Nation (from 81% to 57% in the South) but then reversed direction by the year 2000, rising from 63% to 72% in the Nation (from 57% to 69% in the South). Similarly, between 1968 and 1980, the number of black children attending schools that were more than 90% minority fell from 64% to 33% in the Nation (from 78% to 23% in the South), but that too reversed direction, rising by the year 2000 from 33% to 37% in the Nation (from 23% to 31% in the South). As of 2002, almost 2.4 million students, or over 5% of all public school enrollment, attended schools with a white population of less than 1%. Of these, 2.3 million were black and Latino students, and only 72,000 were white. Today, more than one in six black children attend a school that is 99–100% minority. *See*

The nation's U-turn on the road to public school integration presents significant school policy issues, as well as complex legal questions. The last 65 years have seen school systems, parents, and advocates struggle mightily to reach the state of integration envisioned in *Brown* ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown Id.*, at 493). While on the road to desegregation, however, the legal and public policy destination changed. Broad-scale diversity in America's schools, not merely white/black racial desegregation, has become the contemporary legal litmus test, and the policy objective of many school boards.

The state of student racial segregation puts many school boards at a crossroads. School boards that stay the course in the face of racial segregation risk legal challenges. Alternatively, school boards can turn towards initiatives that increase racial integration. And risk legal challenges in doing so. School board attorneys can guide their school boards toward diversity (nee desegregation) using lawful policies and initiatives, but the journey is likely to be controversial and clamorous. The smoothest legal journey occurs, ultimately, when a community understands that diversity is not about getting people of different races in close proximity to one another. It's a mindset of shared personal beliefs that value diversity.

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Appendix A, *infra.* In light of the evident risk of a return to school systems that are in fact (though not in law) resegregated, many school districts have felt a need to maintain or to extend their integration efforts." *See,* School Desegregation in 2017 – The Process of Achieving Unitary Status, Lindsay Anne Thompson, Esquire. *See also* The Problem We All Live With, Nikole Hannah-Jones.

## II. THE LEGAL UNCERTAINTY OF STAYING THE COURSE

In the face of increasing racial segregation and ongoing racial disparities in educational outcomes, parents and advocates have been active and litigious.[4] Numerous lawsuits have been filed and legal action threatened as a means of addressing the rise in segregation and its educational impacts.

The state of New Jersey was sued in May 2018 in a complaint calling for the state-wide desegregation of its public schools. *Latino Action Network v. New Jersey.* Public schools in New Jersey are some of America's least integrated, even though the state's population is increasingly diverse. The lawsuit claims that about 66% of New Jersey's African American students and 62% of its Latino students attend schools that are more than 75% non-White. The lawsuit blames the lack of integration on residential segregation, and seeks the repeal of the state requirement that students attend the school district in which they reside. A retired state Supreme Court justice is leading the case on behalf of a coalition of plaintiffs.

In July 2018, the Minnesota Supreme Court gave the green light to a potentially potent desegregation lawsuit. In *Cruz-Gusman v. State of Minnesota,* No. A16-1265 (Minn. Jul. 25, 2018), parents sued the state of Minnesota alleging that the public schools in Minneapolis and St. Paul are segregated relative to surrounding school districts. The complaint alleges that:

1) Students are assigned and confined to schools that are separate and segregated;
2) Those schools are separate and unequal;
3) The state has engaged in, or permitted practices, that caused or contributed to the segregation.

[4] *See How Do You Get Better Schools? Take the State to Court, More Advocates Say,* Goldstein, Dana, New York Times, August 21, 2018.

The case is particularly significant because the plaintiffs claim that these circumstances violate the Minnesota state constitution. More specifically, the plaintiffs allege that the racial and economic segregation caused by the State's practices violate the Education Clause, Due Process Clause, and Equal Practice Clause of the State's constitution. The State of Minnesota moved to dismiss the complaint on grounds on justiciability, claiming that the suit failed to state a cause of action. The Minnesota Supreme Court rejected that argument, permitting the case to go forward. In ruling that the alleged facts constitute a valid claim that the state constitution has been violated, the Court stated:

> It is self-evident that a segregated system of public schools is not "general," "uniform," "thorough," or "efficient." (Quoting the disjunctive requirements of the State's Education Clause). *Cruz-Gusman*, at No. A16-1265 (Minn. Jul 25, 2018), p.15, n. 6.

The Minnesota Court's finding that its state's constitutional provisions can provide a remedy for segregated schools may propel litigation in other states, especially the court's use of the Education Clause, since the state's Education Clause is similar to that of most states. The potential for parents to use the state Education Clause provision as a vehicle for desegregation suits may open up new routes for legal challenges in segregated locales, even while the U.S. Department of Education reduces its enforcement actions and courts more liberally release school districts from federal desegregation orders.

Disaggregated data on educational outcomes creates a potential potent predicate for litigation. Data demonstrating disparate results in areas such as achievement scores, student discipline, harassment complaints, and student arrests can serve as a basis for a legal challenge. In New York City, the City's Independent Budget Office issued a report in December 2017 concluding that the achievement gap between the races has been widening significantly in the city's

public schools. In Florida, the state chapter of the NAACP has threatened to sue the Lee County School Board due to racial disparities in student discipline. Nationwide, the U.S. Department of Education reports an increase in student racial harassment complaints in 2017 (up 25% from 2016), as it cuts back on the number of OCR investigators and adopts internal guidance narrowing the scope of its civil rights investigations. Education Week Research Center analyzed federal data and reported in 2017 that in 43 states and the District of Columbia African American students are arrested at school at disproportionally high rates.

This data is providing fuel for litigation. The Collier County public school system (Florida) was sued in 2016 by the Southern Poverty Law Center alleging discrimination against immigrant students. The Kern High School district in California settled a lawsuit in 2017 alleging that the district disproportionately disciplined minority students. In the 50-page settlement, the district agreed to adopt new discipline policies based on recommendations from experts on unconscious racial bias and to pay damages of approximately $100,000. The South Orange-Maplewood school district in New Jersey was sued in February 2018 by minority parents alleging that the school district was systematically depriving African-American students of access to challenging classes. The lawsuit also alleges that the school district sponsors de facto segregation throughout the district.

## III. THE LEGAL UNCERTAINTY OF COURSE CORRECTIONS

While inaction in the presence of segregation and data reflecting disparities by race may invite litigation, so may action. For decades, school boards have pursued policies that promote diversity. "[M]yriad school districts operating in myriad circumstances have devised myriad plans, often with race-conscious elements, all for the sake of eradicating earlier school segregation, bringing about

integration, or preventing retrogression." *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 806 (2007) (Breyer, J., dissenting). The route has often been contentious and the legal outcome uncertain. The legal principles that apply to *voluntary* diversity efforts are markedly different than those that apply to actions taken to remedy the effects of *de jour* segregation. *See Swann v. Charlotte-Mecklenburg*, 402 U.S. 1 (1971). School boards pursuing voluntary diversity initiatives must often follow a route lacking adequate lighting and known guardrails.

The application of constitutional principles to voluntary governmental racial classifications leads to complex legal analysis. The use of race in school board policies is not exempt from this complexity. In its most relevant decision, *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (2007) ("*Parents Involved*"), the United States Supreme Court issued five opinions on the constitutionality of voluntary efforts by two school districts to use individualized racial classifications to achieve diversity. The result of these five opinions was a majority conclusion that the use race as a factor in determining a student's school assignment is unconstitutional.

In *Parents Involved*, the two school districts (the Seattle School District and the Jefferson County Public School District) relied "upon an individual student's race in assigning that student to a particular school, so that the racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole." 551 U.S. at 710. The Seattle School District operated an open choice enrollment plan. If too many students chose the same school as their first choice, a series of tiebreakers were used to determine the students' school assignments. The second tiebreaker depended on the racial composition of the school and the race of the individual student. The Jefferson County Public Schools used a voluntary student assignment

plan, which required all nonmagnet schools to maintain an African-American enrollment of between 15 and 50 percent. Individual students were assigned, and permitted to transfer, to schools based on their race.

Each of the five opinions in *Parents Involved* held that the school boards' policy must pass the Equal Protection Clause's strict scrutiny test, but they differed on the application of the Clause and the outcome. To satisfy strict scrutiny, a governmental policy that uses race must pass a two-prong test: 1) the use of race must serve a compelling state interest, and 2) the use of race must be narrowly tailored to achieve that interest. Four of the nine Justices concluded that the school boards' goal of diversity did not qualify as a compelling state interest, and thus held the policies unconstitutional for that reason. Justice Kennedy wrote a separate opinion, holding that a school board's pursuit of diversity *is* a compelling state interest. He concluded, however, that the plans were not narrowly tailored, and thus were unconstitutional because they failed the second prong of the strict scrutiny test. Four Justices dissented, opining that the plans were constitutional, and stating explicitly that the pursuit of diversity in the K-12 arena of public education is a compelling state interest.

Justice Kennedy's concurrence is crucial because it formed a 5-vote majority opinion on the Court that achieving diversity and avoiding racial isolation serves a compelling state interest. Justice Kennedy's retirement from the Court, however, combined with constitutional views likely to be held by his successor, now casts some uncertainty as to future Court opinions on this subject. Those opinions are likely to be shaped by the move of Chief Justice John Roberts to the swing vote position, becoming in the forecast of University of Chicago law professor Justin Driver, "the least swinging swing justice in the post-World War II era.[5]

[5] *How Brett Kavanaugh Would Transform the Court*, The New York Times, Liptak, Adam, September 2, 2018.

*A. A Detour to Strict Scrutiny - Caution Ahead*

A school board policy touching on race must comply with the Equal Protection Clause of the Constitution, and will be judged by either the strict scrutiny test or rational basis test. Educational policies that utilize race typically fall into one of three categories, and the pertinent Equal Protection Clause test varies accordingly. Those categories are: individual racial classifications, race-conscious policies, and race-neutral initiatives.

When individual racial classifications are used, the strict scrutiny test applies. *Parents Involved*. Under strict scrutiny, a governmental policy is constitutional only if 1) it serves a compelling state interest, and 2) the use of individual racial classifications is narrowly tailored to achieve that interest. Individual racial classifications are present in a school board policy if a student's race becomes dispositive in its implementation.

1. The Compelling State Interest Prong of the Strict Scrutiny Test

In *Parents Involved*, five justices in separate opinions concluded that school boards have a compelling state interest in achieving racial diversity and avoiding racial isolation. The other four Justices held those interests not to be compelling, noting that the Court had only recognized diversity to be a compelling interest in the field of education in two circumstances. One is at the college and university level, and the other is when a public school system has been found to have engaged in *de jure* segregation in violation of the Constitution.

Justice Kennedy provided the fifth vote in *Parents Involved* to form a majority view that achieving racial diversity is a compelling interest of school boards. Given Justice Kennedy's retirement from the Supreme Court, it is worth noting that the Ninth Circuit Court of Appeals decision in *Parents Involved* (an en banc opinion) also found diversity to be a compelling state interest. Similarly, the

Sixth Circuit of Appeals, in its decision in the companion case of *McFarland v. Jefferson County*, found diversity to be a compelling interest in the field of public education. In addition, the First Circuit Court of Appeals has held diversity to be a compelling interest in the field of K-12 education. *Comfort v. Lynn School Committee,* 418 F. 3d 1 (1st Cir. 2005).

The decision of the First Circuit Court of Appeals in *Comfort* offers a prime example of a judicial conclusion that diversity serves a compelling state interest in the K-12 field of public education and, moreover, of the constitutionality of a race-conscious diversity plan. The city of Lynn had been experiencing racial segregation in its schools for some time due to residential housing patterns. The Lynn School Committee adopted a plan to sponsor ten magnet schools as a means of integrating the student body. Believing that the magnet school initiative by itself would be insufficient, the Lynn School Committee also adopted a student transfer policy in which race is a consideration. The transfer plan classifies every school by one of three categories: racially balanced, racially isolated, or racially imbalanced. A school is racially balanced if the percentage of non-white students falls within the range of the overall proportion of minorities in the district. A school is racially isolated if the school's non-white population falls below the racially balanced range. A racially imbalanced school exists when the non-white population is higher than the racially balanced range.

Under the Lynn school board's policy, every student is assigned to his or her neighborhood school. If a student seeks a transfer to another school, however, the race of the student and the racial category of the school is considered in approving or denying the transfer. For example, a white student would be permitted to transfer out of a racially isolated school and into a racially imbalanced school. A non-white student would be permitted to transfer out of a racially imbalanced school and into a racially isolated school. Transfers that would worsen

the racial imbalance in the sending or receiving school are denied. This policy treats students differently based on race, as illustrated by the following example. If a white student and a non-white student both attend a racially isolated school and each request a transfer to a school that is racially imbalanced, the white student's request would be approved, and the non-white student's request would be denied.

The Court of Appeals upheld the Lynn school board's plan. It applied the strict scrutiny test, and concluded that diversity in a K-12 public school system is a compelling state interest. The court noted, in fact, that the record provided a solid basis for concluding that there is a *stronger* interest in promoting diversity at the K-12 education level than at the college or university level. In its argument that promoting diversity is a compelling interest, the school board provided extensive expert testimony, which was relied on heavily by the District Court and the Court of Appeals. The court in *Comfort* also held that the school board's plan satisfied the narrowly tailored prong of strict scrutiny. The Court concluded that the effect on students was minimally invasive, because the plan applied to only voluntary transfers. Additionally, the school board amply demonstrated its compliance with the constitutional requirement to consider race-neutral alternatives, since the record reflected that the school board seriously considered six race-neutral alternatives and found them insufficient.

The Supreme Court has squarely recognized diversity as a compelling state interest in the field of higher education. In *Fisher v. University of Texas at Austin*, 136 S.Ct. 2198 (2016), a case concerning a race-conscious admission program at the University of Texas, the Court provided several reasons why promoting student diversity at a college or university serves a compelling state interest. The Court accepted the following as compelling interests: diversity promotes cross-racial understanding, helps to break down racial stereotypes, enables students to

better understand persons of different races, promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society. Those reasons seem equally applicable in a public school setting, and school boards should assert these interests and support them with expert educational opinion. The *Fisher* Opinion holding those interests to be compelling at the university level was written by Justice Kennedy, who similarly found diversity to be a compelling state interest in the field of K-12 education in *Parents Involved*.

2. The Narrowly Tailored Prong of the Strict Scrutiny Test

The Supreme Court utilized a 4-part test to determine whether the narrowly tailored prong was satisfied in two key cases analyzing race-conscious college admission programs. *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). First, a race conscious program cannot utilize a quota system. Second, the plan cannot "unduly harm members of any racial group." *Grutter*, *Id* at 341. Third, the government must consider and use any workable, race-neutral alternatives. Fourth, the use of race must be limited in time. In *Grutter*, the Court stated that the time limitation element can be satisfied by "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Grutter*, *Id* at 342.

The obligation to consider race-neutral alternatives is perhaps the hardest of the four requirements to satisfy, because the Court engages in a critical analysis of adopted plans. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives." *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). In determining if a plan is narrowly tailored, courts do not defer to the judgment of educators. *Fisher*. While narrow tailoring does not require the exhaustion of every conceivable race-neutral alternative, it does require that a

school board demonstrate that race-neutral alternatives are either unavailable or unworkable. *Fisher*. In *Parents Involved*, Justice Kennedy concluded that the school districts had not shown their plans to be narrowly tailored because he found the plans to be only generally worded, resulting in uncertainty in how the plan would be implemented and students impacted. Justice Kennedy's Opinion demonstrates that providing the court with specific plan details is imperative to satisfying the narrowly tailored prong:

> The discrepancy identified is not some simple and straightforward error that touches only upon the peripheries of the district's use of individual racial classifications. To the contrary, Jefferson County in its briefing has explained how and when it employs these classifications only in terms so broad and imprecise that they cannot withstand strict scrutiny. See, *e.g.*, Brief for Respondents in No. 05–915, at 4–10. While it acknowledges that racial classifications are used to make certain assignment decisions, it fails to make clear, for example, who makes the decisions; what if any oversight is employed; the precise circumstances in which an assignment decision will or will not be made on the basis of race; or how it is determined which of two similarly situated children will be subjected to a given race-based decision. *See ibid.; see* also App. in No. 05–915, at 38, 42 (indicating that decisions are "based on … the racial guidelines" without further explanation); *id.*, at 81 (setting forth the blanket mandate that "[s]chools shall work cooperatively with each other and with central office to ensure that enrollment at all schools [in question] is within the racial guidelines annually and to encourage that the enrollment at all schools progresses toward the midpoint of the guidelines"); *id.*, at 43, 76–77, 81–

> 83; *McFarland* v. *Jefferson Cty. Public Schools*, 330 F. Supp. 2d 834, 837–845, 855–862 (WD Ky. 2004)….
>
> One can attempt to identify a construction of Jefferson County's student assignment plan that, at least as a logical matter, complies with these competing propositions; but this does not remedy the underlying problem. Jefferson County fails to make clear to this Court—even in the limited respects implicated by Joshua's initial assignment and transfer denial—whether in fact it relies on racial classifications in a manner narrowly tailored to the interest in question, rather than in the far-reaching, inconsistent, and *ad hoc* manner that a less forgiving reading of the record would suggest. When a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State.

The plurality opinion in *Parents Involved* also was highly critical of the school districts' efforts to show that their plans were narrowly tailored. Unpersuaded that the school districts' intent in adopting the plans was to obtain educational benefits from a diverse school environment, the plurality opinion charges the school districts with an egregious form of racial discrimination - - racial balancing.[6] Justice Roberts, author of the plurality opinion, provides an admonition instructive to school board and their attorneys:

[6] "The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be 'patently unconstitutional.' *Id*., at 330." *Parents Involved* at 14. *See also Swann v. Charlotte-Mecklenburg Bd. of Educ*., 402 U.S. 1, 23-24 (1971) ("The District Judge went on to acknowledge that variation 'from that norm may be unavoidable.' This contains intimations that the 'norm' is a fixed mathematical racial balance reflecting the pupil constituency of the system. If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse."

> [I]t is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate….
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> This comparison makes clear that the racial demographics in each district—whatever they happen to be—drive the required "diversity" numbers. The plans here are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits; instead the plans are tailored, in the words of Seattle's Manager of Enrollment Planning, Technical Support, and Demographics, to "the goal established by the school board of attaining a level of diversity within the schools that approximates the district's overall demographics." …
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> The plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits….
>
> This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent. *Id* at 729.

This is an important message to school attorneys to ensure that the trial record contains comprehensive specifics on a policy's implementation, as well as a rationale rooted in compelling educational interests.

B. *Rational Basis - - the Toll-free Highway*

Race-neutral and race-conscious strategies need only satisfy the Equal Protection Clause test of rational basis. Examples include magnet schools, boundary line adjustments, open enrollment policies, and voluntary transfer policies.

Under the rational basis test, a school board's use of race must be upheld if it is "rationally related to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). In determining whether an action is reasonably related to a legitimate state interest, courts invoke a deferential standard of review. School boards and educators get the benefit of this deference: "[J]udges are not well suited to act as school administrators. Indeed, in the context of school desegregation, this Court has repeatedly stressed the importance of acknowledging that local school boards better understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their pupils." *Parents Involved*, 551 U.S. at 848-49, 127 S.Ct. 2738 (citing *Milliken v. Bradley*, 418 U.S. 717, 741-42, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974)).

In *Parents Involved*, Justice Kennedy stated that if school authorities "are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion, solely on the basis of a systemic, individual typing by race." *Id* at 789. Justice Kennedy also gave examples: "School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and

tracking enrollments, performance, and other statistics by race." *Id* at 707. Although these mechanisms are race conscious, they do not "lead to different treatment based" on race, so it is "unlikely any of them would demand strict scrutiny to be found permissible." *Id* at 789.

A case in point is *Doe v. Lower Merion School District*, 665 F.3d 526 (3rd Cir. 2011), *cert. denied* (2012). In *Lower Merion*, the school board adopted a school redistricting plan in which student race was a factor. Although the formal goals of the redistricting plan did not include race, the school board did consider the racial make-up of students who would be impacted by the various redistricting plans. The plaintiffs argued that because race was a factor in the school board's selection of a redistricting plan, strict scrutiny must be applied to its decision.

The Third Circuit Court rejected the argument that the school board's plan should be analyzed under strict scrutiny, holding that the rational basis test applied because the plan was "facially race neutral, assigning students to schools based only on the geographical areas in which they live." *Id* at 545. The Court of Appeals noted that the plan, "on its face, neither uses racial classification as a factor in student assignment nor distributes any burdens or benefits on the basis of racial classification." *Id*. The Court differentiated this case from the holding in *Parents Involved* that strict scrutiny applied because in *Parents Involved* the school board policy used race as a sole factor. For the Lower Merion school board, race was merely a consideration.

The Third Circuit Court of Appeals provided an instructive distinction between plans that explicitly classify based on race and those that merely consider race. The court stated:

> "The consideration or awareness of race while developing or selecting a policy, however, is

> not in and of itself a racial classification. Thus, a decisionmaker's awareness or consideration of race is not racial classification. Designing a policy "with racial factors in mind" does not constitute a racial classification if the policy is facially neutral and is administered in a race-neutral fashion." *Id* at 548.

In order for strict scrutiny to apply, the plan would have to be "unexplainable on grounds other than race" or it must be shown that "other legitimate redistricting principles were subordinated to race such that race was the predominant factor motivating the District's redistricting decision." *Id* at 556.

The Third Circuit further noted: "The [Supreme] Court has never held that strict scrutiny should be applied to a school plan in which race is not a factor merely because the decisionmakers were aware of or considered race when adopting the policy." *Id.* The redistricting plan adopted by the Lower Merion school board involved merely the consideration of race, and thus the applicable standard is the rational basis test.

## IV. THE U.S. TRAFFIC SIGNAL – GREEN LIGHT TO RED LIGHT

In 2011, the Office for Civil Rights, U.S. Department of Education, issued a Dear Colleague letter entitled *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*. The Guidance identified the following types of actions that a school board may take to increase diversity, listed from the clearly constitutional to the most constitutionally suspect:

- Race-neutral options, such as open enrollment policies and the geographic placement of special program schools.

- The generalized use of race, such as developing redistricting proposals based on race-neutral factors and then using race as a consideration among viable proposals.
- The individualized use of race, such as using race at the individual student level.

In July 2018, the U.S. Department of Education rescinded its 2011 Guidance, and substituted a Dear Colleague Guidance letter from 2008. The 2008 Guidance letter states: "The Department of Education strongly encourages the use of race-neutral methods for assigning students to elementary and secondary schools." Speculation abounds as to whether the Department's shift in lanes, from encouraging race-based approaches to supporting race-neutral approaches, signals a shift by the Department from *promoting* to *challenging* race-conscious school policies.

The role that the United States Government is playing in this journey has been rendered more uncertain by the recent decision of the U. S. Department of Justice to challenge Harvard University's race-based admissions process by filing a Statement of Interest in *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College*[7]. Angling to have a say in the outcome of this litigation,[8] the United States challenges Harvard's policy as a half-hearted and woefully inadequate attempt to comply with the strict scrutiny requirements set forth by the Supreme Court in its higher education rulings on diversity admission policies. The United States accuses Harvard of racial balancing, to the detriment of Asian-American applicants. If the United States succeeds in their effort to have Harvard's race-conscious admissions policy thrown out on the argument that it

[7] Case No. 1: 14-CV-14176-ADB (D.Mass, Boston Division), Document 497, filed August 30, 2018.
[8] "The United States has a substantial interest in this case because its resolution could have a significant impact on the …..interpretation and scope of the Equal Protection Clause …." Id, Pg. 4, Fn 6

violates the constitutional rights of one minority group, i.e. Asian-Americans, majority race candidates would be among the beneficiaries.

## V. TRAILBLAZING SCHOOL BOARDS AND THEIR VEHICLES

Over 100 school boards and charter schools have instituted policies to increase the diversity of students at their schools.[9] These districts, and the methods they have used, can serve as models for school boards seeking viable and proven diversity initiatives.

### A. Types of Initiatives

1. Controlled Choice. Parents specify their preferences for a school in priority order, and assignments are made based on the parent's choice and the school district's diversity goals. Typically, bus transportation is provided. Controlled choice plans are in effect in the Jefferson County Public School District (Kentucky), Cambridge Public School District (Massachusetts), and Champaign Community Unit School District 4 (Illinois).

2. Magnet Schools. The school district creates schools with a specialized theme, curriculum, or pedagogy to attract students from outside the attendance area on a voluntary basis. Examples include Montessori, STEM, International baccalaureate, early college or dual enrollment, and fine arts programs. These magnet schools may be located in areas of high poverty or concentrations of minorities and are used to attract high income or majority populations into the school. Some districts reserve a certain percentage of seats in a magnet school for students based on socio-economic criteria (see, as examples,

[9] School Integration in Practice: Lessons from Nine Districts, Kahlenberg, Richard D. 2016, The Century Foundation, https://tcf.org/content/report/school-integration-practice-lessons-nine-districts/

the diversity plans in the Hartford Public School System (Connecticut) and the Chicago Public Schools).

3. Redistricting or Boundary Line Adjustments. The school board determines student attendance zones using socio-economic criteria (typically measured by FARM eligibility) or race along with other educational and financial factors. The Eden Prairie School District in Minnesota utilized this approach in 2010.

4. Use of Socio-economic Status. The school board uses a family's socio-economic status as criteria in a student assignment policy. Typically, the family's eligibility for FARMS is used. The Jefferson County Public School District (Kentucky) uses a three-prong definition, however, creating a composite index score based on income, race, and educational attainment.

B. School System Exemplars

1. Cambridge Public Schools (Massachusetts)

The Cambridge Public School (CPS) system implemented a controlled choice policy in 1980, "when the Cambridge School Committee voted to desegregate the schools by moving away from a neighborhood schools model."[10] The CPS controlled choice plan has served as model for many other districts. The original school plan used race as a criterion for student assignment, but concern about the constitutionality of using race caused the district to switch to socio-economic status as a criterion in 2001. Parents select three preferred schools, and school assignments are made in consideration of the family's choices, the family's socio-economic status, and the district's goal of achieving a socio-economic

[10] https://www.cpsd.us/cms/one.aspx?portalId=3042869&pageId=3477782)

balance in the schools. When the percentage of students in a school who receive a free or reduced lunch is within 10 percentage points of the district-wide percentage of free and reduced lunch students, the school is deemed to have met the district's definition of socioeconomic balance. The district's switch from race to socio-economic status did not hamper its pursuit of racial integration. In 2001-02, the last year the district used race as the primary desegregation factor, 66% of the elementary and middle school students attended a racially balanced school. In 2011-12, using socio-economic status instead, the percentage had climbed to 84%.

2. Champaign Community Unit School District 4 (Illinois)

The Champaign Community Unit School District 4 (Champaign) instituted a choice-based enrollment plan in 1997 modeled after the Cambridge, Massachusetts plan. Like the Cambridge plan, it used race as a criterion for achieving diversity. In 2009, in response to the Supreme Court's decision in *Parents Involved*, Champaign substituted socio-economic status as the diversity indicator, determined by a family's eligibility for FARMS. Student assignments are implemented so that each school falls within 15 percentage points of the district average of FARMS enrollment. Elementary school parents rank their school choices, and assignments are issued to achieve socio-economic balance. At the middle school and high school level, student diversity is maintained through geographic attendance zones that are redrawn periodically to ensure socioeconomic balance.

3. Jefferson County Public Schools (Kentucky)

After the Supreme Court invalidated its student assignment plan in *Parents Involved* due to its individualized use of race, the Jefferson County Public School District (JCPS) continued its pursuit of student diversity through a redesigned plan. The new plan, adopted in 2008, broadened the definition of

diversity to include race, income, and educational attainment. At the elementary, middle, and high school level, student assignment is implemented with the aim of insuring that each school in the school district is socio-economically diverse.

All of the census blocks in the school district are designated as a Category 1, Category 2, or Category 3, based on the average income level, race, and educational attainment of the parents in the category. For example, for the income factor, the income level in Category 1 is less than $42,000, in Category 2 between $42,000 - $62,000, and in Category 3 more than $62,000. The assignment of students at the elementary school level is different than at the middle and high school level. There are 92 elementary schools in the JCPS arranged in 13 clusters comprising 5 to 8 elementary schools. The selection of schools within each cluster is designed to maximize diversity among the 3 categories. Parents of elementary school students rank their preference for schools within their designated cluster, and the school district determines the child's specific school assignment based on the parent's preference and the district's goal of achieving diversity. The district's goal is that every school have an index rating of between 1.4 and 2.5 based on the 3 Category system. Every student is guaranteed an assignment to a school within the cluster assigned to their neighborhood. At the secondary level, students are assigned to schools based on attendance zones that are drawn to maximize the diversity of those zones. To do that, the district sometimes uses non-contiguous attendance zones. The new plan was the subject of a lawsuit, filed in state court in 2010, by parents claiming that state law required school children to be assigned to their neighborhood school. In 2012, the Kentucky Supreme Court upheld the JCPS plan. *Jefferson County Board of Education v. Fell,* 391 S.W.3d 713, 727 (2012)

4. Lynn Public Schools (Massachusetts)

Each student may attend their home school, which is based on traditional boundary line adjustments. However, out of district requests are determined based on the racial diversity and class size of the requested school.[11]

5. Hartford Public Schools (Connecticut)

The city of Hartford, Connecticut has a poverty rate of approximately 34%, and its residents are approximately 44% Hispanic, 38% African-American, and 16% white. The surrounding suburbs, by contrast, are approximately 65% white.[12] Working with 30 surrounding school districts, Hartford Public Schools adopted an interdistrict enrollment plan that uses open choice options and magnet school offerings to improve the economic and racial makeup of its schools.

## VI. CONCLUSION – Bon Voyage!

School boards seeking to promote student diversity through policies and initiatives need not sit stalled, unsure if legal avenues exist. They do. Will the journey be controversial? Perhaps. But several lawful options are available, many of which have successful track records.

## VII. RECOMMENDATIONS – A Travel Guide

1. The school board should publicly discuss and document through research how promoting diversity and avoiding racial or economic isolation supports the school system's mission. Create a record that identifies the compelling interests to be served by diversity.

[11] http://www.lynnschools.org/departments_parentinfocenter.shtml#gpm1_6

[12] https://tcf.org/content/report/hartford-public-schools/

2. The school board should consider if race-neutral approaches are available, workable, and adequate to achieve the desired levels of diversity. Document why race-neutral alternatives were determined to be unworkable or insufficient.
3. The school board's record should reflect in-depth consideration of how a proposed diversity policy will be implemented. If a strict scrutiny analysis is applied, with its requirement that the plan be narrowly tailored, the school board will have to demonstrate that it carefully considered how the policy will be implemented and its effects on racial groups. *See Parents Involved.*
4. There are professionals in the field of diversity, including experts in the public education arena. Consider using them. For an example of the value expert testimony can provide a board of education in these cases, *see Comfort v. Lynn School Committee,* 418 F.3d.1 (1st Cir. 2005).
5. The use of terminology is very important, as citizens (and potential plaintiffs) are watching and recording the school board's proceedings. The term "racial balancing" should not be used. Also "diversity" should be defined broadly, not simply as a White vs. African American issue.[13]
6. Consider using socio-economic indicators instead of race. Initiatives that promote socioeconomic integration often result in racial integration as well, and are easier to defend legally.
7. Choice plans and magnet school initiatives are far less contentious than boundary line adjustments (redistricting).
8. If redistricting is used to achieve diversity, develop redistricting plans using race-neutral criteria, and then among those proposals select a plan

[13] *But see, Comfort v. Lynn School Committee*, 418 F.3d 1, (1st Cir. 2005) (upholding a school board's diversity plan that focused only on White and African-American students against a claim that the district's conception of diversity was too narrow, stating that "this white/nonwhite distinction reflects the reality of Lynn's experience.").

that best achieves diversity. Race-neutral criteria include general educational considerations, financial factors such as transportation costs, building utilization, feeds between school levels, neighborhood continuity, natural geographic boundaries, etc. Diversity factors such as socio-economic status, race, educational attainment of parents, disability status, English as a second language, etc. may be added as considerations. The school board may select an option that best promotes diversity based on the Board's established factors.

9. In considering the impact of various redistricting proposals on race, the school board should consider the impact on all races and not just on White or African-American students. *But see* footnote 13.
10. Diversity initiatives and policies should not result in decisions being made based solely on the race of an individual student.
11. Re-assess diversity policies every few years to satisfy a requirement of the narrowly tailored test.

VIII. RESOURCES – Road Maps and Supplies

1. School Board Diversity Initiatives – Summaries

a) *School Integration in Practice: Lessons from Nine Districts*, Kahlenberg, Richard D., 2016, The Century Foundation https://tcf.org/content/report/school-integration-practice-lessons-nine-districts/

b) *Achieving Educational Excellence for All: A Guide to Diversity-Related Policy Strategies for School Districts*, National School Boards Association, College Board, and Education Counsel, 2011

https://cdn-files.nsba.org/s3fs-public/reports/EducationExcellenceForAll-HighRes.pdf?zKxgWRMf_Ml4x41pIMWRWiPG.bVcnqE0

2. School Board Diversity Offices

   a) Denver Public Schools, Culture, Equity, and Leadership Team, https://celt.dpsk12.org.

   b) Oakland Unified School District, Office of Equity, https://www.ousd.org/equity

   c) Jefferson County Public Schools (Louisville, KY), Diversity, Equity and Poverty Division, https://www.jefferson.kyschools.us/department/diversity-equity-and-poverty-programs-division

   d) Cambridge Public Schools, Diversity, Equity and Inclusion Department, https://www.cpsd.us/cms/one.aspx?portalId=3042869&pageId=33736969

   e) Burlington School District, Office of Diversity, Equity, and Community Partnerships, http://www.bsdvt.org/wp-content/uploads/2017/07/BSD-Diversity-Plan-2014-2017.pdf

   f) Guilford County Schools, Office of Diversity, Equity and Inclusion, www.gcsnc.com/domain/2412#calendar25503/20180820/month

3. Chief Diversity Officer Positions

   a) *What Does A Chief Diversity Officer Actually Do?* Ashley Thorne and Peter Wood (National Association of Scholars, September 26, 2008),

https://www.nas.org/articles/What_Does_a_Chief_Diversity_Officer_Actually_Do

b) *Standards of Professional Practice For Chief Diversity Officers*, National Association of Diversity Officers in Higher Education, Worthington, Stanley, and Lewis (2014), https://www.nadohe.org/standards-of-professional-practice-for-chief-diversity-officers

c) *Hiring a Diversity Officer Is Only The First Step. Here are the next 7.*, Yvette M. Alex-Assensoh, June 5, 2018, The Chronicle of Higher Education, https://www.chronicle.com/article/Hiring-a-Diversity-Officer-Is/243591