



A Project of the Racial Isolation Task Force  
Council of Urban Boards of Education · National School Boards Association

**Race-Conscious Student Assignment Practices in Elementary and Secondary  
Education: Key Issues for Boards to Consider in the 2006-07 Supreme Court Term**

*Parents Involved in Community Schools v. Seattle School District No. 1*  
*Meredith v. Jefferson County Public Schools*

**“The student assignment policies adopted by local school boards to produce a racially diverse learning environment are the antithesis of the system of *de jure* racial segregation once administered by local school boards. These policies seek to sow racial unity, not to breed racial fissures. They seek to eradicate the stigma of racial inferiority, not to spawn it. They seek to break down racial stereotypes, not to build them. And they seek to celebrate our nation's racial diversity, not to condemn it.”**

**--Brief of National School Boards Association, et al.  
(October 10, 2006)**

**Holland+Knight**

**Arthur L. Coleman  
Scott R. Palmer  
Steven Y. Winnick**

## ***I. Introduction***

In 2006, the U.S. Supreme Court agreed to resolve challenges in two cases involving race-conscious student assignment practices in elementary and secondary education. One case involves a high school "open choice" plan, in which a race-conscious "integration tiebreaker" may affect student assignments when a high school is racially imbalanced based on district demographics. The other involves a race-conscious student assignment plan designed to achieve certain ranges of black student enrollment. In both cases, diversity-related interests—including those associated with the educational benefits of diversity and promoting racially integrated schools—serve as the justification for the race-conscious policies.

The U.S. Supreme Court is expected to resolve these cases by the end of June, 2007. The Court's decisions in these cases—not unlike the two landmark decisions involving the University of Michigan's race-conscious admissions policies in 2003—are expected to have significant ramifications affecting education policy. In anticipation of these decisions, the National School Boards Association's Council of Urban Boards of Education has prepared this pre-decision policy paper, which: [1] recaps basic federal non-discrimination principles applicable in student assignment cases; [2] summarizes the pending Supreme Court cases (with a discussion of key issues); and [3] discusses issues school board members should consider in anticipation of the Court's decisions.

## ***II. Federal Law Regarding Race-Conscious Practices***

Federal law establishes the most rigorous standard of judicial review—the "strict scrutiny" standard—for any race-conscious policy or practice that confers educational benefits or opportunities to students by "state actors" (pursuant to the 14<sup>th</sup> Amendment of the U.S. Constitution) and recipients of federal funds (pursuant to Title VI of the Civil Rights Act of 1964). Applying that standard, federal courts require that race-conscious practices: [1] serve a compelling state interest; and [2] operate in a way that is "narrowly tailored" to satisfy that interest. Federal courts have recognized as compelling interests both remedial interests (e.g., remedying the present effects of past discrimination) and non-remedial interests (e.g., achieving the educational benefits of diversity).<sup>1</sup>

Applying strict scrutiny principles, the U.S. Supreme Court in 2003 issued two higher education decisions involving racial preferences in admissions:

- Concluding that the educational benefits of diversity could support the limited use of race in higher education admissions; and
- Upholding the University of Michigan Law School's "individualized, holistic" review of all applicants to achieve that compelling goal, but striking down the Undergraduate School's formula (where 20 out of 150 points could be awarded for race) as overly mechanical and too heavily-weighted toward race.

Federal law also provides that state and local education officials are entitled to substantial deference when making mission-driven governance decisions, and that judges should "refrain from imposing...inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions."<sup>2</sup> This reluctance to interfere with policy decisions made by public school officials stems from two long-standing and related principles. First, state and local officials have education-policy expertise not possessed by federal courts. Second, state and local education officials have the primary authority and responsibility to make education policy decisions.<sup>3</sup> As the National School Boards Association has argued in the two cases pending before the U.S. Supreme Court, local control promotes innovation, accountability and sound education policy.<sup>4</sup>

### ***III. Case Overviews: Seattle School District No. 1 and Jefferson County Public Schools.***

Until now, the U.S. Supreme Court has never definitively addressed the lawfulness of voluntary race-conscious policies that affect student assignments in an elementary and secondary setting where the policies are not intended to address past discrimination. Decisions in the two cases before the Court are, therefore, likely to have significant effects on ways that school boards pursue their diversity-related goals.<sup>5</sup>

#### ***A. Parents Involved in Community Schools v. Seattle School District No. 1.***

***Facts.*** The Seattle School District [SSD] adopted an "open choice" plan (rather than neighborhood school assignment plan) for its ten high schools, five of which were typically oversubscribed. Under the plan, students seeking to attend oversubscribed schools were assigned according to four tiebreakers: [1] Sibling tiebreaker, with priority for students with a sibling in the school (accounting for 15-20% of admissions decisions to ninth grade); [2] Integration tiebreaker (applicable to both white and black students), triggered when a high school was racially imbalanced and the sibling preference didn't bring the school within 15% of SSD demographics;<sup>6</sup> [3] Home distance from the school tiebreaker (accounting for 70-75% of admissions to ninth grade); and [4] Lottery tiebreaker (rarely used).

***Circuit Decision.*** The 9<sup>th</sup> Circuit Court of Appeals ruled that the SSD goals of securing the educational and social benefits of racial diversity and avoiding racially concentrated schools were compelling goals. In particular, the court found that the benefits included: improved critical thinking skills, improved race relations (including a reduction in prejudice); and better preparation of students for work and citizenship. At the same time, it concluded that the policy could help avoid specific harms associated with racially isolated schools, including lower student performance and disparities in, for example, teacher quality and the number of advanced courses.

The court also ruled that the policy was "narrowly tailored" (with a design and implementation that appropriately considered race in order to achieve its goals) because:

- The policy did not reserve a fixed number of slots based on race, but sought a critical mass of white and nonwhite students in oversubscribed schools;
- The racial tiebreaker was used only where there were members of an underrepresented race applying for an oversubscribed high school; and even if SSD percent variance goals weren't satisfied, no students were required or recruited to attend a particular high school;
- SSD reasonably considered and rejected race-neutral alternatives, including the use of poverty as an alternative to race; and
- There was no undue harm where all students were required to attend school, and students of one race were not benefited to the detriment of students of other races.

#### ***B. Meredith v. Jefferson County Public Schools.***

***Facts.*** Jefferson County Public Schools [JCPS] adopted a race-conscious student assignment plan in which students were designated as "black" or "other" and schools were to seek a black student enrollment of between 15% and 50%. (The range was based on the overall demographics of public schools in the County. Approximately one-third of students enrolled in schools in the country were black; two thirds were "other.")

Students were assigned to their "resides school"<sup>7</sup> unless it exceeded capacity or hovered at the extreme ends of the racial guidelines. JSPS considered multiple factors—e.g., academic criteria and school

capacity—in addition to race, which could be determinative when the composition of any school was at either end of the range.

**Circuit Decision.** The 6<sup>th</sup> Circuit Court of Appeals ruled that the District's interests in "giv[ing] all students the education in a racially integrated school and maintain[ing] community commitment to the entire school system" were compelling. Specifically, the court found that cross-racial understanding and racial tolerance, preparation for a diverse workplace, and training of future leaders were benefits that accrued to students in racially integrated schools. In addition, the court concluded that benefits also included improved African-American student achievement, the establishment of "a perception, as well as the potential reality, of one community of roughly equal schools," and a "sense of participation and a positive stake" in the school system by the community.

The court also determined that the student assignment policy was "narrowly tailored" (with a design and implementation that appropriately considered race in order to achieve its goals) because:

- The policy presented a flexible and broad target range of black student enrollment (noting the wide ranges in county schools) and didn't have specific racial targets;
- No category of applicants was isolated from others as assignment decisions were made;
- Individualized attention to applicants included consideration of race, residence, and choice of school;
- There was no undue harm as schools were basically equal, therefore not denying benefits or imposing wrongful burdens on students who weren't assigned to their school of choice; and
- Race-neutral alternatives were used, including voluntary choice and geographic boundaries, which "account[ed] for a vast proportion of all student assignment cases."

#### ***IV. Key Issues to Watch***

Whatever the specific case outcomes, it is likely that the Court will provide school boards with additional guidance related to three issues that have been central to the arguments in the pending cases, with implications regarding the ways that school boards attempt to establish and achieve their diversity-related goals:

1. **Goals:** Clarity regarding goals that may support race-conscious student assignment policies. In the 2003 University of Michigan cases, the U.S. Supreme Court ruled that the educational benefits of diversity in higher education—improved teaching and learning, better preparation for the workforce, and enhanced civic values—were "real" and "substantial" benefits that could justify the limited use of race in higher education admissions decisions. Collectively, the *Seattle* and *Jefferson County* cases raise two goals-related questions: [1] the extent to which the higher education compelling interests apply in an elementary and secondary setting; and [2] the extent to which *other* educational bases might support the consideration of race when making judgments affecting students (such as in student assignment decisions). Interests beyond those embraced by the University of Michigan Court, which have been pressed by the districts in the pending cases include, most notably, avoiding the harm associated with isolated schools, including lower student performance and disparities in, for example, teacher quality and the number of advanced courses. Thus, school board members should look for more definitive guidance regarding the interests that can (and can't) be lawfully pursued in non-remedial, elementary and secondary settings.
2. **Means:** An explanation of the ways in which race may be considered when making student assignment decisions. One of the notable features of the student assignment policies challenged in the pending cases is that neither provides for the kind of individualized review required by the

U.S. Supreme Court in the Michigan cases, where race was one of several factors considered in the admissions process. Explainable by virtue of the fact that student assignment decisions in elementary and secondary education (where attendance is compulsory and every student is assigned a school) are not the same as higher education admissions decisions (where, based on their records, some students are admitted and some are not), this issue is one to watch. Also, in each of the pending cases, the ways in which race was considered as part of the assignment process—associated with target ranges comporting to district demographics, and without distinctions being drawn among all subgroups by race or ethnicity—may be discussed in ways that provide school districts with better guidance regarding the parameters of a process of considering race that are required, permissible or forbidden.

3. **Process:** The elements that must accompany any process of policy review and evaluation over time, including with respect to race-neutral alternatives. One of the principles that the U.S. Supreme Court reinforced in its University of Michigan decisions was that institutions using race when conferring student benefits must engage in a process of periodic review and evaluation of their race-conscious policies, with an end goal in sight. School boards may receive more guidance regarding the specific kinds of process steps they should take in order to satisfy the law and ensure that race-conscious policies advancing compelling interests weight race only to the extent that is necessary and appropriate to achieve their goals—and that this determination continues to be assessed over time.

Correspondingly, part of the ongoing process of evaluation, institutions must evaluate and try (as appropriate) race-neutral alternatives that are as likely to achieve diversity-related goals. This means, at a minimum, that boards must give "serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity they seek." At the same time, boards do not have to exhaust "every conceivable race-neutral alternative" or sacrifice core institutional values when determining whether such alternatives are viable.<sup>8</sup> The Court may be poised to provide additional guidance regarding parameters related to the consideration of these alternatives and the circumstances in which "good faith" consideration has reasonably been achieved.

## V. Conclusion

The National School Boards Association Council on Urban Boards of Education [CUBE] has prepared this pre-decision policy paper to help school board members in understanding "the basics" regarding federal law and race-conscious practices and in framing some of the key issues that the U.S. Supreme Court is expected to address in 2007 in two cases involving race-conscious student assignment practices. CUBE will supplement this policy paper with an analysis of the Court's decisions, once they are rendered.

---

## ENDNOTES

<sup>1</sup> When addressing the issue of whether a policy is narrowly tailored, courts have generally examined four related factors:

- The necessity of considering race as an element in the policy;
- The flexibility of the policy with respect to its use of race;
- The burden imposed on non-beneficiaries of the policy by its race-conscious features; and
- Whether the policy is subject to periodic review and whether there is a logical end point to the consideration of race.

Interests not considered compelling have included: Curing societal discrimination; providing role models to help cure societal discrimination; and racial balancing. *See generally* Coleman and Palmer, *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues* (The College Board, 2006).

---

<sup>2</sup> *San Antonio Indep.Sch.Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973).

<sup>3</sup> See, e.g., *Goss v. Lopez*, 419 U.S. at 578 (1975) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint....By and large, public education in our Nation is committed to the control of state and local authorities."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 480 U.S. 260, 273 (1988) ("[O]ur oft expressed view [is] that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges.")

<sup>4</sup> See *Brief of the National School Boards Association, et al.* (October 10, 2006).

<sup>5</sup> Other cases of note include: *Comfort v. Lynn School Committee*, 418 F.3d 1 (1<sup>st</sup> Cir.) (en banc), *cert. den.* (2005) (upholding voluntary student assignment plan); *Brewer v. West Irondequoit Central School District*, 212 F.3d 738 (2d Cir. 2000) (upholding voluntary interdistrict transfer plan seeking to reduce the racial isolation of schools, finding the goal to be compelling); *Tuttle v. Arlington County School Board*, 195 F.3d 698 (4<sup>th</sup> Cir. 1999) (striking down elementary and secondary admissions policies related to specialized programs, which included a race-weighted lottery, as impermissible racial balancing); *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123 (4<sup>th</sup> Cir. 1999) (striking down transfer to magnet school policy where race was a consideration, finding the goal of racial balancing impermissible). See generally, Darden, Coleman and Palmer, *From Desegregation to Diversity: A School District's Self-Assessment Guide on Race, Student-Assignment, and the Law* (National School Boards Association Council on Urban Boards of Education, 2002).

<sup>6</sup> Racial imbalance was defined based on the variance between the racial composition of the student body and all students in SSD. This, in effect, focused on whether admission would bring the racial composition of high schools closer to a 60% nonwhite/40% white balance.

<sup>7</sup> "Resides schools" were defined in different ways, depending upon school levels and special programs.

<sup>8</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003).