Louisville Magazine MARCH 2009 http://loumag.epubxpress.com

ORDER FROM THE COURT

The last two years have yielded several major court decisions for Louisville, but none more important than the condemnation of Jefferson County Public Schools' student-assignment plan by the U.S. Supreme Court.

BY JENNI LAIDMAN | Photos by John Nation

Frank Mellen climbed into the taxicab in Washington, D.C., and realized he was hearing a familiar voice coming from the radio.

His own.

There was never any question about the importance of what he did that morning. But it took on an air of surreal theater as he settled into the backseat of the cab crawling through the Washington traffic and listened to himself answer questions from justices of the United States Supreme Court.

Kentucky had its share of headline-grabbing lawsuits in 2007-08: One major civil case, prosecuted in part by Louisville attorney William McMurry, crippled the Kentucky-based Imperial Klans of America when a jury assessed $2.5 million in damages against its leader for creating an atmosphere of hate and violence that led to the 2006 beating of a young man at a county fair. Many people also followed the sad story of a teenager seeking recompense for the accident that severed her feet on the Superman Tower of Power at Kentucky Kingdom in 2007. The parties — including plaintiff's attorney Larry

Louisville solo-practice attorney Teddy Gordon (facing page) dueled Wyatt, Tarrant & Combs lawyers Frank Mellen (right, above) and Byron Leet on the deseg case for years prior to their final meeting before the U.S. Supreme Court.

Franklin — reached a confidential out-of-court settlement last fall. And in the most lurid courtroom drama, argued for the plaintiff by Oldfather Law Firm attorneys Ann Oldfather and Kirsten Daniel, a jury ordered McDonald's to pay a young woman $6.1 million (and later, another $2.4 million in attorney fees) after she endured a bizarre strip search by the assistant manager of a Mount Washington McDonald's and a sexual assault by the manager's boyfriend. The couple acted on the orders of a man on the phone pretending to be a police officer. The jury held McDonald's responsible for the incident because it failed to warn employees of a series of such hoaxes that had been plaguing its restaurants for 10 years.

Despite the wide audience each of these three cases attracted, none drew more attention, or had greater impact, than the one Frank Mellen and Wyatt, Tarrant & Combs colleague Byron Leet pursued for the defense in Washington on Dec. 4, 2006 — the debate over which school Louisvillian Crystal M. Meredith's son could attend. The question: Could her son, Joshua McDonald, who is white — or any child of any race — be put in a particular school, or kept out of one, because of the color of his skin? Would courts now forbid a practice developed to assure equal education to all children?

That cold and clear-blue morning, Mellen and Leet had their final showdown with another Louisville lawyer, Teddy Gordon — who this time was assisted by counsel from the Bush administration's solicitor general. Gordon had been picking away at the Jefferson County Public School's race-conscious student-assignment plan for nearly 10 years.

As they made their way toward the court that morning, the sun illuminated the marble court building and the crowds of protestors in front of it. Some had been there all night.

A group chanted, "We won't go to the back of the bus. Integration is a must."

But the justices weren't inclined to listen to poetry.

Seven months later, on June 28, 2007, the Supreme Court's decision changed the way schools throughout the nation can consider race. The opinion of Justice Anthony M. Kennedy, who cast the determining vote for a bitterly divided 5-4 court, redefined the issue. He sided with the conservative justices when he wrote that race cannot be *the* deciding factor in student assignment. But unlike those men — Chief Justice John Roberts, and Justices Samuel Alito, Anton Scalia, and Clarence Thomas — he did not endorse a color-blind future for schools. Instead, Kennedy wrote, schools should continue "their important work of bringing together students of different racial, ethnic and economic backgrounds." Such diversity could be achieved, he wrote, by such things as the strategic locations for new schools and the creation of school boundaries with an eye to neighborhood demographics, including race, income and education.

For school districts such as Louisville's, which once bused thousands of kids across town under a court order to achieve desegregation, the decision means a break with the past. Leet echoes a comment made by Justice Ruth Bader Ginsberg — who voted with the minority to uphold race-

conscious student assignment: "How something can go from constitutionally required on Tuesday, then starting Wednesday it's not even constitutionally *permitted* — in fact, it's prohibited — to me, that is an ironic result."

Teddy Gordon practices law in a modest two-story building on West Market Street. His second-floor loft office allows him to holler to visitors in the first-floor reception area and invite them up if his secretary is busy elsewhere. A mob of teddy bears crowd a long office shelf, and Gordon pulls out two commemorating his Supreme Court appearance: One bear wears a suit, the other a robe that keeps creeping immodestly to its waist. He points out other Supreme Court mementos, including a rendering of someone gesturing with both arms before nine dour and robed figures. The justices are recognizable in the sketch, but not even Gordon's wife Suzanne thinks the man waving his arms looks much like her husband.

"How something can go from constitutionally required on Tuesday, then starting Wednesday it's not even constitutionally *permitted* — in fact, it's prohibited — to me, that is an ironic result."
— Byron Leet

"You see, I almost pointed my finger at them," Gordon says as he looks at the drawing. He'd been warned against pointing at the justices in one of the two moot courts he'd participated in. Moot courts are practice sessions where lawyers with Supreme Court experience act as justices. His opponent before the court, Mellen, participated in seven moot courts.

Gordon's press person, Honi Goldman, likes to portray the Supreme Court battle as a David v. Goliath confrontation. It's not a bad narrative. Even the law offices continue the theme. Visitors to Wyatt, Tarrant & Combs ride an elevator to the 28th floor of the PNC Plaza. There, a friendly receptionist announces one's arrival, makes chitchat and offers coffee. Legal discussions take place in big conference rooms with shiny tables and all the personal ambience of a tasteful hotel room. Gordon, Goldman relates, had to buy a new suit to argue in Washington. Mellen says he doesn't remember which suit he wore. Gordon practices alone. Wyatt, with offices in eight cities, employs 101 lawyers at just its Louisville office. Leet went to law school at Vanderbilt. Mellen went to Harvard. Gordon went to the University of Louisville law school at night.

On the Monday of the Supreme Court argument, a story in the *Courier-Journal* portrayed Gordon as something of a bumbler. In the article, his brief to the Supreme Court was called "extraordinarily weak" by a former court clerk, like "something you'd expect from a prisoner representing himself." Months later, even U.S. District Court Judge John Heyburn, who decided how much the school district would pay Gordon after his success (about $210,000 including expenses), was left-handed in his compliments. Acknowledging that Gordon had been "criticized and even vilified," and that he had "pursued an epic case against considerable odds and vehement opposition to an astonishing success," he also wrote that Gordon's victory was due more to "conviction than skill."

Still, he *did* win.

The gradual dismantling of Jefferson County's race-sensitive plan began in 1998, when a group of African-American parents challenged the district on its admissions policies at Central High School, the traditionally black alma mater of Muhammad Ali, which had been converted into the city's law and medicine magnet school. The parents approached Gordon to represent them.

"You're crazy," he says he told them. "You've got the wrong guy."

The Louisville native believed in desegregation. In 1975, when U.S. District Judge James Gordon (no relation) ordered the raced-based merger of inner-city and suburban schools, and instituted cross-town busing to ensure integration, the attorney put his two elementary-school-age children on a bus without objection. He still believes busing was the right thing for Louisville.

"There were still vestiges of segregation. No question about it," Teddy Gordon says. "We had not fully complied with Brown v. the Topeka Board of Education." But he says the student-achievement data that Central parents showed him demonstrated that after 20-odd years, race-based student assigning had become detrimental to black students.

"This was contra to my overall philosophy of believing (integration) would improve educational outcome. I was shocked," he says. He was also converted.

The Central case carved only a small slice from the school's diversity plan: the use of the district's 15-50 rule for magnet schools. That rule stated that no school should have a black enrollment smaller than 15 percent or larger than 50 percent — a broad target based on the district's 35 percent African-American population. The district barred Gordon's clients from Central because enrollment there was already 50 percent African-American. Heyburn ruled in favor of Gordon's clients, determining that the school board couldn't make race a barrier to one-of-a-kind schools without violating the equal protection clause of the Constitution's 14th Amendment. Following that ruling, the district did away with race-based considerations at all four magnet schools: Central, Brown School, Brandeis Elementary School and DuPont Manual High School.

With the zeal of a convert, Gordon became determined to dismantle the district's entire race-based program, which relied heavily on student choice before race was invoked. His next case targeted "traditional" schools — schools favoring a structured environment, dress codes and discipline. Nestled within this lawsuit was the seed that would grow into Gordon's case before the Supreme Court.

Since the U.S. Supreme Court ordered the nation's schools to integrate in *Brown v. Board of Education of Topeka* more than 50 years ago, lower courts have generally interpreted the Constitution's 14th Amendment equal-protection clause the way the majority did in Brown: as a prescription for desegregation.

While violent protest and the Deep South's truculent and bellicose governors couldn't dismantle the notion under direct assault, desegregation proved malleable under more sophisticated probing. In fact, by the time Frank Mellen stood before the Supreme Court, most commentators viewed the school district's case as the final domino to fall in the battle against race-conscious enrollment procedures. Probably the first domino fell when Allan Bakke, who is white, charged the University of California, Davis medical school with reverse discrimination. UC Davis reserved 16 spots in its annual medical school enrollment limit of 100 for minority applicants. In 1978 the U.S. Supreme Court found for Bakke, ordering the medical school to admit him. The late Justice Lewis F. Powell cast the deciding vote, arguing that racial quotas violate the equal protection clause. But he made room for diversity by joining in the opposition's contention that race could be considered in admissions.

On June 23, 2003, the Supreme Court seemed to outline the tenants of an acceptable diversity program through two decisions issued that day, both involving students seeking admission to the University of Michigan. In one case, Michigan resident Barbara Grutter lost her reverse-discrim-

ination case against the law school. Like Bakke, Grutter maintained that the school's use of race in its selection process violated the equal protection clause. The case differed from Bakke in at least one significant way: The law school used no quotas. Instead, the university argued, it considered race along with other factors in order to achieve a diverse student population.

Justice Sandra Day O'Connor wrote the majority opinion in this 5-4 vote. The university could pursue diversity, O'Connor's opinion said, so long as its consideration of race remained "narrowly tailored" — that is, invoked sparingly and alongside other diversity-minded considerations.

The other case involved students seeking admission to Michigan's College of Literature, Science and Arts. The college used a point system that virtually guaranteed admission to any qualified minority applicant. Such a system violated the equal protection clause, the court said in a ruling written by the late Chief Justice William Rehnquist, because it lacked the "narrowly tailored" approach that protected the law school from similar censure. At the same time, the 6-3 vote upheld the university's right to pursue diversity as a legitimate goal.

Gordon filed his 2002 lawsuit against traditional-school enrollment policies on behalf of David McFarland and sons Stephen and Daniel, later joined by a group of other plaintiffs, including Crystal Meredith and her son Joshua. When attorneys argued the case in federal district court, in December 2003, nobody paid much attention to Meredith, Wyatt's Mellen recalls. Unlike the other plaintiffs, her case didn't involve enrollment in a traditional school.

Gordon argued that traditional schools, like non-traditional magnet schools, were unique and therefore could not be included in any race-conscious student assignment plan. Judge Heyburn's decision, issued in June 2004, touched on three things: First, he gave his seal of approval to the school district's regular student-assignment plan, saying it met the standard of narrow tailoring. Second, he said that traditional schools were not unique. Third, he ruled that even though it would be allowable for traditional schools to follow the same assignment plan as other non-magnet schools, the district must stop following a practice distinct to traditional-school assigning, which specifically noted the race (and gender) of every student applicant. That particular plan, he said, was not narrowly tailored, separating students into "racial categories in a manner that appears completely unnecessary to accomplish its objectives."

Gordon viewed Heyburn's decision as a victory for his traditional-school clients. But he appealed the judge's approval of the district's overall student-assignment plan. That left Meredith as the only plaintiff who could go forward with the appeal, Gordon says.

The Meredith case was unusual. Kindergarteners were supposed to be exempt from race guidelines. Yet when Joshua's mother applied to have her kindergarten-age son enrolled in a school close to home, she received a letter telling her that Joshua had to attend Whitney Young Elementary in Louisville's West End so that Whitney Young could stay within the 15-50 guidelines.

"That letter, in fact, was a mistake," Mellen says now. "The racial guidelines don't apply to kindergarten students anyway. Why she was sent the letter we don't know."

Gordon doesn't see a mistake here. He sees calculation: "They wanted another white kid at Whitney Young. They didn't care. They could have wiped it all out. They could have said, 'We concede, let's send him to Bloom.' They had that opportunity. … They ignored it."

The letter would come back to haunt the school system when it mattered most.

On June 9, 2005, the Sixth District Court of Appeals in Cincinnati heard the case. While the attorneys awaited the appeals court's decision, Justice O'Connor announced her retirement. With George W. Bush in the White House, it was a slam-dunk that her replacement would be far more conservative.

"That was not a particularly good day," Leet recalls.

Gordon, who would see his appeal rejected by the Sixth Circuit 21 days later, was elated.

"I have this cliché that I say: Never underestimate the power of divine intervention," he says. "I came home that night and I told Suzanne, 'Something remarkable has just happened.'"

Now all arguments would lead to Justice Anthony Kennedy, the swing vote in the new, more conservative nine. "It became important to us to know what Justice Kennedy had written and said about race-conscious plans," Leet says. "We spent a lot of time and energy looking for the kinds of things that might be of interest to him."

On Dec. 4, 2006, Mellen stood in front of the justices, just a little surprised by how close they were to him. He managed to speak three entire sentences before he was interrupted. He was lucky; most lawyers don't get that far. But as Leet watched the justices volley and argue, it began to look as though Kennedy would not be swayed. "You cannot read too much into the comments of the justices. Frankly, that's a perilous business," Leet says. But he couldn't stop himself. Kennedy didn't seem satisfied with the plans before him.

> **The school district had shown it employed racial "classifications only in terms so broad and imprecise they cannot withstand strict scrutiny," wrote Justice Kennedy. Thus was the county's longstanding student-assignment plan struck down.**

Leet was right. In the ruling seven months later, Kennedy spent some time discussing the fact that a kindergartener, supposedly not subject to race-sensitive assignment, ended up subject to a race-sensitive assignment. The justice used it to show how the Jefferson County Public Schools failed to meet the standard of "narrow tailoring."

The school district, he said, "bears the burden of justifying its use of individual racial classifications." That means it must "establish, in detail," how it makes decisions. Then Kennedy brought up Joshua's kindergarten assignment: "The discrepancy identified is not some simple and straightforward error. …To the contrary." Instead, he said, the school district had shown it employed racial "classifications only in terms so broad and imprecise they cannot withstand strict scrutiny."

Thus was the county's longstanding student-assignment plan struck down.

Since then, the school district created an elementary-school plan tailored to Kennedy's ideas about including income and education as well as race in assignment considerations. The 15-50 rule stands; it just isn't any longer tied to race only. The plan separates the city into six clusters with contiguous boundaries, rather than the non-adjoining boundaries the old cluster plan had, and allows for "grandfathering" students who might otherwise be denied re-enrollment to the schools they're in now.

The courts may appreciate the distinction, but Gordon doesn't.

"So now we're going to once again use a quota," he says. "If we didn't stigmatize a kid enough by color, we're going to stigmatize him by being uneducated or impoverished too." He declares he'll keep fighting, but he may not have a receptive Supreme Court next time. With a Democratic president in office, court appointments are likely to take it further from Gordon's position — the power of divine intervention notwithstanding. ■