NOT BLACK AND WHITE

Making sense of the United States Supreme Court decisions regarding race-conscious student assignment plans

PRACTICAL GUIDANCE FOR PUBLIC SCHOOL DISTRICTS STEMMING FROM U.S. SUPREME COURT DECISIONS IN PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1 AND MEREDITH V. JEFFERSON COUNTY BOARD OF EDUCATION

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CUBE's Racial Isolation Task Force focuses on the development of policies and programs designed to eliminate racial isolation in schools and to promote diverse learning environments. NSBA's Office of General Counsel advocates for public schools in the U.S. Supreme Court and other appellate courts through friend of the court briefs.

The College Board's Access & Diversity Collaborative provides support for educational institutions in the development and implementation of diversity-related policies in light of core institutional goals and federal nondiscrimination law.

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This paper is intended as an information source for elementary and secondary school boards and district officials. Its content should not be construed as legal advice, and readers should not act upon information contained in this paper without professional counsel.

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"This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population."

Justice Anthony Kennedy in *Parents Involved in Community Schools v. Seattle School District No.1* (concurring in part and concurring in the result).

I. INTRODUCTION

At the end of its 2007 term, the U.S. Supreme Court re-entered the debate regarding the consideration of race in education, addressing for the first time the constitutionality of voluntary race-conscious student assignment policies in elementary and secondary education. In a fractured decision, the Court in *Parents Involved in Community Schools v. Seattle School District No. 1* (along with *Meredith v. Jefferson County Board of Education*), by a 5-4 vote, found the specific student assignment policies unconstitutional because they were not properly designed and implemented ("narrowly tailored") to achieve their stated goals.

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At the same time, five Justices also determined, for the first time, that public schools can have compelling interests in promoting the educational benefits associated with student diversity and in reducing the harms of racial isolation. Justice Kennedy served as the Court's swing vote, joining the majority opinion striking down the specific policies at issue, but at the same time agreeing with the four dissenting justices who asserted that school districts can constitutionally advance diversity-related interests through properly designed means, including as necessary appropriate race-conscious means.[1]

Despite the ruling striking down the student assignment policies at issue based on their design, the Court left the door open for school districts to pursue diversity-related goals, including through race-conscious means. This places the mantle of leadership back at the district level. For school boards addressing issues of student diversity and opportunity, therefore, it is important to understand the baselines of the Court's decision in order to best achieve core education goals in a manner that minimizes legal risk. In instances involving race-conscious policies designed to achieve diversity-related goals, that will mean establishing evidence that those goals are compelling and the district's policy design is appropriately calibrated to advance those goals in narrowly tailored ways.

Key Points Regarding "Race-Conscious" Policies

The term "race-conscious" is used throughout this paper to refer to policies that likely trigger a strict scrutiny analysis. Strict scrutiny is the highest standard of review, requiring that a district's goals are "compelling" and that the means toward achieving those goals are "narrowly tailored" with regard to any use of race. As used in this paper, "race-conscious," therefore, means policies that either expressly treat individual students differently because of their race or ethnicity, or general policies that are sufficiently motivated by race or ethnicity, despite their facial race neutrality. (Note that Justice Kennedy's opinion, discussed below, uses the term "race-conscious" more broadly, to include policies that are motivated by race or ethnicity, even though they may not trigger strict scrutiny.)

This paper distills the Court's opinions in a way intended to offer practical policy guidance to school districts — based on the Court's decision, as well as the non-discrimination principles and relevant framework of evaluation that it amplifies.[2] First, this paper provides a summary of the student assignment plans deemed unlawful by the Court — with a focus on the particular features of those plans central to the Court's ruling. Second, this paper outlines the major points made by various Court majorities and pluralities — as well as Justice Kennedy's important swing vote opinion.[3] Third, based on those foundations, this paper outlines the major policy implications of the Court's decision for school districts addressing policies designed to promote the benefits associated with student diversity and avoid the harms of racial isolation. Included in the policy discussion are key action steps that school districts should take in light of the Court's decision. In sum,these policy implications and action steps should be elements of any district process of developing or reexamining policies designed to promote student diversity and/or reduce racial isolation.

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Policy Implications for School Districts Based on Federal Non-Discrimination Law

1. School districts can pursue diversity-related goals through various means — including appropriately designed race-conscious policies aligned with evidence-based educational goals.

2. To support race-conscious practices, district goals should be established based on mission-driven, educationally focused interests.

3. If appropriately framed, two distinct but related interests — achieving the educational benefits of diversity and avoiding the harms associated with racial isolation — may be sufficiently compelling to support race-conscious practices.

4. The concept of critical mass should be carefully evaluated as a possible foundation for gauging success associated with diversity-related goals.

5. Race-conscious policies must reflect a fundamental coherence between means and ends — they must be necessary for, and materially advance, diversity-related goals.

6. Viable race-neutral plans (in lieu of race-conscious plans) must be considered and, when deemed appropriate, tried — with a record of such consideration and action maintained.

7. School districts must periodically review and evaluate their race-conscious programs to ensure that their consideration of race continues to serve compelling interests in appropriately calibrated, narrowly tailored ways, including the following action steps:
   - Determine if the district has clearly-defined, mission-driven diversity-related goals associated with race and ethnicity.
   - Assemble an interdisciplinary team to guide the process and ensure a complete inventory of diversity-related policies.
   - Evaluate the design and operation of policies in light of district goals.
   - Take (and document) necessary action steps over time.

II. THE SEATTLE AND JEFFERSON COUNTY PLANS

Despite the distinctive features of each district's student assignment plans, the interests underpinning the Seattle and Jefferson County student assignment policies were generally the same — achieving the educational benefits of racially diverse schools and avoiding the harms of racial isolation. The diversity-based benefits collectively asserted by the districts included: improved critical thinking skills, improved race relations (including a promotion of cross-racial understanding and a reduction in prejudice); improved African-American student achievement; better preparation of students for a diverse workplace and citizenship; 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. Correspondingly, the harms associated with racially isolated schools in the districts included lower student performance and disparities in, for example, teacher quality and the number of advanced courses.

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Moreover, in operational terms, the plans of both districts shared several key features that were ultimately fatal to their success before the Court, in light of the particular circumstances of the cases:

1. With respect to district goals associated with the benefits of diversity, race was not considered as "part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints.'"
2. The assignment plans' conceptualization of race was limited — race was considered "exclusively in white/nonwhite terms" in Seattle and "black/other" terms in Jefferson County.[4]
3. When relevant within the process of making student assignment decisions, race was (in the majority's view) "decisive by itself." In other words, for some students at some stage in the process, race was "determinative standing alone" — becoming, in effect, "the factor" affecting student placement.

Seattle School District Number 1

Although the Seattle School District had never been found to maintain separate schools by race as a matter of law or policy and had never been subject to a desegregation court order, district policymakers were concerned about racial imbalance caused by housing patterns in Seattle and in 1998 adopted an "open choice" plan (rather than a neighborhood school assignment plan) for its ten high schools. Under that plan, each prospective ninth grade student in the district could choose to attend any high school in the district if space was available. If a school was oversubscribed — and half of them typically were — prospective ninth grade students were assigned to a school according to a series of four tiebreakers, in the following priority order: (1) A sibling tiebreaker, with priority for students with a sibling in the school (accounting for 15-20% of assignments); (2) An "integration tiebreaker," triggered when a high school was racially imbalanced, which was defined to mean that the school was not within 10 percentage points of the district's overall white/nonwhite racial balance;[5] (3) A home-distance-from-the-school tiebreaker (accounting for 75% of assignments); and (4) A lottery tiebreaker, which was rarely used. Each of these tiebreakers was applied independently, so that a student request triggering the integration tiebreaker (and not already assigned

under the sibling tiebreaker) was acted on solely based on whether the student was white or nonwhite. The impact of the integration tiebreaker was, for example, that more nonwhite students received placement at three of five oversubscribed schools with a white enrollment exceeding district targets "than would have been the case had race not been considered."

Jefferson County Public Schools

In 1973, a federal court ruled that Jefferson County Public Schools had maintained a racially segregated school system, and subsequently issued a desegregation decree. That decree was dissolved in 2000, when the federal court found the district to have attained unitary status — by eliminating "[t]o the greatest extent practicable" the vestiges of the prior segregation. Subsequent to that decree, with the goal of maintaining a fully integrated countywide school system where approximately 34% of the students were black and 66% were white, the district adopted a voluntary school choice plan that considered a student's race (along with other factors) in determining a student's school placement.[6] The plan designated students as "black" or "other," and required that all non-magnet schools have a black student enrollment between 15% and 50% — a range established based on the overall demographics of the public school population in the county. Students were assigned to their local school or to another magnet (or other) school of the student's choice unless the local school of choice exceeded capacity or hovered at the extreme ends of these racial guidelines. The district considered multiple factors, including place of residence, school capacity, program popularity, random draw, and the nature of the student's choices prior to consideration of race, which could be determinative when the composition of any school was at either end of the desired range. The racial guidelines were used by county administrators to facilitate and negotiate with principals to maintain attendance rates consistent with the guidelines. These policies generally applied at the elementary, middle, and secondary school levels.

III. THE COURT'S DECISION

The Majority Ruling

In an opinion authored by Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, and joined in part by Justice Kennedy, the Court applied the strict scrutiny standard and struck down both student assignment plans on the grounds that they were not narrowly tailored to meet the districts' articulated goals. Justice Kennedy's limited concurrence with Chief Justice Roberts' opinion established the Court's narrow, 5-4 ruling on three points:

First, the Court concluded that the student assignment policies treated individual students differently based on race and were, therefore, subject to "strict scrutiny." Under that standard,the districts were required to show that the challenged plans were narrowly tailored to promote compelling government interests.[7]

Second, the Court concluded that the previously recognized interests that could justify the use of race — remedying the effects of past discrimination and pursuing educational benefits associated with diversity in postsecondary education — were not bases for the district plans. Neither of these interests was implicated in these cases because (1) the programs were not designed to remedy the present effects of de jure segregation and (2) the programs did not involve a truly holistic review of individual students based on a range of factors, but rather, made race wholly determinative of some student assignments at certain stages of the assignment process and defined diversity in simple black and white or white and nonwhite terms.

Third, the Court ruled that the student assignment policies were not narrowly tailored because the districts did not establish that (1) the use of race was necessary to achieve their diversity-related goals and (2) they had fully considered viable race-neutral alternatives to their race-conscious plans. On the former point, the Court ruled that the district policies were not "necessary" means toward diversity goals inasmuch as they had a "minimal effect" on student assignments, "suggesting that other means would be effective." The Court compared the limited impact of the district policies with the University of Michigan race-conscious law school policy approved in Grutter, which was "indispensable" in more than tripling minority representation at the law school, from 4 to 14.5 percent. The Court observed that in Seattle the use of race made no difference in over one-third of the assignments affected by the integration tiebreaker, and the District could identify only 52 students who, as a result of the integration tiebreaker, were assigned to a school they had not listed as a preference and to which they would not otherwise have been assigned. Correspondingly, the court found that Jefferson County's racial classification affected only 3 percent of all school assignments. The Court thus concluded that the districts had failed to demonstrate that the "marginal" benefits associated with the race preferences "outweigh[ed] the cost" of subjecting numerous students to "disparate treatment solely upon the color of their skin." On the question of race-neutral alternatives, the Court (without elaboration) found that in Seattle, several race-neutral alternatives were rejected "with little or no consideration," and that Jefferson County "failed to present any evidence that it considered alternatives."[8]

The Plurality Opinion (4 Votes)

Although unable to command a Court majority (and therefore, establish binding precedent), the four most "conservative" justices in the majority — without Justice Kennedy's vote — expressed greater hostility toward the use of race and concluded that the district plans were "directed only to racial balance, pure and simple," an "illegitimate objective." The basis for this conclusion was the view that the plans were tied to racial demographics, rather than to "any pedagogic concept of the level of diversity needed to obtain...asserted educational benefits." Elaborating, the Chief Justice opined that the "working backward [from district demographics] 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 precedent." In a related vein, the plurality refused to resolve the "debate" regarding "whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits." The Chief Justice's opinion on behalf of four justices also concluded that "deference to local school boards on...issues [of alleged discrimination]" was "at odds with...equal protection jurisprudence."

The Principal Dissenting Opinion (4 Votes)

The principal dissenting opinion (written by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg) concluded not only that the school district plans at issue served compelling interests, but also that they were narrowly tailored. The dissent sought to distinguish what the Constitution required in terms of

race-conscious action from what it permitted, and differentiated between programs that resulted in racial exclusion and those that sought racial inclusion, observing, "No case... has ever held that the test of 'strict scrutiny' means that all racial classifications — no matter whether they seek to include or exclude — must in practice be treated the same." Throughout the opinion, the dissent also noted the importance of local control and deference to democratically accountable school boards.

Ultimately, the dissent determined that the school districts had compelling interests in overcoming the adverse educational effects of highly segregated schools and achieving the educational benefits of diverse student bodies in their schools. In addition, the dissent found the plans narrowly tailored to achieve these interests based upon factors that included the districts' limited and historically diminishing use of race, reliance on other non-racial student assignment factors, and a history of detailed policy development with the districts proving the lack of reasonable alternatives. In the dissent's view, both plans established tailored ranges, rather than quotas; imposed no racial stigma on students; and resulted in lesser burdens on students who did not receive their first priority assignment than the burden on non-minorities rejected for admission pursuant to the policy approved by the Court in *Grutter.*

Justice Kennedy's Swing Opinion

Justice Kennedy issued a separate opinion reflecting both agreement and disagreement with several of the major points of the Chief Justice's opinion. In Justice Kennedy's words, the portion of the Chief Justice's opinion that he declined to join was "too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race."

Specifically, while finding that the specific student assignment plans were not narrowly tailored, Justice Kennedy joined the four dissenters in stating that elementary and secondary public schools may have compelling interests that can be pursued through appropriate race-conscious means, including interests in promoting the benefits of diversity and in avoiding the harms associated with racial isolated schools.[9] He said in his concurrence:

> This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here [in these specific policies], is to classify every student on the basis of race and to assign each of them to schools based on that classification...Even so, measures other than differential treatment based on racial typing of individuals first must be exhausted. The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds.

...the Court's 2007 student assignment cases provide direction for school districts on the voluntary use of race in student assignment, just as they raise important, unanswered questions.

IV. IMPLICATIONS FOR THE FUTURE USE OF RACE IN K-12 PUBLIC SCHOOL SYSTEMS

Coupled with long-standing federal legal principles related to issues of race in education (including those reflected in the Supreme Court's 2003 higher education decisions regarding admissions policies at the University of Michigan), the Court's 2007 student assignment cases provide direction for school districts on the voluntary use of race in student assignment, just as they raise important, unanswered questions. The policy implications below — ranging from points that appear to be settled under federal law to those that are less so — provide initial guidance for school districts in their efforts to conceptualize and frame their diversity-related goals, and design and implement policies to achieve those goals.[10] Taken together, the implications from this opinion and federal non-discrimination law should be evaluated carefully when making judgments regarding how best to pursue diversity-related educational aims and manage legal risk associated with related race-conscious practices.[11]

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Taking Action

1. School districts can pursue diversity-related goals through various means — including appropriately designed race-conscious policies aligned with evidence-based educational goals.

Nothing in the majority's opinion in the student assignment cases suggests that the Court's rejection of the two student assignment policies at issue precludes districts from taking action to meet their legitimate diversity-related interests in appropriate ways — including, where necessary, race-conscious ways. To the contrary, five justices indicated support for compelling diversity-related interests. Building on relevant federal principles and precedent, the Court provides further guidance regarding how districts may, and may not, design and implement race-conscious diversity-related policies under federal law. Thus, districts may pursue their educational, diversity-related goals in lawful ways if they heed the central teachings of the Court, described below.

Establishing Goals and Objectives

2. To support race-conscious practices, district goals should be established based on mission-driven, educationally focused interests.

Reaffirming a core *Grutter* principle, the Court in the student assignment cases once again cautioned against the establishment of diversity goals divorced from core mission-driven education aims. While "some attention to numbers" is permissible, according to the Court, school boards should frame diversity-related policies in light of their educational objectives, with a focus on the core educational (and related) outcomes they seek to achieve, rather than simple population-related targets.

In practical terms, this means that school districts implementing diversity-related goals through voluntary race-conscious means should ensure that there are strong *educational* foundations for those decisions. Specifically, goals should not be *exclusively* numbers driven, despite the obvious relevance that demographic data may have in shaping policies. Rather, goals should be framed in the context of *benefits* associated with student diversity to be achieved or the *harms* associated with racially isolated schools to be avoided. Key evidence will likely include social science research, generally, as well as district-specific evidence establishing the connection between those benefits/harms and the core educational goals of the district.

...school boards should frame diversity-related policies in light of their educational objectives...

3. If appropriately framed, two distinct but related interests — achieving the educational benefits of diversity and avoiding the harms associated with racial isolation — *may* be sufficiently compelling to support race-conscious practices.

No single opinion on behalf of a Court majority squarely addresses the question of whether achieving the educational benefits of diversity or avoiding the harms associated with racially isolated schools are compelling interests that could support the use of race-conscious student assignment practices.[12] Read together, however, Justice Kennedy's opinion, along with principal dissenting opinion, establishes that a majority of the Court believes that two related but possibly distinct interests may support race-conscious student assignment practices — if those interests are appropriately framed and implemented.[13]

Achieving the educational benefits of diversity.

A Court majority would at the very least likely approve as compelling the educational benefits of diversity framed and implemented in ways that more closely resemble the University of Michigan Law School admissions policy approved in *Grutter*.

In practical terms, therefore, such diversity-related interests in an elementary and secondary setting should include:

- A focus on the core educational (and related) outcomes associated with a school reflecting a diverse student body;
- A focus on more that just race and ethnicity when describing and pursuing diversity goals (including, for example, other demographic factors, special talents and particular student needs) — and with respect to race and ethnicity issues, a focus on all of the relevant student subgroups that comprise the district; and
- A focus on the implementation of those policies to ensure that race and ethnicity are considered in the context of other differences among individual students that may contribute to diversity, rather than categorically by race (without attention to differences among students within various subgroup populations).

...a majority of the Court believes that two related but possibly distinct interests may support the race-conscious student assignment practices — if those interests are appropriately framed and implemented.

Avoiding the harms associated with racial isolation.

The same majority of the Court also appears to agree that the avoidance of the harms associated with racial isolation can be a compelling interest that may justify the use of appropriately designed, race-conscious practices. Reflecting the "middle ground" position of the Court, Justice Kennedy recognized school districts' "legitimate interest in ensuring all people have equal opportunity regardless of their race." [14] In Justice Kennedy's words: "To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken."

The practical implications of this five-justice majority view are less clear than those associated with the benefits of diversity issues. However, it is worth noting that while Justice Kennedy expressly indicated that race "may be [only] one component of the compelling interest in diversity," his opinion makes no such suggestion for the interest in avoiding *racial* isolation in schools, which by its terms refers solely to race.[15] At the same time, to the extent that the interests associated with diversity and racial isolation are appropriately viewed as different sides of the same coin, a focus on the necessary elements of policies advancing the benefits of diversity, discussed above, is likely called for.

Additional key points should guide any district effort to frame its educationally focused goals:

- Overcoming the legacy of "societal discrimination" can never be a compelling interest justifying race-conscious measures. The Court has observed consistently that interests unlimited in scope or time can never meet the threshold of strict scrutiny analysis. (Consider the following: At what point can a public school district pursuing broad social goals declare that its race-conscious policies have succeeded, and how would that district establish such evidence?) Thus, interests supporting race-conscious policies derived from equal opportunity principles must be carefully — and narrowly — framed.

- Policies designed simply to achieve population parity, statistical proportionality, and the like are simply unlawful. The Supreme Court plurality reaffirmed in the student assignment cases, "[r]acial balancing is not to be achieved for its own sake."

4. The concept of critical mass should be carefully evaluated as a possible foundation for gauging success associated with diversity-related goals.

Although not an issue presented directly to the Court in the student assignment cases, the concept of "critical mass" — its definition, its possible relevance to particular district interests, and the unanswered legal questions associated with the concept — merit consideration. The Court majority

suggested that elementary and secondary schools developing race-conscious policies associated with achieving the benefits of diversity should do so in ways more akin to those approved in *Grutter*. And, the higher education diversity goals approved in *Grutter* were premised upon critical mass objectives.

In *Grutter*, the Court described how the University of Michigan Law School gauged its success toward its diversity goals in terms of its ability to enroll a "critical mass" of underrepresented students. In that setting, critical mass represented an objective of meaningful representation of minorities to secure the educational benefits of diversity (for example, by creating significant oppotunities for personal interaction on campus, to show there was no consistent minority viewpoint on particular issues, and to ensure that minority students did not feel isolated or like spokespersons for their race when dealing with their peers). Notably, the University of Michigan framed its critical mass objectives with respect to internal, educational goals, and not with specific reference to statistics regarding population demographics, generally; with reference to general ranges of percentages of under-represented minority students, and not with respect to specific targets or "hard and fast" numbers reasonably susceptible of being defined as quotas; and as one set of objectives among many admissions objectives, and not as a singular enrollment objective that trumped all others in all cases.[16]

...there should be a basic alignment between means and ends: Race-conscious policies designed to achieve compelling interests must be appropriately calibrated — both to actually achieve the compelling interests they advance and avoid over-reliance on race to achieve those aims.

In an elementary and secondary setting, the broad outline of critical mass policy development is likely to resemble its higher education counterpart, with a central inquiry: At what stage in the continuum of bringing together students of different racial and ethnic backgrounds do educators begin to observe changes in student perceptions and behavior that suggest that educational benefits (improved teaching and learning, and enhancing engagement across racial lines, for instance) are occurring?

Developing and Managing Strategies to Achieve Goals and Objectives

5. Race-conscious policies must reflect a fundamental coherence between means and ends — they must be necessary for, and materially advance, diversity-related goals.

A long-standing principle of federal non-discrimination law has been that race-conscious measures must be "narrowly tailored" to the compelling ends they advance. In practical terms, this means that there should be a basic alignment between means and ends: Race-conscious policies designed to achieve compelling interests must be appropriately calibrated — both to actually achieve the compelling interests they advance and avoid over-reliance on race to achieve those aims.

The Court in the student assignment cases expands on a key point regarding the necessity requirement implicit in some prior decisions, emphasizing the principle that race-conscious policies must materially advance compelling goals — otherwise, they are not necessary to achieve their aims. On this point, the Court ruled that the district policies were not "necessary" means toward diversity goals inasmuch as they had a "minimal effect" on student assignments, "suggesting that other means would be effective."

In addition, Justice Kennedy's opinion elaborates on the baseline requirement regarding programmatic coherence, cautioning that policies that are an "ill fit" and "threaten to defeat [their] own ends" cannot stand. He cites several examples. First, he observes that ambiguous policies that reflect "inconsistent" and "ad hoc" considerations of race are most likely not to pass legal muster. Second, he notes that policies that are ill conceived — such as in instances where "a diversity of races" is directly relevant to educational goals but school systems adopt "crude" and "blunt" designations for preferences, based on "white" and "non-white" designations — likely will fail in demonstrating the calibration needed between means and ends. In short, there should be a clear alignment between goals and objectives, on the one hand, and the means established to achieve those goals, on the other.

In a related vein, Justice Kennedy also elaborates on a school district's obligation to clearly define the elements and factors of their race-conscious policies. He emphasizes the importance of having "a thorough understanding of how a...plan works," as well as the need to "establish, in detail, how decisions based on an individual student's race are made." In practical educational and legal terms, key questions that may demand answers include (among others) several suggested by Justice Kennedy:

- Who makes the decisions?
- What, if any, oversight is employed?
- What are the precise circumstances in which an assignment decision will or will not be made on the basis of race?
- How is it determined which of two similarly situated individuals will be subjected to a given race-based decision?

6. Viable race-neutral plans (in lieu of race-conscious plans) must be considered and, when deemed appropriate, tried — with a record of such consideration and action maintained.

A central basis for the Court's action striking down the two student assignment policies was the failure of the school districts to sufficiently survey and evaluate the viability of race-neutral alternatives in achieving their goals. The Court found that Seattle rejected alternatives "with little or no consideration" and Jefferson County "failed to present any evidence that it considered alternatives."

The Court's disfavor of race-conscious policies — expressed by a majority of the Court in the student assignment cases, who view the use of race as "a last resort" — is reflected in the longstanding requirement that school districts give "serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity they seek."

In practical terms, school districts should document through some formal process their serious consideration of (and attempts to use, as appropriate) race-neutral alternatives for achieving the benefits of student diversity and/or avoiding the harms associated with racial isolation. They should account for

the decisions they make — both at the inception of their policy development and in the periodic evaluation of their policies. If race-neutral alternatives are rejected without trying them first, school districts should document their reasons for those decisions.

Moreover, while school boards need to consider race-neutral policies in addressing diversity goals or the goal to reduce racial isolation, Justice Kennedy's concurrence also highlights the point that school districts can implement facially race-neutral policies that may have multiple purposes (including some race-conscious purposes) in ways that may not implicate strict scrutiny review. Stated differently, Justice Kennedy indicated that policies developed with an element of race-conscious intent, but that do not treat individual students differently on the basis of race (and that are not *primarily* motivated by racial intent, based on case law he cites) may not demand the rigor of strict scrutiny analysis:

> 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. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.

...school districts should document through some formal process their serious consideration of (and attempts to use, as appropriate) race-neutral alternatives for achieving the benefits of student diversity and/or avoiding the harms associated with racial isolation.

7. School districts must periodically review and evaluate their race-conscious programs to ensure that their consideration of race continues to serve compelling interests in appropriately calibrated, narrowly tailored ways.

Despite the absence of any discussion of the point in the Court's school assignment ruling, federal law continues to require that schools periodically evaluate (and amend, as appropriate) race-conscious policies to ensure that they continue to promote mission- and diversity-related interests — and that they do so in ways that materially advance those interests while using race in the most limited manner possible. Only by this action can they continue to ensure that their race-conscious policies serve "compelling interests" in "narrowly tailored" ways.

In practical terms, this obligation can be satisfied by taking the following steps:

a. Determine if the district has clearly-defined, mission-driven goals associated with race and ethnicity.

The most important question for school board members to address initially is whether their district maintains diversity-related goals and objectives associated with race and/or ethnicity — based on an assessment of key education goals in light of (among other things) district demographics. If so, then these goals should be

clearly framed, defined and linked with the specific circumstances relevant to the district — as well as with relevant research that supports the district's determination about the importance of diverse schools. Attention to possible distinctions and points of commonality between educational aims associated with a diverse learning environment and efforts to ensure equal opportunity, regardless of background, should be central to this discussion.

b. Assemble an interdisciplinary team to guide the process and ensure a complete inventory of diversity-related policies.

Districts should establish an interdisciplinary team, including key officials in the school district, knowledgeable staff, experts in research and evaluation, and lawyers. Communications staff and community representatives with a stake in diversity policies may also be an important part of the team. Then, with this team in place, districts should gather information on all policies and practices designed to support diversity-related goals, including policies and practices administered under federal and state programs — with the initial goal of ensuring that the logic of particular uses of race within discrete programs is well understood, and, ultimately, that those programs are fully aligned with the established mission-driven aims of the district.

c. Evaluate the design and operation of relevant policies in light of district goals.

The design and operation of race-conscious policies must be carefully, and periodically, evaluated to ensure those policies are appropriately designed to meet district goals. Specifically, districts should ensure that policies are: [a] necessary to achieve the compelling goals, particularly in light of possible race-neutral approaches or less race-restrictive approaches (which should be assessed on an ongoing basis); [b] as flexible as possible with respect to the consideration of race, given established goals; and correspondingly, of minimal adverse impact on students who do not qualify for preferences based on race; and [c] periodically reviewed in light of established goals and legal standards — with the goal of ultimately eliminating race-conscious policies when district goals can be met without use of race.

d. Take (and document) necessary action steps over time.

Districts should make appropriate policy changes over time based on their process of evaluation to ensure race-conscious policies materially advance goals in appropriate ways, given possible changing circumstances — and that they do so without an over reliance on race (or an ill fit between the particular race-conscious policy and the goals that policy serves). As part of that process, communication with key stakeholders to facilitate their understanding about the legal standards, core district interests, and the like is critical.

VII. CONCLUSION

The many implications that stem from the Supreme Court's student assignment cases include opportunities, as well as challenges, for school boards leading on issues of diversity and equal opportunity. Despite the majority's rejection of the two student assignment plans it analyzed, the Court maintained an opening for the development of race-conscious student assignment plans that can serve goals associated with the benefits of diversity and/or the avoidance of harms associated with racial isolation. School boards must, therefore, address their mission-driven diversity interests with care, paying close attention to the ways in which they establish and frame their goals and the means by which they seek to achieve them.

ENDNOTES

1 This paper generally uses the term "race-conscious" to refer to policies that likely trigger strict scrutiny because they: [1] treat individual students differently because of their race; or [2] are sufficiently motivated by race-related intent, despite facial race neutrality. Notably, however, Justice Kennedy's opinion, discussed herein, conceptualizes the term "race conscious" more broadly, to include policies that may be race-related (and even motivated in part by race), but that do not trigger strict scrutiny.

Several other terms used in this policy paper also merit elaboration. First, the terms "race" and "ethnicity," despite their different meanings, are used interchangeably given that the strict scrutiny analysis required by federal non-discrimination law treats them the same. Second, this paper discusses at length two arguably distinct (but related) interests — achieving the educational benefits of diversity and avoiding the harms associated with racial isolation. Unless otherwise noted, the term "diversity-related interests" (or, in some cases, "diversity-related goals") is intended to refer to both interests.

2 Many of these principles were discussed by the Court in its 2003 higher education admissions decisions involving challenges to race-conscious admissions policies — *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003). In *Grutter*, the Supreme Court held that achieving the educational benefits of diversity is a compelling interest that can justify the use of race and ethnicity as a "plus" factor in the admissions process. In that case, Michigan's law school evaluated each applicant individually and considered race, as well as other characteristics and qualities, as plus factors when evaluating candidates. None of the characteristics or qualities, by themselves, guaranteed admission.

In contrast to the law school policy, the undergraduate policy rejected by the Court in *Gratz* automatically assigned 20 points to all underrepresented minorities. The Court ruled that the undergraduate policy was not sufficiently flexible and did not allow for individualized, holistic review of applicants. Correspondingly, the point system essentially guaranteed admissions to virtually all minimally qualified minority applicants. As a consequence, it was not narrowly tailored to achieve the compelling interest of promoting the educational benefits of diversity.

3 A total of five opinions were issued by Members of the Court. Chief Justice Roberts issued the Court's five-justice majority opinion (joined by Justice Kennedy). Segments of Chief Justice Roberts opinion were on behalf of a plurality of the Court (four justices), reflecting views rejected by Justice Kennedy. Justice Breyer authored the principal dissenting opinion on behalf of four justices. Justice Kennedy issued a separate opinion in which he joined portions of the Chief Justice's opinion, but in which he also took issue with segments of that opinion. Justice Thomas issued a separate concurrence in support of the Court's ruling, and Justice Stevens issued a separate dissent.

4 Illustrating the problem, Chief Justice Roberts questioned the logic of Seattle's diversity rationale, noting that under its plan, a school with 50% Asian American students and 50% white students, but no African American, Native American, or Latino students would qualify as balanced, while a school with 30% Asian American, 25% African American, 25% Latino, and 20% white students would not be deemed balanced.

5 In each school the District sought white enrollment of between 31 and 51% and nonwhite enrollment of between 49 and 69%, each within 10% of overall district demographics. (The percentage deviation of 10% was increased to 15% in 2001-02, but most relevant data in the case related to the 10% goal.) This tiebreaker in effect focused on whether assignment of a student to an oversubscribed, racially imbalanced high school would bring the school closer to a 59% nonwhite/41% white balance.

6 Justice Breyer's dissent, on behalf of four members of the Court, took issue with this timeline, concluding instead that the plan at issue was, in effect, the 1996 plan the district had adopted, modified to reflect the district court's subsequent decree.

7 Federal law establishes the most rigorous standard of judicial review — the "strict scrutiny" standard — for any race-conscious policy that confers educational benefits or opportunities by state actors (pursuant to the 14th Amendment of the U.S. Constitution) and recipients of federal funds (pursuant to Title VI of the Civil Rights Act of 1964). Under this standard, federal courts require that race-conscious practices (1) serve a "compelling interest" and (2) operate in a way that is "narrowly tailored" to achieve that interest.

8 The Court majority's limited analysis on race-neutral alternatives should be understood in light of the lower court opinions, which described those efforts in more detail.

According to the Ninth Circuit Court of Appeals, the record indicated that Seattle School District considered and rejected:
[a] poverty as a alternative measure of diversity, without a formal study but with the conclusion that that alternative would not achieve racial diversity and would have other adverse effects;
[b] an Urban League plan that decreased reliance on race, with the conclusion that the plan would undermine its interest in preserving parental and student choice; and
[c] a student assignment lottery, with the conclusion that a random sampling from a racially skewed pool "would produce a racially skewed student body."

According to the Sixth Circuit Court of Appeals (adopting the district court's opinion), Jefferson County Public Schools "not only considered, but actually implemented, a variety of race-neutral strategies to achieve its goals." Specially, the assignment plan included "aspects...that avoided using race at all," including the exemption of certain schools from the racial guidelines, as well as the uses of "voluntary student choices for numerous academic concentrations and...settings," and geographic boundaries.

9 Justice Breyer's dissenting opinion expressly recognized that "five Members of this Court agree that 'avoiding racial isolation' and 'achiev[ing] a diverse student population' remain today compelling interests." Elaborating, Justice Breyer observed that "these interests combine remedial, educational, and democratic objectives."

10 These implications do not address interests in remedying the present effects of past discrimination (including those that would be implicated for districts currently subject to federal court desegregation decrees or U.S. Department of Education Office for Civil Rights 441 B plans). The exclusive focus of this analysis mirrors the setting in which the student assignment plans analyzed by the Court were developed and implemented: a voluntary setting, where either the district had no history of de jure segregation or, despite that history, had been declared unitary.

11 Given the pivotal role Justice Kennedy played in the Court's resolution of the student assignment cases, and given his likely "swing vote" status on the Court on these issues, other implications described below are grounded in the concurring opinion of Justice Kennedy. Notably, as well, Justice Kennedy joined the majority of the Supreme Court in 2003 in striking down the University of Michigan's undergraduate policy on grounds that it was not narrowly tailored to achieve the University's diversity-related goals, just as he dissented from Justice O'Connor's majority opinion in *Grutter* on narrow tailoring grounds — principally focusing on problems with the University of Michigan Law School's conception and implementation of a "critical mass" theory. Perhaps foreshadowing his "swing vote" status, however, Justice Kennedy, alone among the *Grutter* dissenters, expressed the view that the diversity goals the Law School sought to achieve were "compelling," premised upon Justice Powell's opinion in *Bakke* a quarter century before. (Policy implications stemming from Justice Kennedy's opinions are specifically noted as such).

12 The Chief Justice's majority opinion did not reject as non-compelling diversity interests like those found in *Grutter,* but found them inapplicable to the two student assignment plans. Notably, as well, the Court majority expressly did not "attempt[ ] in these cases to assert all the [compelling] interests a school district might assert."

13 Some of the relevant language used by the Justices indicates that the precise relationship between these interests may not be settled. Compare, for instance, Justice Kennedy's conclusion that "[a] compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. *Likewise,* a district may consider it a compelling interest to achieve a diverse student population" with his statement that the four dissenting Justices "find[ ]...a compelling interest in increasing diversity, *including* for the purpose of avoiding racial isolation." Ultimately, the issue may be settled (in words used by Justice Kennedy with reference to the diversity interest), "depending on [the] meaning and definition" provided by school districts.

14 Justice Kennedy affirmed in the student assignment cases the Nation's "moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children." His observations recall the language of Justice O'Connor in *Grutter,* where she recognized the "paramount government objective" in ensuring that higher education institutions are "open and available to all segments of American society," saying: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."

15 Justice Kennedy concludes that a "compelling interest exists in avoiding racial isolation." Separately, he concludes that "a district may consider it a compelling interest to achieve a diverse student population," and in that circumstance he cautions that "[r]ace may be one component of that diversity, but other...factors...should also be considered."

16 See Coleman and Palmer, *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues,* 31-40 (The College Board, 2006) (describing the details of the critical mass issue before the Court in *Grutter*).

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The **CUBE Racial Isolation Task Force** considers the issue of racial isolation in urban schools and examines the education and policy ramifications surrounding issues of race, including the minority achievement gap, desegregation, the disproportionate number of minorities assigned to special education classes and the disproportionate percentage of minority students disciplined. The goal is to equip urban school board members with the latest research and suggested approaches to help prevent student isolation based on race.

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