

Question 1:

*A. Dystopia Public Schools: A Historical Perspective*

Dystopia's historical struggle with the problem of racial isolation in its public school system provides the context for the Dystopia School District's implementation of the current school assignment plan. Dystopia is a diverse community. Approximately 70 percent of its residents are white, and 30 percent are nonwhite. Dystopia public school enrollment breaks down nearly inversely, with approximately 40 percent white and 60 percent nonwhite students. A majority of the District's white students live in neighborhoods north of downtown, the historically more affluent part of the city. A majority of the city's nonwhite students, including approximately 84 percent of all African-American students, 74 percent of all Asian-American students, 65 percent of all Latino students and 51 percent of all Native-American students, live south of downtown.

The District operates 10 four-year public high schools. Four are located north of downtown--Ballard, Ingraham, Nathan Hale and Roosevelt; five are located south of downtown--Chief Sealth, Cleveland, Franklin, Garfield and Rainier Beach; one is located west of downtown--West Dystopia. For over 40 years, the District has made efforts to attain and maintain desegregated schools and avoid the racial isolation or concentration that would ensue if school assignments replicated Dystopia's segregated housing patterns. Since the 1960s, while courts around the country ordered intransigent school districts to desegregate, Dystopia's School Board voluntarily explored measures designed to end de facto segregation in the schools and provide all of the District's students with access to diverse and equal educational opportunities.

In the late 1950s and early 1960s, school assignments were made strictly on the basis of neighborhood. In 1962, Garfield High School reported 64 percent minority enrollment and it accommodated 75 percent of all African-American students. Meanwhile, the eight high schools serving other major areas of the city remained more than 95 percent white.<sup>1</sup>

The District responded to this imbalance, and racial tensions in the de facto segregated schools, in various ways. In the early 1960s, the District first experimented with small-scale exchange programs in which handfulls of students switched high schools for five-week periods. In 1963, expanding on this concept, the District implemented a "Voluntary Racial Transfer" program through which a student could transfer to any school with available space if the transfer would improve the racial balance at the receiving school. In the 1970s, the District increased its efforts again, this time adopting a desegregation plan in the middle schools that requested volunteers to transfer between minority- and majority-dominated neighborhood schools and called for mandatory transfers when the number of volunteers

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<sup>1</sup> From the 1910s through the 1960s, many Dystopia neighborhoods and suburbs practiced overt and total racial exclusion. White-only clauses and other restrictions (which sometimes excluded Jews as well as people of color) can be found today in property deeds for many neighborhoods.

was insufficient, though this portion of the plan was never implemented. The District also took steps to desegregate Garfield High School by changing its educational program, improving its facilities and eliminating "special transfers" that had previously allowed white students to leave Garfield. Finally, for the 1977-78 school year, the District instituted a magnet-school program. While it appeared evident that the addition of magnet programs would not in itself desegregate the Dystopia schools, there was supportive evidence that voluntary strategies, magnet and non-magnet, could be significant components of a more comprehensive desegregation plan.

By the 1977-78 school year, segregation had increased: Franklin was 78 percent minority, Rainier Beach 58 percent, Cleveland 76 percent and Garfield 65 percent. Other high schools ranged from 9 percent to 23 percent minority enrollment.

In the spring of 1977, the Dystopia branch of the National Association for the Advancement of Colored People ("NAACP") filed a complaint with the United States Department of Education's Office of Civil Rights, alleging that Dystopia's School Board had acted to further racial segregation in the city's schools. Several other organizations, principally the American Civil Liberties Union ("ACLU"), formally threatened to file additional actions if the District failed to adopt a mandatory desegregation plan. When the District agreed to develop such a plan, the Office of Civil Rights concomitantly agreed to delay its investigation, and the ACLU agreed to delay filing a lawsuit.

During the summer of 1977, the District and community representatives reviewed five model plans. Ultimately, the District incorporated elements of each model into its final desegregation plan, adopted in December 1977 and known as the "Dystopia Plan." The Dystopia Plan divided the district into zones, within which majority-dominated elementary schools were paired with minority-dominated elementary schools to achieve desegregation. Mandatory high school assignments were linked to elementary school assignments, although various voluntary transfer options were available. With the Dystopia Plan, Dystopia became the first major city to adopt a comprehensive desegregation program voluntarily without a court order. By doing so the District maintained local control over its desegregation plan and was able to adopt and implement a plan which in the eyes of the District best met the needs of Dystopia students and the Dystopia School District.

Opponents of the Dystopia Plan immediately passed a state initiative to block its implementation, but the state Supreme Court ultimately declared the initiative unconstitutional. (cite omitted).

The Dystopia Plan furthered the District's school desegregation goals, but its operation was unsatisfactory in other ways. For example, the Dystopia Plan was confusing, required mandatory busing of nonwhite students in disproportionate numbers, made facilities and enrollment planning difficult and contributed to "white flight" from the city schools.

In 1988, a decade after its implementation, the District abandoned the Dystopia Plan and adopted a new plan that it referred to as "controlled choice." Under the controlled choice plan, schools were grouped into clusters that met state and district desegregation guidelines, and families were permitted to rank schools within the relevant cluster, increasing the predictability of assignments. Because of Dystopia's housing patterns, the District's planners

explained that "it was impossible to fashion clusters in a geographically contiguous manner"; some cluster schools were near students' homes, but others were in "racially and culturally different neighborhoods." Although roughly 70 percent of students received their first choices, the controlled choice plan still resulted in mandatory busing for 16 percent of the District's students.

In 1994, the Board directed District staff to devise a new plan for all grade levels to simplify assignments, reduce costs and increase community satisfaction, among other things. The guiding factors were to be choice, diversity and predictability. Staff developed four basic options, including the then-existing controlled choice plan, a regional choice plan, a neighborhood assignment plan with a provision for voluntary, integration-positive transfers and an open choice plan.

Board members testified that they considered all the options as they related to the District's educational goals--with special emphasis, at the secondary school level, on the goals of choice and racial diversity. Neighborhood and regional plans were viewed as unduly limiting student choice, on which the District placed high value because student choice was seen to increase parental involvement in the schools and promote improvements in quality through a marketplace model. The District sought to maintain its commitment to racially integrated education by establishing diversity goals while moving away from the rigid desegregation guidelines and mandatory assignments prevalent in the 1970s and 1980s.

The Board adopted the current open choice plan (the "Plan") for the 1998-99 school year. Under the Plan, students entering the ninth grade may select any high school in the District. They are assigned, where possible, to the school they list as their first choice. If too many students choose the same school as their first choice, resulting in "oversubscription," the District assigns students to each oversubscribed school based on a series of tiebreakers. If a student is not admitted to his or her first choice school as a result of the tiebreakers, the District tries to assign the student to his or her second choice school, and so on. Students not assigned to one of their chosen schools are assigned to the closest school with space available; students who list more choices are less likely to receive one of these "mandatory" assignments. The most recent version of the Plan, which the School Board reviews annually, is for the 2001-02 school year.

#### *B. The Plan*

The District has sought to make each of its 10 high schools unique, with programs that respond to the continually changing needs of students and their parents. Indeed, the District implemented the Plan as part of a comprehensive effort to improve and equalize the attractiveness of all the high schools, including adoption of a weighted funding formula, a facilities plan and a new teacher contract that would make teacher transfers easier. Nevertheless, the high schools vary widely in desirability. Three of the northern schools--Ballard, Nathan Hale and Roosevelt--and two of the southern schools--Garfield and Franklin--are highly desirable and oversubscribed, meaning that more students wish to attend those schools than capacity allows. The magnitude of the oversubscription is noteworthy: For the academic year 2000- 01, approximately 82 percent of students selected one of the oversubscribed schools as their first choice, while only about 18 percent picked

one of the undersubscribed high schools as their first choice. Only when oversubscription occurs does the District become involved in the assignment process.

The current popularity of Ballard High School is illustrative of the constantly changing dynamic of Dystopia's public high schools. In the fall of 1999, Ballard moved to a new facility under the leadership of a new principal. Prior to the move, Ballard was not oversubscribed; now it is one of the most popular high schools in Dystopia.

Similarly, the popularity and demographics of Nathan Hale High School changed significantly when it acquired a new principal who instituted a number of academic innovations, including joining the "Coalition of Essential Schools" and instituting a "Ninth Grade Academy" and "Tenth Grade Integrated Studies Program." Prior to 1998, Nathan Hale, a north area high school, was not oversubscribed, and the student body was predominantly nonwhite. Starting in 1998, the high school began to have a waitlist, and more white students, who had previously passed on Nathan Hale, wanted to go there. As a result, the number of nonwhite students declined dramatically between 1995 and 2000.

If a high school is oversubscribed, all students applying for ninth grade are admitted according to a series of four tiebreakers, applied in the following order:

First, students who have a sibling attending that school are admitted. In any given oversubscribed school, the sibling tiebreaker accounts for somewhere between 15 to 20 percent of the admissions to the ninth grade class.

Second, if an oversubscribed high school is racially imbalanced--meaning that the racial make up of its student body differs by more than 15 percent from the racial make up of the students of the Dystopia public schools as a whole--and if the sibling preference does not bring the oversubscribed high school within plus or minus 15 percent of the District's demographics, the race-based tiebreaker is "triggered" and the race of the applying student is considered. (For the purposes of the race-based tiebreaker, a student is deemed to be of the race specified in his or her registration materials.) Thus, if a school has more than 75 percent nonwhite students (i.e., more than 15 percent above the overall 60 percent nonwhite student population) and less than 25 percent white students, or when it has less than 45 percent nonwhite students (i.e., more than 15 percent below the overall 60 percent nonwhite student population) and more than 55 percent white students, the school is considered racially imbalanced.

Originally, schools that deviated by more than 10 percent were deemed racially imbalanced. For the 2001-02 school year, however, the triggering number was increased to 15 percent, softening the effect of the tiebreaker. For that year, the race-based tiebreaker was used in assigning entering ninth grade students only to three oversubscribed schools--Ballard, Franklin and Nathan Hale. Accordingly, in seven of the 10 public high schools in 2001-02, race was not relevant in making admissions decisions.

Although the record reflects the general effects of the tiebreaker in 2001-02, it does not include the specific number of students affected by the tiebreaker in the three oversubscribed schools where the tiebreaker applied. The record, however, does include

these numbers for the 2000-01 school year. Although the tiebreaker operated differently in 2000-01, and applied to four schools rather than three, the 2000-01 numbers illustrate the general operation of the tiebreaker.

The race-based tiebreaker is applied to both white and nonwhite students. For example, in the 2000-01 school year--when the trigger point was still plus or minus 10 percent--89 more white students were assigned to Franklin than would have been assigned absent the tiebreaker, 107 more nonwhite students were assigned to Ballard than would have been assigned absent the tiebreaker, 82 more nonwhite students were assigned to Roosevelt than would have been assigned absent the tiebreaker and 27 more nonwhite students were assigned to Nathan Hale than would have been assigned absent the tiebreaker. These assignments accounted for about 10 percent of admissions to Dystopia's high schools as whole. That is, of the approximately 3,000 incoming students entering Dystopia high schools in the 2000-01 school year, approximately 300 were assigned to an oversubscribed high school based on the race-based tiebreaker.

The Board's decision to change the trigger point for use of the tiebreaker from plus or minus 10 percent to plus or minus 15 percent, however, had the effect of rendering Roosevelt High School neutral for desegregation purposes. Thus, the tiebreaker did not factor into assignments to Roosevelt High School in the 2001-02 school year.

In addition to changing the trigger point for the 2001-02 school year to plus or minus 15 percent, the District also developed a "thermostat," whereby the tiebreaker is applied to the entering ninth grade student population only until it comes within the 15 percent plus or minus variance. Once that point is reached, the District "turns-off" the race-based tiebreaker, and there is no further consideration of a student's race in the assignment process. The tiebreaker does not apply, and race is not considered, for students entering a high school after the ninth grade (e.g., by transfer).

As demonstrated in the chart below, the District estimates that without the race-based tiebreaker, the nonwhite populations of the 2000-01 ninth grade class at Franklin would have been 79.2 percent, at Hale 30.5 percent, at Ballard 33 percent and at Roosevelt 41.1 percent. Using the race-based tiebreaker, the actual nonwhite populations of the ninth grade classes at the same schools respectively were 59.5 percent, 40.6 percent, 54.2 percent and 55.3 percent.

DIFFERENCE IN PERCENTAGES OF NONWHITE STUDENTS IN NINTH GRADE WITH AND WITHOUT TIEBREAKER

School	Without Tiebreaker	With Tiebreaker	Percent Difference
Franklin	79.2	59.2	-19.7
Nathan Hale	30.5	40.6	+10.1
Ballard	33.0	54.2	+21.2
Roosevelt	44.1	55.3	+14.2

In the third tiebreaker, students are admitted according to distance from the student's home to the high school. Distance between home and school is calculated within 1/100 of a mile, with the closest students being admitted first. In any given oversubscribed school, the distance-based tiebreaker accounts for between 70 to 75 percent of admissions to the ninth grade.

In the fourth tiebreaker, a lottery is used to allocate the remaining seats. Because the distance tiebreaker serves to assign nearly all the students in the District, a lottery is virtually never used.

Parents Involved in Community Schools ("Parents"), a group of parents whose children were not, or might not be, assigned to the high schools of their choice under the Plan, have filed suit in federal district court. The Parents group is made up of white, black, and Hispanic parents.

One parent, Jonathan Mills tried to enroll his daughter in high school at Ballard, a school in a neighborhood north of downtown, but was told there was no room for his child because she was white. Instead, Mills was told to send his daughter to Franklin, the school located in his own, more urban, neighborhood south of downtown. Mills himself had attended Franklin, and had loved it. But the issue for this single, working father of two was not simply a matter of school quality. Franklin was closer to home, but farther from work, and Mills could not make the school's closing bell. Ballard, on the other hand, was around the corner from her day-care provider. "What I was told, basically, was that my daughter couldn't go to Ballard because she wasn't the right color," Mills explained.

**Assume you are a federal district court judge. The Parents and the District have filed cross-motions for summary judgment. Write your opinion granting or denying summary judgment to either (or both) parties in the case. Decide only issues of federal law.**

## Question 2: African Americans and the Afrolantica Opportunity<sup>2</sup>

As is usually the case with new discoveries, the first oceanographers who reported strange movement in the middle of the Atlantic and suggested that the long lost continent of Atlantis might resurface were dismissed as cranks and publicity seekers. When the first rumblings in the ocean some 900 miles due east of South Carolina grew into an insistent churning that made the waters over the giant site unnavigable, the ridicule heaped on the scientists changed to praise and then to ever more insistent requests that the scientists explain the strange phenomenon.

The ancients accepted as unseen fact what modern scientists refused to believe even as its huge mass became clear on their radar screens. Plato described the "lost continent" in two dialogues, *Timaeus* and *Critias*, and the legend of its existence protested throughout the Middle Ages and even after the Renaissance. Various spelled Atlantis, Atalantica or Atalantis, the continent was said to be situated in the Atlantic Ocean. It disappeared beneath the waves at some unrecorded point in history.

Now, in the first decade of the 21st century, over a period of several months, the huge mass began rising slowly from the ocean depths. Then, in a spectacular display of nature's power, it roared into view with the power of a volcano erupting. For several days, the area was cloaked in boiling hot steam and impenetrable mists. When the air finally cleared after several weeks, there lay a new land complete with tall mountains sheltering fertile valleys, rich plains already lush with vegetation, and beautiful beaches interspersed with deep water harbors. From all indications, the land -- roughly the size of New England -- was uninhabited, though observers could see from afar that fish filled the streams in animals in great abundance roamed its fields.

The United States and several other countries wasted no time in dispatching representatives to "claim" the land or portions of it. The task proved harder than it looked. The first explorers landed in a helicopter and barely escaped with their lives; they experienced severe problems in breathing and managed to take off just before they would have lost consciousness. Subsequent attempts to land either by air or by water also failed even though the landing parties were equipped with spacesuits and breathing apparatus that had sustained human life on the moon. On the new continent, it was the weight of the atmosphere that threatened human life. One survivor explained that it was like trying to breathe under the heavy pressures at the bottom of the sea.

Remarkably, none of the independent adventurers who tried to land on the new land died. Somehow, gasping for breath, they manage to make their escape though the experience was sufficiently painful and scary that none of the survivors wanted to try a second time. The frustration throughout the world was great. Here was exciting new landmass that seemed to be aching for exploration and (of course) development, and no humans seemed able to survive on its inviting but inhospitable shores.

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<sup>2</sup> This hypo is based on "The Afrolantica Awakening" in Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* 32 (1992).

Then came the discovery. A team of four United States Navy divers tried to reach the new land underwater. A submarine entered a deep armor and admitted the divers through a special chamber. They swam underwater through the harbor and into the mouth of a large river that emptied into the harbor. All seemed to go well until the divers were about half a mile up the river. Then, suddenly, they began to experience the breathing difficulties that had plagued earlier explorers. They turned immediately and started back to the submarine, but they had gone too far; long before they reached the harbor, they began to lose consciousness. The crew chief, Marcia Shufford, alone managed to link the three helpless team members together with a slender cable and towed them to safety. Shufford alone did not experience the breathing problems her crewmates complained of and, in fact, felt increasingly invigorated by the new land's waters.

Back on the submarine, the divers were revived and hailed their crew chief as a hero. Shufford declined the honors and reported that she had not felt any breathing problems. Quickly arranged medical checks found her quite normal. The only difference between Shufford and the members of her crew (and indeed all those who had tried to explore the new land) was her race: Shufford was an African American. No military or government officials regarded this fact as significant. After all, peoples of color from other countries, including Africa, had tried to land on the new land with the usual near calamitous results. But just in case, the next helicopter exploratory party consisted entirely of African-American men and the pilot, an African-American woman.

They landed cautiously on the land that the media had dubbed "Afrolantica," but soon found they did not need breathing equipment. In fact, all experienced what became known as the "Afrolantica High": a feeling of well being, exhilaration, and increased self-esteem. This, they explained on their return, was not an alcohol or drug induced feeling of escape, but rather an experience of being unburdened, of liberation. All agreed that on Afrolantica, they felt truly free.

In the period of renewed racial hostility gripping the country, the linking of Afrolantica and freedom for blacks came easily. Here, many thought, is the long-sought promised land. The view grew as more and more African Americans visited the new land and found it habitable and inviting. Biblical parallels with the Hebrews' experiences in the book of Exodus became common. As one black leader put it after a trip of the new land, "after wandering in the American wilderness for not 40 but almost 400 years, suffering the destruction of slavery, the second-class status of segregation, and now the hateful hypocrisy of equal opportunity era, the Lord has sent us a home that is as hostile to others as America has been to us. Let us go and show there what we might have done here."

The leader's enthusiasm was shared by some but far from all African Americans. A spokesperson for the opposing view explained, "emigrating to Afrolantica would be like leaving civilization and returning to the wilderness. Life here is hard, but we will not surrender our labors and those of generations that came before us and for whom life was even harder than it is for us. America, like it or not, is our land too. We would like to visit this Afrolantica, but our home is here."

African American Advocates for Afrolantica (Quad A) introduced legislation in Congress that would provide each African American citizen wishing to emigrate to Afrolantica with a



\$20,000 "reparation subsidy" to finance the move that would be repaid if the recipient sought to return in less than 10 years. Opponents, organized under what they called the "Keep the Faith Movement" (KFM), now claim the legislation would be both bad policy and unconstitutional.

Both sides believe the historical and legal materials examined in this course support of their arguments.

Following the implementation of an elaborate selection process, almost 1000 representatives from every stratum of Black America have come together in a major meeting to discuss the two positions and perhaps evolve a consensus view for decision and action.

- A. Imagine you are Counsel for Quad A; set forth your best argument for why the representatives should adopt your view.
- B. Imagine you are counsel for KFM; set forth your best argument for why the representatives should adopt your view.
- C. Finally, if most African Americans reject the temptation of a new and uncertain life in Afrolantica and remain loyal to America, what would this country's response be?