HOGAN &
HARTSON LLP

M E M O R A N D U M

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TO: School District Clients and Friends

FROM: Maree Sneed
John W. Borkowski
Audrey J. Anderson
Jennifer Stillerman

RE: Student Assignment Following the Supreme Court's Decision in the Seattle and Louisville Cases

As we previously reported to you, on June 28, 2007, the Supreme Court issued its decision in Parents Involved in Community Schools v. Seattle School District No. 1 and Meredith v. Jefferson County Board of Education, 127 S. Ct. 2738 (2007) ("Parents Involved"). This memorandum summarizes several recent developments in the Jefferson County case, which was remanded to the district court, and in two other unrelated cases that discuss Parents Involved. These decisions may shed some light on the possible implications of the Supreme Court's decision.

In Parents Involved, the Supreme Court applied strict scrutiny and invalidated voluntary integration plans adopted by the Seattle School District and the Jefferson County Board of Education in Louisville, Kentucky because a majority of the Court found that they were not narrowly tailored to serve a compelling governmental interest. Justice Kennedy's concurring opinion and Justice Breyer's dissenting opinion, however, also show that five justices view avoiding the harms of racial isolation and providing the educational benefits of diverse student enrollments to be compelling governmental interests. Five justices thus indicated their belief that race could be used as a factor if it was used in a narrowly tailored manner to achieve one of these compelling governmental interests, thereby satisfying the strict scrutiny test. Moreover, those five justices also suggested that a number of race-conscious practices that do not involve individualized decisions based on racial classifications also are likely permissible and may not even be subject to the strict scrutiny standard.

I. Jefferson County. Kentucky

Subsequent to the Supreme Court's decision in Parents Involved, the case was remanded to the district court, which held a hearing on August 2, 2007 "to discuss any pending issues" and issued a related order the following day. Meredith v. Jefferson County Board of Education, No. 3:02CV-620-H (W.D. Ky. Aug. 3, 2007). At the hearing, the Jefferson County Board of Education, through counsel, confirmed that the Board has instructed its principals and staff not to use race in individual student assignments, including assignments for "students who are new to the district since assignments were first made last spring, students who have moved within the district since last spring and therefore need a new assignment and also transfers." With the agreement of plaintiffs' attorney, the district court concluded that because the district has advised its personnel not to use race in "ongoing" student assignment decisions, "the school board is in complete compliance with the recent Supreme Court decision."

The district court did not require the school district to revisit student assignment decisions made under the voluntary integration plan that had been invalidated by the Supreme Court in Parents Involved. The district court also observed that the Supreme Court did not prescribe a particular type of student assignment plan, leaving the Jefferson County Board of Education with "a pretty wide range of choices." The school district confirmed at the hearing that it plans to take time to develop a new student assignment plan while complying with the Supreme Court's decision in the interim. The court indicated that the district could have until "the end of time" to make any decisions about a new plan, so long as, in the meantime, it remains in compliance with the Supreme Court's decision.

In an August 29, 2007 order, the judge also noted the school district's voluntary decision to abandon another problematic student assignment practice that neither the district court nor the Supreme Court had addressed: The school district had used different attendance zones for black and white students to determine assignments at three schools. See Meredith v. Jefferson Board of Education, No. 3:02CV620-H (W.D. Ky. Aug. 29, 2007). While the district court did not rule on this practice, given the school district's decision to end it, the court did opine that it "appears to be the functional equivalent of a race based binary selection process, which a solid majority of the current Supreme Court has rejected in these circumstances." The district court acknowledged that, according to Justice Kennedy's opinion, school boards "are free to devise race-conscious measures in a general way and without treating each student in different fashion solely on the basis of a systematic individual typing by race," but noted that drawing separate attendance areas by race likely was not one of these permissible means.

II. Tucson, Arizona

A district court in Arizona also recently found a transfer policy that used race to be unconstitutional. See Fisher-Mendoza v. Tucson Unified School District No. One, No. CV 74-90 (Aug. 21, 2007). The policy in question permitted students to

transfer to a school if the transfer improved "the ethnic balance of the receiving school and does not further imbalance the ethnic makeup of the home school." The effect of the policy had been to limit the transfer options of minority students because many of the public schools in Tucson are predominantly minority.

While the policy was initially adopted as part of a court-approved desegregation plan in a long-running case in which the court still retained jurisdiction, the court found the transfer policy unconstitutional under Parents Involved, 127 S. Ct. 2738. The court reasoned that because it disproportionately limited enrollment choices for minority students the plan would be unconstitutional unless it was aimed at remedying de jure segregation. In the same order, however, the district court made a preliminary finding that the school district was unitary in the area of student assignment. Therefore, on the basis of that preliminary finding, the court concluded that the transfer policy was not narrowly tailored to achieve a compelling governmental interest.

The decision in the Tucson case underscores the need for school districts that are approaching unitary status to review the policies that they have adopted in implementing court-ordered desegregation plans and to develop appropriate post-unitary policies in areas such as student assignment.

III. Lynn, Massachusetts

Recent developments in another case suggest that there will be controversy and litigation in the wake of the Supreme Court's ruling in Parents Involved, 127 S. Ct. 2738. On July 3, 2007, the plaintiffs in Comfort v. Lynn School Committee, No. 99-11811-NG (D.Ma.), filed a highly unusual motion seeking to reopen a case that had already been resolved. The case involved a challenge to Lynn's "Voluntary Plan for School Improvement and the Elimination of Racial Isolation" and had been finally resolved in favor of the school district by the district court and the First Circuit. Moreover, the Supreme Court had declined to review the case.

The plaintiffs, however, claim that "at least one plaintiff" is currently in middle school and still subject to the Lynn plan, and they argue that "Lynn's student assignment plan is similar to Seattle's plan at issue in Parents Involved." Plaintiffs further argue that the First Circuit relied on the "same, now discredited," rationale in finding Lynn's plan constitutional as did the appellate courts that upheld the Seattle and Jefferson County plans. Therefore, they contend, the Lynn plan "bears the same constitutional defects identified by the Supreme Court in Parents Involved."

Lynn and the Commonwealth of Massachusetts emphasize that the district court's decision to uphold the Lynn plan was affirmed by the court of appeals two years ago and that the Supreme Court denied the plaintiffs' petition for a writ of certiorari. They contend that the plaintiffs have failed to show any entitlement to "what would be extraordinary post-appellate relief" (noting, for instance, that plaintiffs have not

demonstrated actual harm to even the single plaintiff who remains in middle school and is not "even allege[d]" to desire a transfer).

"Even if this case were still on direct appeal," Lynn and the Commonwealth argue, "the Supreme Court's decision would not in any way alter or disturb" the district's court's "analysis or earlier judgment." They assert that the district court "applied the same strict scrutiny standard used by the Supreme Court." In addition, they distinguish the nature of the Lynn plan from the Seattle and Jefferson County approaches. For example, Lynn and the Commonwealth note that "under the Lynn Plan, all children are able to attend their neighborhood school" and that "Lynn uses racial classifications only for the narrow purpose of deciding whether to grant or deny a subset of student transfer requests" (not "initial school assignment"). They state that "a student's race is not considered at all unless a student requests a transfer to or from a school affected by racial isolation" and is then "among the factors Lynn considers in deciding whether to grant or deny such a transfer request." Lynn and the Commonwealth explain that "[e]ven where race is considered, the Plan provides a separate exemption for bi-racial or multi-racial applicants," thereby avoiding an "over-simplified racial dichotomy of white/non-white." In addition, they point to the district court's finding that the Lynn plan was "designed in part to combat Lynn's history of discriminatory transfer practices."

The plaintiffs' attempt to re-open Comfort underscores the willingness of plaintiffs to challenge voluntary race-conscious student assignment plans, even where they have been previously upheld by federal courts. In light of this threat, it is crucial for school districts to think carefully about the use and design of any race-conscious policies or practices.

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If you have questions concerning student assignment issues or the implications of the Supreme Court's decision Parents Involved, please feel free to contact Maree Sneed (at 202-637-6416, MFSneed@HHlaw.com), John W. Borkowski (at 574-239-7010, JWBorkowski@HHlaw.com), Audrey J. Anderson (at 202-637-5689, AJAnderson@HHlaw.com), or Jennifer Stillerman (at 202-637-6159, JBStillerman@HHlaw.com).