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Transfers that diversify schools

Circuit court says K-12 has 'compelling interest' in having diverse classrooms

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Mass. district's use of race in school transfers OKd

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2 judges dissent, but outline how they'd meet *Grutter test*

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Schoolchildren at Aborn Elementary in Lynn, Mass. mark the 1620 arrival of some nationally famous immigrants at Plymouth, 50 miles south of Lynn. Last week, the First Circuit Court of Appeals upheld the constitutionality of voluntary desegregation efforts in the Lynn district.

The long march that began with *Brown vs. Board* in 1954 may be headed again to the Supreme Court. A step in that march took place last week in Boston.

Citing the high court's own arguments in 2004 rulings on Michigan higher education, the First Circuit Court of Appeals ruled that Lynn, Mass., officials did not violate the Constitution when, under state pressure, they adopted policies addressing racial imbalances in some schools.

The Lynn plan uses a child's race in directing transfers among schools, with the aim of creating diverse classrooms.

Just as the Supreme Court ruled in the University of Michigan *Grutter* case, the circuit court ruled that K-12 schools have educational reasons that create a "compelling interest" in creating diversity, and therefore may take race into consideration to ensure diverse classrooms.

Two judges dissented, opposing the "mechanical" use of race in Lynn's transfers. But the two then offered their own idea of how Lynn might use race as a "plus" factor in transfers to work toward the same goal.

Charlotte-Mecklenburg is tinkering now with its assignment plan. That plan almost immediately resegregated by race and economics the schoolchildren whose older siblings went to school in racially balanced schoolhouses under a desegregation plan imposed by the courts.

The speed and depth of Charlotte's abandonment of desegregation has raised eyebrows nationwide and continues to draw the attention of civil rights lawyers. But the school board majority has shown little interest in the subject, and the current assignment review will leave in place the high-poverty, lower-performing schools created by parent "choice."

But lessons from Lynn could be instructive for CMS parents and school leaders looking farther down the road, seeking answers to questions like: Can voluntary transfers out of racially and economically isolated home schools help boost educational outcomes for all children?

An edited version of the First Circuit ruling begins on Page 2.

Last week's ruling is, at best, a mid-course decision in the Lynn case. It is no sure sign of the courts' ultimate guideposts on the intersection of race and education. Nor does the Lynn case necessarily mark the path for a big urban district like Charlotte-Mecklenburg.

Lynn, after all, has 28 schools; CMS has nearly 150. Lynn is 10.8 square miles; Mecklenburg's is 48 times larger.

The court decision, too, could be weak precedent. The decision was by a 3-2 vote. It stands as precedent only in Massachusetts, Maine, New Hampshire, Puerto Rico and Rhode Island.

But court cases out of Seattle, Louisville and now Lynn raise similar issues, and the three

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Court: K-12 has 'compelling interest' in diversity

Following is an edited text of the First Circuit Court of Appeals' decision last week in Comfort vs. Lynn, a Massachusetts case involving whether race may be used in determining transfer rights in a K-12 school district.

A district court upheld the Lynn district's voluntary desegregation efforts. A panel of the First Circuit declared it unconstitutional. Last week's ruling reversed the panel. Plaintiffs have said they will now appeal to the U.S. Supreme Court.

The text begins with the majority opinion, written by Judge Kermit Lipez. A concurring opinion and a dissent follow:

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Two friends at Aborn Elementary in Lynn, Mass. On the district's Web site, school officials describe their transfer policy this way. Elipses are from the Web: "According to the Lynn Public Schools Voluntary Plan for School Improvement and the Elimination of Minority Isolation, approved by the Lynn School Committee and the Massachusetts State Board of Education in February, 1988, amended in September, 1989, and February, 1990, November, 1999... all students may attend their district school...requests for out of district placements are determined by racial balance and class size of the out of district school... Out of district placements are not guaranteed. District students can displace an out of district student if class sizes reach capacity seating (30 students). Out of district students will be required to move to their district school or another school of choice."

This appeal requires us to review certain features of a voluntary plan designed to achieve the educational benefits of racial diversity in the public schools of Lynn, Massachusetts ("Lynn Plan" or "Plan"). The Plan addresses resource allocation, curricula, and other aspects of the classroom experience. Relevant to this appeal, it also controls school assignments and transfers.

Under the Plan, each student is entitled to attend his or her neighborhood school. Students who do not wish to attend their neighborhood school may apply to transfer to another school. Approval of a transfer depends, in large part, on the requesting student's race and the racial makeup of the transferor and transferee schools.

Parents whose children were denied transfers on race-conscious grounds challenged the transfer provisions of the Lynn Plan, claiming, inter alia, that the provisions violate the Fourteenth Amendment Equal Protection Clause. The district court rejected the parents' challenges and upheld the Plan. A panel of this court reversed, finding that the Plan was not narrowly tailored to the defendants' compelling interest in achieving the benefits of educational diversity. We granted review en banc and now affirm.

Our review of the equal protection challenge is informed by the Supreme Court's recent decisions regarding affirmative action in higher education, Grutter v. Bollinger, 539 U.S. 306 (2003), and Gratz v. Bollinger, 539 U.S. 244 (2003). We conclude, based on those cases, that Lynn has a compelling interest in securing the educational benefits of racial diversity. Applying the analytic framework set forth in Grutter and Gratz to the context of a K-12, non-competitive transfer plan, we hold that the Lynn Plan is narrowly tailored to meet this compelling interest.

The plaintiffs assert a number of other claims as well. We do not reach the merits of their facial chal-

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lenge to the Massachusetts Racial Imbalance Act, which fails for lack of standing. We treat the plaintiffs' federal statutory claims as foreclosed by our equal protection ruling and reject their challenge to the Plan under Article 111 of the Massachusetts Declaration of Rights. Finally, we conclude that the district court properly denied the plaintiffs' motion for recusal.

Background

This case comes to us with a rich factual background, described in detail in a series of district court rulings. See Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328 (D. Mass. 2003) (Comfort IV); Comfort v. Lynn Sch. Comm., 150 F. Supp. 2d 285 (D. Mass. 2001) (Comfort III); Comfort v. Lynn Sch. Comm., 131 F. Supp. 2d 253 (D. Mass. 2001) (Comfort II); Comfort v. Lynn Sch. Comm., 100 F. Supp. 2d 57 (D. Mass. 2000) (Comfort I). We set forth only those facts necessary to put this case into context, drawing upon the largely unchallenged findings of the district court.

Lynn Public Schools

Lynn is the ninth-largest city in Massachusetts, with a population of approximately 89,000. At all relevant times, its school system has been neighborhood-centered, entitling students to attend their local schools as a matter of right. By the mid-1970s, several of Lynn's schools were experiencing significant racial imbalance. In 1977, for example, the Washington Community Elementary School had a nonwhite student population of 57%, more than six times the nonwhite percentage in the school system as a whole. Predominantly nonwhite schools suffered disproportionately from resource shortages, overcrowding, discipline problems, and teacher apathy. The school system was plagued by high absentee rates, racial tension, and low test scores.

In an effort to combat these problems, Lynn established its first magnet school in 1979. At the same time, it inaugurated a voluntary transfer program aimed at attracting white students to that school (which apparently was located in a predominantly nonwhite area of the city). The magnet school was only modestly successful in alleviating racial imbalance.

In the meantime, Lynn was undergoing a demographic shift. Between 1980 and 2000, the city went from being 93% white to 63% white, with the school-age population becoming more than half nonwhite by 2000. Residential segregation by race increased during this period as whites clustered in the northern and western areas of Lynn and nonwhites concentrated in its south-central region.

Because of the neighborhood school system, these residential patterns heightened the racial imbalance of Lynn's schools. By 1987, seven of eighteen elementary schools had white enrollments of 90% or more, while four others had predominantly nonwhite student bodies. Lynn responded by developing a plan to launch ten magnet schools, but city leaders did not believe that the magnet program, on its own, would effectively combat the growing racial imbalance. In September 1989, the Lynn School Committee ("Lynn") adopted the Plan that is the subject of this litigation.

"The Plan begins with the premise that every child is entitled to attend his or her neighborhood school. Race is taken into account only when a student seeks to transfer to a school other than his or her neighborhood school."

The Lynn Plan

The defendants describe the Lynn Plan as a voluntary plan for school improvement and the elimination of minority isolation. The Plan begins with the premise that every child is entitled to attend his or her neighborhood school. Race is taken into account only when a student seeks to transfer to a school other than his or her neighborhood school.

Lynn operates eighteen elementary schools (six of which are magnets), four middle schools (three of which have magnet programs), and three high schools. In the 2001-02 school year, 15,444 students were enrolled in the Lynn public schools. Out of this group, approximately 42% of students were white, 15% African-American, 29% Hispanic, and 14% Asian (for a total "minority" or nonwhite population of roughly 58%).

For purposes of the Lynn Plan, schools are placed in one of three categories. A "racially balanced" school is one in which the percentage of nonwhite students falls within a set range of the overall proportion of minorities in Lynn's student population. The range is +/- 15% for elementary schools and +/- 10% for other schools. For example, an elementary school with between 43% and 73% nonwhite students during the 2001-02 school year was considered racially balanced, as was a middle or high school that had a nonwhite enrollment of 48% to 68%. In the 2001-02 school year, nine of Lynn's elementary schools, one of its middle schools, and all three of its high schools were racially balanced.

If a school's nonwhite population falls below the racially balanced range (i.e., if the percentage of nonwhite students in 2001-02 fell below 43% for an elementary school or 48% for a middle or high school), it is "racially isolated." Conversely, a school whose nonwhite population rises above the racially balanced range (i.e., over 73% for an elementary school or 68% for a middle or high school) is considered "racially imbalanced." In 2001-02, five of Lynn's elementary schools and one of its middle schools were classified as racially isolated, while four ele-

mentary schools and two middle schools were racially imbalanced.

The transfer policy is straightforward. Space permitting, a student whose neighborhood school is racially balanced may transfer to another racially balanced school without regard to race. Because all three of Lynn's high schools are currently racially balanced, for example, students may transfer freely among them. Students are also permitted to make "desegregative" transfers. That is, a white student may transfer out of a racially isolated school and into a racially imbalanced school (i.e., to a school with a lower percentage of white students), and a nonwhite student may transfer out of a racially imbalanced school and into a racially isolated school (i.e., to a school with a lower percentage of nonwhite students). By contrast, absent certain exceptions, students may not make "segregative" transfers. A segregative transfer is one that would exacerbate racial imbalance in the sending or receiving school (i.e., a white student may not transfer to a racially isolated school, and a nonwhite student may not transfer to a racially imbalanced school).

A student whose transfer request is denied is entitled to appeal. Roughly half of all appeals are granted. Common grounds for successful appeals are medical and safety concerns, daycare issues, and other types of hardship. Appeals will also be granted when the denial would result in siblings attending different schools. The Plan is implemented by the Parent Information Center ("PIC"), which processes all admissions and transfers, works with parents on appeals, and monitors enrollment and racial composition of individual schools and the district in general.

As the plaintiffs point out, the Lynn Plan can result in unequal treatment based on race. Consider, for example, two children, one white and one African-American, who are initially assigned to the same neighborhood elementary school for the 2001-02 school year. The school is racially isolated (i.e., less than 43% minority). Both children request a transfer to a nearby school that is racially imbalanced (i.e., greater than 73% minority). Under the Plan, the white student will be permitted to transfer, and the African-American student will not.

Although the race-conscious transfer policy is the focus of this appeal, the Lynn Plan also includes numerous other provisions aimed at improving the quality of all schools in the district. It calls for curricular programs and teacher training designed to foster cross-racial understanding and reduce racial tension. It also implemented a standardized curriculum throughout Lynn's schools; developed performance indicators for schools, programs and students; took measures to improve student attendance; and created business/college partnerships with schools to improve the quality of instruction. Finally, the Plan envisions a construction program to upgrade school facilities and alleviate overcrowding.

All parties agree that Lynn's public schools have

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Fallon Elementary in Lynn, Mass.

improved markedly since the Plan's inception, although they dispute which aspects of the Plan are responsible for this improvement. In any event, students' standardized test scores have increased, absentee levels have decreased, and racial tensions have diminished under the Plan.

The Racial Imbalance Act

The Racial Imbalance Act ("RIA") directs the Massachusetts Board of Education to remedy de facto segregation in the public schools throughout the state. The legislature enacted the RIA in response to findings that dramatic levels of racial imbalance in the public schools threatened to harm students' educational opportunities. The RIA has two main effects: it authorizes the Board to fund voluntary efforts to improve racial balance, and it allows the Board to require that school districts adopt integration plans in certain circumstances0.

The Lynn school system has received significant state aid under the voluntary provisions of the RIA. These funds have helped pay for new construction and school renovations. Lynn also receives a state stipend of $500 for each desegregative student transfer, and the state defrays certain costs associated with cross-neighborhood transportation and the creation of magnet schools.

Procedural History

In 1999, the parents of children who had been denied transfers under the Lynn Plan ("Comfort plaintiffs") brought a civil action against the Lynn School Committee, its individual members, and several governmental officials. They claimed that the Lynn Plan and the RIA violate the Fourteenth Amendment Equal Protection Clause, several federal civil rights statutes, and Article 111 of the Massachusetts Declaration of Rights. The Commonwealth intervened as a party defendant for the limited purpose of defending the RIA. The district court denied a motion to preliminarily enjoin the race-conscious aspects of the Lynn Plan, and dismissed several of the plaintiffs' claims. Only one of

the original Comfort plaintiffs remains in the case. Other parents ("Bollen plaintiffs") then filed a second action that included the Comfort plaintiffs' claims, as well as other statutory claims. The Bollen plaintiffs also added as defendants the members of the Board of Education in their official capacities. The district court consolidated the two cases.

Following an eleven-day bench trial, the district court issued a lengthy opinion dismissing a number of the Bollen plaintiffs' claims on standing grounds. It rejected the facial attack on the RIA, and determined that the Plan's transfer provisions are narrowly tailored to several compelling state interests, and thus constitutional. The court also rejected the plaintiffs' remaining federal statutory claims, treating the statutory provisions as co-extensive with the Equal Protection Clause. Finally, the court held that the transfer provisions of the Lynn Plan did not violate Article 111 of the Massachusetts Declaration of Rights.

A panel of this court reversed, holding that the Plan could not the survive strict scrutiny review required by the Equal Protection Clause. Relying on the Supreme Court's decision in Grutter upholding a race-conscious admissions policy at the University of Michigan Law School, the panel recognized a compelling interest in "obtaining the educational benefits of a racially diverse student body." It concluded, however, that the Plan is not narrowly tailored to that interest because it uses race "mechanically" and "forgoes individualized consideration of transfer applications." The panel also cited other narrow tailoring flaws, including the Plan's breadth and indefinite duration. We granted en banc rehearing and now affirm....

Federal Equal Protection Claims

The main issue on appeal is the constitutionality of the Lynn Plan's race-conscious transfer restrictions. The plaintiffs contend that by mechanically taking race into account, the Plan violates the Equal Protection Clause of the Fourteenth Amendment and various federal civil rights statutes. The resolution of the federal statutory claims depends on the fate of the constitutional challenge. Consequently, we focus on the equal protection issue.

Standard of Review

We review the court's findings of fact for clear error and its legal conclusions, including its application of the law to the facts, de novo.

The Supreme Court has reviewed racial classifications under the strict scrutiny standard, which requires that the policy be narrowly tailored to a compelling state interest. The defendants urge us to apply a more relaxed standard here. They emphasize that although the Plan is race-conscious, it is unlike affirmative action because it affects whites and nonwhites equally.

This argument is foreclosed by the Supreme Court's recent decision in Johnson v. California.

"This is not a case where the racial classification is aimed at remedying past segregation. Rather, the parties stipulated that Lynn's interests include fostering integrated public schools and what Lynn believes are [their] positive effects...."

There, the Court considered an unwritten policy of the California Department of Corrections whereby inmates are segregated by race for up to sixty days after entering a new correctional facility. Rejecting the State's argument that its policy should be subjected to relaxed scrutiny because it "neither benefits nor burdens one group or individual more than any other group or individual," the Court explained that all racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and again that, "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining... what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." We therefore apply strict scrutiny to all racial classifications to smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool. This rule applies in the present context just as firmly. The Plan must be reviewed under strict scrutiny.

This standard is not "strict in theory, but fatal in fact." Strict scrutiny "is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." We therefore bear in mind the court's admonition that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause."

Compelling State Interest

Until recently, there was some question as to whether diversity could constitute a compelling interest in the educational context. The Supreme Court has now answered that question in the affirmative, holding in Grutter that a law school's interest in obtaining the educational benefits that flow from a diverse student body was compelling enough to justify the narrowly tailored use of race in admissions.

Grutter involved a challenge to the University of Michigan Law School's admissions policy, which took into account racial and ethnic background as one of several "soft variables" used in assessing applicants. The Law School justified this strategy as furthering its goal of assembling a class that was both "excep-

tionally . . . qualified and broadly diverse." It also sought to enroll a "critical mass" of minority students, thereby enhancing its quest for broad diversity.

The Grutter Court stressed that the Law School's plan did not pursue a critical mass of minority students for its own sake, but rather for the sake of obtaining the educational benefits that flow from having a racially diverse student body. These educational benefits include promoting cross-racial understanding, breaking down stereotypes, fostering livelier and better informed class discussions, and preparing students to succeed in an increasingly diverse society. The Court largely deferred to the Law School's educational judgment not only in determining that diversity would produce these benefits, but also in determining that these benefits were critical to the school's educational mission.

The Court warned, however, that "scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university." Nevertheless, the Court concluded that the pursuit of these benefits constituted a compelling state interest. In so ruling, it recognized "the overriding importance of [education in] preparing students for work and citizenship."

Against this background, we consider the interest that Lynn's race-conscious Plan seeks to advance. This is not a case where the racial classification is aimed at remedying past segregation. Rather, the parties stipulated that Lynn's interests include fostering integrated public schools and what Lynn believes are [their] positive effects; reducing minority isolation and avoiding segregation and what Lynn believes are their negative effects; promoting a positive racial climate at schools and a safe and healthy school environment; fostering a cohesive and tolerant community in Lynn; promoting diversity; ensuring equal education and life opportunities and increasing the quality of education for all students.

The district court grouped these interests into two categories: (i) reaping the educational benefits that flow from having a racially diverse student body in each of Lynn's public schools, and (ii) avoiding the negative educational consequences that accompany racial isolation.

Although there are some differences between these interests, we conclude that they are essentially two sides of the same coin. The negative consequences of racial isolation that Lynn seeks to avoid and the benefits of diversity that it hopes to achieve are rooted in the same central idea: that all students are better off in racially diverse schools. We therefore restate the interests at stake here as obtaining the educational benefits of a racially diverse student body.

Lynn maintains that ensuring a racially diverse student body in its schools has produced, and will continue to produce, many of the same benefits cited by the Grutter Court: disarming racial stereotypes,

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Aborn Elementary classroom.

increasing racial tolerance, and preparing students to live and work in an increasingly multi-racial society. The defendants' expert evidence also suggests that racially isolated students often feel psychological burdens that can lead to poor attendance and academic woes, and that these effects can be combated by racial integration. Consistent with these assertions, Lynn's schools have indeed experienced many positive developments – including higher attendance rates, declining suspension rates, a safer environment, and improved standardized test scores – since the Plan's inception.

In Lynn's view, these developments can be explained by the intergroup contact theory. This theory holds that "under certain conditions, interaction between students of different races promotes empathy, understanding, positive racial attitudes, and the disarming of stereotypes." Under the intergroup contact theory, there are four basic conditions for success: (1) equal status among racial groups, (2) the presence of teachers and staff trained to facilitate interactions between members of different groups, (3) common goals and cooperative activities, and (4) opportunities for personalized contact with a sufficient number of children from different racial groups to disrupt stereotypes.

Lynn's experts explained that meaningful intergroup contact (the fourth condition of intergroup contact theory) requires that a school have a "critical mass" of students of each group, i.e., white and nonwhite. Lynn's experts also testified, and the district court found, that the benefits of intergroup contact continue to accrue as a school becomes increasingly diverse. Citing this theory and crediting the defense experts who explained its application in Lynn, the district court agreed that there was a causal link between improvements in the school system and increased racial diversity.

While acknowledging improvements in the Lynn schools since the Plan's inception, the plaintiffs disagree that these changes can be attributed to the race-conscious aspect of the Lynn Plan. More significantly, they also contend that regardless of whether there are educational benefits to racial diversity, Lynn does not have a compelling interest in achieving those benefits. We disagree.

Lynn's transfer policy expressly aims at attaining racial diversity in the city's schools. Where a community does not seek racial diversity for its own sake, but rather to advance a compelling interest in the educational benefits that diversity provides, there is no absolute bar to pursuing racial diversity. The district court found that this was Lynn's purpose, and the record supports that finding. We see no reason to second-guess it. Cf. Grutter, 539 U.S. at 328 (stating that, typically, a school's "educational judgment that . . . diversity is essential to its educational mission is one to which we defer").

The plaintiffs assert that, unlike Grutter, this case does not implicate a compelling interest that would justify the pursuit of racial diversity. The admissions plan at issue in Grutter strove for diversity along many axes, including race, in an effort to create a student body with diverse viewpoints, thereby enriching classroom discussion and academic experiences. The plaintiffs contend that Grutter's recognition of a compelling interest in "the educational benefits that flow from student body diversity," is thus limited to the benefits that flow from viewpoint diversity in the higher education context and does not extend to the benefits that flow from racial diversity in the K-12 context.

Again, we disagree. Lynn's asserted interests bear a strong familial resemblance to those that the Grutter Court found compelling. There is no reason to believe that these interests are advanced by viewpoint diversity but not racial diversity, or that they are substantially stronger in the context of higher education than in the context of elementary and secondary education.In fact, there is significant evidence in the record that the benefits of a racially diverse school are more compelling at younger ages. See, e.g., Comfort IV, 283 F. Supp. 2d at 356 (summarizing expert's testimony that "[i]t is more difficult to teach racial tolerance to college-age students; the time to do it is when the students are still young, before they are locked into racialized thinking").

The plaintiffs correctly point out that the benefits attributed to the Lynn Plan are not identical to those described in Grutter. But Grutter teaches that the compelling state interest in diversity should be judged in relation to the educational benefits that it seeks to produce. The Lynn Plan uses race in pursuit of many of the same benefits that were cited approvingly by the Grutter Court, including breaking down racial barriers, promoting cross-racial understanding, and preparing students for a world in which "race unfortunately still matters."

There are, of course, some variances between the benefits sought. For example, the law school plan at issue in Grutter focused on the advantages of viewpoint diversity in the classroom, while Lynn emphasizes the positive impact of racial diversity on student safety and attendance. But it is natural that safety and attendance issues will loom larger in elementary and secondary schools than in graduate schools. Conversely, lively classroom discussion is a more central form of learning in law schools (which prefer the Socratic method) than in a K-12 setting. These differences do not negate a compelling interest in racial diversity in a K-12 setting. Instead, they are the logical result of context.

"Although the Supreme Court has not yet considered a constitutional challenge to a voluntary race-based transfer policy for elementary and secondary schools, its recent opinions in *Grutter* and *Gratz* provide some guidance for our narrow tailoring inquiry into the use of race to obtain the educational benefits of diversity."

We are persuaded by the extensive expert testimony in the record, rooted in observations specific to Lynn, that there are significant educational benefits to be derived from a racially diverse student body in the K-12 context. Lynn has a compelling interest in obtaining those benefits.

Narrow Tailoring

Recognizing that public schools have a compelling interest in obtaining the educational benefits of racial diversity does not give schools a blank check to adopt race-conscious policies. Rather, the government's use of race must be narrowly tailored to achieve its compelling interest. See Grutter, 539 U.S. at 333. "The purpose of the narrow tailoring requirement is to ensure that 'the means chosen 'fit' . . . th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'"

Narrow tailoring generally requires the proponent to show that a plan or practice is (i) necessary to the declared purpose, (ii) proportional to the declared purpose, and (iii) not more burdensome than necessary on third parties. It is a context-specific inquiry that must be "calibrated to fit the distinct issues raised" in a given case, taking "relevant differences into account."

Although the Supreme Court has not yet considered a constitutional challenge to a voluntary race-based transfer policy for elementary and secondary schools, its recent opinions in Grutter and Gratz provide some guidance for our narrow tailoring inquiry into the use of race to obtain the educational benefits of diversity. Thus we consider these cases further.

Gratz and Grutter

Gratz involved a challenge to the University of Michigan's undergraduate admissions program. The

University automatically assigned twenty points – one-fifth of the 100 points necessary to guarantee admission – to an applicant from an underrepresented racial or ethnic minority group. This twenty-point bonus effectively made race/ethnicity determinative for minimally qualified minority applicants. Grutter involved a challenge to the University of Michigan Law School's admissions policy. The Law School took race into account as one of several variables in an individual's application. It assigned no mechanical score based on an applicant's race; instead, it considered race only as one of several possible ways in which an applicant could enrich the diversity of the student body.

The Supreme Court struck down the undergraduate admissions plan in Gratz while upholding the law school admissions policy in Grutter. In arriving at these decisions, the Court followed a four-part narrow tailoring inquiry. First, a race-conscious program cannot institutionalize a quota system or otherwise insulate one category of applicants from competition with another solely because of race.

Second, the government must consider whether there are any workable, race-neutral alternatives.

Third, the plan must not "unduly harm members of any racial group."

Fourth, the use of racial distinctions must be limited in time.

Much of this inquiry is relevant here despite significant differences between the competitive admissions plans at issue in Gratz and Grutter and the Lynn Plan, which is non-competitive and governs only student transfers, not initial assignments.

The requirement that the court consider race-neutral alternatives addresses whether the Plan is necessary; if there were a race- neutral way to achieve the benefits of diversity and reduced racial isolation, the use of race would be unnecessary and therefore not narrowly tailored.

The requirements that a race-conscious policy not unduly harm members of any racial group and that it be limited in time minimize the scope of the Plan, ensuring that its use of race is no broader than necessary. The weight of these considerations may vary somewhat from the Grutter setting to ours, but they remain applicable and we will return to them shortly.

The first Grutter criterion relating to competition, however, is less useful to our narrow tailoring inquiry. The University of Michigan admissions policies were designed to "assemble a student body that is diverse in ways broader than race." Individualized assessments, in which race was only one consideration among many, were the most narrowly tailored way to achieve such diversity. The mechanical use of race, by contrast, would preclude an admissions committee from considering students' "background, experiences, and characteristics to assess [their] individual 'potential contribution to diversity.'"

Unlike the Gratz and Grutter policies, the Lynn Plan is designed to achieve racial diversity rather than viewpoint diversity. The only relevant criterion, then, is a student's race; individualized consideration beyond that is irrelevant to the compelling interest.

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Lynn School Committee, 2004-2005.

The concerns motivating the individualized consideration requirement in a competitive, race-preferential admissions context that focuses on diversity along a number of axes (e.g., the Gratz and Grutter policies) are simply not present in a non-competitive K-12 transfer policy aimed at racial diversity. Because transfers under the Lynn Plan are not tied to merit, the Plan's use of race does not risk imposing stigmatic harm by fueling the stereotype that "certain groups are unable to achieve success without special protection." There is also little chance that the decisive use of race in a plan concerned strictly with racial diversity creates the unwarranted presumption that race is a proxy for viewpoint. Indeed, the Plan strives for exactly the opposite result – that is, to preempt racial stereotypes through intergroup contact.

The plaintiffs emphasize that the Supreme Court has also criticized the mechanical use of race on the ground that it may breed cross-racial tension. As the Court recently explained in considering a prison policy of segregating prison inmates by race,

"...racial classifications threaten to... incite racial hostility. Indeed, by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions. By perpetuating the notion that race matters most, racial segregation of inmates may exacerbate the very patterns of [violence that it is] said to counteract."

These concerns, however, are not applicable to the Lynn Plan, which takes race into account to foster intergroup contact rather than to segregate. As the Johnson Court acknowledged, "racial integration... tends to diffuse racial tensions and thus diminish interracial violence."

The Lynn Plan validates this conclusion: by reducing racial isolation and increasing intergroup con-

tact, it has ameliorated racial and ethnic tension and bred interracial tolerance. We therefore see no reason to impose a blanket prohibition on the use of race as a decisive factor in a student transfer plan to further a compelling interest in obtaining the educational benefits of racial diversity. If a non-competitive, voluntary student transfer plan is otherwise narrowly tailored, individualized consideration of each student is unnecessary.

The Lynn Plan

The district court determined, and we agree, that the Plan's use of transfer limits to achieve racial diversity has produced benefits central to Lynn's educational mission. Under the general narrow tailoring framework, however, we must also consider whether the Plan's use of race is no broader than necessary and whether race-neutral alternatives are available.

Breadth

The defendants maintain that the Plan's use of race is minimally invasive. First, it governs only voluntary transfers, rather than initial student assignments. Instead of forcing children to attend schools far from their homes, as might be the result of a controlled choice plan, the Lynn Plan preserves the traditional neighborhood school model. Second, the Plan allows students to transfer freely between racially balanced schools and provides an appeals process for students whose transfer requests are denied on racial grounds.

The Plan is also less burdensome on third parties here than in other contexts because of the nature of the "benefit" at issue, namely the grant of a transfer request. Every child in Lynn is guaranteed a seat in a district where, as the parties have stipulated, every school provides a comparable education. The denial of a transfer under the Plan is therefore markedly different from the denial of a spot at a unique or selective educational institution.

This is not to say that the denial imposes no harm at all; the transfer request itself indicates that despite the availability of a comparable education at any school in Lynn, students (or their parents) do not view the schools as fungible. But in construing the narrow tailoring requirement that a race-conscious plan not unduly harm members of any racial group, we view the diminished nature of any harm here as significant.

Calibration

Despite the minimally invasive nature of the Plan, the plaintiffs contend that it imposes undue harm because of its calibration. Emphasizing the defense experts' testimony that the educational benefits of diversity are predicated on the presence of a critical mass of white and nonwhite students, a figure that social science literature approximates at 20%, the plaintiffs assert that the Plan's numerical guidelines are substantially more restrictive than necessary. In their view, a plan narrowly tailored to the defendants' compelling interest in the benefits of educational diversity would prohibit only those transfers that would upset critical mass. They point out that because the Plan is calibrated around district demographics rather than around critical mass, it prohibits some transfers that do not bring a school population below 20% white. For example, because nonwhites made up 58% of Lynn's student population at the time of trial, an elementary school with a 40% nonwhite enrollment qualified as racially isolated, and therefore subject to transfer limits, even though it contained a critical mass of white and nonwhite students.

"The Lynn Plan's goal is to improve the racial balance not of any particular school, but across the school system as a whole. The optimal balance for each school might well be 50%, but Lynn's 61.9% minority population means that for every school closer to that ideal, another will be further away from it."

In response, the defendants rely on expert testimony that while critical mass is the point at which educational benefits begin to accrue, those benefits increase as a school nears an even balance between white and nonwhite students. Relying on this evidence, the district court found that "gains occur along a continuum: as the racial composition of school populations creeps closer to balanced, racial stereotyping and tension is [sic] reduced and racial harmony and understanding increase." It thus concluded that the Plan was narrowly tailored, despite its orientation around district demographics rather than critical mass.

We agree with the district court's reasoning. The Plan does not seek racial balancing for its own sake, nor does it use rigid quotas to ensure a pre-determined level of diversity at each of Lynn's schools. Rather, the transfer policy conditioned on district demographics (+/- 10-15%) reflects the defendants' efforts to obtain the benefits of diversity in a stable learning environment. The Plan thus provides a sufficiently close "fit" to the defendants' compelling interest to ensure that "'the motive for the classification was [not] illegitimate racial prejudice or stereotype.'"

The plaintiffs launch a second attack at the Plan's calibration on the grounds that it is inconsistent with the defendants' statements that the benefits they seek maximize as a school moves closer to 50% white/nonwhite. They point out that as of December 2004, Lynn's student population was more than 61.9% minority. A middle school that is 50% minori-

ty (the proportion that the defendants have described as ideal) would now fall outside of the +/- 10% range for racial balance and would instead be considered racially isolated, resulting in transfer limitations.

This argument misses the mark. The Lynn Plan's goal is to improve the racial balance not of any particular school, but across the school system as a whole. The optimal balance for each school might well be 50%, but Lynn's 61.9% minority population means that for every school closer to that ideal, another will be further away from it.

Evaluating schools by reference to the racial composition of the city's population is a sensible way for Lynn to strive for the best racial balance attainable across its entire school system, while acknowledging that practical constraints make it impossible for Lynn to have an equal population of minority and non-minority students in every individual school.

White/nonwhite distinction

In addition to challenging the Plan's numerical ranges, the plaintiffs also argue that the Plan is not narrowly tailored to advance a compelling interest in racial diversity because it paints with too broad a brush by distinguishing only between white and nonwhite students, thereby blurring the many subgroups within each category.

However, this white/nonwhite distinction reflects the reality of Lynn's experience. As the district court found, before the Plan, "racial divisions and ethnic conflict between students occurred predominantly along a white/nonwhite axis. The growing gap in understanding between these groups burdened the schools in ways that more precise shades of racial and ethnic difference did not." By increasing diversity along the white/nonwhite axis, the Plan reduced racial tensions and produced positive educational benefits. Narrow tailoring does not require that Lynn ensure diversity among every racial and ethnic subgroup as well.

Duration

A narrowly tailored plan must be limited not only in scope, but also in time. The Court held in Grutter that this durational requirement can be met by "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." The Lynn Plan includes such review. The PIC continuously monitors the schools' demographics, gathering data on racial composition and transfers.

Under the Plan, transfer limits are suspended among schools that are racially balanced. This feature is not merely theoretical. Students may now transfer freely among all three Lynn high schools.

Lynn has also periodically reevaluated the calibration of its Plan with an eye toward maximizing the availability of transfers while maintaining diverse schools. Id. at 348 n.38 (noting that the Plan's original 10% range was expanded to 15% for elementary schools to "permit more choice" and that Lynn considered a 20% range in 1994 but determined that it would compromise student body diversity). We expect that Lynn will continue to do so, presuming, as did the Grutter Court, that school officials will demonstrate a good faith commitment to monitoring the continued need for racial restrictions.

– www.lynnschools.org

Thurgood Marshall Middle in Lynn, Mass.

Consideration of race-neutral alternatives

Because narrow tailoring dictates that the government use race only when necessary to achieve a compelling interest, it requires "serious, good-faith consideration of workable race-neutral alternatives that will achieve the diversity [the government actor] seeks." Here, the defendants have met their burden. The record reflects that they seriously considered, and plausibly rejected, a number of race-neutral alternatives. These included (i) a no-transfer policy, see Comfort IV, 283 F. Supp. 2d at 387-88 (crediting evidence from a demographics expert that instituting such a policy would throw several elementary schools into racial imbalance); (ii) a policy of unrestricted transfers, see id. at 388 (crediting evidence that instituting such a policy would result in 500 to 800 segregative transfers per year); (iii) a redrawing of district lines, see id. at 387-88 (noting that this would be impractical); (iv) forced busing, see id. at 387-88 (concluding that the problems that accompany forced busing justified Lynn's rejection of a controlled choice scheme); (v) a lottery system, see id. at 389 (finding that demographic and scheduling factors made this impracticable); and (vi) a plan conditioning transfers on socioeconomic status, rather than race, see id. at 389 n.100 (noting that because of residential patterns, this system would exacerbate existing racial imbalance).

The plaintiffs argue that there are several other alternatives that the defendants failed to consider.

They point specifically to a Department of Education study reviewing successful race-neutral programs based on socioeconomic status or a lottery, see U.S. Dep't of Educ., Achieving Diversity: Race-Neutral Alternatives in American Education (Feb. 2004), available at www.ed.gov/about/offices/list/ocr/raceneutral.html, and to the race-neutral student assignment plan adopted in Boston.

As noted, Lynn has already considered, and rejected, the possibility of basing student assignments on socioeconomic status or a lottery. While the record does not reflect whether Lynn has considered the Boston plan in depth, we note that the Boston plan is specific to the residential patterns in Boston, which differ from those in Lynn.

Lynn must keep abreast of possible alternatives as they develop, but it need not prove the impracticability of every conceivable model for racial integration. It is sufficient that it demonstrate a good faith effort to consider feasible race-neutral alternatives, as it has done here. We therefore hold that the Lynn Plan is narrowly tailored to the defendants' compelling interest in obtaining the benefits of racial diversity....

Affirmed.

Concurring opinion

BOUDIN, Chief Judge, concurring.

The Lynn plan at issue in this case is fundamentally different from almost anything that the Supreme Court has previously addressed. It is not, like old-fashioned racial discrimination laws, aimed at oppressing blacks; nor, like modern affirmative action, does it seek to give one racial group an edge over another (either to remedy past discrimination or for other purposes).

By contrast to Johnson v. California, the plan does not segregate persons by race. Nor does it involve racial quotas.

Instead, the plan uses race as an express criterion to permit transfers where they are consistent with maintaining schools with a racial mix of students, and to limit transfers where they would increase racial imbalance within the school system beyond certain predetermined limits.

The plan does not purport to favor one race over another, nor have the parties claimed that it does so. Every child can as a matter of right attend his or her local school. And the parties have stipulated that Lynn's schools are educationally equal in quality; thus a child who is unable to transfer to a non-local school of choice is not relegated to an inferior education.

Whether such a plan is desirable as a matter of social policy is open to reasonable debate. So, too, are claims as to the extent of educational or civic benefits derived from the plan. But, in the absence of a constitutional violation, these choices are customarily left to legislatures, city councils, school boards and voters.

"Whether such a plan is desirable as a matter of social policy is open to reasonable debate. So, too, are claims as to the extent of educational or civic benefits derived from the plan. But, in the absence of a constitutional violation, these choices are customarily left to legislatures, city councils, school boards and voters."

Indeed, one of the advantages of our federal regime is that different communities try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs.

Some may be offended by any express use of race as a touchstone for transfers, believing that a race-based criterion is the wrong lesson for school boards to teach and students to absorb. But ours is a society with a heritage of racial problems growing out of generations of slavery and post-slavery segregation, and it may be unrealistic to suppose that everything will work out well if only race is ignored in every context.

In any event, the Supreme Court has upheld the use of race-conscious solutions in certain settings. The question is where and how one draws the line.

If we knew how the Supreme Court would decide the case before us, it would be right to adopt its answer in advance – whatever this court's members might prefer. But where the outcome in the Supreme Court is uncertain and past pronouncements were made in contexts different than the one now presented, the appellate court must exercise its own judgment on whether the local plan is constitutionally forbidden. There is very little to be said for mechanically extrapolating from general phrases visibly addressed to different issues.

Treated as an open question, this is a difficult case. The Supreme Court's language disfavors racial tests and, without flatly forbidding them, has restricted their use with particular rubrics (compelling interest, narrow tailoring).

But such rubrics depend on degree and context; there is no yardstick that crisply determines when an interest is compelling enough or how narrow is sufficiently so. The way the Lynn plan uses race is certainly more benign than laws that favor or disfavor one race, segregate by race, or create quotas for or against a racial group.

The goal of the Lynn plan – to achieve the educational and civic benefits of exposing youngsters to those of different races – is not unlawful; the attack is upon the means.

Yet given the goal, it is not easy to see how it can be achieved in a community like Lynn without using

race as a touchstone. The problem is that in Lynn, as in many other cities, minorities and whites often live in different neighborhoods.

Lynn's aim is to preserve local schools as an option without having the housing pattern of de facto segregation projected into the school system. The choice is between openly using race as a criterion or concealing it through some clumsier proxy device (e.g., transfer restrictions based upon family income).

If the plan were patently offensive to core equal protection principles, this would be an easy case. But the Lynn plan is far from the original evils at which the Fourteenth Amendment was addressed.

The Fourteenth Amendment sought to forbid the oppression of one race by another. We are here working from doctrines concerning the use of race-based criteria that are mainly the product of twentieth-century jurisprudence. This is not a case in which, against the background of core principles, all doubts should be resolved against constitutionality.

Rather, we are faced with a local experiment, pursuing plausible goals by novel means that are not squarely condemned by past Supreme Court precedent. The problems that the Lynn plan addresses are real, and time is more likely than court hearings to tell us whether the solution is a good one; indeed, indications so far are that Lynn's efforts have met with success. To bring that success to a halt in this court seems neither advisable nor necessary.

The Supreme Court has not passed upon a plan anything like the one before us. That Court is free to extend its precedents to the present context, but that is its role – not ours.

Dissenting opinion

SELYA, Circuit Judge (with whom HOWARD, Circuit Judge, joins), dissenting.

While no two cases are exactly alike, the function of the judiciary in passing upon a constitutional challenge is to read the pertinent text of the Constitution, examine the universe of relevant legal precedents, extract guiding principles from that case law, and apply those principles to the facts at hand.

This case, like most cases, presents a factual scenario that contains certain idiosyncratic elements. There is neither a Supreme Court decision squarely addressing whether racial diversity alone may constitute a compelling interest sufficient to justify the government's race-conscious preferences nor one addressing the narrow tailoring of racial classifications in voluntary, non-competitive school transfer plans. The majority accentuates those idiosyncracies, but chooses to overlook the elephant in the room: the fact that this case arises against a backdrop of Supreme Court jurisprudence, recently revisited in Grutter v. Bollinger, and Gratz v. Bollinger, that must guide our decision.

The majority's eagerness to justify departing from precedent frees it to strike out on its own, fashioning a rule that flies in the teeth of the Supreme Court's stalwart opposition to the use of inflexible, race-determinative methods in granting or denying benefits to citizens. (While such methods may be justified to remedy the effects of past discrimination, see, e.g., Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971), no such justification exists in this case.)

Because that departure is inconsistent with the role that an intermediate appellate court should play in the federal system, I respectfully dissent.

To my mind, the precedents are rather clear. The two latest Supreme Court decisions illustrate the point. I begin by briefly rehearsing the facts upon which those decisions turned.

Gratz involved the University of Michigan's undergraduate admissions program. The University automatically assigned 20 points – one-fifth of the 100 points needed to guarantee admission – to an appli-

Friend-of-the-court briefs

The Lynn case has provoked interest nationwide. Groups represented in the briefs filed with the court, in alphabetical order:

Alliance for High Standards NOT High Stakes
American Association of School Administrators
American Psychological Association.
Asian-American Lawyers Association of Massachusetts
Boston Bar Association
Center for Law and Education
Citizens for Public Schools
Citizens for the Preservation of Constitutional Rights
Civil Rights Project at Harvard University
Community Change Inc.
Council of the Great City Schools
Fair Housing Center of Greater Boston
Greater Boston Civil Rights Coalition
Iowa attorney general
Jewish Alliance for Law and Social Action
Lawyers' Committee for Civil Rights Under Law
Lawyers' Committee for Civils Right of the Boston Bar Association
League of Women Voters of Massachusetts
Lynn Business Education Foundation and Lynn Business Partnership Inc.
Maine attorney general
Massachusetts Association of Hispanic Attorneys
Massachusetts Association of School Superintendents
Massachusetts Coalition for Equitable Education
Massachusetts Federation of Teachers
Massachusetts Law Reform Institute
Massachusetts Teachers Association
Metro Council for Educational Opportunity
NAACP Legal Defense & Educ. Fund
Nat'l Center for Fair & Open Testing
National Association of Secondary School Principals
National Education Association
National School Boards Association and Public Education Network
New England Area Conference of the NAACP
New York attorney general
Northshore Branch of the NAACP
Pacific Legal Foundation
Progressive Jewish Alliance
Schott Center for Public and Early Education
Utah attorney general

cant from an underrepresented racial or ethnic minority group. This 20-point bonus effectively made race/ethnicity determinative for minimally qualified minority applicants.

Grutter involved law school admissions. The law school took race into account as one of several variables in an individual's application. The school assigned no mechanical score based on an applicant's race; instead, it considered race only as one of several possible ways in which an applicant could enrich the diversity of the student body. Moreover, the school set no quotas for racial or ethnic minorities.

The Supreme Court struck down the plan used in Gratz while upholding the one used in Grutter. In arriving at these decisions, the Court made it crystal clear that a race-conscious admissions program must use race in "a flexible, non-mechanical way" if it is to be considered narrowly tailored (and, thus, if it is to pass constitutional muster). Such a plan cannot institutionalize a quota system or in any way insulate one category of applicants from another solely on account of race. Race can, however, be used as a plus factor in the course of individualized consideration of each applicant.

The majority, emphasizing that context matters, simply writes this requirement out of the narrow-tailoring analysis. That, to me, requires more than a soupcon of legal legerdemain. While I agree that context matters, the Supreme Court has catalogued a compendium of dangers flowing from the mechanical, inflexible, and exclusive use of race as a determinant.

For one thing, such an approach insulates the preferred category of applicants from competition with other applicants. For another thing, such an approach feeds the stereotype that students from the preferred group lack academic merit and, thus, raises the specter of stigmatic harm.

The majority argues that these dangers are less ominous in a setting, like this one, that neither skews a competitive process nor substitutes race as a proxy for academic merit. But competitive disadvantage and the substitution of race for academic merit are not the only reasons behind the Supreme Court's understandable disdain for quotas and other inflexible uses of racial determinants.

Regardless of the burden imposed by a racial preference, the simple act of granting benefits based on a quota or other mechanical use of race will breed cross-racial tension. Moreover, when government indulges in the automatic and unflinching use of race in the bestowal of any benefit, that usage counteracts the ultimate goal of relegating racial distinctions to irrelevance.

As the Court reminded us earlier this year, the mechanical use of racial classifications inflicts stigmatic harm wherever and whenever it occurs – a consequence that is by no means limited to contexts that involve schools, students, or academic merit. See Johnson v. California, 125 S. Ct. 1141, 1147 (2005) (explaining in a prison context that "racial classifications threaten to stigmatize individuals by reason of their membership in a racial group" and "perpetuate the notion that race matters most").

"A flexible, race-conscious transfer program, creating a strong but non-determinative "plus" factor for integrative transfers but permitting other transfers based on the strength of individual requests, would serve to increase diversity and avoid the harm arising from an unflinching use of race.."

Nothing in either Grutter or Gratz (or in any other case, for that matter) dispels the notion that mechanical, race-based programs work this harm – and, indeed, the Lynn Plan inflicts it upon a number of students seeking to benefit from a program that Lynn knows is appealing without regard to racial reasons.

To illustrate, consider that the Plan can succeed only if the opportunity to transfer to a distant school is attractive to parents. It is conceivable that some parents would transfer a child out of a desire to have the child learn in a more integrated environment.

But the Lynn Plan actively creates and exploits other methods of benign coercion in search of its goal. For instance, Lynn admits that a major function of its "theme" schools is to entice parents to transfer their children.

Another method is selling convenience to parents. School officials are aware that some of schools are located near after-school programs or near high-employment areas. Every student, of every race, in every school zone, has some potential benefit – yet the school committee's policy evaluates whether students may take part in the transfer program based solely on the color of a student's skin. Only after experiencing a racially based rejection can an affected student plead for relief from the stated policy.

In one sense, then, this plan is even more harmful than the racially inflexible program struck down in Gratz. There, prospective non-minority students could be admitted by the terms of the policy itself and thus those who were rejected could look to something other than race as a reason for their failure.

The majority writes off these concerns, stating that Lynn's goal is increased racial harmony for the student body as a whole. But the end cannot be allowed to justify the use of unconstitutional means; even laudable goals must be attained in constitutional ways. The Lynn Plan's inflexible use of race offends this principle.

Moreover, the majority's attempted justification

misses a crucial point. The Fourteenth Amendment protects individuals, not groups. There is a harm inflicted on a student when her government denies her transfer for the sole or determinative reason of race – an immutable condition that she cannot change. That harm cannot be ignored simply because it serves what others (be they school committee members or my distinguished colleagues) perceive as a greater good.

If more were needed – and I doubt that it is – the mechanical use of race is not necessary to meet the compelling interests that Lynn asserts here. A flexible, race-conscious transfer program, creating a strong but non-determinative "plus" factor for integrative transfers but permitting other transfers based on the strength of individual requests, would serve to increase diversity and avoid the harm arising from an unflinching use of race. The children rejected for transfer under such a plan would not be rejected solely because of the color of their skin but because the reasons supporting their transfer requests were comparatively insubstantial. That kind of harm is not constitutionally suspect.

Lynn hardly can be heard to complain that such a plan is unworkable. By its own admission, it already allows more than half of the students denied transfers under its race-based policy to have an exemption for non-race-related reasons. These transfers have not undermined the benefits of diversity in the school community.

The city persists, however, in subjecting all the students who request transfers to what is in effect a two-tier process – one in which the student is evaluated solely on the basis of color and a second in which a rejected student must convince the school that his or her color should not matter.

Many good things can be said about the Lynn Plan. I do not doubt that it is well-intentioned and that it has helped to promote greater diversity in the public schools. But the overriding fact is that it unnecessarily inflicts racially based wounds on a large and diverse group of its students and, consequently, fails to satisfy the narrow-tailoring requirement set out in the Supreme Court's equal protection jurisprudence. Because that is so, I must respectfully dissent from what I view to be an erroneous decision.

Where to find full text; editing rules

The 67-page First Circuit Court of Appeals ruling is dated June 16. The full title of the lawsuit is Samantha J. Comfort, et al., v. Lynn School Committee, et al. The October, 2004 District Court decision upheld in the ruling was written by U.S. District Judge Nancy Gertner.

The full text of the decision may be read online at the First Circuit Court's Web site. Go to www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=03-2415.01A

To download the text in a PDF file, go to www.ca1.uscourts.gov/pdf.opinions/03-2415-01A.pdf

Earlier decisions in the case are archived at the NAACP Legal Defense Fund, www.naacpldf.org/landing.aspx?sub=12

In the version printed in these pages, all legal citations and most footnotes have been removed. Also not reproduced here are sections dealing with: the plaintiffs' standing to bring suit; interpretation of elements of the Massachusetts Declaration of Rights; and whether the District Court judge should have recused herself.

Transfer case ruling

Continued from Page 1

cases could converge within a year at the Supreme Court. With various circuit courts taking different tacks, legal observers believe no clear path on the use of race in K-12 assignment will emerge until the Supreme Court rules.

Many Charlotteans believe earlier court fights now bar CMS from using race in assignment. Judge Robert Potter's 1999 decision did just that. But that part of Potter's decision was later overruled by the Fourth Circuit Court of Appeals.

By the Atlantic

The seaside city of Lynn has a population of about 89,000 people. Its school system, 62% minority, has about 15,000 students.

Assignment is to neighborhood schools. Parents seeking transfers among high schools may do so at will if there are seats, because all high schools are racially diverse. Similarly, about half the elementary and middle schools are diverse.

But at the remaining schools, transfers that would aggravate racial isolation are disallowed.

That is, a white parent seeking to move from a heavily white school to a heavily minority school would be approved if a seat is available. The white parent's black neighbor, seeking the same transfer, would be denied. The example is only hypothetical: News reports suggest that housing patterns are as racially segregated in Lynn as they are in Charlotte.

About a third of parents bypass their neighborhood assignment. And school officials told the courts that even if some of the schools do not meet diversity goals, all schools are more diverse because of the program, and achievement is up. According to the Boston Globe, an attorney for parents contesting the Lynn plan attributed achievement gains not to

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Transfer case ruling

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transfers but to a change in demographics.

Although the court said the transfer program was constitutional, it did not order Lynn to continue it: "Whether such a plan is desirable as a matter of social policy is... customarily left to legislatures, city councils, school boards and voters."

The Circuit Court allowed Lynn to couch its transfer plan in terms of white and nonwhite, agreeing with the District Court that "racial divisions and ethnic conflict between students occurred predominantly along a white/nonwhite axis.... Narrow tailoring does not require that Lynn ensure diversity among every racial and ethnic subgroup as well."

By the Catawba

On paper in Mecklenburg, assignment is about to become even more heavily weighted in favor of the racially and socioeconomically isolated home school.

Last week in front of the board, Assistant Supt. Susan Agruso described changes in the plan proposed for 2006-07 as creating a "limited choice assignment plan."

"There are limits right now placed on nonmagnet choice primarily due to the overcrowding in many of our schools," she said. The number of parents involved in next January's assignment lottery may drop by two-thirds, Agruso said, as parents who want their home school are exempted from the annual ritual.

Reducing the lottery's size cuts administrative costs, and eliminates the marketing of choice that is not really present. CMS received more than 25,000 applications for January's lottery.

Three primary groups of parents will remain in the lottery:

– Those seeking a magnet seat for the first time, with open seats assigned first to siblings of current students, then at random to those in the grades where the seats are;

– Parents exercising their federal No Child Left Behind rights to leave an underperforming school. Last January's lottery included more than 3,300 such students; and

– Parents interested in a seat that is both empty today and that CMS knows will available until the student would age out. Agruso said the administration was committed to offering a transferring student a seat through the terminal grade. That means that, in growth areas or where assignment plan changes already approved would fill seats later, transfer requests might be denied even if seats are vacant for awhile.

Agruso's proposal does not use race in making any placement decisions. But she said the administration proposed allowing "5% of seats at high-performing schools with low rates of economically disadvantaged students be available to students who are low-performing from any other school." AYP transfers would be counted in the 5%. The 5% would be a ceiling, not a set-aside.

"Our attempt here is to provide service to additional students who are low-performing, but not to overwhelm a school by an influx of a large number of students in any given year."

Agruso did not offer any examples of where such seats might appear next year or in later years. The board did not discuss the proposal last week.

Judges as teachers

Reading the Circuit Court ruling in the Lynn Plan is a way for readers to learn more about the legal issues defining how U.S. school districts go about their business.

The ruling also offers insight into how one set of judges looks at the tradeoffs in public policy and constitutional doctrine raised by the case.

And in the case of the Lynn decision, an analysis of one city's efforts to guide parent transfers in a way that helps to achieve the community's educational goals might offer readers some food for thought. It might eventually help a school district free children's access to quality education from the burdens created by adults' penchant for separate and unequal neighborhoods.

– Steve Johnston

The writer is a consultant to the Harvard Civil Rights Project, which filed a brief in the Comfort vs. Lynn *lawsuit. There was no contact between the writer and Project officials during preparation of this edition of* Educate!

Calendar

JUNE

26-July 1 or **July 31-Aug. 5** "Anytown Summer Leadership Program" for high school students, first week at Blowing Rock Assembly Grounds, Boone; second week at Kanuga, Hendersonville. Fee of $350 includes transportation; financial aid available. Information: Alex Wagaman at 704-334-0053 or awagaman@nccj.org

28 School board's Curriculum Committee, 3 p.m., Room 414, Education Center.

29 School board meets, 6 p.m., Government Center.

JULY

10-14 "Bring It On: Rising to Meet the Challenge of High School," an NCCJ residential summer program for rising ninth-graders, held at The Summit at Browns Summit, N.C. \Fee of $300 includes transportation; financial aid available. Information: Alex Wagaman at 704-334-0053 or awagaman@nccj.org

20 School board meets, 6 p.m., Government Center (Moved from July 26).