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**SCHOOL DESEGREGATION 2007: WHAT WILL THE SUPREME COURT SAY?****Overview**

On May 17, 2004, our nation celebrated the fiftieth anniversary of the United States Supreme Court's landmark decision in Brown v Board of Education (1954). In honor of that historic occasion I dedicated the January (2004) CEPI Education Law News Letter to a discussion of Brown and its subsequent impact on public school desegregation law and local school board policy. In that piece I suggested that while the Supreme Court held that "separate but equal is inherently unequal," and more specifically that *de jure* segregation of public school students solely on the basis of race is unconstitutional, many questions remained unanswered and new issues emerged.

*Two Pending Decisions.* On December 4, 2006, the United States Supreme Court heard oral arguments in two cases involving student race. In these cases parents sued on behalf of their children challenging student school assignment plans; which the parents characterize as "unconstitutional racial quotas." The cases are Parents Involved in Community Schools v Seattle School District No.1 (9th Cir. 2005), and Meredith v Jefferson County Board of Education (6th Cir. 2005), and involve the use of race as a factor in assigning children to particular schools. In the Ninth Circuit case achieving "racial diversity" in the student population is highlighted, while in the Sixth Circuit maintaining a "racially integrated environment" is the school system's intent. Needless to say, and depending on how the Supreme Court rules, these two pending decisions will have serious policy implications for local public school boards.

The purpose of this commentary is threefold. First, the historical context within which these Washington and Kentucky cases came to life will be briefly reconstructed. Second, the facts and issues in both cases will be briefly summarized. Third, a forecast of potential policy implications of the Supreme Court's decisions will be offered.

**Historical Context**

*The Application of Brown 1954 through 2006: Race as a Factor.* In the past five decades courts in the different federal circuits have wrestled with a plethora of issues and problems associated with implementing the spirit of

the Brown edict. In 1955, in an effort to implement its landmark decision, the Supreme Court ordered that desegregation be accomplished “with all deliberate speed.” Brown v Board of Education (1955) To carry out this task the school bus became the vehicle for dismantling segregated schools; and, as such, *race* continued to serve as the controlling factor in plans assigning children to public schools. This time, however, student *race* (expressed in terms of percentages) was used as a remedial tool to achieve an acceptable ratio (i.e., balance) of white and black students in *unitary*, not segregated, schools. Swann v Charlotte-Mecklenburg Board of Education (1971)

*The Supreme Court Speaks.* The late-1970’s and the decade of the 1980’s produced a flurry new and unforeseen constitutional, legal, and policy issues,” mainly caused by rapidly changing social demographics in communities. Vacca (2004) In effect, while busing students *by race* to achieve an “acceptable racial balance” in public schools produced positive results in many communities, by the 1990’s several public school systems, still operating under age worn federal court ordered desegregation plans and strict judicial supervision (by federal district court judges), were back in court claiming that court ordered busing was no longer effective, and busing students actually was impeding progress. Local school districts were asking for permission to: (1) move away from intra-district busing efforts, (2) return to local control, and (3) launch new remedial efforts to reduce racial isolation of public school students. Riddick v School Board (4th Cir.1986) and Flax v Potts (5th Cir.1989)

In 1991, the United States Supreme Court showed a willingness to set aside old desegregation efforts and to open the way to new remedies aimed at reducing what had developed in many communities as “racial and socio-economic isolation,” when it accepted a case out of Oklahoma. Dowell v Oklahoma City Board of Education (1991)

By a vote of 5 to 3, the high court expressed a desire to reduce the authority and control of federal judges in local public school decision-making. In an opinion written by Chief Justice Rehnquist, the Supreme Court made it clear that federal court desegregation orders and judicial supervision of local school systems “are not intended to operate in perpetuity.” Dowell (1991)

*Public Education Post-Dowell (1992-2000).* In the years following the Dowell decision, past history of desegregation efforts, changes in community socio-economic conditions, and student enrollment shifts became primary concerns of public school officials as local school systems, especially those in urban and rural areas, worked to fashion new remedies. At the same time, existing court ordered desegregation decrees were being overshadowed and swallowed up by emerging issue producers such as: (1) implementation of statewide student academic achievement standards, statewide testing procedures, and accountability processes, (2) swelling populations of [a] special needs children (especially special education), and [b] non-English speaking students, (3) increased parental demands to establish charter schools, (4) demands for vouchers and parent choice of schools, and (5) a resurgence of separate specialty classes, programs, and schools (e.g., engineering and science, arts and drama, single gender) to accommodate student needs, learning styles, interests, and abilities. Vacca (2004)

By the mid-1990’s, a new overall national goal had moved to the forefront in public education at all levels as an extension of affirmative action efforts. The new goal was “diversity,” and once again *race* (along with ethnicity and gender) became a major criterion in achieving that goal. From this rapidly growing “diversity era” the Seattle, Washington, and the Jefferson County, Kentucky, cases emerged.

**Parents Involved in Community Schools v Seattle School District No.1 (9th Cir. 2005)**

In this case parents sued the school district alleging that the district's "open choice student assignment plan," which used student race as a "tie breaker" in assigning students to "oversubscribed schools," violated the Equal Protection Clause of the Fourteenth Amendment, Title IV of the Civil Rights Act of 1964, and the State of Washington Civil Rights Act. A federal district court entered a summary judgment for the school system, at 137 F.Supp.2d 1224 (W.D. Wash. 2001), and the parents appealed. In deciding the case the Ninth Circuit reviewed the following facts.

*Facts:* Since the 1960's local school officials had voluntarily explored measures designed to end de facto segregation in the schools of the district. In 1963, the school system implemented a "Voluntary Racial Transfer Program" in which any student could transfer to any school in the district where "available space existed," and if the transfer "would improve racial balance at the receiving school."

In the 1970's the school district increased and expanded its efforts. However, by the 1977-78 school year student segregation had increased. In response to this the school system adopted (in the 1980's) a new plan called "controlled choice." The new effort grouped schools into clusters. Because of Seattle's housing patterns it was impossible to fashion all clusters near students' home neighborhoods.

In 1998-99 the district adopted another plan. The new plan became the source of the 2001 court challenge. Under this plan some schools became "highly desirable" and "oversubscribed." To remedy this condition several factors were considered by school officials when making final student school assignment decisions. Student *race* functioned as the tie breaker in making assignments to schools and was applied to both white and non-white students. In the case currently before the Supreme Court race was used in assigning entering ninth grade students at three "oversubscribed schools." Parents whose children were not, or might not be, assigned to the high schools of their choice under the new plan filed suit in a federal district court and their journey to the United States Supreme Court began.

*Ninth Circuit Rules (2005).* Applying a strict scrutiny analysis and relying on several important desegregation decisions, including Grutter v Bollinger (2003) and Gratz v Bollinger, et al. (2003), the Ninth Circuit Court held that the local school district had "a compelling interest in securing the educational and social benefits of racial (and ethnic) diversity and in ameliorating racial isolation in high schools by ensuring that its assignments do not simply replicate Seattle's segregated housing." In the court's view, the student assignment plan employed to accomplish that goal was "narrowly tailored to meet the District's compelling interest." The original district court's decision in the school district's favor was affirmed.

### **Meredith v Jefferson County Public Schools (2005)**

This case was heard on appeal from the United States District Court for the Western District of Kentucky. McFarland v Jefferson County Public Schools, 330 F.Supp.2d 834 (W.D. Ky. 2004)

*Facts:* For twenty-five years the school district maintained integrated schools under a 1975 federal court desegregation decree. The school system accomplished integration by implementing a "Managed Choice Plan" that included racial guidelines. Subject to changes over the twenty-five years, a 2001 revised Plan included the following three organizing principles: (1) management of broad racial guidelines, (2) creation of areas or school clusters, and (3) maximization of student choice (using magnet schools, traditional schools, optional programs, etc.). The stated goals of the revised Plan were to provide substantially uniform educational resources to all students, and to teach basic skills and critical thinking skills "in a racially integrated school environment."

While a student's race was one single criterion in the school assignment process, several other factors (e.g., the racial composition of the receiving school, transfers to the school, etc.) were considered prior to using race. The student race factor was only used "to keep racial balance in each school." Alleging Fourteenth Amendment Equal Protection violations, students and their parents challenged this Plan.

Applying strict scrutiny and relying on a long list of cases [including such benchmark decisions as Swann (1971), Board of Regents v Bakke (1978), Dowell (1991), and Grutter (2003)], the court held that the school system's Plan satisfied the Equal Protection Clause. While making it clear that a student does not have a constitutional right to attend a particular school, the court found "no de facto quota in place."

*Sixth Circuit Rules (2005)*. Because the Sixth Circuit Court considered the district court's opinion well reasoned, and the reasoning clearly supported the lower court's decision to uphold the school system's student assignment plan, a plan that included "racial guidelines," the Sixth Circuit Court upheld the lower court and offered no detailed opinion of its own.

### **What Will The Supreme Court Say?**

Predicting what the United States Supreme Court will decide in the Sixth and Ninth Circuit cases is difficult. However, one can, based on past decisions such as Grutter (2003) and Gratz (2003) cited above, speculate on the analysis the Court will use in reaching a decision in each case. In my professional opinion the Court will apply a *strict scrutiny* analysis and, in doing so, seek answers to the following questions: (1) Does the school system's student school assignment process rest on a *compelling interest*? (2) Is the student selection process *narrowly tailored to accomplish* that compelling interest? (3) Is *student race* factored in as a selection criterion and, if so, [a] why is it used, [b] at what point is it factored into the process, and [c] what weight is given to the student race factor when compared to other selection factors? In essence, the Supreme Court has a daunting task. It must be sure that racial quotas do not exist, and that no student (both white and non-white) is denied equal access to educational opportunities solely because of his/her race.

### **Policy Implications**

No matter which side prevails, the potential policy implications of the Supreme Court's decisions in the pending Washington and Kentucky cases will be several. To be adequately prepared for what is to come, local school officials must be proactive and take the time now to reexamine and reevaluate:

- all student attendance zone configurations
- student-to-school assignment and transfer policies and procedures,
- parent/student school and specialty program choice options,
- specialty school and/or program option admissions processes (including the specific decision-making criteria used), and
- all programs designed to provide remedial instruction to students, especially programs for students who need special help in the academic subjects.

We live in an era where federal and state education officials are monitoring student academic performance, identifying and tracking the progress of "low performing schools," and placing an emphasis on closing the "achievement gap" existing between racial, ethnic, and socio-economic groups of students. It behooves local school officials to develop and implement creative programs and methods of instruction that result in positive progress and achievement for all students. While the "diversity" of students in schools, programs, and classrooms is important to achieve and maintain, it is prudent to remember, after more than a half-century

of post-Brown (1954) desegregation law, that equal access to educational opportunities (including extracurricular activities) must not rest solely on a student's race, ethnicity, or gender.

**Resources Cited**

Board of Regents v Bakke, 438 U.S. 265 (1978)

Brown v Board of Education, 347 U.S. 483 (1954)

Brown v Board of Education II, 349 U.S. 294 (1955)

Dowell v Oklahoma City Board of Education, 111 S.Ct. 630 (1991)

Flax v Potts, 864 F.2d 1157 (5th Cir. 1989)

Gratz v Bollinger, 123 S.Ct. 2411 (2003)

Grutter v Bollinger, 123 S.Ct. 2325 (2003)

McFarland v Jefferson County Public Schools, 330 F.Supp.2d 834 (W.D. Ky. 2004)

Meredith v Jefferson County Board of Education, 416 F.3d 513 (6th Cir. 2005)

Parents Involved in Community Schools v Seattle School District No.1, 426 F.3d 1162 (9th Cir. 2005)

Riddick v School Board, 784 F.2d 521 (4th Cir. 1986)

Swann v Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)

Vacca, Richard S., "The Fiftieth Anniversary of Brown: Desegregation (1954-2004)," CEPI Education Law News Letter (January 2004)

Vacca, Richard S. and William C. Boshier, Jr., LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS, Sixth Edition (LexisNexis 2003), and 2006 CASE LAW SUPPLEMENT

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Note: The views expressed in this commentary are those of the author.