

CLIENT NEWS BRIEF

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**SCHOOL DISTRICT'S STUDENT ASSIGNMENT PLAN
DOES NOT VIOLATE PROPOSITION 209**

In American Civil Rights Foundation v. Berkeley Unified School District (2009) 172 Cal.App.4th 207 (“ACRF”), the California Court of Appeal held that a school district’s consideration of neighborhood demographics in student assignment intended to achieve social diversity does not violate Proposition 209, the state law barring discrimination or preference in public education based on race and other characteristics. This case confirms that Proposition 209 is not an absolute bar to consideration of race in the policies aimed at achieving social diversity in schools.

In ACRF, the Berkeley Unified School District (“District”) created a student assignment plan for placement of students at its eleven elementary schools and within the distinct academic programs offered at the District’s high school. The District’s purpose for the plan was to “promote the values of socioeconomic and racial diversity.” The plan contains three “layers,” including parental choice, priority categories, and diversity categories. First, parents prioritize three elementary schools they would like their child to attend, and the District attempts to sign students based on this preference. However, the District also considers five priority categories, which give the highest priority to students currently attending the school within their attendance zone, and the lowest priority to nonresident students desiring interdistrict transfers. Within the priority categories, the District uses diversity categories to make student assignments so “that the student body at each elementary school reflects the racial and socioeconomic diversity of the total elementary school population in the attendance zone.”

The District associates each student with a diversity category from one to three. The category is derived from the average household income, average education level, and percentage of students of color in the planning area. The District has 445 planning areas ranging in size from four to eight city blocks. The necessary demographic information comes from census data and student data collected by the District. Generally, planning areas with low income, low education levels, and higher levels of students of color are ranked at a diversity category of one. Areas with high levels of income, education, and Caucasian students receive a ranking of three. Areas with mixed levels of income, education, and racial makeup fall into diversity category two.

The District assigns students a diversity category based on their planning area of residence, and every student within a given planning area receives the same diversity category regardless of the student's own personal attributes or his family's income and education levels. Thus, under the plan, if an elementary school has a higher concentration of category one students than the District as a whole, a student living in a category three planning area would receive preference in assignment over a student from a category one planning area. The plan works similarly in assignment of high school students to the four "small schools" or academic programs offered through the District's one high school.

The plaintiff, American Civil Rights Foundation, challenged the plan, alleging that it violated the California Constitution, article 1, section 31, subdivision (a), which constitutes Proposition 209, passed by the voters in 1996. Proposition 209 prohibits discrimination or the granting of preference to any individual based on race, sex, color, national ethnicity, or national origin in the operation of public education. The trial court agreed with the District and dismissed the plaintiff's complaint, after which the plaintiff appealed.

The Court of Appeal agreed that the District's assignment plan does not violate Proposition 209. Initially, the court noted a school district's broad authority to adopt policies for the communities they serve under Education Code section 35160. The primary limit of this authority is that a school district's policies cannot be in conflict with the law. The court reasoned that the District's assignment plan does not violate Proposition 209 because it "does not show partiality, prejudice, or preference to any individual student on the basis of that student's race." Rather, "[a]ll students in a given residential area are treated equally—regardless of the student's individual race or other personal characteristic." Contrary to plaintiff's argument, Proposition 209 does not bar any consideration of race whatsoever, but rather the granting of preference or discrimination solely on the basis of race. Although it is conceivable that demographic data from a given planning area where there exists high levels of neighborhood racial segregation could result in demographic data acting as a proxy for race, that hypothetical situation was insufficient to defeat the assignment plan where the plaintiff challenged the plan on its face (in a constitutional "facial challenge" a plaintiff must establish there is no set of circumstances that the assignment plan could be applied without violation of Proposition 209). Finally, the court also distinguished Crawford v. Huntington Beach Union High School District (2002) 98 Cal.App.4th 1275, because, in that case, the subject school transfer policy created "different transfer criteria for students solely on the basis of their race."

This case is significant as the first published California appellate decision since the passage of Proposition 209 allowing a school district to use race as a consideration in developing policies that aim to achieve student socioeconomic and racial diversity within its schools. Nevertheless, this case is fact-specific and nuanced in its development and, thus, there exist legal risks in developing similar assignment plans. School districts desiring to develop a lawful assignment plan with the goal of student diversity should consult legal counsel.

If you have any questions about this case, please contact one of our seven offices located statewide.

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

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