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IMPORTANT MESSAGE: Court Leaves School Diversity Options Open

Dear School Superintendents, School Board Members and County Commissioners:

We are writing to you because we know that you are interested in strategies to improve public schools, including those targeted at assisting students with the greatest needs. In the last ten years or so, a series of federal court rulings have left the impression that a vital tool—the ability to create racially and economically diverse schools—has been taken away from school officials. This is not true. After the recent Supreme Court opinion on two student assignment plans,¹ many options for achieving diversity remain available to schools. We will tell you about some of these strategies and the strong social science evidence that supports pursuing them. Since many school systems in North Carolina have been waiting for more clarity on what they can do, we will also provide you with additional resources that will assist you in selecting strategies that are right for your community.

School officials now have the opportunity to address some of these issues by ensuring that communities have economically and racially diverse schools

The Courts had fostered uncertainty.

Before the 1990s, constitutional mandates set out in *Brown v. Board of Education* required most school boards in the South to integrate their schools as a part of a court order. Then the Supreme Court ruled in the early 1990s that once a school system remedied segregation, it was not required to correct racial imbalance caused by forces outside of its control, such as residential housing patterns.² Some school boards nonetheless continued their efforts to integrate on their own volition. However, the permissibility of their voluntary integration efforts was called into question in 1999, when the federal court of appeals that has jurisdiction over North Carolina—the fourth circuit—rejected two voluntary plans for maintaining racial balance.³ A short time later, the same court of appeals rejected Charlotte-Mecklenburg Schools' race-conscious student assignment plan.⁴ These opinions seemed to indicate that not only were school districts not required to continue racial integration but, for all practical purposes, they were foreclosed from implementing voluntary plans to integrate their schools.

It is not surprising that school districts in North Carolina began to feel vulnerable to legal repercussions if they pursued racial integration. After these opinions were issued, the Wake County Public School System dropped its racial integration plan and began to focus on the benefits of socioeconomic diversity. And even after the U.S. Supreme Court approved of a University of Michigan law school admission program that took diversity (including racial diversity) into account, North Carolina public schools were reluctant to make too much out of this ruling, given the earlier fourth circuit rulings about K-12 racial integration.⁵

This is why the Supreme Court rulings issued this summer are so important for North Carolina. Adverse decisions from the fourth circuit and lack of direction from the Supreme Court had left uncertainty as to what school officials could do to achieve diversity in our schools. Of course, schools have hardly been at a standstill. The constitutional right to a sound basic education, federal and state testing and accountability programs, legislative reforms have created a cauldron of activity demanding better educational strategies at the

This letter results from a collaboration between two organizations with a deep interest in the future of integrated public education in North Carolina and the South.

The UNC Center for Civil Rights resides in the School of Law at the University of North Carolina at Chapel Hill. The Center filed a brief on behalf of Charlotte-area residents in support of the Louisville and Seattle districts. The Center has hosted several conferences on race and schools, and Dean Jack Boger, a co-founder of the Center, co-edited a collection of essays published in a book titled, *School Resegregation: Must the South Turn Back*. (UNC Press)

MDC Inc., established in 1967 by the North Carolina Fund, is a nonprofit research firm that works with communities in the South on education, workforce development and asset-building. It publishes a biennial State of the South report; the 2004 report called on the South to move “as swiftly as possible to eliminate high-poverty schools.”

local level. As a result of this summer's decision, school officials now have the opportunity to address some of these issues by ensuring that communities have economically and racially diverse schools.

So how do the recent Supreme Court decisions clarify options?

After a long period of uncertainty, the Supreme Court finally heard two cases that dealt with whether school districts could choose to include racial diversity as a strategy for improving public schools. On June 28, 2007 the Court issued decisions in *Parents Involved in Community Schools Inc. v. Seattle School District No. 1* and *Meredith v. Jefferson County (KY) Board of Education*, involving the Seattle, Washington and the Jefferson County, Kentucky school districts. The Court did not close the door on schools seeking diversity, but rather it rejected these particular plans on the narrowest of grounds. Five of the nine justices rejected the particular student assignment plans, finding specific faults.

Three of the sixty-four amicus curiae (friend of the court) briefs filed in these cases were submitted by North Carolina amici. Most of the 64 amici, and all of the North Carolina amici, filed on the side of the Louisville and Seattle school boards. Research cited in their briefs relied heavily on a growing body of social science evidence that racially isolated minority schools are indeed harmful to minority students and that all students derive lifelong benefits from positive interracial exposure as schoolchildren. With the Court requiring school districts to base diversity goals on sound research, these amici briefs (see "Resources") are a good source for the increasingly sophisticated social science that supports the preferability of racially integrated schools.

In both cases a five-justice majority held that the districts' plans to achieve racial diversity were flawed in their particular methods for achieving diversity. These justices objected to the districts' "binary" view of diversity: even though the districts had other races and ethnicities, the plans only measured diversity based on all students fitting into two categories (black and nonblack in Jefferson, white and nonwhite in Seattle). The majority found this measure to be too crude because it ignored other dimensions of racial diversity in the districts. Further, the majority found that both plans were flawed because each district's process for gauging whether it had achieved racial diversity was tied to whether enrollment in a given school was relatively proportional to the demographic distribution of students in the district at-large. The Court has now made clear that voluntary integration plans cannot end with the goal of achieving relative racial balancing. Instead, each plan must be designed to achieve sufficient diversity to meet a district's specified objectives for diversity.

In other words, the Court expects that any methods for achieving diversity will be directly connected to specified goals, and that research explains how much diversity is needed to meet the goals. It is not enough for a school board and school officials to draw a parallel between a school district's distribution of students by race and the racial distribution within a particular school, and then assert that the interest sought is reducing the harm of racial isolation. With these decisions, the Court has signaled that school boards must describe the particular harms they seek to avoid, using research—and not the district's demographics—to identify when racial isolation occurs.⁶

The bottom line is that this five-member majority of the Supreme Court considers using an individual student's race so intrusive that the plan must be carefully crafted. The plans from Louisville and Seattle didn't pass the test. School officials must therefore be ready to show that in adopting an assignment plan, they first considered other options for avoiding racial isolation without the use of racial classifications of individual students. In addition, if they consider race, they also must be able to explain how the use of individual students' race is both necessary to and effective in bringing about reduced racial isolation and achieving the district's specified goals in seeking racial diversity.

To create the five-member majority, Justice Kennedy joined the parts of the opinion written by Justice Roberts that found, as outlined above, specific faults with the Louisville and Seattle plans. Justice Kennedy refused, however, to join in the more sweeping language in Justice Robert's opinion. In fact, in his concurring opinion, Justice Kennedy joined the four dissenting justices to voice unequivocal support for racial diversity as an important strategy in providing equal opportunities for all students.

School districts have clear options for seeking diversity.

Numerous approaches to achieving diversity remain available to school boards. We describe them in the three categories, as follows:

(1) Racial classifications

While you may hear people say that schools can no longer classify students by race in student assignment plans, the Supreme Court did not go that far. The Court definitely made it harder, but it is still possible for school districts to seek diversity through taking individual students' race into account. School districts that find this to be the best or only way to achieve diversity will need to consider carefully their entire plan, from identifying the objectives of diversity to utilizing research to the extent possible to justify their particular approaches. They will need to avoid the kind of flaws identified in the two plans reviewed by the Supreme Court and will need to review other options that the Court considers less intrusive than classifying students by their race, such as the options described below. For districts that want more information on how to approach diversity through this kind of racial classification process, a good place to start may be the forthcoming NAACP Legal Defense and Educational Fund, Inc. and UCLA Civil Rights Project manual *Still Looking to the Future: Voluntary K-12 School Integration* (to be posted at http://www.naacpldf.org/VOLINT/add_docs/volint_fs.html).

A key starting point is to recognize that the law allows and research supports exploring options that are right for your community.

(2) Race-conscious approaches

School leaders can craft race-conscious student assignment plans without assigning racial classifications to individual students. From a legal perspective, race-conscious practices have a clear advantage over individual racial classifications in that the Court seems more willing to allow this approach. While Justice Roberts and the three justices joining his opinion were explicitly neutral on this matter, Justice Kennedy and the four dissenting justices constitute a majority that would very likely accept race-conscious approaches as a part of a strategy to provide equal opportunities to all students. As Justice Kennedy wrote in his concurring opinion,

“The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race . . . 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.”⁷⁷

Justice Kennedy’s opinion reads as if it were written directly to school and community leaders to give guidance on how to pursue diversity. He further explains, “In the administration of public schools by the state and local authorities, it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. . . . If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.”⁷⁸ Among the race-conscious measures that Justice Kennedy mentions are the following strategies:

- drawing attendance lines with impact on race considered,
- allocating resources for special programs, and
- recruiting students and faculty.

In addition to the strategies listed by Justice Kennedy, Justice Roberts also noted specific race-conscious strategies in his plurality opinion (the part of his opinion joined by only Justices Alito, Scalia and Thomas), namely:

- choosing the site for constructing new schools and
- selecting academic offerings to attract students to certain schools.

And even though Justice Roberts declined to express an opinion on the validity of these strategies, such strategies would plainly garner the support of Justice Kennedy and the four dissenters.

Notice that these are not unusual, untested strategies. Rather, these options are familiar, mainstream tools for school boards: creating magnet schools to attract a diverse student body, carefully choosing new sites that can serve students from different neighborhoods and using attendance zones along with transportation to bring together students who live in different parts of the community. So, not only are these practices more likely to pass any judicial review, but also from a practical perspective school boards may find broad support for these policies. And while any plan that considers the impact on race should be carefully crafted, Justice Kennedy and the four dissenting justices definitely leave this door open.

(3) Socioeconomic diversity – a race-neutral strategy

The door is wide open to consider socioeconomic diversity. While racial diversity provides direct benefits to students and society, many scholars and public officials find the link between socioeconomic diversity and academic achievement similarly compelling. As Richard D. Kahlenberg recently wrote in a Century Foundation report, “Breaking up concentrations of poverty is not, as one judge suggested, a ‘clumsier proxy device’ for obtaining a certain racial result; it is a powerful education strategy for raising student achievement.”

Diversity as an educational strategy works to offset the well-documented distressed learning environment created when high concentrations of at-risk students are placed in the same classrooms, a problem underscored by a national study released this summer by the University of North Carolina at Chapel Hill researchers examining reading skills of low-income children in the early grades. Dr. Kirsten Kainz, co-author of *The Ecology of Early Reading Development for Children in Poverty* (2007), found that placing a high concentration of struggling readers in the same classrooms erased the benefits of comprehensive literacy instruction. Dr. Lynne Vernon-Feagans, Kainz’s coauthor, observed that their “findings support policies that promote comprehensive reading instruction, but indicate that just as much attention needs to be paid to ensuring that schools are integrated and to reducing classroom concentrations of children reading below grade level.”⁷⁹

Even though many school districts in North Carolina direct more resources to their high-poverty schools, it has proven to be universally more difficult to allocate the most important resource, high-quality teachers, to high-poverty schools. This was one of the findings in an April 2007 evaluation of North Carolina's program to provide additional targeted funds for some of the state's economically disadvantaged school districts. Among their initial findings on the implementation of the Disadvantaged Student Supplemental Fund, Dr. Gary T. Henry of UNC-Chapel Hill and Dr. Charles L. Thompson of East Carolina University found that "[w]ith remarkably few exceptions, students living in poverty and minority students were substantially less likely to be taught by higher quality teachers than were their more economically advantaged and white peers."¹⁰

As reported in MDC's *State of the South 2004*:

"Substantial evidence shows that students from low-income families score higher on tests when they go to school with students from more affluent families. Middle-income students do worse than their peers when they go to high-poverty schools. ...Some high-poverty schools, of course, manage to produce academically high-performing graduates. Such schools require extraordinary educational leadership and professional support beyond that available to most schools in distressed areas."¹¹

The clear message for districts with a solid middle-class population base is that they should consider the option of offering every student a predominantly middle-class school. The benefits are critically important for the success of low-income students, and research is clear that socioeconomic diversity does not diminish the achievement levels of middle-income students. In other words, as long as a school remains predominantly middle-class, having more low-income classmates does not hurt middle-class students.¹²

Not only is there a strong research basis for considering socioeconomic diversity, the courts are likely to be deferential to school boards that take this approach. Even though socioeconomic diversity may also produce some racial diversity, courts will not require the strict scrutiny of the plan as is the case when racial classifications are used. A plan that is

reasonably developed to achieve the academic benefits of socioeconomic diversity will not only satisfy the courts but will provide an essential complement to other educational strategies aimed at improving opportunities for the neediest students.

For a nationally-recognized model of this approach, we need to look no farther than the Wake County Public School System, a recognized leader among the 40 school districts across the country using family income as a criterion in assigning students.¹³ With a plan in place since 2000 that takes into account family income and achievement scores, Wake County consistently leads urban counties in the state in student achievement scores among all students and those qualifying for free and reduced-price lunch.¹⁴

Leadership's new role is to face reality and mobilize people for change.

The lesson from Wake County is not only about how to shift from student assignment based on race to assignment based on economic and educational factors. It is also a lesson in leadership, both from the school system itself and from the civic sector. Both law and research have been on the side of Wake County's leadership. Still, it has been necessary to garner and sustain community support for assignment plans that deal simultaneously with socioeconomic diversity and dramatic growth. Public support is evident in the recent passage of a bond issue of nearly \$1 billion, with the backing of the business sector. Meanwhile, the Wake Board of Education is in the midst of appealing a lower court ruling in a case brought by a group of parents that held that the Board did not have the authority to assign students involuntarily to attend year-round schools, a key tool for addressing Wake's multiple challenges. It no doubt takes courage and conviction to stick to a plan¹⁶—for the well-being of the entire community—when parents make entreaties to accommodate their children.

North Carolina schools are at an important juncture. School districts have implemented numerous strategies while under the close watch of the state and federal government, as well as Superior Court Judge Howard E. Manning, Jr., as he continues to preside over the *Leandro*

The relationship between racial segregation, poverty concentration and reduced student and school performance in North Carolina is hard to ignore.

Last year, Superior Court Judge Howard E. Manning, Jr., highlighted an academic crisis in North Carolina's 44 lowest performing high schools.¹⁵ To question whether the crisis resulted from unequal funding, Judge Manning examined the total per pupil expenditures in the states 44 lowest performing high schools and its 44 highest performing schools and concluded that, on average, *fewer* dollars were spent per pupil in the top performing high schools. On the other hand, the lowest performing high schools were overwhelmingly burdened by high

levels of segregation. An analysis by the UNC Center for Civil Rights found that 41 of the 44 struggling schools were racially isolated, predominantly nonwhite schools, most by very high percentages, and 31 of the 44 low-performing high schools were majority low-income. By contrast, none of the 44 high-performing high schools were segregated minority schools, and only one was majority low-income. With heightened resources failing to ameliorate the disadvantages associated with racial and economic isolation, the question becomes twofold: when a school district has the option of pursuing racial and socioeconomic diversity in its local schools, is the operation of a segregated, high-poverty school justifiable *either* as a matter of educational quality *or* sound fiscal practice?

case. Research supports a judgment that racial and socioeconomic diversity are not just good ideas, but key components that enhance the effectiveness of other educational strategies. The state's economic and civic future continues to ride on the quality of its public schools. To eliminate high-poverty, racially-isolated schools wherever possible is to adopt a strategy for educational advancement.

Each community in North Carolina is different in its racial and socioeconomic makeup and in the viability of different educational strategies, including seeking diversity in the schools. A key starting point is to recognize that the law allows and research supports exploring options that are right for your community.

We value leadership and the sense of public service demonstrated by people who hold office in county governments and school districts. We appreciate what a tough role that leadership can sometimes become. Ronald Heifetz, director of the Leadership Education Project at Harvard University's John F. Kennedy School of Government, is a scholar, a teacher and author of the acclaimed, *Leadership Without Easy Answers*.¹⁷ According to Heifetz, the role of the leader is changing. The new role is "to help people face reality and to mobilize them to make change." And making change is painful. "Many people have a 'smiley face' view of what it means to lead. They get a rude awaken-

ing when they find themselves with a leadership opportunity. Exercising leadership generates resistance—and pain. People are afraid that they will lose something that's worthwhile. They're afraid that they're going to have to give up something that they're comfortable with. ... Mustering the courage to interrogate reality is a central function of a leader."¹⁸

In seeking to assist you in your leadership role, we hope this document will serve as a resource as you consider the school integration guidance provided by Supreme Court in this summer's opinion. We've provided a listing of additional resources and footnotes that provide more information. We would be glad to hear from you—and assist in any way possible—as you help your community explore options to build a better future by offering high-quality schools for all of the children in our state.

Sincerely,

Julius Chambers, Director
UNC Center for Civil Rights

David Dodson, President
MDC, Inc.

Ashley Osment, Senior Attorney
UNC Center for Civil Rights

Ferrel Guillory, Senior Fellow
MDC, Inc.

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Notes

¹*Parents involved in Community Schools v. Seattle School District No. 1 et al.*, 551 U.S. ____ (2007) (consolidating two appeals: *Parents Involved in Community Schools v. Seattle School District No. 1*, 426 F.3d 1162 (2005); *McFarland v. Jefferson County Public Schools*, 330 F.Supp.2d 834 (2004); see also *McFarland ex rel. McFarland v. Jefferson County Public Schools*, 416 F.3d 513 (2005).

²*Freeman v. Pitts*, 503 U.S. 467 (1992).

³*Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123 (1999); *Tuttle v. Arlington County School Board*, 189 F.3d 431 (1999).

⁴*Capacione v. Charlotte-Mecklenburg Schools*, 57 F.Supp.2d 228 (1999).

⁵*Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁶Three of the sixty-four *amicus curiae* (friend of the court) briefs filed in these cases were submitted by North Carolina *amici*. Most of the 64 *amici*, and all of the North Carolina *amici*, filed on the side of the Louisville and Seattle school boards. Research cited in their briefs relied heavily on a growing body of social science evidence that racially isolated minority schools are indeed harmful to minority students and that all students derive lifelong benefits from positive interracial exposure as schoolchildren. With the Court requiring school districts to base diversity goals on sound research, these *amici* briefs (see "Resources") are a good source for the increasingly sophisticated social science that supports the preferability of racially integrated schools.

⁷*Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 551 U.S. ____, 127 S.Ct. 2738, 2745 and 2797 (2007) (Kennedy, J., concurring).

⁸*Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 551 U.S. ____, 127 S.Ct. at 2745 (2007) (Kennedy, J., concurring).

⁹Kainz, K., & Vernon-Feagans, L., *The Ecology of Early Reading Development for Children in Poverty*, *The Elementary School Journal* 107(5), 407-427 (2007).

¹⁰Henry, Gary T., & Charles L. Thompson, , North Carolina Department of Public Instruction, *First Report of the Evaluation of the Disadvantaged Student Supplement Fund (DSSF)*, http://soe.unc.edu/fac_research/spotlight/dssf.pdf (Apr. 2007).

¹¹MDC, Inc., *State of the South 2004: Fifty Year's After Brown v. Board of Education*, (2004), http://www.mdcinc.org/docs/sos_04.pdf.

¹²Richard D. Kahlenberg, The Century Foundation, *All Together Now: Creating Middle Class Schools through Public School Choice 36* (Brookings Institution Press 2003).

¹³Richard D. Kahlenberg, The Century Foundation, *Rescuing Brown v. Board of Education: Profiles of Twelve School Districts Pursuing Socioeconomic School Integration*. (June 28, 2007) *Student Assignment Process*, Wake County Public School System website at <http://www.wcps.net/growth-management/student-assign-process.html>. Wake's policy establishes goals that no more than 40% of a school's total enrollment will be comprised of students eligible for free-and-reduced-price lunch ("FRL") and no more than 25% of its enrollment will be comprised of students performing below grade level on the state's end-of-year exams.

While Wake's race-neutral plan uses socio-economic factors and student performance outcomes that can be extrapolated by neighborhood, districts have other options for assignment criteria. For example, some districts have used whether a student resides in a single parent household as one criterion for ensuring at-risk students attend schools with resources and social capital that follow students born into more advantaged circumstances. Other districts have used the level of education attained by a student's mother as another criterion.

¹⁴For example, analyses performed by the UNC Center for Civil Rights for school year 2004-05 showed high school students eligible for free or reduced priced lunches substantially outperforming their FRL-eligible counterparts in North Carolina's five other largest school districts (Charlotte-Mecklenburg, Cumberland, Durham, Guilford, Winston-Salem-Forsyth) and non-FRL students in Wake substantially outperforming their urban non-FRL counterparts. In addition, the Center for Civil Rights found that African American high school students from Wake substantially outperformed their African American counterparts in the five other large urban school districts.

¹⁵Fax Only Letter from Hon. Howard E. Manning, Jr., to Superintendent Atkinson (North Carolina Department of Public Instruction) *et al.*, dated March 3, 2006.

¹⁶*Wake Cares, Inc., et al. v. Wake Co. Bd. of Educ.*, 07 CVS 04020 (Wake Co. Superior Court, May 3, 2007)

¹⁷Ronald, Heifetz, *Leadership Without Easy Answers*, Cambridge: Belknap/Harvard University Press, 1994.

¹⁸*Id.*

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MDC, Inc.
P.O. Box 17268
Chapel Hill, NC 27516-7268
Phone: (919) 968-4531
www.mdcinc.org

UNC Center for Civil Rights
UNC School of Law
Van Hecke-Wettach Hall
100 Ridge Road, CB # 3380
Chapel Hill, NC 27599-3380
Phone: (919) 843-3921
www.law.unc.edu/civilrights/

National Organizational Resources

Charles Hamilton Houston Institute at Harvard Law
125 Mount Auburn Street
3rd Floor
Cambridge, MA 02138
Phone: (617) 495-8285
www.charleshamiltonhouston.org

The Civil Rights Project
University of California at Los Angeles
8370 Math Sciences
Los Angeles, CA 90095
Phone: (310) 267-5562
www.civilrightproject.ucla.edu; see specifically,
www.civilrightsproject.ucla.edu/policy/court/voltint.php

Kirwan Institute
433 Mendenhall Laboratories
125 South Oval Mall
Columbus, OH 43210
Phone: (614) 688-5429
<http://kirwaninstitute.org>

NAACP – LDF
New York Office:
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, NY 10013
Phone: (212) 965-2200
www.naacpldf.org

Resources

Amicus Brief of Roy Cooper, North Carolina Attorney General, along with 18 other attorneys general in support of Respondents in *Parents Involved in Community Schools v. Seattle School District No. 1*, 2006. <http://www.law.unc.edu/PDFs/AttorneysGeneralBrief.pdf>

Amicus Brief of the Swann Fellowship, former school board members, CMS parents and students in support of Respondents in *Parents Involved in Community Schools v. Seattle School District No. 1*, 2006. (Represented by counsel at the UNC Center for Civil Rights) <http://www.law.unc.edu/PDFs/SwannBrief.pdf>

Amicus Brief of Walt Sherlin, former Associate Superintendent of the Wake County Public School System, in support of Respondents in *Parents Involved in Community Schools v. Seattle School District No. 1*, Oct. 10, 2006. <http://www.law.unc.edu/PDFs/WaltSherlinBrief.pdf>

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SCHOOL OF LAW

THE UNIVERSITY
of NORTH CAROLINA
at CHAPEL HILL

CAMPUS BOX 3380
VAN HECKE-WETTACH HALL
CHAPEL HILL, NC 27599-3380

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