

Analyzing Kennedy’s Race Proxies in the Courts and in the Classroom

By Noah Hurwitz

Since the Supreme Court’s 2007 *Parents Involved v. Seattle School District* decision, school districts have sought creative ways to implement post-*Seattle* voluntary desegregation models through the use of those “race conscious measures,”ⁱ or racial proxies, suggested in Justice Anthony Kennedy’s concurring and controlling opinion. For example, Berkeley (Cal.) School District devised a race neutral student assignment plan that passed muster in the California Court of Appeal.ⁱⁱ The Berkeley model appears to be an improvement over the older model of redistricting and mandatory busing still being used in Ann Arbor, Michigan, where decades of integration via mandatory busing has not significantly boosted minority outcomes.ⁱⁱⁱ Although the battle over using racial proxies needs to further play out in the courts, the effectiveness of Kennedy’s proxies, in terms of creating student diversity and improving academic performance, will depend on the willingness of school districts to utilize progressive methods and abandon those older methods proven unsuccessful.

Race-Based Student Assignment in Seattle

In *Seattle*, the Supreme Court held that Seattle School District’s one-time race-based student assignment policy violated the Equal Protection Clause of the Fourteenth Amendment.^{iv} Seattle adopted student assignment in 1997 after concluding that integration through mandatory busing had too many deleterious side effects on minority students.^v Seattle’s assignment plan gave all students the flexibility to apply to any high school in the District.^{vi} When a certain school was “oversubscribed” because too many students selected it as their first choice, the district employed tiebreakers, one of which was race, to determine which students received priority admission.^{vii} The racial tiebreaker was only applied when a particular school’s racial

demographics were not within ten percentage points of the district's overall “white/nonwhite” racial balance.^{viii}

After raising the percentage of minorities in more segregated schools over a four year period, Seattle discontinued race-based student assignment in 2002, less than two years after a local parent organization filed suit objecting to the district’s use of race as a tiebreaker.^{ix} In early 2009, Seattle instituted a socio-economic student assignment policy in order to “create some opportunities for greater diversity.”^x

In the aftermath of *Seattle*, administrators and attorneys around the nation were left to interpret Justice Kennedy’s controlling opinion restricting the methods used to combat racial segregation in public school districts. While Kennedy opposed student assignment policies that use individual racial classifications, he preserved the notion that race could be a factor used to further a compelling state interest in student diversity, so long as it was narrowly tailored.^{xi} Kennedy’s suggestions on how to achieve racial diversity included “...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.”^{xii} In 2004, Berkeley School District implemented what they perceived to be a “race neutral” student assignment plan reflective of Kennedy’s proxies.^{xiii}

Race as a Factor in Berkeley

Kennedy recognized the opportunity for school districts to diversify by drawing attendance zones using a general recognition of neighborhood demographics. In *American Civil Rights Foundation v. Berkeley School District*, defendant school district drew hundreds of small attendance zones and developed a student assignment plan based on each zone’s demographic

classification, using race as one of numerous factors.^{xiv} Plaintiff alleged that defendant violated Section 31 of the California Constitution, which says state and local government entities “shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”^{xv}

Since 2000, Berkeley explored race neutral ways to increase school diversity.^{xvi} In 2004, the district implemented Elementary and High School student assignment plans.^{xvii} The Elementary plan first asked parents to complete a school preference form; ranking 3 out of 11 elementary schools that they would prefer their child attend.^{xviii} Next, the district prioritized the preferences by whether students lived in a requested school’s attendance zone, lived outside the zone, had siblings currently attending a school, lived in the zone while not attending the school, and whether they were non-resident students requesting an inter-district transfer.^{xix} After taking into account these priority categories, the district used diversity calculations to maintain the racial and socioeconomic diversity of each school.^{xx} The diversity calculation was reached by dividing the district into 445 planning areas and assigning each area a diversity score of 1, 2, or, 3 based on average household income, average education level of the adult population, and percentage of “students of color” that lived in the specific planning area.^{xxi} Notably, every student in each planning area received the same diversity score, regardless of race, and was given additional priority towards their school enrollment.^{xxii}

At the high school level, Berkeley has one large high school and four smaller schools.^{xxiii} The high school student assignment plan worked similarly to the elementary plan, assigning students higher enrollment priority based on their neighborhood’s diversity category.^{xxiv}

The Court of Appeal in California held that neither plan discriminated against nor granted preferential treatment to any individual group on the basis of race.^{xxv} The court reasoned that despite the presence of race in neighborhood classifications, every student in a given neighborhood received the same treatment regardless of race.^{xxvi} The Berkeley student assignment policy did not show “partiality, prejudice, or preference” to any particular student when all students in a given residential area were treated equally.^{xxvii} The court reasoned that giving preference based on the “collection and consideration of communitywide demographic factors” was a permissible classification, rather than discrimination against a “student or student group.”^{xxviii} Although plaintiff categorized the district’s policy as a “veiled substitute for a student’s race” and the court reasoned that hypothetically the demographic data could be a proxy for race, the court determined the policy did not pose a “total and fatal conflict with constitutional prohibitions.”^{xxix}

While the Berkeley decision is based on California State Law, federal courts would similarly approach reviewing race neutral student assignment plans. Given Kennedy’s suggestions in *Seattle*, Berkeley’s use of race in neighborhood classification is likely permissible towards student assignment because it is conscious of race, only as one of several factors used to classify particular neighborhoods demographically.

In addition, the Berkeley decision is significant because it is similar to the new student assignment plan introduced by Jefferson County, Kentucky after the Supreme Court conjunctively held Jefferson County’s former student assignment plan unconstitutional in *Seattle*.^{xxx} Jefferson County is in the final stages of implementing a new plan, looking not only at race, but also income and education levels.^{xxxi} The new plan will target schools to “...enroll 15 to 50 percent of their students from neighborhoods where the average household income is below

\$41,000; average education levels are less than a high school diploma with some college; and the minority population is more than 48 percent.”^{xxxii} In addition, race neutral student assignment is praised for maintaining school diversity to a greater degree than other socioeconomic based student assignment strategies.^{xxxiii}

Berkeley’s policy is also more productive than simply redistricting students based on race. As discussed later, there are implicit political elements that poison redistricting based on racial demographics. Race-conscious student assignment plans give minority students a choice of whether they prefer neighborhood schools or non-neighborhood alternatives. By giving minorities the choice of attending a particular school, districts avoid negatively stigmatizing students in way mandatory busing often does. There are also fewer implicit advantages for majority students where race-conscious student assignment plans operate because majority students are asked to potentially sacrifice attending their school of choice for diversity purposes. Asking the majority to concede privilege for the good of the minority neutralizes stigma and reinforces the message that diversity is important in education. Therefore, while not entirely beneficial to all students, Berkeley student assignment appears permissible under *Seattle*, more constructive than socio-economic assignment alternatives, and capable of diversifying schools districts.

Case Study: Ann Arbor School District

In Ann Arbor, Michigan, citizens, city council, and educators have long explored ways to encourage diversity in the public schools and provide students with a culturally diverse education. However, as cited in a 2004 Time Magazine article, African American students are four times more likely to fail classes than non-minority students, despite living in a district that

spends \$9,234 per pupil and acknowledges narrowing the “achievement gap” as its first educational priority.^{xxxiv}

Unlike many Midwestern cities, the issue of racial diversity is not a taboo or reluctant topic in Ann Arbor, where the city has felt the impact of minority advocacy since the 1950s. In 1965, the Ann Arbor School Board was pressured to address segregation at the predominantly African American Jones Elementary School on Ann Arbor’s north side.^{xxxv} The neighborhood around Jones was primarily African American and Jones was 90% minority.^{xxxvi}

At the time, the School Board had two African American members, including future Board President Dr. Harold J. Lockett.^{xxxvii} The Board discussed three potential approaches to integrating the Jones students and/or supporting them academically.^{xxxviii} First, the possibility of enrolling additional white students at Jones, which could be achieved by changing attendance boundaries or mandatory busing.^{xxxix} Second, they considered only bolstering academics by making Jones “superior in teachers and supportive services to compensate for educational disadvantages.”^{xl} Finally, they considered closing the school and redistributing the Jones students to two predominantly white schools.^{xli} The Board chose the third option and closed Jones, replacing it with an alternative high school aimed at attracting students throughout the district.^{xlii} Along with closing the school, the Board made various recommendations toward future operation, including “promote greater racial understanding,” “insure a fairly even racial distribution in all schools,” and “publicize the educational, sociological, and moral factors which motivated the board to try to promote racial integration in the school.”^{xliii}

In 1966, the U.S. Office of Education appropriated \$73,966 to assist Ann Arbor in studying the Jones School transfer.^{xliv} After reading the study, an African American board member, Henry Johnson, commented, “Exposure to desegregated schooling does not reap

overwhelming positive benefits. For schools to be successful, it takes more than just physically transplanting a child.”^{xlv} The study deemed the Jones School closing as a failure and described the Board’s decision as “...an unfair burden on the Negro community.”^{xlvi} Years later, the school closing is regarded as the critical event that broke up the north side African American community.

In 1967, the Ann Arbor Housing Commission investigated the need for low income public housing and proposed the construction of large public housing developments at sites throughout the city.^{xlvii} A predictable consequence of the new developments was the desegregation of Ann Arbor’s north side and a random redistribution of that minority community.^{xlviii} Albert Wheeler, state chairman of the NAACP, proposed building “scattered” single family homes for those families that applied for assistance, as an alternative to the housing developments.^{xlix} Wheeler opposed developments that would cause a stigmatized “concentration” of low income housing residents and accused the Commission of “proposing a 40-year ghetto.”¹ A January 23, 1968 newspaper article said that both conservatives and liberals considered the housing proposals so poor that no housing would be a better alternative.^{li} Moreover, Thomas Sharpe, a Republican State Representative of nearby Howell, warned the Commission “that the proposed plan...will not only perpetuate, but actually intensify racially segregated housing patterns.”^{lii} Nevertheless, the Ann Arbor City Council approved the Commission’s plan for construction of eight dispersed public housing developments on June 23, 1969.^{liii} Notably, the developments were not constructed in close proximity to elementary schools or later accommodated with their own neighborhood schools.

In 1979, a minority advocacy group sued the school district over the failure to accommodate African American language barriers in an elementary school.^{liv} *Martin Luther*

King Jr. Elementary v. Ann Arbor School District, also known as the “Black English” case, required the school district to take more appropriate action in proposing instructional programs to help teachers recognize the “home language” of students in teaching reading skills and Standard English.^{lv} The lawsuit further reveals the minority advocacy that thrived in Ann Arbor in the 1960s and 1970s.

Throughout the 1980s and early 1990s, the School Board redistricted the school zones to additionally diversify remaining schools that lacked significant integration. The plans integrated those less diverse schools by routing students from low income housing areas to new schools, despite having to pull students out of their true neighborhood schools. In a separate effort designed to achieve the same goal, the district merged two segregated elementary schools that were located 1.6 miles apart. Students in the combined, yet distant neighborhoods attended K-2 at Bryant Elementary School and grades 3-5 at Pattengill Elementary School. The decision alleviated segregation at both schools, but forced students to spend half of their elementary years transporting to a non-neighborhood school. While the district achieved overall diversification by the mid-nineties, Ann Arbor’s achievement gap failed to narrow in the subsequent decade.

Evaluating Racial Proxies

“...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.”

Kennedy’s first suggestion, “strategic site selection of new schools,” entitles districts to consider race as a factor in deciding where to construct new learning environments. However, the process of constructing new schools has a political element that undermines a district’s

ability to build new schools in minority neighborhoods. As a presumption, political strength within a district is harnessed by the majority. When decisions are made to build and close area schools, the choices more likely reflect the voting constituency rather than diverse needs of school children.

Kennedy's second suggestion, "drawing attendance zones with general recognition of the demographics of neighborhoods" could be interpreted as something akin to the race-conscious demographical classifications in Berkeley or the traditional redistricting and mandatory busing efforts in Ann Arbor.

Kennedy's first two suggestions, "selection of new schools" and "drawing attendance zones," have a potentially destructive political element. As stated above, new schools in minority areas are not often supported by the majority. In addition, the redistricting evident in Ann Arbor's diversity plan places diversity's burden on minorities. In Ann Arbor, the laudable goal of diversity is compromised by removing minorities from neighborhood schools and busing them to integrated neighborhoods. An emphasis on integration in Ann Arbor by means of mandatory busing in the 1960s was responsible for fracturing the minority community and harming student achievement. Ann Arbor reflects how a far too simplistic goal of integration can have a negative impact on minority advocacy.

As an example, redistricting forces "Child X," from a low income housing community, to be bused to a new elementary school. The school district applauds the decision because the elementary school's 15% African American population reflects a diverse education environment. Majority parents approve the decision because their children will, according to research, show improved test scores and increased civic duty from their exposure to minority children in a heterogeneous setting. However, at least in Ann Arbor, Child X gains very little from

redistricting. Due to a necessary bus ride in the morning, Child X is more tired than fellow students and at a higher risk for referrals and suspensions in school. In addition, Child X receives less preferred teachers because his parent advocate is detached from the non-neighborhood school and feels uncomfortable advocating in a setting where Child X is a minority. Child X's teacher notices his parent does not attend as many school functions and therefore feels less accountable for Child X's overall education. This may account for Child X receiving a full grade lower on average than the majority students.

It can also be debated that Child X consciously or subconsciously realizes his lower status as a diversity pawn and grows alienated at an earlier age to the educational setting. This lower status is often exacerbated because Child X is more likely than his classmates to relocate and shift schools during his educational career. Each of these relocations forces Child X to get on another bus to another new location, where teachers and administrators feel less accountability for his education in comparison to his peers. Sadly, all of this occurs because the parents of majority students will simply not tolerate their child getting on the bus, unless the district places a veiled onus on the majority to voluntarily diversify their children by sending them to school in the minority area. This is perhaps the premise behind Kennedy's third and fourth suggestions, "allocating resources for special programs" and "recruiting students and faculty in a targeted fashion."

"Resources for special programs" is vague, but implies some of the most effective methods of diversify school districts. Where student assignment and redistricting lack support or seem ineffective, building or revamping new schools as magnet schools may stoke integration. Magnet schools offer students a specialized educational setting that compliments the general

curriculum. While magnet schools do not appeal to all students, they generally use open enrollment to attract students for the entire district.

If magnet schools are intended to encourage diversity, they should be allocated to minority neighborhoods rather than majority or even well-integrated settings. Again, it is important to ask majority students to sacrifice for educational diversity. By lending resources to minority neighborhood magnet schools, the district will more likely attract a diverse student body and neutralize negative perceptions of minority neighborhoods and schools. A successful minority neighborhood magnet school can raise property value in poor neighborhoods and increase diversity in the community.

Moreover, magnet schools should be housed within general neighborhood schools and districts should use Kennedy's fourth suggestion, "recruiting students," to broaden their appeal. While race-targeted recruiting potentially violates the Equal Protection clause, race-neutral recruiting to diversify schools is more likely within a school district's legal limits.

Finally, Kennedy's suggestion of "tracking enrollments, performance, and other statistics by race" seems to be the least constructive method he proposes. For the obvious reason that racial segregation has eluded school districts for decades despite significant investment in studies and research, additional statistical data is not the best use of district resources.

In light of *Seattle* and the national trend away from court ordered desegregation, new and unique solutions to racial segregation are desperately needed around the nation. However, while school districts investigate new ways to diversify their school populations, they must end integration methods that hinder racial minorities more than they advance diversity. In Ann Arbor, a school board consisting of 43% African Americans approved construction of Skyline High School, a neighborhood high school/magnet in a segregated (majority) location on Ann Arbor's

northwest side. To ensure diversity, the district will again bus minorities from a low income community 2.9 miles to the new high school, as opposed to 1.5 miles to those students' former high school, Pioneer High. The decision to construct the school reaffirmed the political clout of the majority versus the deterioration of Ann Arbor's minority community. Yet, in another five years, Ann Arbor administrators will shake their heads and wonder why they have such an embarrassing achievement gap.

ⁱ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2792 (2007).

ⁱⁱ *American Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 90 Cal. Rptr. 3d 789, 792 (App. Ct. 2009).

ⁱⁱⁱ Sonja Steptoe. *Closing the Gap*, Time Magazine, Nov. 22, 2004, available at www.time.com/time/magazine/article/0,9171,785346-1,00.html.

^{iv} *See Parents Involved in Cmty. Sch.*, 127 S.Ct. at 2792-93.

^v Paul Thomas Hill. *It takes a city: getting serious about urban school reform*, Brookings Institution Press. Washington D.C., 2000. P. 189.

^{vi} *Id.* at 2747.

^{vii} *Id.*

^{viii} *Id.*

^{ix} Alex Fryer. *Seattle Plans New System for Student Assignment*, Seattle Times, May 23, 2007 , available at http://seattletimes.nwsourc.com/html/localnews/2003718452_assignment23.html.

^x Available at www.seattleschools.org/area/newassign/SAP_FAQ.pdf.

^{xi} *See Parents Involved in Cmty. Sch.*, 127 S.Ct. at 2792-93.

^{xii} *Id.* at 2793.

^{xiii} *American Civil Rights Found.*, 90 Cal. Rptr. 3d at 791-92.

^{xiv} *Id.* at 792-93.

^{xv} *Id.* at 792.

^{xvi} *Id.*

^{xvii} *Id.*

^{xviii} *Id.* at 793.

^{xix} *Id.*

^{xx} *Id.*

^{xxi} *Id.*

^{xxii} *Id.* at 794

^{xxiii} *Id.* at 795.

^{xxiv} *Id.*

^{xxv} *Id.* at 801.

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- ^{xxvi} *Id.* at 798.
- ^{xxvii} *Id.*
- ^{xxviii} *Id.*
- ^{xxix} *Id.* at 799.
- ^{xxx} Chris Kenning. School Diversity Elusive, *Courier-Journal*, Apr. 5, 2009, available at www.courier-journal.com/apps/pbcs.dll/article?AID=/20090405/NEWS01/904050418&template=printart.
- ^{xxxi} *Id.*
- ^{xxxii} *Id.*
- ^{xxxiii} Genevieve Siegel-Hawley. *Issue 6*, The Integration Report, Apr. 1, 2008, available at <http://theintegrationreport.wordpress.com/2008/04/01/issue-06/>.
- ^{xxxiv} Sonja Steptoe. *Closing the Gap*, *Time Magazine*, Nov. 22, 2004, available at www.time.com/time/magazine/article/0,9171,785346-1,00.html.
- ^{xxxv} Mary Jo Frank. *A History of Desegregation of the Ann Arbor Public Schools*, University of Michigan, Sept. 30, 1976.
- ^{xxxvi} *Id.*
- ^{xxxvii} *Id.*
- ^{xxxviii} *Id.*
- ^{xxxix} *Id.*
- ^{xl} *Id.*
- ^{xli} *Id.*
- ^{xlii} *Id.*
- ^{xliii} *Id.*
- ^{xliv} *Id.*
- ^{xlv} *Id.*
- ^{xlvi} *Id.*
- ^{xlvii} Judith Marks. *West Liberty Heights*, available at <http://www.westlibertyheights.org/index.html>.
- ^{xlviii} *Id.*
- ^{xlix} *Id.*
- ^l *Id.*
- ^{li} *Id.*
- ^{lii} *Id.*
- ^{liii} *Id.*
- ^{liv} *Martin Luther King Jr. Elementary Sch. Children v. Ann Arbor Sch. Dist. Bd.*, 473 F.Supp. 1371, 1372 (E.D. Mich. 1979).
- ^{lv} *Id.*