THE SCHOOL DISTRICT OF
PALM BEACH COUNTY, FLORIDA

OFFICE OF CHIEF COUNSEL TO THE SCHOOL BOARD
3318 FOREST HILL BOULEVARD, C-302
WEST PALM BEACH, FL 33406-5813

(561) 434-8500 FAX: (561) 434-8105

ARTHUR C. JOHNSON, Ph.D.
SUPERINTENDENT

GERALD A. WILLIAMS, J.D.
CHIEF COUNSEL

MEMORANDUM

TO: ***School Board Members***
Dr. Art Johnson, *Superintendent*
Kris Garrison, *Director, Planning*
Judith Brennan, *Manager, School Boundaries & Demographics*

CC: ***Ann Killets,*** *Chief Academic Officer*
Joseph Moore, *Chief Operating Officer*
Nat Harrington, *Chief Public Information Officer*

FROM: ***Gerald A. Williams,*** *Chief Counsel to the School Board*

DATE: ***November 30, 2005***

RE: ***Discussion at the August 31, 2005 Boundaries Workshop Relating to Use of Socioeconomic Data, for December 7, 2005 Workshop***

At the August 31, 2005 Board Workshop on Boundaries, the use of socio-economic data in considering student boundary recommendations was briefly covered. It is expected that this topic will be discussed in further detail at the upcoming Board Workshop on Boundaries on December 7, 2005. Accordingly, we have updated the March 12, 2003 memo that the Chief Counsel submitted to the Board relating to this issue. This updated Memorandum reflects the current opinion of Chief Counsel's office. In sum:

Because socioeconomic status is facially race-neutral, it appears that, under applicable case law interpreting the Equal Protection Clause and the Title VI regulations, consideration of socioeconomic data by the ABC in making boundary recommendations should generally be lawful *as long as* such use of the data: a) has an educational basis supported by legitimate research; b) is just one of many factors considered and does not receive disproportionate weight; c) is not a proxy for consideration of race/ethnicity; d) is not motivated by racial/ethnic considerations; e) will not have a disproportionate adverse impact on any particular racial/ethnic group or groups (unless such impact can be proven to be justified by a substantial, legitimate educational purpose which could not be

achieved by any means with less-disproportionate impact and is not a pretext for action on the basis of race, color, or national origin); and f) is not implemented unless and until Policy 5.01 is revised to expressly allow consideration of socioeconomic status, along with criteria for appropriate use of such data.

Analysis and Discussion

Lawfulness of Considering Socioeconomic Status. The first question actually should include two sub-issues: A) appropriateness of considering socioeconomic status under current School Board Policies; and B) general and specific legal parameters.

A. *Current Policies*. The Administrative Procedure Act requires Policies to specify the "procedures and . . . principles, criteria, or standards for agency decisions." FLA. STAT. § 120.54(1)(a)2. Attendance boundary-setting is, itself, a rulemaking process. *See Polk v. School Board of Polk County*, 373 So. 2d 960, 961 (Fla. 2d DCA 1979); *Plantation Residents' Association, Inc. v. School Board of Broward County*, 424 So. 2d 879, 880 & n.2 (Fla. 1st DCA 1983); and *Cortese v. School Board of Palm Beach County*, 425 So. 2d 554, 555 (Fla. 4th DCA 1983) (stating that boundary-setting is rulemaking by the Board, and parents' substantial interests were affected by changes in school boundaries).

We believe School Board Policy 5.01 sets forth a limited range of criteria which may be considered in boundary recommendations currently; and the Policy would need to be amended by official Board action before additional substantial criteria could be considered. For example, if it would be lawful to do so, a new subsection (2)(h) could be added through the policy-revision process to specify the ABC's authority to consider student socioeconomic data and some criteria for using such considerations. The Superintendent has the statutory authority to recommend adoption of Policies by the Board, and the Board has the authority to approve or disapprove the recommendation. *See* FLA. STAT. §§ 1001.41(1), (2); 1001.49(3), (4); and Op. Att'y Gen. Fla. 96-13.

B. *General Legal Parameters*. The relevant legal analysis includes: 1) foundational parameters and 2) specific issues.

1. *Foundational Legal Parameters*. In 2000, the Board retained Al Lindseth, an outside counsel with recognized expertise in school boundary issues, to analyze the District's history of litigation and OCR monitoring with respect to attendance boundaries and provide a comprehensive analysis of the constitutional parameters for boundary criteria in this District. We have reviewed and fully concur with the well-reasoned and carefully-researched recommendations of Mr. Lindseth, who concluded that the District has achieved unitary status and is not currently subject to OCR monitoring on attendance-

boundary issues and thus "neither notions of racial balance nor racial separation should play a role in the ABC's consideration of attendance zone changes." Mr. Lindseth's conclusion is consistent with the controlling case law in the Eleventh Circuit: *Johnson v. Board of Regents of the Univ. of Georgia*, 263 F.3d 1234, 1247-1248 (11th Cir. 2001).[1]

In a legal memo issued by this Office on November12, 2003, we concluded that the advice of Al Lindseth to the School Board remained correct and consistent with the U.S. Supreme Court's recent decisions regarding diversity higher education (*Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003)). Setting K-12 attendance boundaries is a process very distinct from the university admission process. The college admission process involves individual students applying for consideration for enrollment, often based on factors such as high school GPA, SAT or ACT scores, personal statements, and the like. By contrast, the process of setting K-12 attendance boundaries cannot take individual students into consideration on a personal level as required by *Grutter*. Thus, as explained in our Nov. 12, 2003 memo, the *Grutter* decision should not be treated as precedent for K-12 attendance boundary setting.

Even if setting K-12 attendance boundaries could be analogized to the college application process, it seems that the boundary-setting process would be far more analogous to the mechanical race-conscious process in *Gratz* (which was struck down) than the personal, individual-attention process approved (on a temporary basis) in *Grutter*. Setting boundaries is a geographical, somewhat mechanical process, not a situation where individual student applicants are personally and individually evaluated and considered as to a broad range of personal attributes. Even where there is a compelling interest, educational institutions cannot "use race in a rigid or mechanical way that fails to give sufficient weight to the different types of diversity that various [individual] applicants can offer." *Johnson v. Board of Regents of the Univ. of Georgia*, 263 F.3d 1234, 1253-54 (11th Cir. 2001). We find no practical application of the *Grutter* decision to the boundaries process; that decision does not allow the School Board to use race as a factor in setting boundaries.

Moreover, the *Gratz* decision reemphasized that the Equal Protection Clause calls for government to be color-blind; and race-conscious measures will be struck down when not narrowly-tailored to serve a compelling state interest—a standard that courts rarely find to be met. Courts have held that a desegregation order from a federal court would create such a compelling interest in K-12 attendance boundary decisions; however, as emphasized by Mr. Lindseth in 2000, the District has achieved unitary status and is not

---

1. *Johnson* concluded that race-consciousness as a means of increasing diversity is constitutionally permissible only when "the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination," and stated that racial/ethnic "diversity is an 'important interest,' but not the kind of compelling interest that potentially might withstand even the strictest constitutional scrutiny."

currently subject to OCR monitoring on attendance-boundary issues. In sum, neither *Gratz* nor *Grutter* allow the School Board to consider race as a factor in setting attendance boundaries.

2. *Specific Analysis.* Under Equal Protection analysis, courts review policies to see if the government is intentionally discriminating against a class of people who are entitled to special constitutional protection. Supreme Court cases have defined the "suspect" and "quasi-suspect" protected classes entitled to heightened protection, including race and ethnicity.[2]

a) *Equal Protection Clause: Race-Neutral Classifications.* Although, as stated above, the Equal Protection Clause would prohibit considering race or ethnicity as a factor in the ABC's boundary recommendations, it is important to understand that *socioeconomic status* ("SES") is a *facially race-neutral non-suspect class*: there are middle- and upper-SES minority students, and there are lower-SES majority students; and vice-versa. Under Equal Protection analysis, the courts will usually uphold a policy disadvantaging a *non*-suspect class—even when there is both disparate intent and disparate impact on members of the non-suspect class—as long as the policy passes a "rational-basis" test: evidence must prove that the policy rationally furthers a legitimate governmental objective. Because no protected or suspect class would be involved, consideration of SES should require only a "rational basis" analysis under the Equal Protection Clause. Thus, under the Equal Protection Clause, it should be permissible to use SES as long as such consideration of SES is shown to be a rational means of furthering a legitimate governmental/educational objective.

b) *Correlation to Race.* Although SES is facially race-neutral, some local newspaper articles in 2003 and anecdotal evidence pointed out a probable correlation between SES and minority status. This information from 2003 implied that the *effect* of considering SES would be similar to the effect of using race as a factor. For example, one report questioned whether African-American students could suffer a disproportionate busing burden if SES were considered in boundary recommendations. Thus, the issue of correla-

---

2. The "suspect classes" (race, ethnicity, and sometimes alienage [lack of U.S. citizenship]) receive strict judicial scrutiny and are usually struck down if the court finds both disparate impact and intent. The "quasi-suspect classes" (gender and illegitimacy) receive intermediate scrutiny and are sometimes upheld, sometimes struck down if the court finds both disparate impact and intent. The "non-suspect" classes are age, wealth, mental status, sexual orientation, *socioeconomic status*, and sometimes alienage. PRYGOSKI, CONSTITUTIONAL LAW (4th ed. 1998) § 538-40. Regulations affecting non-suspect classes are generally upheld, as the courts apply weak scrutiny.

tion could involve a related question: whether an adversely affected party could claim *implied* intent to use race-conscious decision-making.

A facially race-neutral policy's disproportionate impact on racial minorities does not, standing alone, establish racially-motivated discriminatory intent under the Equal Protection Clause. However, a plaintiff may be able to establish an implication of intent by proving factors such as substantial disparate impact, discriminatory *statements* in the *legislative or administrative history* of the decision, a history of discriminatory official actions, and procedural and substantive departures from the norms generally followed by the decision-maker. *See Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir.1993). Accordingly, in discussing an SES-conscious plan, it would be advisable for the staff and the Board to avoid any language that could be mistaken for evidence of an intent to make race-conscious boundary recommendations.

Similarly, the reported correlation of SES to race could be used by an aggrieved party to claim that SES would be used as merely a proxy for race—considering race under the guise of considering a facially-race-neutral factor. Some judges believe SES merely represents a proxy for race. For example, a footnote in a recent decision from a federal appellate court with jurisdiction in nine Western states (not in Florida) said that "socio-economic status does nothing more than substitute a number from a family's tax return for race." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 426 F.3d 1162, 1184 n.26 (9th Cir., Oct 20, 2005). However, a report from the U.S. Department of Education explains that socioeconomic considerations should include more than income:

> The definition of socioeconomic disadvantage often encompasses three key factors: parents' education, family income and parents' occupation(s). Other factors are also often considered to define socioeconomic disadvantage, including a family's net worth, family structure, school quality and neighborhood quality. All of these factors are quantifiable . . . . While race is not a factor in socioeconomic preference plans, minority students may benefit under these plans because their racial and ethnic groups are disproportionately disadvantaged according to socioeconomic factors.

See U.S. Dep't of Educ., Achieving Diversity: Race-Neutral Alternatives in American Education (Feb.2004), available at http://www.ed.gov/about/ offices/list/ocr/edlite-raceneutralreport2.html. Further, as a federal trial court in California has explained (although not precedent in Florida):

> [t]he Supreme Court has held that a party challenging a facially race neutral plan must show *not merely* that race was *a motivation* in choosing the *race neutral* factors but that it was *the predominant* factor motivating the decision. *Hunt v. Cromartie*, 121 S.Ct. 1452, 1458 (2001). The challenging party must show that the *race neutral* plan is *unexplainable* on grounds *other than race. Id.* There is no evidence here that the factors chosen by the District . . . correlate so strongly with race that they cannot

> be explained as anything but a proxy for race. . . . [T]he factors . . . can apply to students of *any* race or ethnicity. *Even if* there were evidence of a *strong correlation* between the . . . factors and the race of the students, however, that *still would not be enough to invalidate* the plan without evidence that race also was the District's *predominant motivation* for choosing those factors. *Id.* at 1459.

San Francisco NAACP v. San Francisco Unified Sch. Dist. 2001 WL 1922333, *10 (N.D.Cal. 2001). Accordingly, an aggrieved party probably would face a difficult burden in trying to prove that SES is merely a proxy for race. Similarly, four judges in the Ninth Circuit (not having jurisdiction in Florida) have suggested that considering socioeconomic status in certain student-assignment plans can be a viable race-neutral method of increasing diversity without triggering strict judicial scrutiny. *See Seattle School Dist. No. 1*, 426 F.3d at 1196-1222 (Bea, Kleinfeld, Tallman, and Callahan, JJ., dissenting).

c) *Regulations under Title VI of the Civil Rights Act.* Although a plaintiff must prove intentional discrimination in order to succeed in a claim under the Fourteenth Amendment or under the Title VI statute, the Title VI regulations also prohibit *disproportionate adverse impact* on a group protected by Title VI (i.e., on a group identifiable by race, color, or national origin) in the areas listed in the footnote.[3] To establish a disproportionate *impact* claim under Title VI,

> a plaintiff must first demonstrate by a preponderance of the evidence [i.e., "more likely than not"] that a *facially neutral* practice has a *disproportionate adverse effect* on a group protected by Title VI [i.e., on a group identifiable by race, color, or national origin]. If the plaintiff makes such a prima facie showing, the defendant then must prove that there exists a *substantial legitimate justification* for the challenged practice in order to avoid liability. If the defendant carries this rebuttal burden, the plaintiff will still prevail if able to show that there exists a *comparably effective alternative practice* which would result in *less disproportionality*, or that the defendant's proffered justification is a *pretext* for discrimination.

Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1406-7 (11th Cir. 1993) (discussing 34 CFR § 100.3) (citations omitted).

---

3. 34 CFR § 100.3(b)(2), (3) prohibits disparate adverse *impact* on the basis of race, color, or national origin in the following areas: the types of services provided, financial aid, other benefits or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program. Further, in determining the site or location of a facilities, the selections must not have the effect of excluding individuals, denying them benefits, or subjecting them to discrimination, on the basis of race, color, or national origin; nor should the selections have the purpose or effect of defeating or substantially impairing the accomplishment of the race-neutral objectives.

To proactively prepare for potential claims of disproportionate impact under the Title VI regulations, the Board should also strive to determine that no comparably-effective alternative practice would be available with a less-disproportionate impact on the basis of race, color, or national origin. In other words, we believe any SES-conscious plan should be narrowly tailored.

The courts have set forth guidelines for narrowly tailoring. The following suggestions were adapted from a list in *Johnson v. Board of Regents of the Univ. of Georgia*, 263 F.3d 1234, 1253-54 (11th Cir. 2001): 1) the plan should not use SES in a rigid or mechanical way that fails to give sufficient weight to the different types of factors; 2) the plan should ensure that other factors besides SES are also considered fully and fairly; 3) the plan should not provide any arbitrary or disproportionate benefit or detriment on the basis of SES; and 4) it should be shown that the District has considered, but rejected as inadequate, other alternatives for achieving the stated educational purpose.

<u>*Conclusion as to Legal Parameters*</u>: In light of the above discussion of the Equal Protection Clause and the Title VI regulations, it appears that, under case law, consideration of socioeconomic data by the ABC in making boundary recommendations should generally be lawful *as long as* such use: 1) has an educational basis supported by legitimate research (we understand that Dr. Marc Baron has reviewed the educational literature and provided articles to the Board, which support an existing substantial legitimate justification for considering SES diversity in a school as promoting student achievement); 2) is just one of many factors considered and does not receive disproportionate weight; 3) is not a proxy for consideration of race/ethnicity; 4) is not motivated by racial/ethnic considerations; 5) will not have a disproportionate *adverse impact* on any particular racial/ethnic group or groups (unless such impact can be proven to be justified by a substantial, legitimate educational purpose which could not be achieved by any means with less-disproportionate impact and is not a pretext for action on the basis of race, color, or national origin); and 6) is not implemented unless and until Policy 5.01 is revised to expressly allow consideration of socioeconomic status, along with criteria for appropriate use of such data.

In the event any questions may arise concerning this Opinion, please do not hesitate to contact me.

Submitted by: Randall Burks, Ph.D., Esq.