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How Does the 2007 Seattle Decision Affect Arkansas?

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On December 2, 2008, lawmakers announced that Arkansas' school choice law would need to be revisited during the upcoming 2009 session.

OEP provides this report to summarize the actions of the U.S. Supreme Court in Seattle and an account of Arkansas' current school choice law, and then provides some suggestions as to what policymakers might do this January.

Click here to view a policy brief from July 2007 discussing the Parents v. Seattle Decision and its effects on Arkansas Schools.

Executive Summary

In a 2007 decision, the United States Supreme Court struck down school integration plans in Louisville and Seattle. The Court held that it violates the constitutional principle of equal treatment for state governments to assign students, or block their requested school transfers, based on the race of individual students or the racial percentages in the student population. Those state policies had been challenged by parents who were upset that their children had been denied the ability to go to a preferred public school.

Due to that Supreme Court decision, one of the most controversial decisions facing the Arkansas General Assembly during the upcoming session is how to modify the Arkansas Public School Choice Act,[1] as well as the Arkansas Opportunity Public School Choice Act of 2004.[2] These school choice provisions affect numerous Arkansas students. In the 2007-08 year, a total of 2,623 students in Arkansas successfully sought a transfer to another district, including 298 black students and 75 Hispanic students. As we understand from a conversation with staff at the Arkansas Department of Education, close to half of Arkansas' schools are involved in public school choice, whether sending or receiving transfer students.

As Representative Johnny Hoyt recently said, "Anytime you have the Supreme Court making a ruling that raises question about a state law, you have to take another look at it." In addition, a pending lawsuit argues that the school choice law unconstitutionally makes race a sole factor in determining if a student is able to transfer. Whether or not that particular lawsuit succeeds, both Acts are susceptible to a legal challenge: just as in Louisville and Seattle, Arkansas public school students can be barred from transferring to another school district based on the student's own race and the racial percentages in the district. The General Assembly must therefore modify those legal provisions.

This does not mean that the General Assembly faces a stark choice between eliminating public school choice altogether vs. allowing unlimited choice. Nor does it mean that racial considerations are entirely out of bounds. Justice Kennedy's concurrence — which provided the fifth and controlling vote — suggested that even if states may not block student transfers based on race, states may still try to encourage racial diversity by methods "including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs;

[1] Ark. Laws § 6-18-206.

[2] Ark. Laws § 6-18-227.

recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." To the extent the Assembly wishes to pursue racial diversity, it should consider policies of that sort.

As a specific example of the sorts of measures that are still allowed, numerous school districts nationwide — including Seattle and Louisville themselves — have moved towards the pursuit of socio-economic integration, rather than racial integration *per se*. Such plans may afford at least some low-income students the opportunity not to be trapped in a poor performing school. In addition, it would presumably be constitutional for the Assembly to bar transfers out of districts where such transfers would undermine socio-economic integration.

Finally, any benefits of integration (whether racial or socio-economic) are usually due to improvements in the schools themselves, such as better teachers or higher expectations. The Arkansas General Assembly may wish to consider policies that would improve teacher and school quality across the board, which would benefit all students rather than the few who seek transfers.

In the following Policy Brief, we first describe the workings of the Arkansas public school choice laws. Next, we briefly analyze the evidence in support of racial integration in education. We then describe in detail the Supreme Court's ruling. The concluding section then points to several possible actions that the General Assembly might take.

ARKANSAS' CURRENT PUBLIC SCHOOL CHOICE LAW

There are two main sources of public school choice that we have identified as relevant: the Arkansas Public School Choice Act of 1989, and the Arkansas Opportunity Public School Choice Act of 2004 (part of Act 35), the latter of which is relevant because it incorporates the racial conditions from the former. The federal No Child Left Behind act (NCLB) similarly requires that states allow students to transfer out of public schools that fail to achieve adequate yearly progress for two or more years. To the best that we can ascertain, Arkansas has not attempted to impose any racial conditions on such NCLB transfers; if our assumption is incorrect, the analysis in this Policy Brief would apply to such conditions as well.

Public school choice in Arkansas began with the "Arkansas Public School Choice Act of 1989," or the "Act." At the outset of that Act, the Arkansas General Assembly declared its belief that students and their parents should be "provided greater freedom to determine the most effective school for meeting their individual educational needs," and that increased competition would lead to "enhanced quality and effectiveness" because of the "added incentive" for school boards and teachers to "satisfy the educational needs of the students who reside in the district."

In service of those goals, the General Assembly established a system that allows "any student to attend a school in a district in which the student does not reside."[3] The Arkansas General Assembly has reiterated its commitment to freedom of choice since that time: before 2003, local school boards could refuse to admit students who lived in another district, but then the General Assembly modified the law to *require* that all schools participate in the public school choice program, noting that public school choice is "one of the methods for providing equal opportunity" to students.[4]

The right to exercise public school choice is not, however, unfettered. Due to concerns that public school choice might be used to undermine racial integration, the Arkansas General Assembly included subsection (f)(1), by which a student is not allowed to transfer to a district that has a higher percentage of students that belong to the same race as the student. For example, if a white student in a 60% white district sought to transfer to a district that was 65% white, the transfer would not be allowed under the Arkansas public school choice law.

The racial restriction comes with a few exceptions. **First**, if the student is seeking to transfer to another district in the same county *and* if the percentages of minority and majority races in both districts are "within an acceptable range," then the transfer may be allowed. The "acceptable range" of racial percentages is defined on a yearly basis by the Arkansas Department of Education based on the population in every county, and the Act directs the education department to establish guidelines allowing the percentage of minority or majority students to differ by one-fourth from the county's racial balance. Thus, in the example from the previous paragraph, if the percentage of blacks and whites in both school districts was within the range defined by the Arkansas Department of Education, a white student might indeed be allowed to transfer from the 60% white district to the 65% white district.

Second, school transfers may be allowed if each school district lacks a "critical mass of minority percentage in the student's race of more than ten percent (10%) of any single race." Although inartfully drafted, this provision apparently means that a black student could be allowed to transfer from an 8% black district to a 9% black district.

Third, under subsection f(4), the racial integration restriction must give way to any court-ordered desegregation plan.

The Arkansas Opportunity Public School Choice Act of 2004 allows students to transfer out of any public school that has been deemed failing for two or more years.[5] That school choice law is relevant here because it has a subsection that makes all transfers

[3] Ark. Laws § 6-18-206(a).

[4] 2003 Ark. Acts 1272 at § 2.

[5] Ark. Laws § 6-18-227(b)(1)(A).

subject to the racial provision in the Arkansas Public School Choice Act of 1989.[6]

Although no centralized statistics are kept regarding the number of students denied a transfer based on race, the Arkansas Department of Education does receive complaints about such denials. In late October, a Hot Springs attorney filed a lawsuit on behalf of parents in Malvern, alleging that the Arkansas school choice act is unconstitutional in making race the only factor that determines whether a student can transfer. While a magistrate judge has currently recommended a finding that the parents in that case lack standing, another lawsuit could easily be brought by parents who do have standing.

Reasons for Pursuing Integration

Supporters of racial integration have pointed to a wide range of possible benefits. For example, one study found that desegregation resulted in a black dropout rate that was 2-3% lower,[7] while other studies have suggested that black students who attend integrated schools are more likely to attain success in integrated universities and work settings,[8] including modestly higher incomes.[9] White students who interact with children of other races may show less racial prejudice as adults.[10] In addition, desegregation might equalize the availability of high-quality teachers, given that inner-city schools with high concentrations of minority students often have trouble attracting or retaining such teachers.[11]

As for academic achievement, the evidence is rather thin. One noted analysis found that desegregation did not affect math achievement, and raised reading achievement by only about two-to-six weeks' worth of instruction.[12] Another comprehensive analysis of over 250 desegregation studies found that "desegregation has had some positive impact on the reading skills of African American youngsters. The effect is not large, nor does it occur in all situations, but a modest measurable effect does seem apparent. Such is not the case with mathematics skills, which seem generally unaffected by desegregation."[13]

In any event, the main purpose of integration is to bring the benefits of well-funded schools to disadvantaged populations.

The Supreme Court's Restriction on State and Local Integration Efforts

Insofar as the Arkansas public school choice law restricts freedom of choice based on racial percentages and a given student's race, the recent lawsuit filed in Malvern has a strong likelihood of succeeding, based on a recent decision from the United States Supreme Court. In *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), the Supreme Court struck down integration plans in both Seattle and Louisville.[14] As the following description will show, the Seattle and Louisville plans were substantively similar to the Arkansas public school choice law, in that they too limited public school choice based on the racial identity of the student and the racial composition of the affected schools.

In Seattle, the city's integration plan allowed ninth graders to choose any of the district's high schools. If a given high school was oversubscribed, the district would then need to choose which students would receive their first choice, and which students would be sent to a second or third choice school. One of the tiebreakers was whether the school was within 10 percentage points of the balance of white and nonwhite students in the population. In other words, if the school was more than 10 percentage points away from racial balance, students would be chosen to attend that school based on whether their

[6] Ark. Laws § 6-18-227(e) ("The provisions of this section and all student choice options created in this section are subject to the limitations of § 6-18-206(d)-(f).").

[7] Guryan 2004.

[8] Crain and Strauss 1985.

[9] Ashenfelter, Collins and Yoon 2005.

[10] Wood and Sonleitner 1996; APA Brief 2006.

[11] Hanushek, Kain and Rivkin 2004.

[12] Cook 1984.

[13] Schofield 1995.

[14] The Seattle and Louisville plans concerned transfers within the same district, whereas Arkansas' law is a state-wide law concerning inter-district transfers. That distinction has no bearing on the legal analysis, given that the Supreme Court's reasoning would apply in both settings.

race would aid in bringing the school to the right racial balance. The plaintiff in the Seattle case was a white student who had been denied admission to his preferred school because of the racial tiebreaker.

In Louisville, all non-magnet schools were required to have a minimum black enrollment of 15 percent and a maximum of 50 percent. Parents of kindergarteners or first-graders (or parents new to the district) were allowed to submit their first and second choices for schools, but their children could be denied attendance at a chosen school if the child's race would put the school out of the racial percentage guidelines (for example, if the school would have too many or too few blacks). All students were also permitted to seek a transfer to another school, but a transfer could be denied due to the racial guidelines. In the Louisville case, the plaintiff was a mother whose son had been denied admission to a school a mile from home due to the racial guidelines, and had instead been assigned to a school ten miles away.

The *Seattle* case was a 5-4 decision, but the 5 votes to strike down the Seattle and Louisville school choice plans were divided: 4 votes joined an opinion by Chief Justice Roberts, while Justice Anthony Kennedy wrote a separate and narrower concurrence. We will describe both opinions, although Justice Kennedy's separate concurrence is more significant, because he provided the fifth and crucial vote.

In considering the racial integration plans in Seattle and Louisville, the Supreme Court applied "strict scrutiny," a constitutional doctrine requiring that when the government classifies people by race (even with a benign intent), it must be doing so in a way that is "narrowly tailored" to a "compelling interest." "Narrowly tailored" means that the racial classification cannot sweep any more broadly than is truly necessary, and a "compelling interest" means that the government must have a truly important reason for using the racial classification in the first place.

Strict scrutiny is a difficult and almost insurmountable test to meet. The 4-vote opinion by Chief Justice Robert held that the only relevant "compelling" governmental interest would be "remedying the effects of past intentional discrimination." That compelling interest was not present, however, given that Seattle never had a history of intentional racial segregation in the first place, and Louisville had been released from a desegregation order in 2000. Thus, any "continued use of race must be justified on some other basis."

The 4-vote opinion then rejected the claim that state governments can pursue racial "diversity" as a compelling interest. The opinion noted that a previous Supreme Court decision (regarding the Michigan university system) had allowed the pursuit of racial diversity only in the university context, and only because the universities were using race as part of focusing on each applicant "as an individual," rather than rejecting a few students solely on the basis of their race.

In addition, the Seattle and Louisville plans were tied to "each district's specific racial demographics," not to any evidence about the level of diversity needed to obtain any "educational benefits." Thus, it was clear that the school districts were pursuing "racial balance" for its own sake, and seeking mere racial balance does not count as a "compelling" governmental interest. Otherwise, the government could perpetually classify people by race throughout a wide range of programs. Moreover, the school districts failed to show that that they had "considered methods other than explicit racial classifications."

Importantly, the Supreme Court noted that relatively few students were affected: In Seattle, the racial tiebreaker caused only 52 students to be assigned to a school that they had not listed as a preference, and in Louisville, elementary students were given their first or second choice 95 percent of the time. Still, the Supreme Court noted, the very fact that so few students were affected cast doubt on the school districts' claims that they needed to assign students by race in order to achieve some broad societal goal.

Justice Kennedy's narrower concurrence — which is what will apply if anyone were to file a lawsuit against Arkansas' school choice act — disagreed with the other four Justices on the diversity issue. In Justice Kennedy's view, it is indeed "permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body."

Thus, schools are allowed to pursue *other* ways of bringing the races together, "including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." While such governmental actions could still be considered "race conscious," they do not "lead to different treatment based on a classification that tells each student he or she is to be defined by race."

The problem that Justice Kennedy saw with the Seattle and Louisville plans, however, was precisely that they used a "crude system of individual racial classifications" to tell students whether or not they would be able to attend a chosen school. Kennedy added that "crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand," and that "to be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society." He reiterated that "race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree."

A Path Forward: How Should Arkansas Amend Its Public School Choice Law?

As should be clear, there are striking similarities between the racial integration section in the Arkansas public school choice law, and the Seattle and Louisville integration plans that the Supreme Court struck down as in violation of the Constitution's guarantee that the government must treat everyone equally.

Like the city-wide plans in Seattle and Louisville, the Arkansas law arguably looks like a "crude system of individual racial classifications" (to quote Justice Kennedy), because all school transfer requests are considered by looking at the student's race, the percentage of that student's race in his home school district, and the percent of that student's race in the new school district to which he or she is seeking a transfer.

Like the plans in Seattle and Louisville, the Arkansas law is directly based on "each district's specific racial demographics," rather than being based on any studies or other evidence about the level of diversity needed to obtain any "educational benefits." The law deems certain school transfers to be out of bounds simply because the racial percentages fail to match up. Thus, to quote Justice Kennedy, the Arkansas law could be said to "reduce children to racial chits valued and traded according to one school's supply and another's demand."

Finally, just like Seattle and Louisville, Arkansas cannot point to a court-ordered desegregation plan that would require a state-wide law "remedying the effects of past intentional discrimination." Most of the towns and cities in Arkansas have never been subject to a desegregation order in the first place. Even Little Rock — which has been long associated with the infamous standoff at Central High School in 1957 — was released by a federal court from any further desegregation obligations as of 2007. Nor would it be availing for the General Assembly to adopt a finding that the entire state is in need of desegregation (as has been argued in the Malvern case); it is quite unrealistic to suppose that the *Seattle* case would have come out differently had the Kentucky or Washington legislatures adopted such a finding.

For all these reasons, the Arkansas school choice law — as it currently stands — would likely be struck down if reviewed by a court. Indeed, a federal court in Arizona struck down a similar plan based on the Supreme Court's *Seattle* decision.[15] Thus, the Arkansas General Assembly should remove any text in subsection (f)(1) suggesting that school transfers can be awarded or denied based on whether the student's race matches a set of pre-determined racial percentages drawn up by the state Department of Education. It is fairly clear that this approach is contrary to the Supreme Court's ruling.

There are several possibilities as to what the General Assembly could do next. *First*, the General Assembly could simply remove public school choice altogether. We think, however, that such an approach would be imprudent: it would adversely

[15] Schulte 2007

affect some 2,500 students per year (some of whom are minorities themselves). Moreover, eliminating choice would undermine the increased competition brought by student choice, and would therefore contradict the Assembly's previous finding that such competition creates "enhanced quality and effectiveness" because of the "added incentive" for school boards and teachers to "satisfy the educational needs of the students who reside in the district." In addition, eliminating choice could have unintended ramifications; for example, if a smaller school district has to reject all transfers, that district might be pushed under the 350-student margin, and would therefore be eliminated as a separate district.

Second, at the opposite extreme, the General Assembly could expand public school choice such that any student is entitled to transfer to any other district. Although the Assembly could certainly go in this direction, it may be concerned about certain districts in Arkansas where white flight would be encouraged by such unlimited opportunity to transfer into other districts.[16]

Third, keep in mind that Justice Kennedy provided the fifth and controlling vote in the *Seattle* case, and his narrower opinion noted that states may still adopt race-conscious measures of the following sort: "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race."

Thus, if the Arkansas General Assembly believes that some sort of race-conscious measure is still necessary to prevent public school choice from undermining racial integration, the Assembly should consider additional legislation of the sort that Justice Kennedy listed. As a lawyer who defended the Seattle program has noted, "districts will find it easier to defend an integration plan that uses race-neutral means. These include school choice plans, attendance zones, and magnet or focus schools that consider socioeconomic status, parents' level of education, geography, concentrated poverty, home language, test scores, and other academic achievement data." (Schulte 2007).

Such legislation would not need to be part of the school choice law itself. The establishment of magnet schools, for example, is not relevant to the question whether any individual student can seek a transfer, and such programs could be more suitably established in a separate law.

Moreover, as we read the *Seattle* decision, a preference for *socio-economic* integration would still be allowed. As a *New York Times* article reported this summer, both Seattle and Louisville, as well as several other school districts around the country, have "announced a switch to class-based integration." As Richard Kahlenberg notes, "Today, roughly forty districts, educating 2.5 million students, in 'red' states and 'blue' states across the country, are known to look at family income as a way to assign students."[17]

Indeed, some recent research has suggested that socio-economic desegregation could have academic benefits. One pair of researchers, looking at nationwide data, estimated that the average black student's achievement "would increase by 2 points, or about 1 full year of learning," if he or she transferred to a school where the student body was "affluent."[18] As Kahlenberg argues, the "best thing going for socioeconomic integration politically is that it works educationally, raising the academic achievement of low-income students while maintaining high levels of achievement for middle-class children." Indeed, although socio-economic integration does not completely replicate racial integration, "research finds that socioeconomic school integration is a more powerful lever for raising academic achievement than racial integration per se."[19]

Thus, the Arkansas General Assembly might consider modifying the public school choice law to

[16] Although it is possible that an Arkansas resident could file a lawsuit claiming that an unfettered public school choice law contributed to desegregation, such a lawsuit would have to prove that the General Assembly acted with discriminatory intent. Such a showing is unlikely to occur.

[17] Kahlenberg 2007 at 3.

[18] Rumberger and Palardy 2005.

[19] Kahlenberg 2007 at 5, 7.

include a preference for school transfers that increase socio-economic integration — whether because a rich student is seeking to transfer into a poorer district, or because an impoverished student is seeking to transfer into a richer district.

Fourth, socio-economic integration can only go so far, for the simple reason that if too many poor children transferred to an "affluent" school, that school would no longer be affluent in the first place, but would now have a poorer student body. Thus, the Arkansas General Assembly could consider measures to improve low-income schools *so that they have more of the characteristics of high income schools*, regardless of who transfers to where.

For example, in the study mentioned above, the researchers found that most of the benefits of attending a high-income school boil down to four factors: "Teachers' expectations about students' ability to learn; the average hours of homework that students completed per week; the average number of advanced (college prep) courses taken by students in the school; [and] the percentage of students who reported feeling unsafe at school." But, as Kahlenberg notes, "teachers in middle-class schools are more likely to be licensed, to be teaching in their field of expertise, to have high teacher test scores, to have greater teaching experience, and to have more formal education."[20]

Thus, school districts around the country are considering how to bring these benefits —physical safety, good teachers, high expectations — in *all* schools for *all* students, rather than just for the few who are able to transfer into a richer school district elsewhere. For one example, the St. Petersburg, Florida district is considering "significantly smaller class sizes, longer school days and bonus pay for teachers at [high-risk] schools."[21]

The Arkansas General Assembly might usefully consider adopting similar measures for high-risk schools in Arkansas. Indeed, such measures — which could be considered among the "special programs" that Justice Kennedy mentioned — might provide an incentive that would ultimately boost or preserve racial integration by creating an incentive for higher-income students not to transfer out of those schools.

[20] Kahlenberg 2007 at 7.

[21] Tobin 2008.

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