New Jersey Charter School Law, Race and Equal Protection

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Introduction

This brief addresses the constitutional import of the New Jersey Charter School Program Act’s race-conscious student enrollment mandates. The New Jersey Charter School Program Act provides that charter schools must not discriminate on any “basis that would be illegal if used by a school district.” If more applicants apply than space available, the charter school must use a random selection process to determine admittees. Despite these non-discrimination and space-available admission requirements, the law allows schools to exercise preferential treatment in admissions: a charter school can restrict admission to specific grade levels or to the school’s subject areas of concentration.

Additionally, despite the non-discrimination requirement, the Charter School Program Act mandates certain discriminatory practices which are not readily subject to legal challenges. For instance, the Charter School Program Act dictates that students in the resident district of the charter school must be given enrollment preference over other prospective students. If more resident students apply than space available, these students will then be subjected to the random-selection process as well.

Another preference in the law deals with the enrollment of continuing students. The Charter School Program Act provides that, as long as a charter school has the requisite grade level at the school, it must give enrollment preference to students who attended the school in the immediate prior school year.

The Charter School Program Act also authorizes but does not require enrollment discrimination on the basis of family ties. In particular, the law states that “[a] charter school may give enrollment priority to a sibling of a student enrolled in the charter school.” Charter schools are also authorized but not required to craft and incorporate into their charter, criteria that is reasonable for evaluating prospective students. However, such criteria must not discriminate against prospective

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2 Id.
5 Id.
7 Id.
students because of their intellect, handicap status, athleticism, English language proficiency, aptitude measures, achievement measures, or other ground that would be legally invalid for a school district to use.\footnote{Id.; N.J. Admin. Code tit. 6A, 6A:11–2.10(b) (2014).}

Notwithstanding the non-discrimination and space-available admission requirements, the Charter School Program Act requires charter schools to incorporate race in their enrollment decisions in order to ensure that a cross section of the community is represented in the school’s enrollment. Specifically, the law provides:

The admission policy of the charter school shall, to the maximum extent practicable, seek the enrollment of a cross section of the community’s school age population including racial and academic factors.\footnote{N.J. Stat. Ann. § 18A:36A-8(e) (2014).}

This provision is important because of the tendency of charter schools to become one-race charter schools. There are also many charter schools in heavily-minority districts furthering segregation. This makes it important to ensure that diversity rather than segregation persists in those districts.

This brief examines the constitutionality of this and other race-conscious mandates of the New Jersey Charter School Program Act under the United States Equal Protection Clause. It also analyzes the mandates under the New Jersey Equal Protection constitutional provision.

\textbf{Race-Conscious Mandates in the New Jersey Charter School Program Act}

As noted earlier, even though the Charter School Program Act prohibits discrimination on any ground that would be legally invalid if employed by school districts, it also provides that:

The admission policy of the charter school shall, to the maximum extent practicable, seek the enrollment of a cross section of the community’s school age population including racial and academic factors.\footnote{N.J. Stat. Ann. § 18A:36A-8(e) (2014).}

The language of this mandate suggests that it is a race-conscious provision rather than a racial quota. It is evident that it is not a quota since it does not require reservation of specific number of seats for a particular race(s).\footnote{"Properly understood, a ‘quota’ is a program in which a certain fixed number or proportion of opportunities are ‘reserved exclusively for certain minority groups’” (Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 846 (2007) (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 496 (1989))).}

There are other race-conscious mandates in the state laws governing charter schools. For instance, the New Jersey Department of Education regulations provide that:

Prior to the granting of the charter, the Commissioner shall assess the student composition of a charter school and the segregative effect that the loss

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of the students may have on its district of residence.\textsuperscript{15}

Further, the regulations state that:

On an annual basis, the Commissioner shall assess the student composition of a charter school and the segregative effect that the loss of the students may have on its district of residence.\textsuperscript{16}

If the Commissioner finds that the charter school has segregative effect, the Commissioner can impose a remedy.\textsuperscript{17} According to the Superior Court of New Jersey Appellate Division, if a charter school has already been approved, a school district must wait until the school actually has a segregative effect on the district before seeking judicial or administrative remedial action for the segregative effect.\textsuperscript{18}

The New Jersey Department of Education regulations require that charter schools seeking to be regional schools include in their application a “plan to ensure the enrollment of a cross section of the school-age population of the region of residence, including racial and academic factors.”\textsuperscript{19}

The regulations empower the commissioner to deny or grant charter renewals based on the “annual assessments of student composition of the charter school.”\textsuperscript{20} The regulations also provide that:

No later than January 15 of subsequent school years [after the initial recruitment period for a charter school], a charter school shall submit to the Commissioner the number of students by grade level, gender and race/ethnicity from each district selected for enrollment from its initial recruitment period for the following school year.\textsuperscript{21}

What is evident from the above provisions is that New Jersey places a premium on the racial composition of its charter schools.

The United States Equal Protection Clause and New Jersey’s Charter School Laws’ Race-Consciousness

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides:

No State shall ... deny to any person within its jurisdiction the equal protection of the laws.\textsuperscript{22}

The Equal Protection Clause is designed to protect people from discrimination on the basis of various characteristics including race.

\textsuperscript{16} N.J. Admin. Code tit. 6A, 6A:11–2.2(c) (2014).
\textsuperscript{22} U.S. Const. amend. XIV.
The scope of the Equal Protection Clause with respect to voluntary race-conscious mandates was muddled for many years because the United States remained silent on the constitutionality of such mandates. Unlike in desegregation cases which seek to remedy legally-sanctioned segregation, race-conscious cases involve voluntary efforts to promote diversity. In 2007, in Parents Involved in Community Schools v. Seattle School District No. 1, the United Supreme Court finally ruled on the constitutionality of race-conscious measures. Even though the Parents Involved case involved race-conscious measures at public schools, the reasoning in the case applies to New Jersey charter schools since they are public schools.

New Jersey’s Charter School Program Act appears to send mixed messages to school districts. On one hand, the law declares that charter schools must not discriminate on any basis that would be illegal for school districts; on the other hand, the law requires charter schools to use race-conscious measures. In essence, charter schools have to ensure that they only use race-conscious measures in the same way that school districts can constitutionally use them. Consequently, if Parents Involved authorizes public schools to use race-conscious measures, then charter schools can.

In Parents Involved, the Supreme Court iterated that “when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.” Student admission on the basis of race is a distribution of benefits under this rule. Therefore, the New Jersey mandate to enroll a cross section in a race-conscious manner is subject to strict scrutiny under the United States Supreme Court Equal Protection Clause jurisprudence.

Since the various charter school provisions highlighted above also facially involve decisions based on race, those provisions will also attract strict scrutiny. According to the Supreme Court, “racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.” Unfortunately, the Supreme Court requires both invidious and beneficial uses of race to be reviewed under strict scrutiny. Justice Kennedy pointed out that:

25 N.J.S.A. 18A:36A-2 (“The Legislature finds and declares that the establishment of charter schools as part of this State’s program of public education”); N.J.S.A. 18A:36A-3(a) (“A charter school shall be a public school operated under a charter granted by the commissioner”).
Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.  

The strict scrutiny standard demands that the means used in a racial classification must be narrowly tailored to a compelling interest. In other words, the government must establish two things in order to satisfy strict scrutiny: (i) a compelling interest justifying the racial classification; and (ii) the means used in pursuing the compelling interest is narrowly tailored to achieve the compelling interest.

New Jersey’s compelling interest for its race-conscious charter school mandates is diversity. The state seeks to ensure that students learn in diverse educational settings. Five Supreme Court Justices in Parents Involved recognized a compelling interest in diversity at the K-12 level. Consequently, the race-conscious mandates in New Jersey’s Charter School Program Act as well in the New Jersey Department of Education’s regulations would survive the compelling interest prong of strict scrutiny.

The Supreme Court has warned against use of race-conscious plans with sweeping mandates to remedy past general discrimination in society. Therefore, neither the state nor charter schools can rely on an interest in remedying societal discrimination as justification for race-conscious measures. Instead, the state and charter schools should singularly focus on the compelling interest in diversity.

The challenge for the compelling interest lies in how it is implemented under the charter school law mandates. If the means chosen does not satisfy the narrowly-tailored requirement pursuant to Parents Involved, it will not survive Equal Protection Clause review.

While New Jersey charter schools must incorporate race-consciousness into their enrollment decisions in order to ensure a community cross-section enrollment, the language of New Jersey’s race-conscious mandate is a bit amorphous. For instance, the main race-conscious mandate uses the terms “practicable” and “seek” which qualify the obligation such as to not make it necessarily a quota which the Supreme Court abhors. The mandate also states that charter schools must consider a variety of factors “including racial and academic factors” in seeking to enroll a cross section of the community. In essence, the law uses a race-plus approach. This is important as it aligns

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33 The Justices were the four-liberal leaning Breyer, Ginsburg, Souter and Stevens as well as the unpredictable Justice Kennedy (unpredictable because he sometimes takes conservative positions when not expected while taking liberal positions when not expected).
36 Id.
with what the Supreme Court has approved. As Justice Kennedy stated:

In 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 its racial composition.37

New Jersey leaves it up to each charter school to come up with a race-conscious plan that satisfies the state’s student-enrollment mandate. Therefore, individual charter schools need to be fully aware of what they can (or cannot) do in targeting race-conscious enrollment of a cross-section of the community. The Parents Involved narrowly-tailored analysis reveals some guidance.

A majority of the Supreme Court38 in Parents Involved ruled that, in order to satisfy narrow tailoring, the means chosen must have more than a minimal effect in achieving the compelling interest.39 Consequently, charter schools must ensure that any race-conscious plan they implement can be shown in court to have more than a minimal impact on diversity. The Commissioner must also ensure that any remedy granted in pursuit of diversity in addressing segregative effect, as required in the New Jersey Department of Education regulations, will have more than a minimal impact. Expounding on the import of the “minimal impact” principle, the Supreme Court stated that:

While we do not suggest that greater use of race would be preferable, the minimal impact of the districts’ racial classifications on school enrollment casts doubt on the necessity of using racial classifications.40

According to the Supreme Court majority, if a race-conscious plan has only marginal impact, it implies that there are other means that would be more effective than the means used by the school.41

In order to satisfy narrow tailoring, charter schools must also document that they evaluated workable non-race-conscious means for attaining diversity before settling on the race-conscious means.42 Such evaluation of race-neutral means must be done seriously and in good faith.43 The districts in Parents Involved faltered on this requirement because they could present no evidence that they engaged in good faith and serious evaluation of race-neutral means before adopting race-conscious measures.44

New Jersey would be wise to include in its Charter School Program Act the requirement of documented consideration of race-neutral means before adoption of race-conscious means; and before race-conscious Commissioner decisions. This might increase the chances that the state’s

38 This majority was comprised of Justices Thomas, Scalia, Kennedy, Alito and Chief Justice Roberts.
40 Id. at 734.
41 Id.
42 Id. at 735.
43 Id.
44 Id.
race-conscious mandate would pass narrow-tailoring muster under the requirement of serious good-faith evaluation. Charter schools are not, however, required to evaluate every existing race-neutral alternative. As long as they document that they seriously considered some race-neutral alternative before concluding that race-consciousness was the effective approach to diversity, they should be fine. This requirement would apply to both the race-conscious enrollment decisions as well as the Commissioner’s remedy of the segregative effect of a charter school.

Charter schools also must be very clear in documented evidence about the need for the race-conscious plan; as must the Commissioner in ordering remedial action to address segregative effects. This is because the plurality of the Supreme Court insisted that:

If the need for the racial classifications embraced by the school districts is unclear, even on the districts’ own terms, the costs are undeniable.

Charter schools should build a logical stopping point into their race-conscious plans. This is essential as several Justices expressed concern about an open-ended race-conscious plan that would effectively cause the “definition of racial diversity” to fluctuate with demographic changes.

Justice Kennedy was the pivotal vote in the 5-4 decision so his opinion about narrow tailoring in the case is defining. According to Justice Kennedy, narrow tailoring requires “inquiry into less restrictive alternatives.” This inquiry “requires in many cases a thorough understanding of how a plan works.” Charter schools must document the details of how they use race in making race-conscious enrollment decisions about individual prospective students. Justice Kennedy considers this a “threshold mandate” of narrow tailoring. The Commissioner should similarly document for actions to remedy segregative effect of a charter school.

Justice Kennedy is highly particular about the need for detail and precision in race-conscious plans. A plan that simply references the statutory requirement that charter schools enroll a cross section of the community using race-consciousness will not suffice. Neither would a plan that merely includes sweeping language, without specific guidelines; nor would a plan that merely encourages cooperative efforts to achieve the race-conscious cross-section enrollment. A narrowly-tailored plan cannot be “broad and imprecise” in describing “how and when” racial classifications are used. The plan must be very clear about each

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46 The plurality was comprised of Chief Justice Roberts and Justices Alito, Scalia and Thomas.
48 Id. at 731.
of the following: (i) who makes the race-conscious decisions about each student;\textsuperscript{58} (ii) how the school ensures accountability and monitoring of the decisionmaking process;\textsuperscript{59} (iii) the specific situations in which enrollment decisions will be made based on race;\textsuperscript{60} (iv) the specific situations in which enrollment decisions will not be race-based;\textsuperscript{61} and (v) how the school will decide which of two students similarly situated should be enrolled based on race.\textsuperscript{62}

Justice Kennedy noted that, the more complex a race-conscious plan is, the more susceptible it is to internal inconsistencies and ambiguities.\textsuperscript{63} This is an additional reason for charter schools to ensure that their race-conscious plans are comprehensively precise. As Justice Kennedy emphasized, “[w]hen a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State.”\textsuperscript{64}

In order to be deemed narrowly tailored, the charter school must use racial categories reflective of the diversity of races in the resident district (or regional district for a regional charter school).\textsuperscript{65} Justice Kennedy opined that the use of the racial categories white versus non-white would not suffice if there is a diversity of races in the district.\textsuperscript{66} If the school chooses to use such binary categories despite the diversity of races in the district, it must clearly justify why the binary categories (as opposed to the categories reflective of the diversity of races) provide the best means of achieving the compelling interest in diversity.\textsuperscript{67} This requirement was evident in Justice Kennedy’s conclusion regarding one of the districts in the \textit{Parents Involved} case:

The district, nevertheless, has failed to make an adequate showing in at least one respect. It has failed to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as ‘white,’ it has employed the crude racial categories of ‘white’ and ‘non-white’ as the basis for its assignment decisions. … Far from being narrowly tailored to its purposes, this system threatens to defeat its own ends, and the school district has provided no convincing explanation for its design.\textsuperscript{68}

Justice Kennedy endorsed certain race-conscious plans which charter schools should consider as part of their comprehensive approach to achieving diversity. These plans include deliberative choice of location for the charter school; dedicating resources to special programs that will attract a diverse student population; targeted recruitment outreach to prospective students and faculty.\textsuperscript{69} Justice Kennedy indicated that these plans would satisfy the strict scrutiny standard of review.\textsuperscript{70}

\textsuperscript{58} Id. at 785.
\textsuperscript{59} Id.
\textsuperscript{60} Parents Involved, 551 U.S. at 785.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id. at 786.
\textsuperscript{65} Id.
\textsuperscript{66} Id. at 786-87.

\textsuperscript{67} Parents Involved, 551 U.S. at 787 (2007).
\textsuperscript{68} Id. at 786-87.
\textsuperscript{69} Id. at 789.
\textsuperscript{70} Id.
Charter schools as well as the state are also authorized to track student statistics based on race; including such data such as performances and enrollment by race.\textsuperscript{71} This supports the conclusion that the New Jersey Department of Education regulations identified above which call for tracking data by and for the Commissioner, while race-conscious, satisfy strict scrutiny.

Charter schools’ race-conscious plans must not individually type students by race.\textsuperscript{72} In this spirit, Justice Kennedy declared that:

If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.\textsuperscript{73}

If the charter school uses individual typing by race, it must only be as a very last recourse after it is clear that no other viable option exists.\textsuperscript{74}

Relative to the plurality and Justice Kennedy, the dissenting Justices were more receptive to giving schools discretion with respect to the means used to achieve the compelling interest in diversity.\textsuperscript{75} Writing for the dissent, Justice Breyer noted that:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.\textsuperscript{76}

Given that the dissent embraces a race plan akin to a quota, it is evident that the New Jersey Charter School Program Act’s non-quota race-conscious mandate would a fortiori readily pass muster under this perspective. Besides, the dissent would apply a standard less stringent than strict scrutiny to review race-conscious plans designed to include (as opposed to exclude) minorities in equal education opportunity.\textsuperscript{77} This further buttresses the conclusion that the liberal-leaning Justices would support New Jersey’s race-conscious mandate.

Even if strict scrutiny is applied, a race-conscious plan would satisfy these Justices if certain factors are satisfied: (i) The use of race is a single part of the plan that is principally dependent on non-racial factors;\textsuperscript{78} (ii) the use of race is not burdensome to a

\textsuperscript{71} Id.
\textsuperscript{72} Parents Involved, 551 U.S. at 789 (2007).
\textsuperscript{73} Id. at 788-89.
\textsuperscript{74} Id. at 790.
\textsuperscript{75} Id. at 823.
\textsuperscript{76} Id. at 804-05 (quoting Swann v. Charlotte–Mecklenburg Board of Education, 402 U.S. 1, 16 (1971)).
\textsuperscript{77} Parents Involved, 551 U.S. at 837 (2007).
\textsuperscript{78} Id. at 846.
substantial number of people;\(^{79}\) (iii) the plan reflects “the results of local experience and community consultation”;\(^{80}\) (iv) the plan is “the product of a process that has sought to enhance student choice.”\(^{81}\) New Jersey’s charter school race-conscious mandate satisfies at least two of the factors. As noted earlier, it calls for incorporation of a variety of factors in race-conscious plans; and does not call for the centrality of race. Additionally, given that a driving point for charter schools is choice, the fourth factor should easily be satisfied. As for the third factor, the state and the individual charter school would have to ensure that the race-conscious plan is developed after consulting the local community and local experiences.

In order to satisfy the second factor, the state and school must ensure that the race-conscious plan is not so drastic that it is disruptive to a significant number of people. The Justices also indicated that it would help a race-conscious plan to show that other plans that use race less explicitly would not effectuate the compelling interest in diversity.\(^{82}\)

New Jersey’s Equal Protection Constitutional Provision and the Charter School Race-Conscious Mandate

New Jersey’s Equal Protection constitutional provision states:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.\(^{83}\)

Unlike the federal constitution which relies on a three-tier standard,\(^{84}\) New Jersey analyzes its constitutional provision using a balancing test which considers the following factors: (i) the nature of the right impacted by the government action;\(^{85}\) (ii) the extent to which the government action infringes the right;\(^{86}\) and (iii) the public necessity for the action.\(^{87}\) The nature of the right implicated in New Jersey’s race-conscious mandate is the fundamental right of every student to have an opportunity to pursue the same education quality.\(^{88}\)

The argument goes that, if race is considered in enrollment decisions or in the Commissioner’s remedy of the segregative effect of a charter school, then those denied the opportunity to attend a charter school are being denied the fundamental right to quality education as others similarly situated. While it is true that this right is fundamental, the argument fails because the race-conscious plan only minimally affects the right to a quality education. After all, as Bruce D. Baker found:

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\(^{79}\) Id. at 847.

\(^{80}\) Id. at 848.

\(^{81}\) Id.

\(^{82}\) Id.

\(^{83}\) N.J. Const. art. I, ¶ 1.

\(^{84}\) The federal Equal Protection Clause is reviewed using the following three-tier standard: rational basis; intermediate scrutiny; and strict scrutiny.


\(^{86}\) Id.

\(^{87}\) Id.

\(^{88}\) Id. at 48.
Charter schools do not vary substantively on measures of student growth from other schools in the same county or city when controlling for student characteristics and resources.89

Given this, New Jersey’s race-conscious mandate should satisfy the first two factors of the balancing test.

The need for diversity of schools provides the linchpin for the third factor. Certainly, one-race charter schools, and charter schools that leave district schools highly segregated, are not in the public interest. Such schools undermine the promise of Brown v. Board of Education for integrated education.90 They are also reminiscent of education in the era of segregated schooling, albeit that that era mostly featured de jure segregation. The public necessity for desegregation in education as well as the academic benefits of integrated education should be viewed as important reasons for ensuring the enrollment of a cross section of the community that accounts for race, among other factors. Similarly, the Commissioner’s remedy of segregative impact of charter schools on district schools is justifiable on the basis of academic benefits of integrated education.

One-race charters might also violate another provision of the New Jersey Constitution which states:


No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.91

This constitutional provision makes it even more critical for the Commissioner to remedy the segregative effects of charter schools. It makes it even more imperative to enforce the Charter School Program Act requirement that charter schools enroll a student population reflective of a cross section of the community. For those denied enrollment on the basis of race, however, this constitutional provision could also form the basis for a challenge to race-conscious plans since it prohibits denial of a right on the basis of race. To help minimize their legal exposure, charter schools would be wise to ensure that they consider a composite of factors as required in the Charter School Program Act mandate; otherwise, they risk more provable racial discrimination challenges under this constitutional provision.

Conclusion

Charter schools implementing New Jersey’s charter school race-conscious mandates should survive Equal Protection challenges under the federal constitution if they comply with the Supreme Court’s dictates in the Parents Involved decision. Charter schools must ensure that they do not use race-conscious plans that principally rely on race. Instead a race-conscious

91 N.J. Const. art. I, ¶ 5.
plan that considers race as a plus factor should be used.

Furthermore, New Jersey courts need to recognize a public necessity, under the New Jersey constitution, to prevent one-race charters. Additionally, New Jersey courts as well as the Commissioner need to enforce the requirement that charter schools enroll a cross section of the community that is reflective of race. Finally, the state must encourage the establishment of more regional charter schools that span both suburban and urban districts so that the regional charters can effectively and appropriately reflect a cross section of a community that would ensure diversity in the schools.