

From Desegregation to Diversity'

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INTRODUCTION

Beginning with the Supreme Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 83 (1954), the Nation embarked on a journey that many hoped would lead to fully integrated public schools reflective of the diversity of our citizenry. For many reasons, court-ordered desegregation did not bring that dream to fruition. Since the Supreme Court's decisions in *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991), and *Freeman v. Pitts*, 503 U.S. 467 (1992), court-ordered desegregation plans have been replaced in many school districts. Moreover, voluntary efforts to promote diverse public schools have been limited to some degree by the Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

In this context, school districts are faced with important questions. What should come after court-ordered desegregation? Is racial and ethnic diversity an important value in public education? If so, how do we move from policies designed for desegregation to systems intended to promote diversity? The Metropolitan Nashville

¹ A prior version of this paper was presented at the fall 2013 meeting of the NSBA Council of School Attorneys.

Public Schools (“MNPS”) recent experience in grappling with these questions may be instructive for other districts facing the same issues.

I A Desegregated District with Growing Diversity and Persistent Racial Isolation

In 1998, after decades of court-ordered desegregation, MNPS was declared unitary and freed from federal court supervision. *Kelley v. Metro. Bd. of Educ.*, Case No. 3:55-2094. Consistent with the Supreme Court’s decision in *Dowell*, this declaration was premised upon legal conclusions that MNPS had complied with outstanding court orders and eliminated the vestiges of prior unconstitutional segregation to the extent practicable.

The student assignment plan put in place in 1998 continued to rely on some cross-town busing that had begun under the court-ordered remedy, but the plan also tolerated a number of racially isolated “neighborhood” schools. This was legally acceptable because a unitary school district is not responsible for demographic patterns. In unitary districts, the Equal Protection Clause of the Fourteenth Amendment prohibits intentionally discriminatory state action but does not mandate integration. Nashville had and retains today a significant degree of residential segregation.

In 2008, the Board adopted a new student assignment plan that, among other things, eliminated the non-contiguous attendance zones that were a remnant of the court-ordered desegregation remedy. By 2008, 94% of the students who were being bused out of their neighborhoods to more distant schools were African American. As part of its rezoning plan, the School Board made the legally sound decision to eliminate

this one way busing and replace it with a system in which students in those areas had a choice to attend either a school close to their home or a more diverse school.

Under the new student assignment plan, formerly non-contiguous zones became choice zones. No student in a choice zone is required to attend a zone school or any other school. Rather, these students now have a “zoned choice option.” The zoned choice option is different than “grandfathering” because it is permanent. And, the District provides transportation to and from school for all students who select the zoned choice option. The zoned choice is available to anyone in the zoned option area regardless of race.

The overall level of diversity in the MNPS schools has improved over time, particularly under the new plan. For example, in the 1998-99 school year, there were only 13 schools in MNPS with no race in the majority. That number increased steadily over time, with increases nearly every year. In 2008-09, there were 38 schools with no race in the majority. In the first year of implementation of the new plan, that number increased to 49 and essentially held that pattern since. There has also been a consistent increase in schools with three ethnic or racial groups, with each having at least 10% or more representation – from 9 in 1998 to 69 in 2011-12. There were 56 such schools in the district in the year before the new assignment plan and 64 in the first year of implementation. The plan also did not cause any school to become 90% one-race. Moreover, the number of schools with enrollments that were 90% students of one race or ethnicity remained the same under the first year of the new plan and subsequently decreased.

Initially, the choices made under the new plan did result in a small increase in the total number of African American students attending racially isolated schools, but within two years the number of students attending such schools had declined below pre-plan levels. African American students in one-race schools in the final year of the old plan represented 12% of the African American students in the MNPS (4,400). In the first year of the modified plan, the number of such students increased by about 500 and the percentage increased to 13%.” By the 2001-12 school year, however, the percentage was back down to 12, and the number of students had gone down to 4,200.

II. Between a Rock and Hard Place?

Despite the increasing levels of integration, the elimination of mandatory one-way busing for a student population that was disproportionately African American, and the enhanced choices provided to those students, two parents of African American children in those areas sued on behalf of their children and other similarly situated students. *Spurlock v. Metropolitan Government of Nashville*, No. 3:09-cv-00756 (M.D. Tenn. filed 2009). The plaintiffs claimed that the plan unconstitutionally segregated African American children and that it should be subject to strict scrutiny under *Parents Involved* because demographic information, including race and ethnicity, had been considered in drawing attendance boundaries. MNPS had considered racial and socio-economic data in developing the plan in an effort to preserve diversity in the District and to avoid a significant increase in racial isolation.

MNPS moved to dismiss the case and for summary judgment arguing that since the plan relied on geography and choice in making student assignments it did not involve a racial classification that triggered strict scrutiny. As a result, the District argued the

question was whether MNPS had intentionally caused a segregative effect. The District Court, however, rejected MNPS's argument that the increasing diversity of the District made it clear as a matter of law that there was no legally cognizable segregative effect and that students in the formerly noncontiguous areas could not be heard to complain about attending a racially isolated school since they had been given a guaranteed option of choosing an integrated school with transportation provided. The District Court also certified a class, despite the absence of any evidence that students other than the named plaintiffs were dissatisfied with the plan.

After a three-week trial, the District Court dismissed the case, finding that the Board of Education had adopted a plan that did not involve a racial classification and that it had not acted with discriminatory intent. *Spurlock v. Metropolitan Government of Nashville*, 2012 WL 3064251 (July 27, 2012). The judge noted the choice options under the plan and the fact that MNPS had provided supplemental resources to schools serving relatively high percentages of low-income and minority students. The judge did find that the plan had a segregative effect based on two conditions. First, it focused on the fact that a group of schools in one suburban area of the school district had experienced a ten percentage point decline in its African American enrollment. Second, the judge concluded that the temporary 400 students increase in the number of students attending racially isolated schools was a segregative effect, despite the fact the students chose to attend those schools.

The plaintiffs appealed to the Sixth Circuit. In May 2013, a three-judge panel of the Court of Appeals affirmed in a unanimous decision. *MNPS v. Spurlock*, 716 F3d 383 (6th Cir. 2013). The panel did not address the District Court's conclusion that the

plan had a segregative effect, but affirmed based on the lack of segregative intent. The Sixth Circuit also rejected the plaintiff's argument that the consideration of racial demographics in the plan's development automatically subjected it to strict scrutiny.

Plaintiffs have filed a petition for a writ of *certiorari* in the United States Supreme Court that is currently pending. Petitioners ask the Supreme Court to overturn the finding by the District Court, affirmed by the Sixth Circuit, that the student assignment plan was not motivated by discriminatory intent. But, petitioners would have the Supreme Court go much further, as well. They theorize that MNPS, which considered, among other things, general racial demographics in drawing its attendance zones, should be subject to strict scrutiny because any consideration of race is a racial classification. (The District Court and Sixth Circuit rejected that argument, and the Third Circuit rejected a similar argument in *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524 (3d Cir. 2011) , *cert. denied*, 132 S.Ct. 2773 (2012).) Petitioners also ask the Supreme Court to overturn years of precedent and apply an "expanded version of rational basis review," to assess the reasonableness of race-neutral government actions. The Court has not made a decision about whether to review this case.

Spurlock demonstrates a potential difficulty for school districts. On the one hand, the petitioners claim that District's student assignment plan illegally increased existing racial isolation. On the other hand, they also argue that considering racial information to avoid or minimize such a result was unconstitutional. To date the federal courts have rejected both claims, but the fact that both have persisted so long in the same case is troubling.

III. MNPS's Commitment to Diversity

Shortly after adopting its current student assignment plan, the MNPS Board of Education hired a new director of schools with extensive experience with school desegregation. Dr. Jesse Register had previously been involved with desegregation plans in three different school systems. This experience would prove invaluable as he embraced the challenges of Nashville.

In 1982, as an assistant superintendent in Cabarrus County, North Carolina, Dr. Register had developed a pupil assignment plan for the entire school district. Then, in 1991, he was hired by the Iredell-Statesville Schools, also in North Carolina, in order to implement the merger of city and county school districts. Likewise, the Hamilton County Schools in Tennessee hired Dr. Register in 1996 to plan for and implement the merger of the Hamilton County and Chattanooga City school districts. At the time, there was an active OCR investigation of a complaint against Hamilton County for allegedly promoting white flight from the city to the county. In all of these districts, pupil assignment techniques were used to promote integrated schools.

Dr. Register came to Nashville in 2009, having determined that he could implement MNPS's new student assignment plan. But, neither he nor the Board viewed it as fixed in stone. For example, while fighting the *Spurlock* case described above, MNPS also moved to enhance its plan. First, Dr. Register led a system-wide turnaround effort designed to improve all of the District's schools. Second and more directly related to student assignment, MNPS applied for and received a federal magnet grant to implement six new magnet schools to promote diverse enrollments in schools with disproportionately high African American enrollments.

In addition, in 2012, the Director of School and the Board of Education decided that they needed a long term systematic effort to promote diverse schools in the District. They recognized, despite the legal quagmire of *Spurlock* and the limitations of *Parents Involved*, that diverse schools benefit all children and that residential segregation in terms of race, ethnicity and socioeconomic status created challenges for many schools. Moreover, they recognized that while their schools had been desegregated for more than a decade, they were not all diverse. And, diversity in Nashville was no longer simply a matter of Black and White. The District's Hispanic population had grown tremendously and immigrants speaking more than a hundred languages had flocked to Davidson County. In light of these considerations, the Board on November 13, 2012 unanimously adopted a Resolution reaffirming its commitment to the value of diversity in its community and its schools. A copy of the Resolution is attached as Appendix A.

The Resolution recognizes that “value is added to the quality of education when students learn in settings that are diverse by race, ethnicity, culture, and income level.” The Board recognized that its “schools should preserve, support and further diversity in education by being planned and operated in a manner that maximizes diversity and minimizes isolation.” In order to do this, the Board directed Dr. Register, among other things, to establish a definition of a diverse school for MNPS and to develop and manage “a comprehensive district-wide Diversity Strategy oriented to maximize the number of schools that meet the district’s definition of diversity.”

Dr. Register embraced this task and sought the counsel of desegregation expert and diversity consultant Dr. Leonard Stevens to assist him. The first steps involved developing a workable definition and a plan. Of course, ever since the Supreme Court’s

decision in *Parents Involved*, school districts Nation-wide have been searching for such plans that will pass muster in the federal courts. And, while there is no one such plan, there are some established legal parameters.

IV. The Legal Framework for Development of a Diversity Management Plan

In *Parents Involved*, five members of the Supreme Court endorsed both promoting diversity and avoiding racial isolation as not only legitimate, but compelling interests that school districts may pursue.² In 2011 the U.S. Department of Education Office for Civil Rights (“OCR”) and U.S. Department of Justice (“DOJ”) issued guidance (the “Guidance”) stating that school districts may pursue diverse school enrollments and seek to avoid racially isolated schools, and describing the types of measures that school districts may use to lawfully promote those ends.³ *Parents Involved* and the Guidance together provide the basic framework for developing plans to promote diversity in the area of student assignment. As described below, there are two key steps to this process: (1) defining MNPS’s interest in diversity; and (2) adopting specific measures to implement in order to promote that interest.

First, a district, like MNPS, with a commitment to diversity, should reflect carefully on why it values diversity and develop a corresponding definition.⁴ For example, the MNPS Resolution requires “a definition of an integrated school which is meaningful,

² 551 U.S. 701 (2007). Nevertheless, some courts, including a district court in the Sixth Circuit, have held that diversity is not a compelling interest in the K-12 context. *Perrea v. Cincinnati Public Schools*, 709 F.Supp.2d 628, 644 (S.D. Ohio 2010) (“The *Grutter* compelling interest of diversity in higher education does not apply to the primary or secondary schools run by CPS.”). *Perrea* is not binding on MNPS, and in our view is wrongly decided on that issue, but it does illustrate the potential risk of race-conscious measures.

³ A copy of the OCR & DOJ, *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools* (2011) (the “Guidance”), available at <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf> is attached as Appendix B for your reference.

⁴ *Id.* at 8 (first step is “Identify[] the Reason for Your Plan”).

practical, and embraces measures of diversity including, but not limited to race and ethnicity.” In undertaking this initial task, there are a number of important principles to keep in mind:

- The Guidance, for example, stresses that a school district should tailor its definition to its unique mission and circumstances.⁵ Accordingly, the definition should include a clear statement of why the district seeks to promote diverse school enrollments or to avoid racial isolation. It may recognize, for example, the educational benefits flowing from those interests, the district’s role in developing students to be citizens and leaders, and other goals important to its educational mission.
- To the extent race or ethnicity is a component of a district’s definition, it also should be “only one element in a range of factors”.⁶ The MNPS Resolution, for example, includes a good start toward this end, as it provides that the goal is for MNPS to be “diverse by race, ethnicity, culture, and income level, because as our Vision statement says, ‘All students bring unique cultural backgrounds, learning styles, abilities and interests’ to the schools.”
- As the Guidance also explains, the definition should provide a means to “[e]valuate how you will know when your compelling interest has been achieved.”⁷ While, on the one hand, strict numerical goals are disfavored, it is appropriate to consider numbers in order to determine whether there exists a critical mass of students from various backgrounds that is sufficient to promote the desired education benefits.

Second, a school district that is committed to promoting diversity should carefully consider the types of measures it will use in order to promote its educational interests in diversity. The Guidance describes three general categories of methods that school districts might use to further their interests in diversity and avoiding racial isolation: (1) race-neutral; (2) general race-based; and (3) individualized. These approaches have escalating levels of legal risk:

⁵ As the Guidance explains, school district should “[d]etermine how these compelling interests relate to your school district’s mission and unique circumstances”. Guidance at 6.

⁶ Grutter v. Bollinger, 539 U.S. 306, 324 (2003) (quoting Regents of Univ. of Calif. V. Bakke, 438 U.S. 265, 314 (1978)).

⁷ Guidance at 8.

- Race-neutral measures: Race-neutral measures are the least risky approach. “Race-neutral approaches can take racial impact into account but do not rely on race as an express criterion.”⁸ Considering socioeconomic status or parents’ education levels to promote diverse enrollments would be examples of completely race-neutral methods. Case law and the Guidance broadly permit the use of race-neutral measures. School districts must in good faith consider race-neutral measures before turning to individualized race-based approaches.
- General race-conscious measures: Justice Kennedy in *Parents Involved* and the Guidance suggest that school districts also have fairly wide latitude to implement general race-conscious measures. “Generalized race-based approaches use race as an express criterion, but do not rely on the race of individual students or treat individual students differently because of their race.”⁹ In *Parents Involved*, Justice Kennedy identified five presumptively valid general measures: 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.¹⁰ Thus, for example, the consideration of racial and ethnic data in developing the MNPS’s student assignment plan was a lawful use of generalized racial criteria, as the District Court and Sixth Circuit in *Spurlock* both correctly concluded.
- Individualized race-based approaches: Individualized approaches consider the race of individual students in making assignment or other decisions and generally should be avoided. While *Parents Involved* and the Guidance suggest that individual approaches may be permissible, a school district would have the heavy burden to justify that it has adopted measures that are narrowly tailored to its compelling government interest. To be narrowly tailored, a measure must “provide each student with an individualized review appropriate to the K-12 context”, meaning that race is a “plus factor” among many other non-racial factors and is not the “defining feature”.¹¹ As noted, before turning to individual approaches, a school district must also determine that race-neutral measures are unworkable (it would also be prudent to consider general-race based approaches first, too), and periodically review the implementation of the measure to determine whether it “remain[s] necessary and modify...practices as needed.”¹²

⁸ Guidance at 5.

⁹ *Id.* at

¹⁰ *PICS*, 551 U.S. at 789. *See also* Guidance at 4.

¹¹ *Id.* at 7.

¹² *Id.*

Finally, the Guidance sets forth a number of fairly specific possible “approaches to achieving diversity or avoiding racial isolation.”¹³ These approaches include potentially useful examples that school districts such as MNPS may want to consult.

V. A Plan for Promoting Diverse School Enrollments

In March 2013, the MNPS Board of Education adopted a detailed “Diversity Management Plan,” a copy of which is attached as Appendix C. While every district that values diversity should develop a plan tailored to its circumstances, values and educational goals, the attached MNPS Plan shows one example of how to operationalize the principles discussed above in a school district moving from a history of desegregation to a future of embracing diversity.

For example, the context for MNPS’s development of its definition of diversity is an important starting point. The District is a pluralistic school district--no racial group of students is in the majority. African Americans, Hispanics, Whites, Asians and Native Americans are all groups of less than 50% system-wide in a district of about 80,000 students. And the proportions have been fairly stable over the last 10 years, with the exception of steadily growing Hispanic enrollment. So one central issue for MNPS is preserving the significant diversity that presently exists, and then working to enhance it. This is different in kind from the era of desegregation, when in many districts there were no diverse schools, or very few, to preserve.

Likewise, it is instructive that the MNPS goal for student diversity includes multiple criteria: income, disability, language and race/ethnicity. On income, disability

¹³ Id. at 9-13.

and language, respectively, the definition says a school should have an enrollment whose proportion in each of these categories is at least two-thirds of the District-wide average for schools at its grade level. The idea here is to make sure that a diverse school is reasonably representative of the District in all of these categories. And, for a school to be regarded as diverse, it must meet two out of three of these categories.

With respect to race/ethnicity, to be considered diverse, a school has three alternative ways to qualify. It can be a pluralistic school--no racial group in its enrollment exceeds 50%. Or, its enrollment can include at least three racial or ethnic groups out of the six that are reported, with each of the three representing at least 15% of the school's enrollment. Or, its enrollment can include at least two groups, and each of the two represents at least 30% of the school's total enrollment. If a school satisfies any of these criteria, it qualifies as a diverse school in which the District believes all students will have the opportunity to learn from students of different perspectives and no student will suffer the harms of racial isolation.

Under the MNPS plan, it is also significant that there is no penalty for not meeting the definition of diversity. But schools that fail to do so are considered in need of greater diversity, and this need must be addressed by the central office.

The MNPS plan also does not rely on any means that involve individual racial classifications. Rather, it makes promoting diversity through race neutral means a central aspect of all aspects of the District's decision-making from school siting, to program placement; marketing and communications to magnet schools, facilities to transportation; and across the entire spectrum of school district and school operations.

VI. Small Steps Forward on a Long Journey

What will all this mean in practice for MNPS and other school districts that embark on a similar journey? At the time the MNPS Plan was adopted (March 2013):

--Of 133 schools, 67 (50%) met the definition for student diversity.

--58% of the District's students were enrolled in diverse schools.

--52 schools were plurality schools, mirror images of the District.

The unfinished work is self-evident. There are many schools that do not presently meet the definition of diversity. Among those, there are a dozen or so schools that are 90% or more minority or low-income or both. Creative and sustained efforts will be needed to address such isolation and promote more diverse schools throughout the District.

There are also open questions on how best to strategically use transportation to promote diversity; to use magnet schools to get more diversity; to provide individual students in 90% schools an option to get to an integrated school, and to make school choice and diversity not only compatible but mutually beneficial over the long run. At a broader level, a new mindset must be learned and shared for a large school system to consistently think about foreseeable diversity impacts each time it makes a decision, whether that decision involves spending or building or program placement or zoning. Similarly, it is MNPS's challenge to empower parents with relevant information when they make school choices because it is a school system in which parent and student choices increasingly determine student assignments.

These questions will not be answered overnight. Moreover, the journey will not end. The task will never be accomplished. For unlike segregation, which was a

problem to be solved, diversity is a value to be preserved and promoted. It is akin to our natural environment—a precious asset that requires perpetual management.