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**The Public Interest Law Center of Philadelphia's Public Comments Regarding
Lower Merion School District's Redistricting Plan**

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The Public Interest Law Center of Philadelphia ("Law Center") submits these comments upon the request of a group of concerned parents of children – both black and white – attending school in Lower Merion School District ("LMSD"). The parents are concerned that the redistricting plan proposed by LMSD transfers a disproportionate number of black students to Harriton High School from Lower Merion High School ("LMHS"), thereby dividing a valued and diverse community that is nearer to LMHS than to Harriton.

This disproportionate transfer of black students risks violating constitutional law, including law in this federal judicial circuit, prohibiting school districts from using methods, in furtherance of the legitimate goal of racial and other forms of diversity, that unfairly burden one racial group as compared to others. In particular, as the plan stands, it risks placing significantly greater burden on black students than on white students both in terms of relocation and the potential ostracism or outsider status such relocated students will experience in their new school. These concerned parents urge LMSD to further evaluate its options to devise a plan that more evenly distributes the burdens imposed by redistricting.

The Law Center urges LMSD to insure that it comply with the requirements of the Constitution of the United States during the redistricting process. We submit these comments to provide guidance as to what the law requires of LMSD, including the factors that LMSD should consider in determining whether its plan conforms to the law.

I. Achieving Diversity or Other Legitimate Aims

The Law: The Supreme Court has not foreclosed the permissibility of considering race among other factors to achieve diversity in secondary schools. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court upheld the University of Michigan Law School's practice of considering race when deciding who should populate its incoming class. The Court held that achieving diversity is a compelling state interest that justifies the consideration of race. In *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), Justice Kennedy, in his tie-

breaking opinion, cited *Grutter* for the proposition that “[i]n the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is racial composition.” *Id.* at 2792 (Kennedy, J., concurring). Justice Kennedy recognized that Constitutional color-blindness does not comport with reality (“regrettab[ly]”). *Id.*

Justice Kennedy’s opinion emphasized two factors as having especial weight in determining whether a school district’s practice of considering race in order to achieve diversity is constitutional: (a) whether the district employs a general policy versus whether it singles out individual students and (b) whether the district’s practice was narrowly tailored to minimize adverse consequences. Under the view of the Constitution set out in Justice Kennedy’s opinion (and shared, in this respect, by the four dissenting justices in the case, who would have upheld the redistricting plans at issue), the Constitution permits school districts to attempt to achieve racial and other forms of diversity through narrowly tailored efforts.

The Facts: There is strong evidence that LMSD’s current redistricting effort is, at least in part, directed at achieving greater racial and socio-economic balance as between the two high schools in the district. Evidence of this goal includes (1) statements by district officials, (2) references to race and socio-economic diversity on the Frequently Asked Questions link on the district’s website that addresses redistricting, (3) the manner of redistricting, that is, the fact that a disproportionate percentage of black students will be affected, as discussed in detail below, and (4) the district’s own mission statement, posted on its website under “Strategic Plan,” which includes reference to the importance of diversity (“[T]he Lower Merion School District strives to ensure that all students . . . value . . . the diversity of others . . .”).

Although the Law Center does not yet have all of the relevant facts, the evidence does not suggest that LMSD is singling out individual students, a practice that would run afoul of Justice Kennedy’s *Seattle* opinion. Rather, it appears that the LMSD is attempting to use a general policy – redrawing geographic boundaries – to achieve diversity in both its high schools.

Even if LMSD’s goal is not to achieve diversity at Harriton but rather to equalize the size of the two high schools, the evidence suggests that LMSD is using race as a factor in pursuing the size goal.

In either case, the same rule applies: The school must consider race in a manner that is narrowly tailored to achieve its aim and that does not place an unlawfully disproportionate burden on black students.

II. Disproportionate Burden of Efforts to Achieve Diversity

The Law: When a school district considers race in order to achieve diversity among its students, or when it considers race in equalizing school size, its actions are subject to strict judicial scrutiny and must be narrowly tailored to accomplish that goal. *Johnson v. California*, 543 U.S. 499, 505 (2005). A district must be careful to not employ counterproductive measures, that is, the district must not use discriminatory means to accomplish an end to discrimination or other legitimate aims.

One way in which a district risks discrimination is by overly burdening minority students. “[A] school board may not rectify its past illegal conduct by disproportionately burdening those whose rights it violated.” *Mitchell v. McCunney*, 651 F.2d 183, 189 (3rd Cir. 1981); *see also Harris v. Crenshaw County Bd. of Educ.*, 968 F.2d 1090, 1097-98 (11th Cir. 1992) (“[T]he burden may not be placed on one racial group.”).¹

More specifically, in the context of redistricting, “the school board has an obligation to implement a student reassignment plan that will not dislocate black students significantly more than white students.” *Mitchell*, 651 F.2d at 189 (nonetheless finding that black students did not suffer disproportionate burden); *see also Harris*, 968 F.2d at 1097-98 (“[T]he burden of desegregation must be distributed equitably”) (nonetheless holding that “the burden of the closing [did] not fall disproportionately on blacks” because the school closure was justified by compelling non-discriminatory reasons; transporting the African American children the majority of whom were already taking the bus to school, to the high school that would remain open rather than to the one that would be closed would “add, at most, ten miles to their bus ride” and was “not unreasonable”; and there was “no reasonable alternative to” the busing option); *Arvizu v. Waco Indep. Sch. Dist.*, 495 F.2d 499, 504-08 (5th Cir. 1974) (“[I]t is incumbent upon district courts to insure that the burdens of desegregation are distributed equitably Although a district court has wide discretion in formulating remedial decrees, such discretion is abused where a district court approves a plan that, in the hope of providing better quality education to some children, has a substantial adverse effect upon the quality of education available to others.” (internal quotations omitted)) (remanding to district court regarding question of disproportionate burden where “appellants claim[ed] that the impermissible burdens of desegregation imposed upon them [were] evidenced by the elimination of neighborhood schools . . . and the disproportionate number of black school children bussed to implement desegregation plans”).

Finally, the district must consider whether alternatives exist that would not disproportionately impact the black community but would nonetheless achieve the goals of the redistricting efforts. Part of the analysis of whether a plan is “narrowly tailored” involves determining whether viable race-neutral, or less race-conscious, alternatives are reasonably available. *See Harris*, 968 F.2d at 1097-98 (noting that no reasonable alternatives to the district’s plan existed); *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (holding that, where strict scrutiny applies, a proposed measure “is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose” and that “the burden is on the Government to prove that the proposed alternatives will not be as effective as the” proposed measure). In other words, some disproportionate effect is acceptable *if no other alternative is available that would more evenly distribute the burden and still satisfy the district’s legitimate goals.*

The Facts: The Law Center has received information that, if true, demonstrates that the redistricting plan places a disproportionate burden on black students. The Law Center has

¹ While the cases cited here generally address efforts to undue *de jure* segregation, *Seattle* and its immediate precursors established that strict scrutiny applies to all situations involving racial classifications. There is no reason to think that the principle of requiring an even distribution of burdens and benefits should apply more in cases of *de jure* segregation than in cases of a mere *de facto* lack of diversity, which Justice Kennedy, in *Seattle*, treats the same as *de facto* segregation.

received two sets of numbers – one regarding changed populations at Lower Merion High School and another representing the changed populations at Harriton High School. While these two sets of numbers should match up, the figures that the Law Center has received do not. Under either set of numbers, however, black students are disproportionately affected. We also note that these figures are those provided as part of Plan 3, and we were not able to obtain numbers relating to Plan 3-Revised.

Under the first set of numbers, black students make up 16.5% of students relocated from Lower Merion High School to Harriton. This percentage is 49% higher than the percentage of black students who would be bused under a proportional plan, in which black students would represent 11.1% of the relocated students (because black students make up 11.1% of the Lower Merion High School's students). In other words, if black students were to be relocated proportionally to their representation at the high school, only 27 out of the 243 relocated students would be black. Instead, 40 of the 243 relocated students are black. Meanwhile, white students are under-represented among the relocated students, by just over 1% -- they make up 80% of the high school's population and 79% of the relocated students. Thus, a black student is about 50% more likely to be bused than a white student. Another way to analyze these figures is to note that 24.5% of Lower Merion High School black students are being relocated, while only 16.4% of white students at the same high school are being relocated – again, black students are about 50% more likely to be relocated.

The apparent unfairness increases if we use the numbers regarding the change to Harriton High School's racial breakdown instead – 59 relocated blacks and only 168 relocated whites, out of a total change of 252. The 59 relocated black students represent 36.2% of the blacks at Lower Merion High School, and the 168 relocated white students are 14.3% of the whites at Lower Merion High School. Thus, a black student is 119% more likely to be relocated than a white student. Blacks are over-represented among relocated students by more than 2 to 1.

A neighborhood's proximity to Harriton High School does not appear to fully explain this situation. The latest plan appears to carve out identifiably black neighborhoods (where some 25% to 30% of families are black) for redistribution to Harriton High School, even as adjacent neighborhoods, and possibly even neighborhoods that are closer to Harriton High School, that are not identified as largely black areas are not included among the neighborhoods designated for redistribution to Harriton High School.

Accordingly, LMSD ought to examine the following questions, and any other relevant question, in evaluating (1) whether black students bear a heavier burden than white students and (2) whether an alternative plan is available that would more evenly distribute the burden and thereby demonstrate that the current plan is not sufficiently narrowly tailored:

1. Do relocated black students tend to reside further away from Harriton High School than relocated white students?

If so, black students will suffer longer commutes to school than white students, thus posing a larger burden on black students – and the district must address (a) the size of this

disproportionate burden and (b) whether another plan would serve the goal of diversity or the goal of equal school size while reducing this burden.

2. Do some relocated black students live further away from Harriton High School than white students who are not being relocated?

If so, it would appear that the goal of equalizing size could be met in a manner that posed less burden on black students. Alternatively, LMSD would need to explicitly set a goal of diversity and determine if another plan would serve the goal of diversity while reducing this disproportionate burden.

3. Do black students represent a disproportionately large percentage of students who will be newly bused, *i.e.*, those who were walking (by choice) and are now going to be bused because Harriton is too far away to walk?

If so, the district must address (a) the size of this disproportionate burden and (b) whether another plan would serve the goal of diversity or equal school size while reducing this burden.

III. Beyond Inconvenience – the Burden of Outsider Status

The Law: The concern over disproportionate burden, regardless of the goal, is not only over distributing the inconvenience of long travel and upset of being bused away from one's neighborhood school. Rather, there exists the additional problem of potential stigmatization of students who are bused in. Even though students may "incur no significantly greater transportation burden in attending their new schools . . . the dislocation of students through school closure involves more than transportation. In their new schools plaintiffs may risk social ostracism as well as the rancor of the residents of the community to which they travel." *Mitchell v. McCunney*, 651 F.2d 183, 187-89 (3rd Cir. 1981) (internal citation omitted) (citing *Brice v. Landis*, 314 F. Supp. 974, 978 (N.D. Cal. 1969)) (nonetheless holding that "a racially identifiable neighborhood school should not remain open simply because the community asserts strong ties to it," where the school board would otherwise have been obliged "to maintain or rehabilitate an unsafe and physically obsolescent school" even though "adequate and spacious schools are nearby" and where the African American school was going to be closed under any plan). Similarly, in holding that a plan that "places the burden of desegregation upon one racial group" risks being unconstitutional, the Fifth Circuit referred to the stigmatization rationale:

The minority children are placed in the position of what may be described as second-class pupils. White pupils, realizing that they are permitted to attend their own neighborhood schools as usual, may come to regard themselves as "natives" and to resent the [black] children bused into the white schools every school day as intruding "foreigners." It is in this respect that such a plan, when not reasonably required under the circumstances, becomes substantially discriminating in itself. This undesirable result will not be nearly so likely if the white children themselves realize that some of their number are also required to play the same role at [black] neighborhood schools.

Lee v. Macon County Bd. of Educ., 448 F.2d 746, 754 & n.12 (5th Cir. 1971) (quoting *Brice*, 314 F. Supp. at 978).

The Facts: While both black and white students will be removed from Lower Merion High School or the surrounding neighborhoods to Harriton High School, black students will represent a disproportionate percentage of these relocated students, as discussed above. As a result, should ostracism, or at least the fear of ostracism, occur, black students may experience it disproportionately as compared to white students. LMSD should consider the following questions, and any other relevant questions, in determining whether newly relocated black students are likely to experience outsider status or ostracism at Harriton High School:

1. To what extent will relocated students feel as though they are being placed in a school where they have not grown up as neighbors or classmates to the other students?
2. Will the experience of being seen as outsiders that relocated students experience be heightened for black students because of their minority status and the small number of black students currently attending Harriton High School?
3. Will relocated students be forced by their limited transportation options to return home immediately after the school day ends, thereby missing out on extracurricular and social activities that would otherwise facilitate acceptance and inclusion at their new school?

In particular, will "late bus" service be available to accommodate students' attendance at events such as evening athletic competitions at "home," team practices that are held off-site (such as crew, ice hockey, etc.), student clubs, or theater programs? Will such service be available to accommodate transportation needs from extracurricular activities, such as music and athletic programs, that begin prior to the start of the academic schedule?

4. Do proportionally fewer relocated black students than relocated white students have access to automobile transportation that would allow them to avoid relying on buses to return home from Harriton High School to participate in extracurricular and social activities?

If the answer to any of these questions is "yes," the district must consider the weight of that additional burden on black students, and whether there is an alternative plan that could reduce the burden.

IV. Conclusion

The Public Interest Law Center of Philadelphia commends the school district for apparently seeking greater diversity at Harriton High School. The law seems to create an inherent conflict by, on the one hand, accepting diversity as a legitimate goal and, on the other hand, prohibiting schools from achieving this goal in a manner that places a disproportionate burden on those students who may require relocation in order for the school to achieve greater diversity. The

challenge in this case is particularly acute: How can a school increase the percentage of black students at a smaller school without disproportionately transporting black students from the larger school that also has a greater proportion of black students?

Faced with the difficulty of the challenge of fostering diversity under these circumstances, the district is obliged by the Constitution to assign students to the two high schools in a manner that is narrowly tailored to achieve the goal. To ensure that the plan is narrowly tailored, the district must ensure either that (1) the burden does not fall disproportionately on black students, or (2) if the burden does fall disproportionately on black students, no alternatives exist that would impose less of a burden on black students and still allow the district to achieve its goals of equalizing school size and achieving greater diversity. Even if the goal were merely to equalize school size, the district may not intentionally place a greater burden on black students if a racially neutral alternative exists. Given the figures and maps provided to us, we strongly urge the school district to examine closely these questions to determine whether the current plan respects the constitutional rights of black students in the district.