Education leaders have long recognized the value and educational benefits of diversity in K-12 public schools. In order to realize those benefits, some districts have adopted a range of programs to promote or expand racial and ethnic diversity. The Supreme Court’s *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) and *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) decisions add to the developing case law districts can look to as they create or review diversity policies and practices. It must be noted that the *Grutter* and *Gratz* decisions were specific to post-secondary institutions, so while it offered valuable insights for K-12 public schools, all matters surrounding race-conscious diversity policies are not resolved by the case. Among legal analysts, there remains no consensus about all of the decision’s policy implications for K-12.

Another important point is that the these rulings, like many other rulings on non-remedial diversity plans, applies only to schools that are not under court desegregation orders. Desegregation measures ordered by a court or administrative agency differ from diversity plans in that they are remedial in nature, focusing on correcting past segregation and other forms of racial discrimination in school systems. In these cases, the legality of taking race into account is undisputed. Diversity programs, on the other hand, are voluntary efforts that are more future-oriented, seeking to promote and achieve the educational benefits of racial and ethnic diversity.

A final caution: while Supreme Court decisions like *Grutter* and *Gratz* apply through the United States, case and state law vary. It is important to know the case law from your own federal judicial circuit courts as well as state laws and statues that may affect school diversity efforts. This document offers a general overview of the current state of diversity law in public schools. New decisions will be handed down, and other cases are currently under review. When considering the adoption or revision of student diversity programs, be sure to consult with your district or state association legal counsel.
Background on diversity and desegregation legal issues

When courts are asked to evaluate a race-conscious diversity or desegregation program, the relevant governing law is the Equal Protection Clause of the Constitution (the 14th Amendment), as well as other federal statutes and regulations. The Equal Protection Clause requires the government (therefore public schools) to treat similarly situated people in a similar manner. Because of the history of racial discrimination in the United States, the courts examine race-related practices especially carefully. This close examination is known as "strict scrutiny."

When courts address diversity policies, they begin from the premise that by considering student race, the school district has created a "racial classification." As a result, the policy will always be subjected to strict scrutiny. Courts uphold this sort of racial classification only if it can be shown to meet two "prongs" of a strict scrutiny analysis: 1) the classification is necessary to achieve a compelling state interest; and 2) the classification is "narrowly tailored" enough to meet the interest without creating overly burdensome negative consequences for those outside the classification.

Typically, legal challenges to race-conscious school policies assert that such policies are a violation of the Equal Protection Clause simply because they take students’ race into account. The defense of such policies is based on the rationale that they promote a compelling state interest by preparing children for success in academics, work, and the democratic process in a diverse American society.

Overview of Grutter and Gratz cases

On June 23, 2003, the United States Supreme Court decided the two University of Michigan affirmative action cases. The Court upheld the Law School’s admission policy, but struck down the undergraduate admission program.

In Grutter v. University of Michigan, the Law School case, the United States Supreme Court, by a 5-4 vote, upheld the law school’s program. The Court ruled that diversity in higher education is a compelling state interest, which may allow a school to consider a student’s race in making admission decisions in a carefully constructed admissions program. Writing for the majority, Justice Sandra Day O’Connor concluded that the school’s objective to “enroll a ‘critical mass’ of minority students” avoided the constitutional sins of racial quotas or racial balancing. The Grutter opinion stressed that the University of Michigan Law School considered each applicant individually, weighing all of the attributes the student would bring to the school, not just the student’s race. For this reason, the Court found that the Law School’s approach met the narrowly tailored prong of strict scrutiny – that is, it considered race no more than absolutely necessary to achieve the goal of educational diversity.

Gratz v. University of Michigan involved a challenge to the undergraduate admission programs used by the University. In this case, the University of Michigan lost. Having an enormous undergraduate applicant pool, the University judged applicants on a point system, with a certain number of points...
awarded for various applicant attributes, including GPA, SAT scores, athletic ability and legacy status. An applicant who received at least 100 of 150 total possible points would be admitted. In its effort to achieve student body diversity, the University awarded 20 points to all applicants from groups it considered disadvantaged minorities. The Supreme Court, by a vote of 6-3, struck down the undergraduate affirmative action program. Writing for the majority, Chief Justice Rehnquist concluded that automatically awarding a significant number of bonus points for race made race the decisive factor in securing admission for every minimally qualified minority applicant. The Court went on to state that awarding a fixed number of points, without considering each candidate individually, was unlawful discrimination against non-minorities. The Court found the University could have devised a program which was more narrowly tailored to its interests than the fixed point system.

**What did we learn from Grutter and Gratz?**

**Diversity can be a compelling state interest**

The most significant aspect of the Grutter decision was the Court’s declaration that racial diversity can be a compelling state interest. Of particular note is that the decision made explicit there are diversity interests that go beyond remedies for past racial injustices. Justice O’Connor wrote in her opinion, “…we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions;” she also observed that the benefits of diversity are “not theoretical but real…” The opinion goes on to enumerate the value of “‘cross-racial understanding,’ [which] helps to break down racial stereotypes, and ‘enables (students) to better understand persons of different races.’” O’Connor bolsters diversity efforts of K-12 schools when she notes, “…numerous studies show that student body diversity promotes learning outcomes, and ‘better prepares student for an increasingly diverse workforce and society, and better prepares them as professionals.’” These same arguments can be made in support of solid K-12 diversity plans.

Grutter also offered further clarification of the standards typically used to gauge the constitutionality of diversity plans. In her majority opinion, Justice O’Connor expands upon existing legal analyses including “strict scrutiny,” “narrowly tailored,” “flexible,” “individualized,” “plus factor,” “undue harm,” and the limitations of diversity measures. Each term will be further elaborated below.

**Parameters of what is acceptable**

As noted earlier, race-based student diversity programs must pass “strict scrutiny” by the courts. Included in this “most exacting judicial examination,” will be the determination as to whether or not the use of racial classifications is narrowly tailored enough to meet a compelling state interest. In Grutter, the Court concluded, “When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.”
Grutter provides some guidance on what constitutes an acceptable level of “narrow-tailoring,”

- Other, race-neutral alternatives must have been considered (although the Court points out that, “[n]arrowly tailoring does not require the exhaustion of every conceivable race-neutral alternative”).
- There can be no quotas, separate admission pools, or admission tracks for students.
- There can be no “racial balancing,” a term not defined by the Court, but which seems to relate to measuring diversity against some larger population.
- Race is an acceptable “plus factor” in admissions, but it must be one of many factors considered. The race or ethnicity of the applicants cannot be “the defining feature of his or her application.” This requires that a diversity plan be flexible and provide individualized, competitive consideration of all applicants.
- The plan cannot unduly burden non-minority applicants. Racial and non-racial factors must be considered in order that non-minorities and minorities remain competitive.
- The plan must be limited in duration, reviewed to ensure that the intent is being achieved, and it must have an end point.

What is suggested for K-12 by the Grutter decision?

The Court strongly emphasized and supported the value of diversity in public education, business, government, and the military. While the Grutter case made frequent references to the uniqueness of higher education, the case for diversity may actually be stronger in elementary and secondary public schools. In fact, the Grutter decision draws often on earlier K-12 cases. The Court reaffirms Brown v. Board of Education, pointing out that “education...is the very foundation of good citizenship” and “…education [is] pivotal to ‘sustaining our political and cultural heritage’ with a fundamental role in maintaining the fabric of society.”

Justice Scalia’s dissent from the Grutter opinion may also help strengthen the case for diversity efforts in K-12 institutions. According to Justice Scalia, learning “citizenship” and obtaining the “educational benefit” of diversity are “the same lesson[s] taught to (or rather learned by, for it cannot be ‘taught’ in the usual sense) by people three feet shorter and twenty years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergartens.” In other words, it seems he would prefer to see the benefits of diversity instilled at a younger age.

The Grutter opinion is helpful for K-12 schools in that it suggests that lottery admissions programs will likely be viewed as constitutional so long as there is only one lottery, and not separate lottery pools based on race. It will not be permissible for schools or districts to set aside or hold a certain number of slots, or proportion of slots, for specific racial groups of students whether those are in a lottery, or in school or classroom assignments. But because the ruling also declares that a lottery makes “nuanced judgment impossible,” districts or school might want to evaluate the advantages and disadvantages of a lottery versus a more individualized diversity plan.
Grutter strongly suggests that district diversity plans which include race neutral weighting factors such as economic status, students’ neighborhood, or efforts to simplify transportation will be permissible so long as they are true diversity measures and not veiled efforts at achieving racial quotas or proportionality. The Court looked favorably on the University of Michigan Law School’s consideration of other diversity factors besides race. Part of the Grutter decision rested on the fact that the school’s “race-conscious admissions program adequately ensures that all factors may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.” It was important to the Court that there were instances where the Law School admitted “nonminority candidates with grades and test scores lower than underrepresented minority applicants…”

This is not to say that race can never be a factor in a diversity plan. As the Court points out “race unfortunately still matters”; however, such a plan must insure that “race be used in a flexible, nonmechanical way.” Race can be a “plus factor,” just not the definitive factor.

Generally speaking, student assignment programs which look more like the Law School’s admissions program, i.e. using more subjective criteria and individualized decision making, are more likely to pass constitutional scrutiny than those which resemble quotas. Student assignment programs that use several factors, including race, without particular weight assigned to the factors are likely to pass constitutional scrutiny. From a practical standpoint, subjective criteria in student assignment programs may be difficult for large districts to manage, since they require individualized review.

What remains unresolved after Grutter?

While the Supreme Court’s Grutter decision is an important contribution to K-12 diversity case law, the decision alone does not offer the answers to every circumstance or question encountered in the efforts of K-12 schools to achieve diversity.

The most important unanswered question is: How narrow is “narrow” when a district plan comes under strict scrutiny? A definitive answer to this question will remain an unknown when developing diversity programs. Justice O’Connor notes that, while, “…all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.”

The Grutter opinion also makes frequent mention of deference given to institutions of higher education due to their unique constitutional position with respect to academic freedom of speech and thought. Just how that will translate to K-12 remains to be seen. In other, non-diversity related cases, the courts have been more willing to limit the free speech of students and staff, but a strong argument can be made that student diversity may be more compelling at the K-12 level than in higher education.
Unfortunately, while Justice O’Connor’s opinion indicated the belief that race conscious practices should not be necessary in 25 years, the trend in K-12 school has been towards resegregation and racial isolation, especially in high poverty areas. It will be up to K-12 leaders to improve their diversity programs so that the Court’s 25-year timeline can become a reality.

What to consider when contemplating, adopting, reviewing, and updating school diversity plans

• Is the district under a desegregation order? If so, then the district is governed by that order, not subject to the strict scrutiny analysis, and, so long as the desegregation plan is consistent with the mandates of the order, it will likely be acceptable. These court-ordered desegregation plans are remedial programs designed to correct past inequities while diversity plans take affirmative steps to promote future rewards such as educational benefits.

• Why is race being used as a part of the diversity plan? The reasons for including race in any policy should be compelling. The district should have solid evidence that the race-based policy will actually further the district’s stated goals. As referenced in Grutter, an earlier court reminded schools that in taking steps towards K-12 diversity, “generalities emanating from the subjective judgments of local officials” would not establish a compelling reason for race-based diversity measures.

• Were other, race-neutral policies considered or used and found to be ineffective? If so, then this would likely strengthen the district’s contention that a race-based policy is “narrowly tailored.” Districts are not necessarily required to exhaust all race-neutral options, but they should give “serious, good faith consideration” to them. In the last few years many districts, hoping to avoid possible litigation over affirmative action plans, have turned to race-neutral plans focusing on student income. Race-neutral and race-conscious efforts may also be part of the same plan; they are not necessarily exclusive of one another.

• Is the policy research-based? To be defensible, districts should frame their diversity policies with an eye towards current research and existing evidence. Base the policy on good data.

• Are there quotas or rigid numbers involved? Racial quotas, balancing and proportion plans will be unacceptable in competitive admission situations. Goals can be allowable, and race may be used as a “plus factor,” just not the sole determining factor. The courts tend to allow more flexibility in non-competitive circumstances such as transfer decisions or school boundaries.

• Is the diversity plan narrowly tailored? The plan should be narrow enough to achieve its intended aims, and it should be limited in its use of race only so far as is necessary to meet the district’s objectives. The Grutter decision warns that well-intended goals “are potentially so dangerous that they may be employed no more broadly than the interest demands.”

• Is the plan unduly “burdensome” to other groups of students? In its earlier Bakke decision, the Supreme Court emphasized that race-based activities will come under continued review, and that governmental institutions must assure such plans “will work the least harm possible to other persons competing for the benefit.” The Court reiterated this requirement in Grutter. Districts should guard against any “undue,” unintended harmful consequences of its diversity efforts.
- **Is it flexible and individualized?** Especially in the case of competitive admissions (e.g., magnet schools), acceptable plans should ensure the consideration of the individuality of students. *Grutter* emphasizes it is critical that “all factors that contribute to student body diversity are meaningfully considered alongside race…”

- **How and when will the program be reviewed?** There must be evidence that a district’s diversity plan is achieving its intended, stated goal. *Grutter* goes so far as to call for “periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.” Existing diversity programs should be evaluated for effectiveness and new plans should include provisions for regular review.

- **Is the plan in place for a limited period of time?** In *Grutter*, the Supreme Court states outright that “race-conscious admissions policies must be limited in time.” Although school diversity plans are not necessarily the same as a university admissions policy, it is advisable that districts consider adopting time limits on race-based diversity efforts. Diversity may continue to be a “compelling interest,” but race-based measures may not be indefinitely necessary, or allowable, in order to achieve it.

- **What are the district’s transfer, magnet school, and attendance zone policies?** In light of *Grutter* and *Gratz*, schools might consider reviewing transfer, magnet school, and attendance zone policies, whether or not they are not specifically oriented towards achieving racial and ethnic diversity. Such reevaluation of these types of polices is not mandated by either case, but would be advisable for district who choose to move forward with diversity plans.
Diversity Resources and Links:

Grutter and Gratz — full Court opinions:

Grutter and Gratz — summaries of the decisions:


“Guidance to School Boards on Race and Student Assignment” (Council of School Attorneys – NSBA): http://www.nsba.org/site/page.asp?CID=449&DID=8889

Student Diversity and Equity Rulings and Resources (Council of School Attorneys – NSBA):
http://www.nsba.org/site/page.asp?CID=449&DID=8734

Summary of Recent Cases on diversity (Council of School Attorneys – NSBA):


Other Harvard Civil Rights Project reports on desegregation and diversity:
"Race in American Public Schools, Rapidly Resegregating School Districts” (Aug. 2002)
http://www.civilrightsproject.harvard.edu/research/deseg/Race_in_American_Public_Schools1.pdf

"A Multiracial Society with Segregated Schools: Are We Losing the Dream?” (Jan. 2003)
http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf

“Race-Neutral Approaches to Diversity” (Office for Civil Rights):
http://www.ed.gov/print/about/offices/list/ocr/raceneutral.html