



Sustaining Public School Diversity An Innovative Strategy from Jefferson County, Kentucky



**LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
U N D E R L A W**

An Education Policy Brief

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Our Commitment to High Quality Education through Diversity

Since the founding of the Lawyers' Committee for Civil Rights Under Law, we have supported integration and diversity in the public schools, following the mandate of the landmark *Brown v. Board of Education* decision that "in the field of public education the doctrine of 'separate but equal' has no place."¹ *Brown* teaches that a free and just society requires diversity in our public schools and equal opportunity for all children. The Lawyers' Committee seeks to help citizens and leaders around the country bring students of all backgrounds together to learn and grow.

The Lawyers' Committee was established in 1963 as a nonpartisan, nonprofit organization at the request of President John F. Kennedy. Our mission is to involve the private bar in providing legal services to address racial discrimination and to secure, through the rule of law, equal justice under law.

1. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

Commitment to Diversity, continued

For nearly 50 years, the Lawyers' Committee has advanced racial equality by increasing educational opportunities, fair employment and business opportunities, community development, open housing, environmental health and justice, criminal justice and meaningful participation in the electoral process. And through this work, we have learned a great deal about the challenges confronting our nation as it continues to tackle issues of race and equality of opportunity for all.

It is through this lens that the Lawyers' Committee works at the national, state and local levels to address the immense racial disparities that continue to exist in our educational system.

We have learned that integrating schools is one of the best ways to bring educational excellence and equity to children of all racial and economic backgrounds. Numerous studies show superior academic achievement by African-American and Latino children educated in racially diverse schools.² Studies also show that students of all backgrounds in integrated schools develop more positive attitudes and relationships with members of other races,³ and that such students report that they build stronger critical thinking skills, educational goals and principles of citizenship.⁴ It can also be easier to achieve resource equity among schools when schools are racially and economically heterogeneous.⁵

The Lawyers' Committee believes that access to free, quality education is a civil right, and we are committed to efforts to ensure this right, including providing a diverse and integrated public school environment for all children. We recognize that it is simpler to send students to their nearest neighborhood schools without considering diversity. However, neighborhoods across America do not typically reflect the rich diversity of our cities and counties, let alone of our nation.

To create an education system that is equitable and effective for all our students, we need to go beyond neighborhood schools with thoughtful student assignment processes that bring students of different backgrounds together. Jefferson County Public Schools has shown great leadership in this effort, and we hope that this paper will allow others to learn from its important work.

2. See Marguerite L. Spencer & Rebecca Reno, "The Benefits of Racial Economic Integration in Our Education System: Why This Matters to Democracy" 13-14 (Kirwan Institute 2009) (citing over one dozen studies dating from the 1980s to the 2000s showing the beneficial effect of school diversity on black and Latino achievement).

3. See *id.* at 14 (citing over twenty studies on the social and economic benefits of school diversity).

4. See Michael Kurlaneder & John T. Yun, "Is Diversity a Compelling Educational Interest? Evidence from Louisville in Diversity Challenged: Evidence on the Impact of Affirmative Action" (Gary Orfield, ed., 2001).

5. See Derek W. Black, "In Defense of Voluntary Desegregation: All Things are not Equal", 44 *Wakeforest Law Review* 107, 114-122 (arguing that the negative stigma associated with predominantly minority schools leads white and higher-income parents to avoid them, perpetuating such schools' high-minority, high-poverty status; that such schools tend to attract fewer high-quality teachers and other resources; and that, therefore, "changing the racial identity of schools is effectively a predicate to delivering equitable and quality educational opportunities to many minority children." (at 121)).

“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. Likewise, a district may consider it a compelling interest to achieve a diverse student population.”

-Supreme Court Justice Anthony M. Kennedy⁶

Introduction

This policy brief documents a student assignment system designed to create racially diverse public schools while satisfying constitutional requirements recently articulated by the Supreme Court. Since *Brown v. Board of Education* was handed down by the Court in 1954, school integration has been at the forefront of our national consciousness as a constitutional imperative. Integration has been a difficult goal to achieve, but it has remained an ideal of many leaders and citizens of all races. It is a key element of the society we aspire to have.

Therefore, when the Supreme Court in 2007 articulated new constraints on how school districts could voluntarily pursue integration and diversity within the Constitution, there was concern among those committed to civil rights and equity in education. The concern was heightened by the complex, even confusing, nature of the Court’s ruling in this case, titled *Parents Involved in Community Schools v. Seattle School District No. 1*⁷ (“*PICS*”). *PICS* spanned 176 pages in the official court reporter. It included an opinion by Chief Justice John Roberts, some but not all of which commanded a five to four majority, along with two concurrences and two dissents. While it was clear that the opinion still allows school districts to adopt policies to create racial integration and diversity in their schools, it was less clear how to put the Court’s new rules into practice.

6. *Parents Involved in Cmty. Sch. v. Seattle Sch. District No. 1*, 551 U.S. 701, 797-98 (Kennedy, J., concurring in part and concurring in the judgment).

7. 551 U.S. 701 (2007).

Introduction, continued

This brief documents a real-world example of a student assignment plan created based on the guidelines in the *PICS* case. Although Jefferson County Public Schools (JCPS) was one of the districts whose prior student assignment plans were struck down in *PICS*, determined leaders in Jefferson County did not give up on the educational ideal of diversity. With support from a team of national and local legal and educational experts, JCPS devised a new student assignment plan that brings together students of different backgrounds within the newly articulated constitutional requirements.

Beyond offering an important example of how to work within the constitutional law articulated in *PICS*, the JCPS experience reveals practical challenges that may be encountered in such an effort. As discussed in this brief, the JCPS plan itself is a work in progress, subject to continuing debate and efforts at improvement. Additionally, although it does not affect the JCPS plan's status under the U.S. Constitution, the future of the plan in Jefferson County has been thrown into doubt because of a Kentucky court ruling in September 2011 that the plan violates a state law regarding student enrollment.

The Kentucky Court of Appeals held that a 1970s law that was created in resistance to court-ordered school desegregation efforts gave each student a right to attend the school nearest his or her home, which could not be reconciled with the JCPS plan.⁸ However, JCPS has appealed this decision to the Kentucky Supreme Court,⁹ and the plan will remain in effect through the 2011-2012 school year. Thus, the final word has not been heard on this plan under state law.¹⁰

Whatever the outcome of this unusual state law issue, the JCPS plan was not challenged on federal constitutional grounds, and the Kentucky court ruling would not affect similar plans in other states. The plan continues to represent a thoughtful and powerful example for school districts around the country of how to combat segregation and promote diversity under federal law. Furthermore, the process for developing the plan, and the challenges and successes encountered in implementing it, offer guidance for strategically advancing the goal of diverse, integrated public schools. The determination and resourcefulness of the leaders in Jefferson County in this effort are worthy of emulation throughout the country.

8. *Fell v. Jefferson County Bd. of Educ.*, No. 2010-CA-001830-MR 12-20 (Ky. Ct. of App. Sept. 30, 2011).

9. Brief of JCPS on file with author.

10. For more discussion, see *infra*, pp. 17-18.



History: From Mandatory to Voluntary Integration

Two years after the U.S. Supreme Court's 1954 declaration that segregated public education was unconstitutional in *Brown v. Board of Education*, the Louisville Board of Education revised its student assignment policies in an attempt to desegregate its schools. The new policies were not successful, however, and by the early 1970s the vast majority of the city's schools were between 80% and 100% Black or White. A lawsuit by civil rights groups and parents led to a U.S. District Court order in 1975 that JCPS (which by then was a county-wide school system comprising the Louisville city schools and those in the city's surrounding suburbs) remedy what the court found to be unconstitutional segregation throughout its public school system.¹¹

11. *Parents Involved in Cmty. Sch.*, 551 U.S. at 813-814 (Breyer, J., dissenting).

History, continued



Photo Courtesy Jefferson County Public Schools System

For the next 25 years, JCPS moved toward desegregation through several approaches involving both extensive busing and student choice. By 2000 the District Court found that JCPS had complied in good faith with the order to desegregate. The court declared Jefferson County a “unitary” district, meaning that it had fully dismantled its segregated school system. According to the court, the school board had “treated the ideal of an integrated system as much more than a legal obligation - they consider it a positive, desirable policy and an essential element of any well-rounded public school education.”¹²

In this spirit, even when the court lifted its order to desegregate the schools in 2000, JCPS remained committed to making more progress in integration. JCPS continued to use a range of policies to ensure a demographic mix of students at each school. (Because JCPS was no longer under court order to integrate its schools, its efforts are referred to as “voluntary desegregation.”) The Jefferson County school system was about 34% Black at the time, and the district set a target range that each school be 15% to 50% Black. A student’s race was one factor in assignment decisions, as a student in some circumstances would not be assigned to a school if the school’s population was outside of the target range and the student’s enrollment would move it farther away.¹³

12. *Hampton v. Jefferson Cty. Bd. of Educ.*, 102 F. Supp.2d 358, 370 (W.D. Ky. 2000). See also *Parents Involved in Cmty. Sch.* 551 U.S. at 813-818 (Breyer, J., dissenting).

13. *Parents Involved in Cmty. Sch.*, 551 U.S. 701, 715-18.

In 2007, however, the U.S. Supreme Court struck down the JCPS plan, faulting it for basing individual student assignment decisions on race, in *PICS*¹⁴ (which was a consolidation of lawsuits against a Seattle school district and JCPS). Although JCPS had used a similar assignment plan when it was under a court order to desegregate, the Supreme Court held that considering the race of individual students when assigning them to school, in the particular way that JCPS had done, was not permitted under the Equal Protection Clause of the U.S. Constitution's 14th Amendment for a school district engaging in voluntary desegregation. Thus, because JCPS had been declared unitary in 2000, it could no longer consider the race of individual students in assigning them to schools except under certain criteria that its current plan did not meet.¹⁵



The PICS case narrowed but did not eliminate the means available for school districts to promote diversity. With admirable focus on the value of integration and diversity, Jefferson County was determined to find a way.

14. 551 U.S. 701 (2007).

15. Technically, the Supreme Court held that considering the race of individual students was only constitutional where it served a compelling governmental interest and was narrowly tailored to serve this purpose; further, the Court found the plans at issue failed under the narrow tailoring requirement for a number of reasons. See *id.* at 733- 35. However, as explained below, the Court left open to school districts a wide range of approaches to pursuing school integration.

History, continued

Concurrently, a majority of justices held that unitary school districts retain substantial power to combat racial isolation in the public schools, which often follows from racially segregated housing patterns, and to give students the benefit of learning in diverse environments. Most important to understanding the Jefferson County plan, Justice Kennedy gave clear guidance to school districts, saying that they could pursue diversity by adopting “race-conscious” measures that do not involve assigning individual students by race. As examples, he said school districts could consider race in drawing school attendance boundaries, selecting sites for new schools, funding special programs and recruiting students and staff.¹⁶ Additionally, because a majority of the Court found the goals of combating racial isolation and promoting diversity to be “compelling interests” of school systems, assignment plans with those goals that consider the race of individual students would be constitutional if they met the legal standard of being “narrowly tailored.”¹⁷



In short, the *PICS* case narrowed but did not eliminate the means available for school districts to promote diversity. With admirable focus on the value of integration and diversity, Jefferson County was determined to find a way.

16. *Id.* at 787-790 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy stated that these race-conscious methods were unlikely to trigger strict scrutiny. *Id.* at 789. Four other justices, in a dissent authored by Justice Breyer, indicated broad support for school systems seeking to achieve integration and diversity. See generally *id.* at 803-68 (Breyer, J., dissenting). Thus, a majority of justices, five out of nine, have given strong indication that measures such as Justice Kennedy outlined are within the constitutional powers of a school district.

17. It is beyond the scope of this report to examine the legal requirements for strict scrutiny (which encompasses both compelling interests and narrow tailoring). For a more thorough analysis of these issues and of *PICS* in general, see Anurima Bhargava, Erica Frankenberg & Chinh Q. Le, *Still Looking to the Future: Voluntary K-12 School Integration* 23-33 (NAACP Legal Defense Fund/The Civil Rights Project 2008) (available at www.naacpldf.org).

The Jefferson County Solution

A Geographic Approach

After *PICS*, leaders in Jefferson County worked to devise a new student assignment plan. They identified seven criteria they sought to achieve: diversity, quality, predictability, stability, equity, achievement and school choice. They examined a range of possibilities. A return to a purely neighborhood-based system would not yield diverse schools, nor would a choice-only plan. They found, however, that a geography-based approach, under which school assignment zones would be drawn that encompassed a mix of demographic characteristics, could create diverse school populations.¹⁸

The plan JCPS implemented in fall, 2009 employed a broadened definition of diversity, covering income and educational attainment along with race and ethnicity. JCPS analyzed census data across the county for three factors: minority population, educational attainment of adults over age 25 and household income. It then identified whether each elementary school “resides” area, or assignment zone, was above average in minority population and below average in educational attainment and household income; if so, it was designated with an A. The remaining resides areas were designated with a B. This resulted in approximately one A area for every two B areas. JCPS then constructed six contiguous elementary school clusters, with each cluster combining A areas with B areas to create a demographic balance within the cluster in terms of race, educational attainment and income.

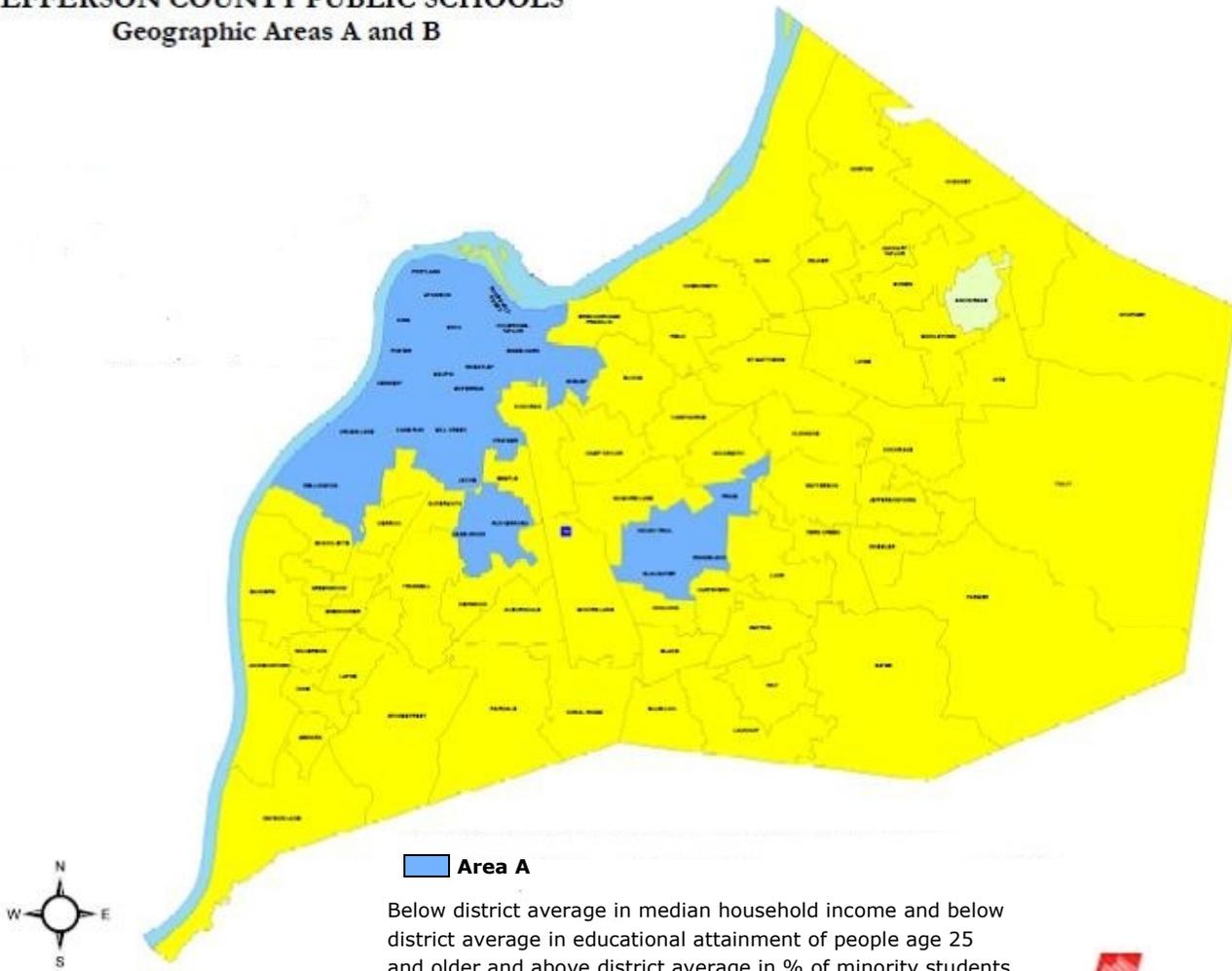
As described previously, the JCPS plan was carefully designed to meet the constitutional guidelines articulated in *PICS*. The plan does not consider the race of individual students when assigning them to schools. Rather, it specifically employs one of the “race-conscious” methods techniques sanctioned in Justice Kennedy’s opinion, by drawing attendance boundaries with consideration of race.²⁰ (*Please see maps on the following pages.*)

18. The Supreme Court in *PICS* had criticized JCPS for failing to show that it had considered race-neutral alternatives to its race-based assignment plan. *PICS*, 551 U.S. at 735. As described above, in this instance JCPS did consider race-neutral alternatives such as school choice and neighborhood schools, before selecting its current “race-conscious” approach.

19. This was responsive to Justice Kennedy’s description of the kind of diversity a school system may pursue. For example, he stated, “it is permissible ...to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.” *Id.* at 788 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added).

20. See *id.* at 789 (Kennedy, J., concurring in part and concurring in the judgment).

JEFFERSON COUNTY PUBLIC SCHOOLS
Geographic Areas A and B



Area A

Below district average in median household income and below district average in educational attainment of people age 25 and older and above district average in % of minority students in resides area.

Area B

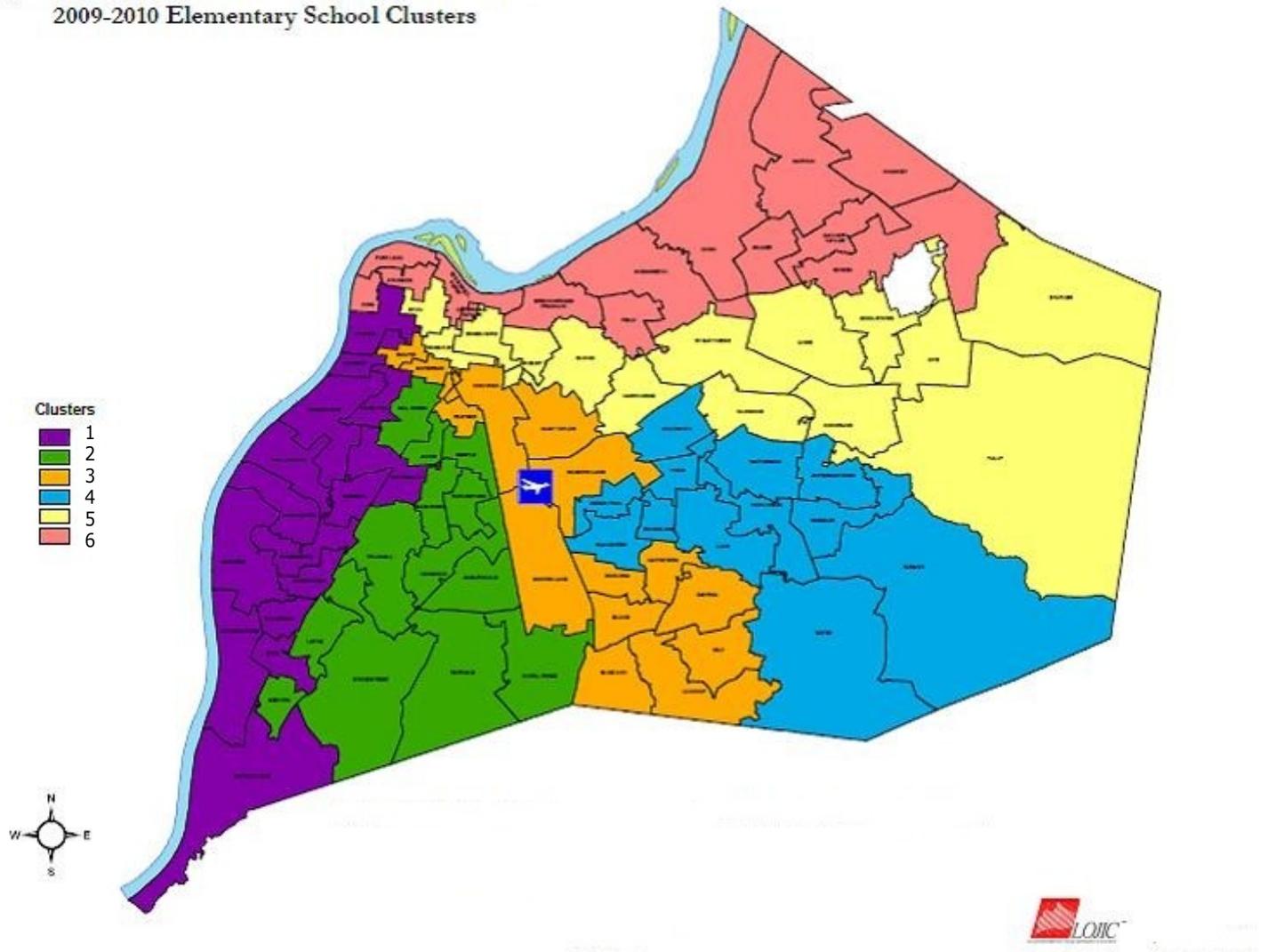
At the district average or above in income or educational attainment or below the district average in % of minority students in resides area.

Map Courtesy Jefferson County Public School System.



JCPS analyzed each elementary school “resides area” for its racial demographics, income levels and education levels. Areas with an above average minority student population and below average income and education levels were designated “A” areas; the others were “B” areas.

JEFFERSON COUNTY PUBLIC SCHOOLS
2009-2010 Elementary School Clusters



Map Courtesy Jefferson County Public School System.

JCPS then created six elementary school clusters, each of which contained a roughly equivalent mix of A and B area students.

Assigning for Diversity



The diversity goal is now to have 15% to 50% Area A students at each school. At the elementary level, as of 2010-2011, the plan is being implemented with incoming students through grade 3 and will be moving up one elementary grade each year. Each child's family fills out an application identifying and ranking its four top choice schools in the cluster where the family lives. Two of the four schools must be in Area A, and two in Area B. In addition, families can apply to up to two magnet schools or programs, an element of the JCPS system that was not affected by *PICS*.

A set of rules governs elementary assignment decisions. Siblings are given priority to go to school with siblings. Preference is also given to families choosing

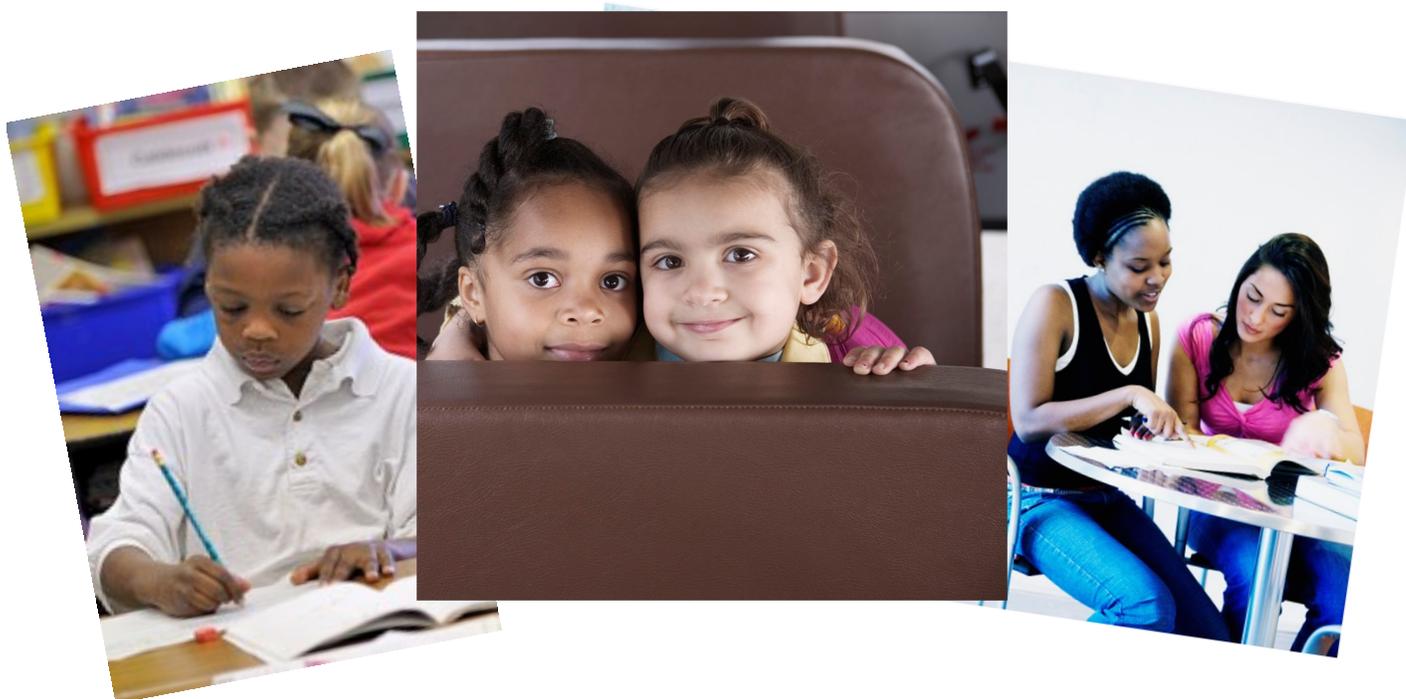
their neighborhood or "resides" school. Beyond this, the system accommodates family preferences to the extent possible while staying within the ranges described above. When there are too many Area A or Area B applicants for a given school, a random drawing is used to determine assignments.

Magnet schools and programs weigh applications based on various criteria specific to the school, including grades, test scores, essays, letters of recommendation and the like.

Diversity in middle and high schools is to be achieved by a similar geography-based approach. Each middle and high school is assigned an attendance or “resides” zone, sometimes including non-contiguous areas, designed to create a zone with 15% to 50% area A students. Assignment to middle and high schools outside of a resides zone largely follows the principles applied to elementary admission, including magnet schools and programs. Implementation at the middle school level began in 2011-12, starting with grade 6. High schools are scheduled to come under the assignment plan in 2012-13.²¹



21. High schools were previously scheduled to start under the plan in 2011-2012, but the Board of Education voted to delay this by one year. Chris Kenning, “New Survey Says...90% of JCPS Parents Favor Diversity Goal,” *The Courier-Journal*, January 28, 2011, at A1.



Immediate Impact

The JCPS plan has increased public school diversity. As the 2011-12 school year began, 61% of JCPS elementary schools met the diversity guidelines for the grades covered by the plan - up from 54% in 2010-11 and 48% in the prior year.²²

Notably, 42% of kindergarten and first-grade families in 2010-11 identified a school other than their neighborhood school as their first choice, indicating that many parents value the chance to choose from a broader range of schools.²³ Busing is moderate, but not insignificant, with the average ride for elementary students who use the bus being 29 minutes.

22. Some advocates of the student assignment plan have been disappointed in this rate of progress, seeing it as too slow. See, *e.g.*, NAACP Louisville, KY Branch, "White Paper on Jefferson County Public Schools Student Assignment Plan" 7-9 (May 24, 2010).

23. Sheldon Berman, "A Report from the JCPS Superintendent," *The Courier-Journal*, November 7, 2010, at H1.

Support and Debate

The student assignment plan was originally introduced to the community through a series of public meetings around the city in 2007. The plan has retained the overall support of leaders and the community, although it continues to be the subject of debate.

A January 2011 survey of JCPS parents and students by Gary Orfield and Erica Frankenburg of The Civil Rights Project at UCLA covering all grade levels showed 91% of parents said their children benefited from diverse schools and 89% said the school district should have guidelines to ensure students learn in a diverse environment. Eighty-seven per cent of kindergarten parents and 83% of grade 1 and 2 parents were satisfied with the quality of their children's education.²⁴

However, JCPS clearly still has work to do to build full support for its plan. Majorities, but not large majorities, were positive about the direct impact of the plan on them, with 69% of parents happy about their children's school assignment and 54% satisfied with how JCPS was implementing the plan. Only 44% of parents gave a positive assessment of how the plan was working in general.²⁵

Bus rides to and from non-neighborhood schools appear to be the biggest source of parental complaints with the county's school assignment plan. There have been some significant travel mishaps, including 400 students arriving home late on buses the first day of school in 2010.²⁶ More broadly, parents express a preference for schools close to home: despite their overwhelming support for school diversity expressed in the Civil Rights Project survey, nearly 80% nevertheless said a student should be able to attend the school closest to him or her.²⁷

JCPS clearly still has work to do to build full support for its plan. Majorities, but not large majorities, were positive about the direct impact of the plan.

24. Gary Orfield & Erica Frankenburg, "Experiencing Integration in Louisville: How Parents and Students See the Gains and Challenges " 24, 25 & 28 (The Civil Rights Project 2011).

25. *Id.* at 29-30.

26. Antoinette Konz, "JCPS Says 400 Students Delivered Home Late, Some After 9 p.m.," *The Courier-Journal*, August 17, 2010.

27. Orfield & Frankenburg, *supra* n.21 at 26.

Support and Debate, continued



Photo Courtesy Jefferson County Public School System

JCPS appears to be making progress in addressing the logistical challenges of the plan. Adjusted bus routes and new tools such as an online resource to find bus routes, improved bus radios and other means led to a much smoother start to school in 2011 than the prior year.²⁸ One district official also noted that because JCPS is implementing its new plan grade by grade, it has essentially been running two bus systems at once, one for the grades under the new assignment plan and one for the grades under the old; as the plan gets more fully phased in, the district will move toward one bus system, making transportation more manageable.

Beyond travel issues, one school administrator indicated that test score data available under the No Child Left Behind Act makes it harder to sell parents on the virtues of this type of assignment plan - parents question why a child is being asked to travel farther to a school that appears, by the measure of student proficiency rates on state tests, to be inferior to the child's neighborhood school. This underlines the importance of the efforts of JCPS, led by a new superintendent as of the 2011-12 school year, to improve the quality of education throughout the district as a critical component in making its school assignment plan work.²⁹

28. Antoinette Konz & Sarah Lawson, "Opening Day for JCPS Smoother than a Year Ago," *The Courier-Journal*, Aug. 17, 2011.

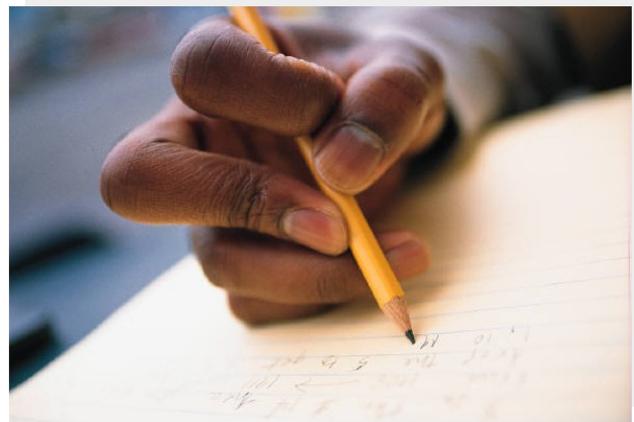
29. The Board of Education decided in late 2010 not to renew the prior superintendent's contract. Board members expressed dissatisfaction with academic progress in the schools based on test scores, and with the implementation of the student assignment plan in its first two years. Antoinette Konz, "School Board Votes to Replace Berman," *The Courier-Journal*, November 23, 2010, at A1; Antoinette Konz, "Two Issues Hurt Berman with the Board," *The Courier-Journal*, November 24, 2010, at A1.

Planning for Improvement

JCPS is considering how it can improve the student assignment plan. The Board of Education retained school integration experts Gary Orfield and Erica Frankenberg, supported by a former JCPS executive director of student assignment, a demographic expert and a transportation expert to study the plan and recommend ways to make it more effective and workable. Orfield and Frankenberg presented their report to the Board on September 12, 2011.³⁰

The report argues that a revised plan can shorten length of travel for elementary students while still achieving significant diversity. It recommends analyzing the demographics with smaller geographic units than the prior plan did - 540 census block groups rather than under 100 neighborhood school assignment zones - and categorizing them into three leveled groups rather than just A or B. By doing so, Orfield and Frankenberg show that there is more diversity spread throughout the county than was apparent with the larger resides areas receiving one blanket designation.³¹

Based on this analysis, the report recommends dividing the county into 13 clusters instead of six. Each of these proposed clusters, when analyzed at the census block level according to the three categories, encompasses a fair amount of racial, income and educational attainment diversity, according to the report. Therefore, the authors propose creating assignment rules that allow each school to enroll a student body representative of the mix of students from the three categories of census block groups in its cluster. With students guaranteed seats in their own clusters, bus rides would be shorter than in the current larger clusters.³²



30. Chris Kenning & Antoinette Konz, "Student plan overhaul urged," *The Courier-Journal*, September 13, 2011.

31. Gary Orfield & Erica Frankenberg, "Diversity and Educational Gains: A plan for a changing county and its schools" 10-11 (The Civil Rights Project 2011).

32. *Id.* at 16.

Planning for Improvement, continued



Photo Courtesy Jefferson County Public School System.

The report has other recommendations. For example, it suggests identifying neighborhoods that already have stable, integrated populations, and giving families in those neighborhoods an absolute right to attend their neighborhood school - there is no reason to bus students away from a diverse community in the name of diversity. There are suggestions for training faculty to most effectively bring about the educational and social benefits of school diversity. As a final example, the report discusses ways to strengthen the JCPS magnet schools, which can draw students of many backgrounds to their special programs.³³

JCPS Superintendent Donna Hargens has said she will hold a series of public comment sessions on these recommendations to inform the Board's deliberations on the proposal.³⁴ There is much to consider, as the proposal could address some of the challenges the plan has faced while continuing to give children the benefit of integrated schools. At the same time, citizens need to consider whether the proposal will work as projected and whether setting diversity goals based on the population of each cluster rather than of the county as a whole will produce the desired level of diversity throughout the school district.

33. Id. at 19, 21-23, 25-26.

34. Chris Kenning & Antoinette Konz, "Student plan overhaul urged," *The Courier-Journal*, September 13, 2011.

For interested citizens from other school districts, the proposal also offers at least two important lessons. First, it shows that there is more than one way to achieve diversity through the use of the demographics of geographic regions in the student assignment process. (Both the original plan and the new proposal are examples of systems that employ what Justice Kennedy called the “race-conscious” drawing of student assignment boundaries.) Second, the proposal demonstrates that the development of an effective student assignment plan that promotes integration and diversity may involve multiple phases of design, implementation and refinement.

The development of an effective student assignment plan that promotes integration and diversity may involve multiple phases of design, implementation and refinement.



Challenged in the Courts

Since the JCPS plan was implemented it has not been challenged on its constitutionality, an indication that even its opponents believe that it comports with the law of *PICS*. (One of the original plaintiffs from the *PICS* case challenged the new plan on constitutional grounds after the case was sent down from the Supreme Court, but the District Court refused to consider her claims because the plan had not yet been implemented.)³⁵ A small group of parents challenged the plan in 2009 based on dissatisfaction with their children's assignments, but they later withdrew their complaint.³⁶

The JCPS plan has fared less well in another challenge, this one based on state law. In 2010, 13 families challenged the plan under a state law on school enrollment.³⁷ The trial court upheld the plan,³⁸ but the Kentucky Court of Appeals reversed that ruling in September, 2011.³⁹

35. *Meredith v. Jefferson County Bd. of Educ.*, No. 3:02CV-620-H, Memorandum and Order (W.D. Ky. March 11, 2008.)
36. *Bains v. Jefferson County Public Schools*, No. 3:08-CV-00456-JGH, Stipulation of Dismissal without Prejudice of All Claims Against Defendants (W.D. Ky. Oct. 9, 2009).
37. Kentucky Revised Statute 159.070.
38. *Arnold v. Jefferson County Bd. of Educ.*, No. 10-CI-04174, Opinion and Order (Jefferson Circuit Ct., Division 10, Aug. 12, 2010).
39. *Fell v. Jefferson County Bd. of Educ.*, No. 2010-CA-001830-MR (Ky. Ct. of App. Sept. 30, 2011).
40. *Id.* at 12-13.

The court held that the particular state law, which it said had been passed in the 1970's as an act of state-level resistance to desegregation orders issuing under the U.S. Constitution,⁴⁰ gave each child a right to attend the school closest to his or her home.⁴¹ The court ordered that the current plan will remain in effect through the 2011-12 year, but must be abandoned in 2012-13.⁴² JCPS has appealed this ruling to the state Supreme Court.⁴³

The Lawyers' Committee believes the JCPS plan should be upheld under Kentucky law. However, it is important to emphasize that whatever the outcome in this state lawsuit, it will not reflect upon the federal constitutionality of the plan. The plan was carefully created to fit within the boundaries of constitutionality described in *PICS*, and that is not at issue in the Kentucky case. The fact that an unusual state law might be an obstacle to the plan's implementation in Kentucky does not detract from its relevance as an example in other states, where this particular law would not apply.

41. *Id.* at 14-20. The law states, "Within the appropriate school district attendance area, parents or legal guardians shall be permitted to enroll their children in the public school nearest their home." KRS 159.070. The law previously stated, "Within the appropriate school district attendance area, parents or legal guardians shall be permitted to enroll their children for attendance in the public school nearest their home." *Fell* at 12-13 (emphasis added). Because of the deletion of the term "for attendance", JCPS argued that the right to "enroll" that remains in the law signifies merely a right to register students in the public school system, not to attend the particular school at which they enroll. *Id.* at 17. The appellate court interpreted the phrase "enroll in" to imply enrolling as a student in the particular school, despite the language change. *Id.* at 18-19.

42. *Id.* at 21.

43. Brief on file with author. *See also* Chris Kenning, "Kentucky Court of Appeals rules against JCPS student-assignment plan," *The Courier-Journal*, September 30, 2011. Earlier in the year, the plan survived the threat of the enactment of a new state law change that essentially would have given parents a more explicit right to send children to the nearest school. The bill was passed in the State Senate in 2011 but died in committee in the House of Representatives. Stephanie Steitzer, "Senate Schools Plan Dead," *The Courier-Journal*, January 12, 2011, at A1.

Conclusion: Choosing Diversity

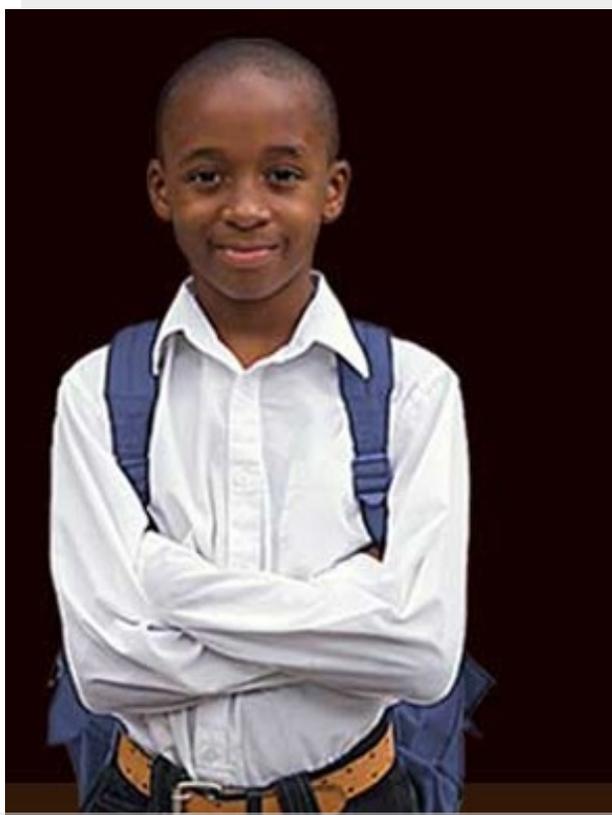


Photo Courtesy Jefferson County Public School System

By increasing diversity in its schools, Jefferson County is showing how a community can buck the national trend toward greater public school segregation. According to The Civil Rights Project, 2006-2007 data show that the average African-American or Latino student attends a school that is about three-fourths minority students, with about 40% of Latino and African-American students attending intensely segregated schools of 90-100% minority enrollment. This reflects a significant increase from the late 1980s, when only about 33% of this student population attended intensely segregated schools.⁴⁴ Furthermore, the average African-American or Latino student attends a school with 57% to 59% of students in poverty (an increase from 43% for African-American students in the late 1980s).⁴⁵

Creating and sustaining the Jefferson County plan has been a major effort. As described above, the design work demanded substantial analysis and deliberation, especially because Jefferson County was developing one of the first post-*PICS* plans. In the implementation phase, students, parents and administrators all face greater challenges than they would under a simple neighborhood schools plan.

44. Gary Orfield, "Reviving the Goal of an Integrated Society: A 21st Century Challenge" 12-13 (The Civil Rights Project 2009).

45. *Id.* at 14.

The citizens of Jefferson County who are leading this effort believe in the vision of students of all races and backgrounds learning together. They understand diversity in the public schools yields important results for our children and our society, by enhancing educational opportunity and helping build understanding and connection among different groups in our communities. They are working hard to sustain support among their fellow citizens for the educational and social value of diversity, and to find ways to lessen the logistical burdens of the plan. They are also working hard to improve schools across the county, so that parents can feel comfortable with whatever school assignment their children receive. Given the tenacity and imagination Jefferson County has shown to date in its pursuit of diversity in the public schools, there is much reason to hope that this effort will overcome the practical and legal obstacles it has faced and the JCPS system will evolve and thrive.

The Lawyers' Committee for Civil Rights Under Law commends Jefferson County Public Schools for its determined, thoughtful pursuit of school integration. The JCPS plan, the process by which it was created, and the challenges it has faced all provide important lessons for school districts throughout the nation. We hope that other communities will build on these lessons and continue the pursuit of school diversity to meet, in the words of Justice Kennedy, our nation's "historic commitment to creating an integrated society that ensures equal opportunity for all of its children."⁴⁶

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46. *Parents Involved in Cmty. Sch.* 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in the judgment).

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For more information about the Jefferson County Public School System, please visit:

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