

PICKING UP THE PIECES AFTER *PICS*: EVALUATING CURRENT EFFORTS TO NARROW THE EDUCATION GAP

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INTRODUCTION

Segregation and inequality in K–12 education are two of the most critical problems facing today's Latino community. Latino students are about thirty-three percent less likely than are white students to graduate from high school.¹ Those who do graduate are fifty percent less likely than are their white counterparts to meet the basic requirements for applying to college.² Latino students are also much more likely to attend segregated schools than are African American students.³ Seventy-six percent of Latino students attend schools with mostly minority student bodies,⁴ and more than one-third attend schools whose student bodies are more than ninety percent minority.⁵ Perhaps even more remarkable, while segregation for African American students has fallen twenty-eight percentage points since 1969, segregation for Latino students has risen 13.5 points.⁶ Today's Latino students are thus significantly more segregated than were their parents.

This reality of segregation and inequality in K–12 education underlines the significance for Latinos of the Supreme Court's recent decision in *Parents Involved in Community Schools v. Seattle Independent School District*⁷ (*PICS*). In *PICS*, the Court held that student assignment plans in Seattle, Washington, and Louisville, Kentucky, that were designed to promote diversity in K–12 education violated the Equal Protection Clause because they took race into consideration.⁸ Advocates are now faced with the tough ques-

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¹ See JAY P. GREENE & MARTIN A. WINTERS, MANHATTAN INSTITUTE, PUBLIC HIGH SCHOOL GRADUATION AND COLLEGE READINESS RATES IN THE UNITED STATES: 1991–2002 1 (2005), http://www.manhattan-institute.org/pdf/ewp_08.pdf.

² See *id.*

³ Beatriz Arias, *School Desegregation, Linguistic Segregation and Access to English for Latino Students*, 2 J. EDUC. CONTROVERSY (2007), <http://www.wce.wvu.edu/Resources/CEP/eJournal/v002n001/a008.shtml>.

⁴ *Id.*

⁵ *Id.*

⁶ GARY ORFIELD, CIVIL RIGHTS PROJECT AT HARVARD UNIV., SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 32 (2001), http://www.civilrightsproject.ucla.edu/research/deseg/Schools_More_Separate.pdf.

⁷ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) [hereinafter *PICS*].

⁸ See *id.* at 2746.

tion of what options may remain for combating segregation and inequality in K–12 education.

At least three options are evident. The most popular option takes into consideration socioeconomic status when formulating student assignment plans in order to promote diversity. A second option applies the transfer provision of the No Child Left Behind Act (NCLB).⁹ The third option tries to narrow the education gap through minority-focused charter schools. This Note will explore and evaluate these options in the post-*PICS* legal landscape. Section One will summarize *PICS* and discuss the decision's significance for Latino students. Sections Two to Four will discuss in turn the three options for combating the racial segregation and inequality in K–12 education that may survive *PICS*.

This Note will conclude that minority-focused charter schools offer an important way to narrow the education gap when efforts to promote diversity have run aground. Where advocates cannot combat racial isolation directly using student assignment or transfer, Latino students should not therefore be sentenced to receive substandard educations. Despite diversity's importance, we cannot wait to address the education gap until we achieve diversity. Given the extent to which *PICS* made the pursuit of diversity in K–12 education elusive at best, minority-focused charter schools offer rays of hope in the otherwise dismal landscape of minority K–12 education.

I. PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1

Last term, the Supreme Court revisited a question at the forefront of American education policy since the 1950s: what role should race play in education policy? In *PICS*, the Justices divided over this question. Their opinions revealed widely divergent views about the meaning of racial equality and the legacy of *Brown v. Board of Education*.¹⁰ Chief Justice Roberts and Justices Scalia, Thomas, and Alito argued that *Brown* called for racial blindness,¹¹ whereas Justice Breyer, with whom Justices Stevens, Souter, and Ginsburg joined, argued that *Brown* called for “true racial equality” in “everyday life.”¹² Justice Kennedy settled somewhere in the middle, calling the objective “equal educational opportunity.”¹³ Ultimately, Justice Kennedy provided the crucial fifth vote necessary to invalidate two school districts' race-conscious student assignment plans under the Equal Protection Clause. Given this outcome and the prevailing Justices' views about *Brown*, the *PICS* decision appears to forbid any use of race in student assignment plans. While Justice Kennedy's middle-of-the-road position on *Brown* may leave

⁹ No Child Left Behind Act, 20 U.S.C. § 6301 (2006).

¹⁰ 347 U.S. 483 (1954).

¹¹ *PICS*, 127 S. Ct. at 2767-68.

¹² *Id.* at 2836 (Breyer, J., dissenting).

¹³ *Id.* at 2791 (Kennedy, J., concurring).

the door open for some race-conscious policies, *PICS* requires teachers, school administrators, and activists to rethink their approach to promoting racial diversity in K–12 education and to look for novel, innovative ways to combat the crippling racial inequality that plagues K–12 education in the United States.

PICS involved two school districts. The Seattle school district in Seattle, Washington, never underwent court-ordered desegregation but did have a mandatory busing program adopted in 1978 after a settlement with the National Association for the Advancement of Colored People (NAACP).¹⁴ In 1988, the school board replaced this busing program with a voluntary integration policy, the most recent version of which began in 1999.¹⁵ Under the policy, each incoming ninth-grade student chose among the district's ten traditional high schools and ranked them in order of preference.¹⁶ When a school was oversubscribed, the policy used certain "tiebreakers" to determine which students would fill the available slots.¹⁷ The first tiebreaker selected students with siblings currently attending the school.¹⁸ The second tiebreaker considered the student's race and the particular school's racial composition.¹⁹ Students were classified as "white" or "nonwhite," which included all other racial groups; the districtwide ratio in 2007 was forty-one percent white to fifty-nine percent nonwhite.²⁰ When an oversubscribed school's racial composition fell more than ten percentage points outside the districtwide ratio, the second tiebreaker would select students who would help make the school's racial composition nearer to the districtwide ratio.²¹ The third tiebreaker considered the school's geographic proximity to the student's residence.²²

The Jefferson County school district in Louisville, Kentucky, was under a court-imposed desegregation order from 1975 until 2001.²³ After 2001, the school board adopted a voluntary integration policy requiring that all non-magnet schools in Jefferson County have student bodies from fifteen to fifty percent African American.²⁴ About thirty-four percent of students were African American and most others were white.²⁵ At the elementary school level, the board assigned students to "resides" schools based on geographic proximity to their residence; the resides schools were "grouped into clusters to facilitate integration."²⁶ Parents of kindergarten or first-grade students or

¹⁴ See *id.* at 2804 (Breyer, J., dissenting).

¹⁵ *Id.* at 2805–06.

¹⁶ *PICS*, 127 S. Ct. at 2746–47 (majority opinion).

¹⁷ *Id.* at 2747.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 2747.

²³ See *id.* at 2749

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

of newly arrived students could submit an application indicating their first- and second-choice schools within their cluster.²⁷ Assignment decisions then depended on the space available and whether the student's enrollment would contribute to racial imbalance beyond what the guidelines permitted.²⁸ Transfers could be requested, but they could be denied based on available space or the racial guidelines.²⁹

The nonprofit organization Parents Involved in Community Schools brought an action in the Western District of Washington challenging Seattle's voluntary integration policy on Equal Protection grounds.³⁰ The district judge granted the school district's motion for summary judgment, and, sitting *en banc*, the Ninth Circuit affirmed.³¹ Meanwhile, in Jefferson County, Kentucky, Crystal Meredith brought an action in the Western District of Kentucky challenging that county's integration policy when her kindergarten-level child's transfer request was denied.³² The district judge upheld the policy under the Equal Protection Clause, and the Sixth Circuit affirmed.³³ Both cases then went to the Supreme Court, which struck down both plans in a consolidated opinion.³⁴

Chief Justice Roberts's opinion was joined in part by Justices Scalia, Kennedy, Thomas, and Alito.³⁵ The Chief Justice reasoned that the plans' racial classifications called for strict scrutiny under the Equal Protection Clause, and he distilled from precedent two compelling interests within the school context: (1) remedying the effects of past intentional discrimination; and (2) achieving diversity in higher education. The Chief Justice said that the first interest was unavailing here because Seattle never underwent court-ordered desegregation and Jefferson County had already completed court-ordered desegregation.³⁶ The second was unavailing because under both plans race was the "decisive" factor rather than "part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints.'"³⁷ The Chief Justice added that the plans were not narrowly tailored given the racial classifications' minimal effects on student assignment and because Seattle and Jefferson County failed to consider race-neutral alternatives.³⁸

²⁷ *Id.*

²⁸ *Id.* at 2749–50.

²⁹ *Id.* at 2750.

³⁰ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 137 F. Supp. 2d 1224 (W.D. Wash. 2001).

³¹ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005).

³² *McFarland v. Jefferson County Public Schs.*, 330 F. Supp. 2d 834 (W.D. Ky. 2004).

³³ *McFarland ex rel. McFarland v. Jefferson County Public Schs.*, 416 F.3d 513 (6th Cir. 2005).

³⁴ *PICS*, 127 S. Ct. at 2768.

³⁵ *Id.* at 2746.

³⁶ *Id.* at 2752.

³⁷ *Id.* at 2753 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

³⁸ *See id.* at 2759–60.

Justice Breyer wrote a dissenting opinion joined by Justices Stevens, Souter, and Ginsburg.³⁹ He maintained that Seattle and Louisville had experienced “severe racial segregation” and that both policies were constitutionally permissible.⁴⁰⁻⁴¹ Justice Breyer argued that school authorities had broad discretion to use race-conscious policies to promote racial diversity⁴² and concluded that, under settled law, the Court should not have applied strict scrutiny.⁴³ He added that, even with strict scrutiny, the plans were narrowly tailored to achieve a compelling interest in “setting right the consequences of prior conditions of segregation,”⁴⁴ “overcoming the adverse educational effects produced by and associated with highly segregated schools,”⁴⁵ and “producing an educational environment that reflects the ‘pluralistic society’ in which our children will live.”⁴⁶ Justice Breyer concluded by saying that, in striking down the Seattle and Jefferson County plans, the majority had broken the promise of *Brown v. Board of Education*,⁴⁷ which was “the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation’s cities and schools.”⁴⁸

The Chief Justice and Justice Thomas both responded to Justice Breyer’s argument concerning *Brown*. In the part of his opinion not joined by Justice Kennedy, the Chief Justice maintained that, under settled law, racial classifications are inherently suspect because they promote notions of racial inferiority leading to racial hostility,⁴⁹ reinforce the belief that people should be judged by their skin color,⁵⁰ and “endorse[] race-based reasoning and the conception of a Nation divided into racial blocs.”⁵¹ He added that “it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”⁵² Finally, the Chief Justice characterized *Brown* as holding “that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority.”⁵³ Justice

³⁹ *Id.* at 2800 (Breyer, J., dissenting).

⁴⁰ *Id.* at 2809.

⁴¹ *Id.* at 2830.

⁴² *Id.* at 2812 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

⁴³ *See id.* at 2812–20.

⁴⁴ *Id.* at 2820.

⁴⁵ *Id.* at 2820.

⁴⁶ *Id.* at 2821.

⁴⁷ *Id.* at 2837.

⁴⁸ *Id.* at 2836.

⁴⁹ *Id.* at 2767 (majority opinion) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

⁵⁰ *Id.* (citing *Shaw v. Reno*, 509 U.S. 630, 657 (1993)).

⁵¹ *Id.* at 2767 (citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O’Connor, J., dissenting)).

⁵² *Id.* (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)).

⁵³ *Id.*

Thomas argued that *Brown* invalidated “segregation” but not “racial imbalance,” which can, but does not necessarily, result from past segregation.⁵⁴ Justice Thomas quoted and endorsed Justice Harlan’s characterization of our Constitution as “color-blind.”⁵⁵

Justice Kennedy concurred in part with the Chief Justice’s opinion and concurred in the judgment, providing the crucial fifth vote. He reasoned that, although Seattle and Jefferson County had a compelling interest in “ensuring all people have equal opportunity regardless of their race,”⁵⁶ their plans were not narrowly tailored. He explained that Jefferson County failed to clarify precisely how race was used to make assignment decisions and that Seattle, although making clear how race affected decisions, “failed to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as ‘white,’ it has employed the crude racial categories of ‘white’ and ‘non-white.’”⁵⁷

Justice Kennedy proceeded to depart from the views of both Chief Justice Roberts and Justice Thomas about racial classification in education policy, saying that “[t]o the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.”⁵⁸ He said that “as an aspiration, Justice Harlan’s axiom must command our assent [but in] the real world, it is regrettable to say, it cannot be a universal constitutional principle.”⁵⁹ Justice Kennedy deemed the Chief Justice’s axiom “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race”⁶⁰ not sufficient to decide the cases. He explained that the problem defies easy solution and that “[s]chool districts can seek to reach *Brown*’s objective of equal educational opportunity.”⁶¹ Elaborating on this, Justice Kennedy took the following position:

If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a gen-

⁵⁴ *Id.* at 2769 (Thomas, J., concurring). Justice Thomas defined segregation in public schools as “the deliberate operation of a school system to ‘carry out a governmental policy to separate pupils in schools solely on the basis of race,’” *id.* (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6 (1971)), and racial imbalance in public schools as “the failure of a school district’s individual schools to match or approximate the demographic makeup of the student population at large,” *id.*

⁵⁵ *Id.* at 2782 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

⁵⁶ *Id.* at 2791 (Kennedy, J., concurring).

⁵⁷ *Id.* at 2790–91.

⁵⁸ *Id.* at 2791.

⁵⁹ *Id.* at 2792.

⁶⁰ *Id.* at 2768.

⁶¹ *Id.* at 2791.

eral way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.⁶²

For example, Justice Kennedy imagined that school boards might choose new school sites strategically, draw attendance zones with the demographics in mind, allocate resources for special programs, “recruit[] students and faculty in a targeted fashion,” and track enrollment, performance, and other factors by race.⁶³ He reasoned that, because these race-conscious measures do not “tell[] each student he or she is to be defined by race,” they would not require strict scrutiny.⁶⁴

II. SOCIOECONOMIC DIVERSITY

Many critics of race-conscious student assignment plans argue that plans designed to promote socioeconomic diversity among the students are preferable tools for achieving racial diversity.⁶⁵ They argue that, because racial and socioeconomic characteristics often correlate, plans that promote socioeconomic diversity will result in more racially diverse student bodies. Race and socioeconomic status indeed have a strong correlation for public school students. For example, fifty percent of Latino and African American students attend schools where seventy-five percent or more of the students are low income.⁶⁶ Only five percent of white students attend such schools.⁶⁷ However, this correlation alone does not necessarily mean that student assignment plans designed to promote socioeconomic diversity will always achieve racial diversity, especially in urban school districts where most students are low-income.

The student assignment policies of the San Francisco Unified School District provide a cautionary example. The district was under a court-mandated K–12 desegregation plan for nearly twenty years whereby no school was allowed to have a majority of students be from one racial or ethnic group.⁶⁸ However, after the 2001–2002 school year, the district instead adopted a student assignment plan that took socioeconomic status into consideration and ignored race.⁶⁹ Under the new plan, students may choose which schools they would like to attend, and the district employs a “diver-

⁶² *Id.* at 2792.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See, e.g., Richard Kahlenberg, *Socioeconomic School Integration*, POVERTY & RACE (Poverty and Race Research Council, Washington, D.C.), Sept.–Oct. 2001, at 1, available at <http://www.pirac.org/newsletters/sepoc2001.pdf>.

⁶⁶ ANGELINA KEWALRAMANI ET. AL., U.S. DEPT OF EDUC., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC MINORITIES 35 (2007), available at <http://nces.ed.gov/pub2007/2007039.pdf>.

⁶⁷ *Id.*

⁶⁸ Jonathan D. Glater & Alan Finder, *School Diversity Based on Income Segregates Some*, N.Y. TIMES, July 15, 2007, available at http://www.nytimes.com/2007/07/15/education/15integrate.html?_r=2&pagewanted=print&oref=slogin&oref=slogin.

⁶⁹ *Id.*

sity index” to assign students who chose oversubscribed schools.⁷⁰ Since this change, this urban school district of 55,000 students has experienced troubling resegregation patterns.⁷¹ From the 2001–2002 school year to the 2005–2006 school year the number of segregated schools—that is, schools where more than sixty percent of students belong to the same racial group—rose from thirty to fifty.⁷² School officials attributed these problems to the fact that most San Francisco public school students come from low-income families; and where most students are low-income, socioeconomic diversity will not affect racial diversity.⁷³ Administrators also attributed the program’s failure to the fact that where all schools are poor, racial diversity alone gives parents little incentive to send their children farther away from home.⁷⁴ Ultimately, students end up attending schools close to home, creating student bodies that mirror the racial compositions of San Francisco’s segregated housing patterns.

On the other hand, the promotion of socioeconomic diversity reached a much better outcome in the Wake County School District.⁷⁵ Covering Raleigh, North Carolina, and surrounding suburbs, the district has both low-income urban areas and high-income suburban ones.⁷⁶ This diversity of wealth created fertile ground for success. The Wake County plan pursues the following objective: no school within the district should have more than forty percent low-income students, nor should any school have more than twenty-five percent underperforming students.⁷⁷ To achieve this objective, the Wake County plan divides the district into sections coded by socioeconomic status and assigns students to schools based on that coding.⁷⁸ The plan also considers other factors in assigning students, including proximity, school capacity, stability, and special needs.⁷⁹ Moreover, Wake County has several magnet schools that attract white students into Raleigh from the suburbs.⁸⁰ The Wake County plan has been very successful at helping minority students perform better. For example, the amount of third- to eighth-grade

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ UNIV. OF NORTH CAROLINA SCH. OF LAW CTR. FOR CIVIL RIGHTS, THE SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS: A CRUCIAL CONSIDERATION IN STUDENT ASSIGNMENT POLICY 17 (2005), <http://www.law.unc.edu/documents/civilrights/briefs/charlotterep.pdf>.

⁷⁶ *Id.* at 16.

⁷⁷ *Id.* at 17.

⁷⁸ *Id.* The reasons to use this section-coding approach rather than to consider each family’s socioeconomic status are twofold. First, this allows students living near one another to attend school together. Second, this avoids stigmatizing individual students by distinguishing them according to their family’s socioeconomic status. *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

African American students reading at grade level went from forty percent in 1995, before the plan began, to eighty-two percent in 2006.⁸¹

The contrast between San Francisco's failure and Wake County's success proves that replacing race with socioeconomic status in K-12 student assignment plans will not necessarily promote diversity across the board. Such plans will likely be ineffective for large urban school districts with high concentrations of low-income students, such as those in San Francisco, Los Angeles, New York, and Chicago. As Section Three below will explain, these urban school districts are also the least likely to benefit from the diversity-creating potential of NCLB's transfer program.

III. USING NO CHILD LEFT BEHIND

When the school district of Tuscaloosa, Alabama, redrew school zone boundaries so as to force hundreds of African American students to move from well-performing, racially diverse schools to failing, racially isolated schools, the parents argued that the change amounted to resegregation and threatened to use NCLB's transfer program to return their children to well-performing schools.⁸² These parents were referring to the program under the NCLB that requires that students be allowed to transfer from failing schools into well-performing ones. While many consider this an ideal way to combat racial isolation after *PICS*, NCLB's transfer program's failure in many urban school districts and a recent Sixth Circuit decision limiting the program's mandate make this approach an unlikely solution.

Under NCLB, schools are considered "failing" when they do not make "adequate yearly progress" (AYP) for two consecutive years.⁸³ Each state defines its own AYP, which derives from comparing the proficiency in certain subjects of students in one school against the proficiency of other students in the state.⁸⁴ Schools that fail to make their AYP for two consecutive years are designated as "identified for school improvement"⁸⁵ and ones that fail for four consecutive years are designated as "identified for corrective action."⁸⁶ Schools identified for corrective action must make significant changes, such as changes in the curriculum or teaching staff.⁸⁷ Those that still fail to make AYP for another consecutive year must be completely re-

⁸¹ Glater & Finder, *supra* note 68.

⁸² Sam Dillon, *Alabama Plan Brings Out Cry of Resegregation*, N.Y. TIMES, Sept. 17, 2007, http://www.nytimes.com/2007/09/17/education/17schools.html?_r=1&oref=slogin&pagewanted=print.

⁸³ 20 U.S.C. § 6316(b)(1)(A) (2006).

⁸⁴ *Id.* § 6311(b)(2)(C).

⁸⁵ *Id.* § 6316(b)(1)(A).

⁸⁶ *Id.* § 6316(b)(7)(C).

⁸⁷ *Id.* § 6316(b)(7)(C)(iv).

structured, which may involve letting the U.S. Department of Education operate the school or reopening as a charter school.⁸⁸

Regarding the transfer program, NCLB requires that schools identified for school improvement allow their students to transfer to another public school (or public charter school) not identified for school improvement, giving priority to low-achieving, low-income students.⁸⁹ Such schools must also notify parents of the designation, the reason for the designation, and the opportunity to transfer.⁹⁰ Schools on the receiving end must allow transferring students to remain until they complete the highest grade available at the school.⁹¹ Schools identified for corrective action must also provide transportation to students wishing to transfer as well as tutoring and other services to any remaining low-income students.⁹²

In theory, the NCLB transfer program provides an ideal tool for giving low-income minority students in failing schools the opportunity to attend better ones. Moreover, schools that fail repeatedly will in theory eventually be drained of students and will need to close. Since highly segregated schools tend to perform worse than diverse ones, presumably they would be the first to close due to this program. This would leave open only well-performing, diverse schools and would improve the quality of education for all students. However, two major obstacles impede the transfer program's effectiveness in increasing diversity and improving the quality of education for minority students.

First, parents seldom use the NCLB transfer program. After surveying ten school districts in 2004, the Civil Rights Project at Harvard University found that fewer than three percent of students eligible to transfer actually made requests.⁹³ The percentages are even lower in large cities, with 1.9 percent for Chicago and 2.3 percent for New York City.⁹⁴ Even after requests are granted, parents often do not go through with the transfer. Another study found that in Fresno, CA, only fifty-six percent of students whose transfer requests were granted actually went through with the transfers.⁹⁵ One reason for the under-use of the NCLB transfer program is that an eligible student's alternative schools are often not much better than the student's current school. For example, ninety percent of receiving schools in Chicago were only marginally better than the sending schools; some of them

⁸⁸ *Id.* § 6316(b)(8).

⁸⁹ *Id.* § 6316(b)(1)(E).

⁹⁰ *Id.* § 6316(b)(6).

⁹¹ *Id.* § 6316(b)(13).

⁹² *Id.* § 6316(b)(5)(B).

⁹³ Press Release, Harvard Graduate Sch. of Educ., No Child Left Behind: A Federal-, State-, and District-Level Look at the First Year (Feb. 9, 2004), <http://www.gse.harvard.edu/news/features/orfield02092004.html>.

⁹⁴ *Id.*

⁹⁵ JIMMY KIM & GAIL L. SUNDERMAN, CIVIL RIGHTS PROJECT AT HARVARD UNIV., DOES NCLB PROVIDE GOOD CHOICES FOR STUDENTS IN LOW-PERFORMING SCHOOLS? 7 (2004), http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/29/dc/98.pdf.

had already been placed on an Illinois list for “chronically poor performance.”⁹⁶ Thus, parents often choose to keep their children near home rather than to send them farther away when the chances appear only slight that the children will have better educational opportunities farther away.

Second, when eligible students do request transfers, school districts often lack the resources to accommodate the requests. This problem has a particularly large effect in populous urban school districts. For example, 8000 New York students requested transfers in 2003, creating a serious overcrowding problem for the well-performing schools, and about one-third of the students were transferred to failing schools by consequence. Chicago’s school district received 19,000 transfer requests in 2003 but could fill only 1100 due to limited capacity.⁹⁷ In perhaps the most extreme example, Los Angeles’s school district had 250,000 students eligible to transfer but could accommodate only 527 due to limited space in eligible schools.⁹⁸

L.A. school district officials say that they will try to solve the problem by building 160 new schools, costing \$19 billion,⁹⁹ even though the school district receives only about \$700 million in NCLB funds.¹⁰⁰ In 2006, U.S. Secretary of Education Margaret Spelling threatened to withdraw NCLB funds unless the L.A. school district formulated an effective plan to accommodate transfer requests.¹⁰¹ In November 2007, the California Department of Education warned that the L.A. school district could be abolished, overtaken, or completely restructured unless it satisfied the NCLB’s requirements.¹⁰² However, a recent decision by the Sixth Circuit may help the L.A. school district avoid penalties despite these threats.¹⁰³ In *School District of Pontiac v. Secretary of the U.S. Department of Education*,¹⁰⁴ decided on January 7, 2008, eight school districts and eleven educational institutions from around the nation appealed a decision by the U.S. District Court for the Eastern District of Michigan holding them responsible under the NCLB for implementing measures not funded with NCLB funds. Reversing that decision, the Sixth Circuit stated:

[A] state official deciding to participate in NCLB could reasonably read § 7907(a) to mean that her State need not comply with

⁹⁶ JAY P. GREENE ET AL., YOU CAN’T CHOOSE IF YOU DON’T KNOW: THE FAILURE TO PROPERLY INFORM PARENTS ABOUT NCLB SCHOOL CHOICE 8 (2007), http://www.uark.edu/uader/EWPA/Research/School_Choice/NCLB/060407_NCLB.pdf.

⁹⁷ *Id.*

⁹⁸ Claudio Sanchez, *All Things Considered, California Schools Could Lose Aid over “No Child” Law* (NPR radio broadcast July 6, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5538536>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *School Dist. of Pontiac v. Sec’y of the U.S. Dep’t of Educ.*, 512 F.3d. 252 (6th Cir. 2008).

¹⁰⁴ *Id.*

requirements that are 'not paid for under the Act' through federal funds. Thus, Congress has not 'spoke[n] so clearly that we can fairly say that the State[s] could make an informed choice' to participate in the Act with the knowledge that they would have to comply with the Act's requirements regardless of federal funding.¹⁰⁵

The majority opinion stated that while Congress could clarify NCLB's mandate, until that time, the school districts' obligation to incur costs for compliance was unclear.¹⁰⁶ In remanding the case to the district court, the Sixth Circuit effectively upheld the appellants' claim that they were not responsible under NCLB for implementing changes not funded with NCLB funds. By letting school districts suspend mandated changes until more NCLB funds arrive, the *Pontiac* decision may severely limit the availability of transfers and other services required by NCLB. However, *Pontiac* may also force Congress to reevaluate NCLB and to confront the question of whether to provide better funding for the NCLB transfer program and other mandates. If Congress decides to increase funding for the NCLB transfer program, the L.A. school district and similarly situated ones will have more opportunity to determine the program's effectiveness. Until then, the NCLB transfer program will likely remain suspended in those school districts with insufficient NCLB funds.

IV. CHARTER SCHOOLS AS AN ALTERNATIVE

For school districts like those in San Francisco and Los Angeles, where student assignment plans based on socioeconomic diversity and the NCLB transfer program have failed, charter schools that cater to predominately minority student populations may offer promising alternatives. The NCLB transfer program allows students to transfer to charter schools.¹⁰⁷ If charter schools were more widely available, the L.A. school district and others similarly situated could transfer more students away from failing schools under NCLB. Moreover, charter schools located in heavily segregated neighborhoods may offer better educational opportunities than the often-failing traditional public schools. Minority activists have tried to broaden this promising possibility by sponsoring charter schools designed to focus on providing better educational alternatives for minority students.

For example, the National Council of La Raza (NCLR), a leading Latino activist organization, launched the Charter School Development Initiative in 2001 to help develop fifty charter schools focused on improving the educational opportunities of Latino students nationwide.¹⁰⁸ According to the

¹⁰⁵ *Id.* at 272.

¹⁰⁶ *Id.*

¹⁰⁷ 20 U.S.C. § 6316(b)(1)(E)(i) (2006).

¹⁰⁸ National Council of La Raza, Charter School Development Initiative (CSDI), http://www.nclr.org/section/charter_school (last visited Jan. 31, 2008).

NCLR, this network of fifty schools “embraces the low-income, Latino, and English-language-learner (ELL) students who face daily challenges of distinct learning needs and can be ill-served by traditional public schools and mainstream agencies.”¹⁰⁹ All schools in the NCLR network have predominantly Latino student bodies, and most are located in predominantly Latino communities. These charter schools are distinctive in their “holistic approach” to education, which involves many extracurricular services and parental education.¹¹⁰ For example, NCLR charter schools give special focus to ELL students, offer low-cost services before and after school hours, and provide many opportunities for parents, including literacy and job training programs.¹¹¹ According to the organization, “this holistic approach to education can best meet the unique and varied academic and non-academic needs of Latino students, including those related to language and culture.”¹¹²

In addition to Latino-centered NCLR schools, many charter school programs focus on low-income minority students more generally. For example, the Knowledge Is Power Program (KIPP) administers charter high schools designed to reach out to underserved students.¹¹³ Ninety-five percent of the students are African American, and eighty percent receive free or reduced-price lunches based on their families’ socioeconomic status.¹¹⁴ KIPP’s unique characteristics include a strong focus on helping all students attend college and extended school schedules, including longer school days, Saturday school, and school during several weeks of summer.¹¹⁵ KIPP schools also have a strong focus on discipline, giving rewards for following rules.¹¹⁶ Another example of charter schools serving minority students is the Aspire program in California. Located predominantly in urban areas with large minority populations, Aspire schools serve student populations that are ninety-nine percent African American or Latino and ninety-seven percent low-income.¹¹⁷ Like KIPP schools, Aspire schools have longer school days, some Saturday school, and greater parental involvement.¹¹⁸ Aspire schools also provide special supplementary services to students, including mentoring and at-home support.¹¹⁹

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Bill and Melinda Gates Foundation, Knowledge Is Power Program (KIPP), <http://www.gatesfoundation.org/UnitedStates/Education/TransformingHighSchools/ModelSchools/KIPP.htm> (last visited Jan. 30, 2008) [hereinafter KIPP].

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *The Eli and Edythe Broad Foundation Awards \$23.3 Million to Grow Quality Public Charter Schools*, REUTERS, Jan. 17, 2008, <http://www.reuters.com/article/pressRelease/idUS209612+17-Jan-2008+BW20080117> [hereinafter *Eli and Edythe Broad*].

¹¹⁸ Aspire Public Schools, Parent Involvement, <http://www.aspirepublicschools.org/?q=involvement> (last visited Feb. 1, 2008).

¹¹⁹ *Id.*

While many minority-focused charter schools are too new for adequate evaluation, several have shown great results already. For example, all tenth-grade students in KIPP Houston High School passed the Texas Assessment of Knowledge and Skills (TAKS) exam in language arts (compared to seventy-eight percent district-wide); about ninety percent passed in reading (compared to fifty percent district-wide); and ninety-six percent passed in mathematics (compared to forty-three percent district-wide).¹²⁰ Moreover, all ninth-grade students in KIPP Houston High School passed the TAKS exam in reading (compared to eighty-two percent district-wide), and ninety-six percent passed in mathematics (compared to forty-three percent district-wide).¹²¹ Additionally, ninety-four percent of ninth-grade students in KIPP Pride High School in Gaston, North Carolina, passed the North Carolina End-of-Course Test in English I (compared to seventy-two percent district-wide), ninety-three percent passed in Algebra I (compared to seventy-eight percent district-wide), and ninety-six percent passed in Algebra II (compared to sixty-eight percent district-wide).¹²² In the Aspire schools, the underserved students have a ninety-eight percent graduation rate (compared to forty-four percent statewide), and all Aspire schools exceed California's testing targets (compared to sixty-five percent statewide).¹²³

While minority-focused charter schools still form a relatively small movement, their success has earned them significant support and funding from private sources. For example, the Bill and Melinda Gates Foundation has given over \$3.2 million to Aspire schools,¹²⁴ over \$10 million to the KIPP schools,¹²⁵ and \$3.6 million to NCLR schools.¹²⁶ Moreover, in January 2008 alone, the Eli and Edythe Broad Foundation gave the KIPP schools \$12 million and the Aspire schools \$5 million.¹²⁷ While these dollar amounts may appear small compared to the cost of running public schools, such private support will likely make the charter schools more attractive to other school districts that may welcome such programs in the future. The examples here also demonstrate civil society's important role in helping to narrow the achievement gap. Donations like these allow charter schools to experiment with innovative programs that not only serve minority students directly but also, once proven effective, become new tools with which all schools can better serve minority students.

¹²⁰ KIPP, *supra* note 113.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Eli and Edythe Broad, supra* note 117.

¹²⁴ Bill and Melinda Gates Foundation, Aspire Public Schools, <http://www.gatesfoundation.org/UnitedStates/Education/TransformingHighSchools/ModelSchools/Aspire.htm> (last visited Feb. 1, 2008).

¹²⁵ KIPP, *supra* note 113.

¹²⁶ Bill and Melinda Gates Foundation, National Council of La Raza Community Charter School Development Initiative (NCLR), <http://www.gatesfoundation.org/UnitedStates/Education/TransformingHighSchools/ModelSchools/NCLR.htm> (last visited Feb. 1, 2008).

¹²⁷ *Eli and Edythe Broad, supra* note 117.

The success of minority-focused charter schools shows that even though social and legal barriers may impede efforts to increase diversity in K–12 education, underserved minority students may still have an opportunity to receive high-quality education at schools focused on their special needs. The racial isolation at these schools may trouble many advocates who value exposing students to racial diversity. However, despite this clear drawback, minority-focused charter schools may offer one of the most legally sound alternatives for narrowing the achievement gap in K–12 education. Indeed, they implement many of Justice Kennedy's recommendations in his concurring opinion in *PICS*, such as choosing sites strategically, targeting recruitment of students and teachers, creating minority-focused special programs, and tracking enrollment and achievement by race.¹²⁸ Minority-focused charter schools thus provide an ideal tool of transition while school districts try to invent new ways to promote racial diversity in K–12 education after *PICS*.

CONCLUSION

The *PICS* decision seems to have severely limited the tools available to school districts for fostering racial diversity in K–12 education. By consequence, the racial isolation and inferior resources that plague most minority students in traditional public schools may not only continue, but also increase, in the future. Uncertainty about what *PICS* allows may chill school districts to the point that they abandon all race-conscious efforts to promote racial diversity and equality in K–12 education.

For those school districts looking for new ways to reach underserved, minority students, the three alternatives described above may become the points of departure. However, only school districts with economic diversity will likely have any success with plans designed to promote socioeconomic diversity. Moreover, only school districts with sufficient NCLB funds will benefit from the NCLB transfer program. Thus, for all school districts, but especially for economically homogeneous ones with limited NCLB funds, minority-focused charter schools offer a promising alternative.

Since they incorporate many of Justice Kennedy's recommendations, minority-focused charter schools are particularly useful because they provide discrete testing grounds, allowing school districts to learn which race-conscious alternatives are effective and valid under the Equal Protection Clause. Moreover, innovative race-neutral policies adopted by minority-focused charter schools, such as having longer school days and greater parental outreach, offer traditional public schools additional tools with which to better reach underserved students.

Critics may argue that minority-focused charter schools do nothing to combat, and indeed even sanction, the evils of racial isolation. While these

¹²⁸ See *PICS*, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring).

critics are correct in suggesting that advocates should strive to combat racial isolation, we should not allow this pursuit of diversity to eclipse or undermine the pursuit of equal educational opportunity. If equality has the chance to make progress, we should not stall that progress until diversity has the chance to catch up. Today's legal landscape, due to *PICS*, may severely limit school districts' ability to ensure racially diverse student bodies, but with minority-focused charter schools the door still remains open for narrowing the achievement gap and promoting equality in K–12 education. Moreover, offering an education that will lead to college and successful careers will make the most difference in ensuring that today's racially isolated children become full participants in society and break the cycle of *de facto* segregation. Enabling these minority students to join their white peers both in higher education and in the white-collar workforce creates hope for an enduring diversity that springs from the roots of equality. In short, though minority-focused charter schools may not necessarily expose today's minority students to racial diversity, they give them greater hope of experiencing diversity and success during the rest of their lives.