



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 81

Number 4 *The Resegregation of Southern Schools? A
Crucial Moment in the History (and the Future) of
Public Schooling in America*

Article 10

5-1-2003

Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity

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Recommended Citation

William L. Taylor, *Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity*, 81 N.C. L. REV. 1751 (2003).
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TITLE I AS AN INSTRUMENT FOR ACHIEVING DESEGREGATION AND EQUAL EDUCATIONAL OPPORTUNITY

WILLIAM L. TAYLOR

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INTRODUCTION

Recently, in reflecting on the more than four decades I have spent working on issues of school desegregation, I tried to identify the factors that have made desegregation remedies—when carried out well—such an effective means for advancing educational opportunities for children of color and poor children. I engage in this analysis not to conduct a retrospective, but because I believe that a new federal law, Title I of the No Child Left Behind Act, provides an opportunity for continuing desegregation that parents and others who care about equal opportunity should seize.

There can be no doubt that the remedies employed to implement *Brown v. Board of Education*¹ have often had a positive impact. Numerous case studies, for example, have documented the gains associated with desegregation.² For a twenty-year period during the 1970s and 1980s, African-American children in public schools made steady progress, cutting the achievement gap between themselves and whites roughly in half on the widely respected National Assessment

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1. 347 U.S. 483 (1953).

2. For a meta-analysis of case studies, see generally Robert L. Crain & Rita E. Mahard, *Minority Achievement: Policy Implications of Research*, in *EFFECTIVE SCHOOL DESEGREGATION* 55 (Willis B. Hawley ed., 1981).

of Educational Progress.³ The progress was greatest for black children in the Southeast during the 1970s after the Supreme Court decreed that broad remedies were to be implemented promptly.⁴

The gains that have been achieved through desegregation also are reflected by measures other than standardized achievement tests. In St. Louis, where my colleagues and I negotiated the largest voluntary interdistrict desegregation plan in the nation in 1983, more than 12,000 African-American children who live in the city attend public schools in sixteen suburban districts on a voluntary basis. These children have made striking progress in the desegregated suburban schools.⁵ Although a high proportion of the transferring children come from poor families, the transferring children graduate high school and enroll in college at more than twice the rate of their city peers.⁶

Why the difference in outcomes in racially and socioeconomically segregated schools and those that are desegregated? The shibboleth of anti-desegregation groups that it is not necessary for black children to sit next to white children in order to learn is an irrelevancy. The middle-class schools of the suburbs generally have several attributes that contribute to their effectiveness. One is that middle-class schools are set in communities where most everyone—parents, teachers, and students themselves—have high expectations for success. The question, therefore, for most students in these schools is not whether they will have a chance to go to college but which college they will attend. With high expectations come high standards. The norms set for student achievement are high, and shoddy work ordinarily will not do. The final distinguishing

3. See Marshall S. Smith & Jennifer O'Day, *Educational Equality: 1966 and Now*, in SPHERES OF JUSTICE IN EDUCATION: THE 1990 AMERICAN EDUCATION FINANCE ASSOCIATION YEARBOOK 53, 74 (Deborah A. Verstegen & James Gordon Ward eds., 1991) (discussing the progress of African-American children during the 1970s); William L. Taylor, *The Continuing Struggle for Equal Educational Opportunity*, 71 N.C. L. REV. 1693, 1697 (1993) (discussing Smith's and O'Day's study and the influence of desegregation on academic performance).

4. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1970) (holding that extensive busing may be a needed tool to redress state imposed segregation); *Green v. County Sch. Bd.*, 391 U.S. 430, 438-42 (1967) (holding that freedom-of-choice plans are not acceptable remedies unless they are effective in eliminating state imposed segregation).

5. AMY STUART WELLS & ROBERT L. CRAIN, STEPPING OVER THE COLOR LINE: AFRICAN-AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS 182 (1997); *The Role of Social Science in School Desegregation Efforts: The St. Louis Example*, 66 J. NEGRO EDUC. 195, 241-51 (William L. Taylor et al. eds., 1997) [hereinafter *The Role of Social Science*].

6. WELLS & CRAIN, *supra* note 5, at 198-99.

characteristics are ample resources, beginning with highly qualified teachers and accountability. If a principal or teacher is not measuring up, parents and community leaders will demand her replacement, and they have the clout to see that their demands are met. Indeed, if a school system is not responsive, many parents have the means to go elsewhere.

Another aspect of the St. Louis data suggested the importance of these factors—high expectations and standards, good teaching and resources, and accountability. Although the suburban districts participating in the program are similar in terms of the socioeconomic profiles of the African-American transfer students enrolled, the college-going rates of the transfer students are very different.⁷ In the wealthiest districts, where high proportions of the resident students go to college, the college-going rates of transfer students tend to be high as well.⁸ In less affluent districts, the rate declines.⁹ Clearly, the environment provided by the school system has an important impact on student success.

In contrast to the attributes of these suburban schools, racially and socioeconomically isolated schools typically lack the assets that contribute to the effectiveness of middle-class schools. Many teachers simply assume that most of their children cannot learn at high levels. Low expectations lead to low standards. Given the way state school finance systems work, schools with poor children often lack critical resources. Well qualified teachers either do not come or do not stay. And while many parents want the best education for their children, the parents lack the clout to hold the system accountable for poor teaching or overcrowded classrooms.

In many ways, the drive for school reform that became a national movement with the campaign to overhaul Title I in the 1990s seeks to replicate in high poverty schools the conditions that have enabled poor children and children of color to succeed in desegregated middle-class schools. Title I of the Elementary and Secondary Education Act (“ESEA”) was adopted in 1965 to aid disadvantaged students. The law produced gains early, but later evolved into an effort to bring economically disadvantaged children only up to basic levels at a time when the economy was demanding an increase in higher order skills.¹⁰ When reform came in 1994 with the Improving

7. *The Role of Social Science*, *supra* note 5, at 241–45.

8. *Id.*

9. *Id.*

10. COMM. ON CHAPTER 1, MAKING SCHOOLS WORK FOR CHILDREN IN POVERTY 3–7 (1992).

America's Schools Act, Congress made the central finding that all children could learn and that virtually all (except those with severe cognitive impairments) could master challenging material.¹¹ From this finding flowed a requirement for high standards for all students (to replace the dual standards then in use) and for accountability on the part of school officials and school systems for student progress.¹²

This parallel effort to improve education for poor children and children of color is taking place at a time when courts are closing out long-standing desegregation orders and some highly politicized courts have thwarted the efforts of educators and communities to continue voluntarily the policies of desegregation and diversity courts once called upon them to adopt.¹³

11. Improving America's Schools Act of 1994, Pub. L. No. 103-382, §§ 101, 1001(c)(1), 108 Stat. 3518, 3521 (codified as amended at 20 U.S.C.A. § 6301 (West Supp. 2003)).

12. See S. REP. NO. 103-292, at 3 (1994) (discussing the need for states to be accountable for student performance).

13. The history of the past decade in the federal courts is testimony to the seemingly limitless capacity of the judiciary and the nation to delude itself on matters of race. Granted, the *Brown* decision was more about ridding the nation of the legalized caste system that oppressed black people than it was about educational content. See generally Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) (discussing the "broad principle of practical equality" in the context of school desegregation cases); William L. Taylor, *Racial Equality: The World According to Rehnquist*, in THE REHNQUIST COURT 39, 52 (Herman Schwartz ed., 2002) (comparing Chief Justice Warren's approach to desegregation with Chief Justice Rehnquist's approach). Granted, also, judges were not comfortable with long-term supervision of school systems. Nevertheless, the Court recognized the damaging effects of segregation and promised to employ equitable remedies until the dual system and its vestiges were eliminated to the extent possible. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1970) (holding that the Court's objective is still "to eliminate from the public schools all vestiges of state-imposed segregation"). And, in its unanimous 1977 decision in *Milliken v. Bradley*, 433 U.S. 267 (1976) (*Milliken II*), the Court exhibited a practical understanding of the disparities caused by segregation and the need for long-term remedies. *Id.* at 287-88 (upholding state liability for school improvement remedies by the Detroit school system that the lower courts deemed necessary to redress the effects of unconstitutional segregation). Nevertheless, in the last of its unitary decisions, *Missouri v. Jenkins*, 515 U.S. 70, 95-103 (1995), the Rehnquist majority brushed off evidence that educational disparities attributable to segregation persisted and disregarded Justice Marshall's earlier dissent in *Board of Education v. Dowell*, 498 U.S. 237, 252 (1991), that remedies should continue as long as conditions "likely to inflict . . . stigmatic injury" persist. Now a number of lower federal courts have gone further to outlaw voluntary desegregation measures that school authorities have undertaken to further goals of education and socialization. See, e.g., John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1721 (2000) (noting how the United States Court of Appeals for the Fourth Circuit has struck down some voluntary desegregation measures). In the minds of these judges, the fictional notion that we have become a color-blind society outweighs even their once-cherished attachment to local control.

Accordingly, while the quest for desegregation must continue—through voluntary programs crafted to resist judicial invalidation, through state court action, and through community and national advocacy—other means must be pursued simultaneously to create true educational opportunity for children who have been denied it. In my judgment, wholehearted pursuit of school reform and the resources to make it effective is the best bet.

I will not attempt in this Essay any detailed exploration of the methodology of state or federal education reform or the pros and cons of the increased use of testing to enforce accountability.¹⁴ Rather, the focus here will be on two elements of the Title I reform legislation that conform closely to the civil rights struggle in education of the last half of the twentieth century and that present new opportunities that might otherwise be foreclosed.

The first element empowers parents. This power is derived from the provisions of the No Child Left Behind Act (“NCLB”)¹⁵ that require school authorities to permit parents whose children attend failing schools to transfer to other better performing public schools. Properly implemented, this right to transfer can serve as a means for reducing racial and socioeconomic isolation and achieving for some children the goals of desegregation.

The second element seeks to place greater responsibility on states to help local education agencies and schools carry out the duties, for example, of providing high quality teachers, imposed by the law. In many ways, the provision mirrors the “adequacy” approach state litigation challenging school finance systems has taken in recent years. To the extent these provisions of Title I can be made effective, they will provide a remedy in states where litigation has not been successful.

I. TITLE I: TRANSFERS AND DESEGREGATION

The reforms to Title I adopted in 1994 called upon schools and school systems to produce progress in meeting high level standards

14. For a discussion of federal education reform, see OFFICE OF THE UNDER SEC’Y, U.S. DEP’T OF EDUC., *HIGH STANDARDS FOR ALL STUDENTS: A REPORT FROM THE NATIONAL ASSESSMENT OF TITLE I ON PROGRESS AND CHALLENGES SINCE THE 1994 REAUTHORIZATION* (2001) (Sup. Doc. No. ED1.310/2:457280). For a discussion of state education reform, see DAVID K. COHEN & HEATHER C. HILL, *LEARNING POLICY: WHEN STATE EDUCATION REFORM WORKS* (2001). For a discussion of the use of testing for accountability, see William L. Taylor, *Standards, Tests and Civil Rights*, EDUC. WK., Nov. 15, 2000, at 56.

15. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1116(b)(1)(E), 115 Stat. 1425, 1479 (2002) (to be codified at 20 U.S.C. § 6316).

for children set by the states.¹⁶ The Act required states to develop measures for determining student gains and for assessing whether students had become proficient in two key areas: language arts (including reading) and mathematics.¹⁷ When schools failed to produce gains, they were identified for intensive technical assistance provided by the state.¹⁸ If such assistance did not work, the statute called for the states to take corrective action.¹⁹ The corrective action specified in the Act was essentially a menu from which the state could select measures it deemed appropriate, such as restaffing the school by requiring teachers to apply for reemployment, changing the school governance, or actually closing the school.²⁰ One of the optional measures allowed parents in these failing schools to have their children transferred to better performing schools.²¹

The NCLB, enacted in 2002, strengthened the 1994 law in several important ways.²² The NCLB set a goal of twelve years for all students to reach proficiency in language arts and mathematics.²³ During that period, state criteria will be applied to determine whether schools and school districts are making “adequate yearly progress” so that no school falls too far behind in meeting the twelve-year goal.²⁴ In addition, because the law seeks to close historic gaps, adequate yearly progress will not be deemed to have been made unless adequate gains are recorded for the major racial and ethnic groups,

16. Improving America's Schools Act of 1994, §§ 1111, 1112, 1114, 1115, 108 Stat. at 3523–32, 3534–42 (codified as amended at 20 U.S.C.A. §§ 6311, 6312, 6314, 6315 (West Supp. 2003)).

17. *Id.* § 1111, 108 Stat. at 3523–29 (codified as amended at 20 U.S.C.A. § 6311 (West Supp. 2003)).

18. *Id.* § 1116(c), 108 Stat. at 3543–45 (codified as amended at 20 U.S.C.A. § 6316 (West Supp. 2003)). The Improving America's Schools Act required states to provide a statewide system of support for schools in order that they might achieve their educational goals; at a minimum, this included specialized school support teams. *Id.* § 1116(c)(4), 108 Stat. at 3544.

19. *Id.* § 1116(c)(5), (6), 108 Stat. at 3544–45.

20. *Id.* § 1116(c)(5), 108 Stat. at 3544–45.

21. *Id.* § 1116(c)(5)(B)(i)(VII), 108 Stat. at 3545.

22. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1116(b)(1)(E), 115 Stat. 1425, 1479 (2002) (to be codified at 20 U.S.C. § 6316). For an additional exploration of the opportunities presented by the NCLB, see generally James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703 (2003) (arguing that the NCLB has the potential to profoundly transform American education).

23. No Child Left Behind Act of 2001, § 1111(b)(2)(F), 115 Stat. at 1447–48 (to be codified at 20 U.S.C. § 6311).

24. *Id.* § 1111(a)(2)(I), (b)(2)(C)(v), 115 Stat. at 1446–49.

for economically disadvantaged children, for children with limited English proficiency, and for children with disabilities.²⁵

Most important, for purposes of this Essay, the transfer from failing schools was changed from a matter of discretion for the state to a matter of right for parents.²⁶ The new right took effect on the first day of the 2002–2003 school year and applied to schools that had been identified for improvement—i.e., that had failed to make adequate progress for two consecutive years—and that had not improved enough to escape that status.²⁷ Under the Act, parents with children in these schools have an unqualified right to transfer their children to another school in the district that is not in need of improvement.²⁸ The district is responsible for furnishing transportation and may use a portion of its Title I grant for transportation.²⁹

Where a district does not have enough acceptable schools, parents have a qualified right to transfer their children to other acceptable schools.³⁰ The district is called upon to establish “to the extent practicable . . . a cooperative agreement with other local educational agencies in the area for a transfer.”³¹ In addition, if the whole district has been identified for corrective action for failing to make adequate progress, the state has the option of authorizing students to transfer to a higher performing public school operated by another educational agency.³² In both of these cases, states would provide transportation, but in one case, concurrence of potential transferee districts is necessary, and in the other, the state must agree.³³

How likely is it that this transfer program will promote desegregation? No definitive answer to that question will be possible until an analysis of the racial composition of the some 8,600 schools that have been designated as transferor schools for this school year is

25. The Act has other new requirements, such as the establishment of science standards, which students must meet. *Id.* § 1111(b)(3)(C)(v)(II), 115 Stat. at 1450. The new requirements for adequate yearly progress are discussed in Robert L. Linn et al., *Accountability Systems, Implications of the No Child Left Behind Act of 2001*, EDUC. RESEARCHER, Aug./Sept. 2002, at 3.

26. No Child Left Behind Act of 2001, § 1116(b)(1)(E), 115 Stat. at 1479 (to be codified at 20 U.S.C. § 6316).

27. *Id.*

28. *Id.*

29. *Id.* § 1116(b)(9), (10).

30. *Id.* § 1116(b)(11).

31. *Id.*

32. *Id.* § 1116(c)(10)(C)(vii), 115 Stat. at 1490.

33. *Id.*

done.³⁴ But many of the potential transferor schools are schools with highly concentrated poverty in central cities.³⁵ The poor children in these schools are overwhelmingly African-American and Latino.³⁶ It is probable, therefore, that large numbers of children of color will have the opportunity to transfer, and that, in many cases, their options will include the ability to transfer to less-segregated (as well as higher performing) schools.³⁷ It is already clear, however, that a number of factors may inhibit participation in the transfer program and thus limit the program's ultimate utility as a vehicle for desegregation and educational improvement.

One problem that affects the reform program as a whole is the temptation for states to fudge their standards or assessments in order to minimize the number of failing schools and avoid embarrassment. For example, Mississippi's education department, having previously claimed that it was being coerced by the federal government to identify transfer schools, announced that only eleven of the previously identified 122 schools continued to need improvement.³⁸

A second barrier to the reform movement is the apparent reluctance of many local superintendents to implement the transfer provision. Such reluctance has been manifested in a variety of ways. In some places, like Chicago, education officials have sought to limit the numbers of transferee schools by adopting odd interpretations of overcrowding.³⁹ In other school systems, like Montgomery County,

34. See Erik W. Robelen, *Few Choosing Public School Choice*, EDUC. WK., Aug. 7, 2002, at 1, 38.

35. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 115 (1993); Gary Orfield & Sean Reardon, *Working Papers: Race Poverty and Inequality*, in *NEW OPPORTUNITIES: CIVIL RIGHTS AT A CROSSROADS* 17, 17-30 (Susan M. Liss & William L. Taylor eds., 1992).

36. See MASSEY & DENTON, *supra* note 35, at 115; Orfield & Reardon, *supra* note 35, at 17-30.

37. The NCLB and the Department of Education's regulations do not treat the question of desegregation directly. The regulations call for desegregation plans to be taken into account in implementing transfer programs and for efforts by the LEA to seek modification of any desegregation plan that prohibits transfers. Public School Choice, 34 C.F.R. § 200.44(c) (2002).

38. Press Release, Mississippi Dep't of Educ. (Aug. 6, 2002), at <http://www.mde.k12.ms.us/extrel/news/02NCLB.htm> (on file with the North Carolina Law Review); Special Memorandum from the Missouri Department of Education (July 2, 2002), at <http://www.mde.k12.ms.us/memo.html> (on file with the North Carolina Law Review); see also Michael A. Fletcher, *Failing Schools Find Hole in Law*, WASH. POST, Aug. 29, 2002, at A1 (noting that Arkansas identified no failing schools despite the fact that ninety percent of its students scored below proficient in the 2001 state eighth grade English test).

39. Chicago estimated that 125,000 students were eligible for transfer, but, using the system's definition of overcrowding (more than eighty percent of rated capacity), there were only 2,500 available slots. Robelen, *supra* note 34.

Maryland, only one transferee school has been designated despite proposed Department of Education regulations calling for a minimum of two choices for each child in a transferor school.⁴⁰ In many districts, districts delayed in notifying parents of the transfer opportunities and little or no use was made of the media or community meetings to reach out to those least likely to be informed of transfer opportunities.⁴¹ As a result, in some local education agencies (“LEAs”) the initial response was tepid and many of the applicants were not poor, although the law requires that priority be given to the lowest achieving children in the lowest income families.⁴²

Why school officials are generally reluctant to implement the transfer provisions is a matter of speculation. They may regard it as an impingement on their basic control over student assignment. Even though the statute allows the LEA to designate the transferee schools, this limitation on the unrestricted exercise of their authority apparently rankles some officials. Moreover, while transfers may present some opportunities like lower class size in the transferor school, they are also a public confession of failure. In any event, the early returns suggest that school officials cannot generally be relied upon to make the program a success.

One further problem is whether the federal government will be firm in requiring states and LEAs to adhere to the NCLB. Already, the State of Kentucky has been granted a delay of one semester in implementing a transfer program because it allegedly did not have current data on which schools were in need of improvement.⁴³ And, contrary to the policies of the 1960s, when John Gardner’s firm enforcement of Title VI of the Civil Rights Act of 1964 helped bring about widespread desegregation in the South,⁴⁴ the Department of Education of recent years has been permeated by a culture of

40. Susan Levine, *Few Families Seek School Switch in Montgomery*, WASH. POST, June 22, 2002, at B7.

41. Liz Bowie, *Schools Setting Limits on Transfers*, BALT. SUN, July 10, 2002, at 1 (explaining why the Baltimore city school system offered places to only 194 of 30,000 students in lower performing schools).

42. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1116(b)(1)(E)(ii), 115 Stat. 1425, 1479 (2002) (to be codified at 20 U.S.C. § 6316).

43. Letter from Steven Winnick, Deputy Counsel, Department of Education, to William L. Taylor, Acting Chair, Citizens’ Commission on Civil Rights, and Dianne M. Piché, Executive Director, Citizens’ Commission on Civil Rights (Oct. 11, 2002) (on file with the North Carolina Law Review).

44. John Gardner, a Republican educator, philanthropist, and philosopher, deserves enormous credit, along with Lyndon Johnson, for the desegregation that took place in the 1960s.

nonenforcement, which appears to afflict Democratic and Republican administrations alike.⁴⁵

All of which is to say that if the transfer provisions of the NCLB are to be a vehicle for desegregation and educational improvement, the impetus will have to come from civil rights groups and community activists around the nation. The key need is for every community to establish a group that will inform and counsel parents about the opportunities provided by the transfer program and will contest unneeded restrictions in the way the program operates. In St. Louis such a group—the Voluntary Interdistrict Coordinating Committee (“VICC”)—was created by a settlement of the school desegregation litigation in 1983.⁴⁶ The VICC helped establish a network of communication to inform parents of the opportunities in the participating districts.⁴⁷ It answered parents’ questions and provided a place where parents and students could go for advice if they were having problems in their new schools.⁴⁸ For example, the settlement agreement provided for protections against in-school discrimination and the VICC was a place where parents could go if they had concerns.⁴⁹ The NCLB also has a provision requiring transfer students receive the same treatment as other students in the school.⁵⁰

Further, the VICC provided a steady stream of information about how children in the program were faring, including student accomplishments. And the accomplishments have been substantial—including high school graduation and college-going rates that are

45. See CITIZENS’ COMM. ON CIVIL RIGHTS, TITLE I IN MIDSTREAM: THE FIGHT TO IMPROVE SCHOOLS FOR POOR KIDS 138 (1999) (“The bad news is that the Clinton Administration, once a prime advocate of standards based reform, has since had a massive failure of will and nerve. That failure has been manifested by a refusal to insist that states comply with fundamental provisions of the law . . .”), available at <http://www.ccr.org/images/midstream.pdf>.

46. *Liddell v. Bd. of Educ.*, 567 F. Supp. 1037, 1040 (E.D. Mo. 1983) (approving settlement agreement), *aff’d in part and rev’d in part*, 731 F.2d 1294 (8th Cir. 1983). VICC was established by section IX of the settlement agreement. *Liddell v. Bd. of Educ. of City of St. Louis*, No. 72-100C(4), Settlement Agreement, § IX, at IX-9 to IX-10 (E.D. Mo. July 5, 1983) (on file with the North Carolina Law Review).

47. See WELLS & CRAIN, *supra* note 5, at 338.

48. *Id.*

49. The settlement agreement provided, for example, that transfer students “shall not be assigned by the host district in any manner that contributes to racial segregation,” *Liddell*, No. 72-100C(4), Settlement Agreement, at II-11, that “the host district shall respond to the educational needs of students without regard to their status as a transfer or resident student,” *id.* § IIF3, at II-12, and that “participating districts should apply disciplinary standards and procedures in a nondiscriminatory manner.” *Id.* § IIF4, at II-13.

50. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1116(b)(1)(F), 115 Stat. 1425, 1479–80 (2002) (to be codified at 20 U.S.C. § 6316).

double or triple those of African-American students in most urban areas.⁵¹ Over the years, enrollment in the program has grown to between 12,000 and 13,000 students in most years, more than one-fourth of the African-American population in St. Louis schools. Some parents enroll their children out of a basic concern for their safety in St. Louis public schools, while others are motivated by the superior resources and opportunities of suburban schools. Meanwhile, the settlement agreement provides for educational investments in the St. Louis schools, which are beginning to show results in some schools after a long period of stagnation.⁵²

While there was little organization at the beginning, as the program grew, so did its constituency. When an incumbent mayor of St. Louis campaigned to bring the students back in the 1990s, he was defeated in the primary with the help of parents who felt their children's education was threatened. The parents regrouped to protest when the State's motion for unitary status in the litigation threatened termination again.⁵³

An effort at affirmative outreach similar to that in St. Louis is needed to make the transfer program work. The prospects for desegregation and enhanced opportunities will vary from district to district, and the need for suburban-district or state approval is likely to stymie most efforts for interdistrict remedies like those in St. Louis. But in many countywide districts in the South, the program will not be restricted and may help take up the slack in places like Charlotte-Mecklenburg or Tampa-Hillsborough where desegregation orders have expired.⁵⁴ Moreover, while many large cities have only a handful of schools performing at acceptable levels, other districts will provide real opportunities for children now mired in failing schools.

The Title I transfer program is hardly a panacea for the harm that federal courts, racially biased attitudes, and policies have done to

51. WELLS & CRAIN, *supra* note 5, at 198.

52. See ST. LOUIS CMTY. MONITORING & SUPPORT TASK FORCE, ANNUAL REPORT TO THE COMMUNITY 22-25 (2002). The Task Force, established by the parties to the *Liddell* litigation as a part of the 1999 settlement, reported gains in achievement levels at several city schools as measured by the Missouri Assessment.

53. D. Bruce La Pierre, Editorial, *If You Build Quality, Students Will Come*, ST. LOUIS POST-DISPATCH, Oct. 10, 1993, at 3B.

54. See *Capacchione v. Charlotte-Mecklenburg Sch.*, 57 F. Supp. 2d 228, 293 (W.D.N.C. 1999), *aff'd in part, rev'd in part, vacated by in part, and remanded sub nom. Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 233 F.3d 232 (4th Cir. 2000), and *cert. denied sub nom. Capacchione v. Charlotte-Mecklenburg Bd. of Educ.*, 535 U.S. 986 (2002); *Manning v. Sch. Bd.*, 244 F.3d 927, 929 (11th Cir. 2001).

the quest to make *Brown* a reality.⁵⁵ But it is one piece of evidence that the spirit that animated the decision is still alive and one tool that can be used in pursuing the quest.

II. THE STATE'S RESPONSIBILITY UNDER TITLE I TO BUILD SCHOOL CAPACITY

Even if the transfer program is successful in providing new opportunities for desegregated, effective education for a good number of children, most will remain in the inner-city schools. There is a second aspect of Title I that may strengthen education for children who do not transfer.

Since its inception in 1965, Title I of the ESEA has been built on a fiction. The overriding purpose of the law was to provide federal assistance in meeting the needs of economically and educationally disadvantaged students.⁵⁶ It was widely understood that the special needs of these children called for a larger investment in their education than what was ordinarily required for other children.⁵⁷ That was the rationale for a federal education program targeted to the poor.

The tacit assumption of the rationale, however, was that the playing field provided by state and local governments in their education expenditures was level and provided all students, rich and poor, with relatively equal resources. Unfortunately, nothing could be further from the truth. First, since public education is a state function, the amounts spent on children are in large part a function of the wealth of a particular state. Thus a child in a public school in a poor state, such as Mississippi or Alabama, is likely to receive far less than a child in a wealthy state, such as Connecticut or New Jersey. Since federal aid constitutes less than ten percent of total education expenditures, the wide gap between rich and poor states is barely narrowed by federal interstate funding formulas that are geared to state need.⁵⁸

55. See generally Boger, *supra* note 13 (arguing that recent federal court decisions threaten a return to segregated schools).

56. STEPHEN K. BAILEY & EDITH K. MOSHER, *ESEA: THE OFFICE OF EDUCATION ADMINISTERS A LAW 1-36* (1968); see also MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW 858-64* (4th ed. 2002) (discussing the historical setting of the ESEA).

57. BAILEY & MOSHER, *supra* note 56, at 8-9, 26-30, 31-33; YUDOF ET AL., *supra* note 56, at 803.

58. COMM. ON EDUC. & LABOR, U.S. HOUSE OF REPRESENTATIVES, *A REPORT ON SHORTCHANGING CHILDREN: THE IMPACT OF FISCAL INEQUITY ON THE EDUCATION*

In the early years after the enactment of the ESEA, other problems emerged in the allocation of funds, such as the withdrawal by some states and local districts of assistance from poor schools that were slated to receive federal funds.⁵⁹ These issues were addressed by a series of amendments to the ESEA that required states and localities to maintain their fiscal effort in education and to use federal funds to supplement, not supplant, state and local expenditures.⁶⁰

The amendments also called upon recipient districts to maintain comparability in the levels of state and local funding in schools *within* the district.⁶¹ But the major spending disparities ordinarily are not among schools within a district but *between* districts.⁶²

These gaps are the result of continued use of the property tax as the principal means for financing public schools in most states.⁶³ This system means that districts with great real property wealth are able to finance their public schools with a tax effort that is no greater (and sometimes less) than property-poor districts.⁶⁴ Because the latter districts are more likely than the former to contain economically disadvantaged children, state finance systems usually work to negate the federal goal of addressing the special needs of disadvantaged children.⁶⁵

OF STUDENTS AT RISK 19–20 (Comm. Print 1990) (prepared by William L. Taylor & Dianne Piché) (Sup. Doc. No. Y4.ED 8/1:101-U).

59. PHYLLIS MCCLURE & RUBY MARTIN, TITLE I OF ESEA: IS IT HELPING POOR CHILDREN? 19 (1969).

60. See, e.g., 20 U.S.C. § 6322(b) (2000) (repealed and recodified 2002). The No Child Left Behind Act preserved the “supplement not supplant” provisions. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1120A(b), 115 Stat. 1425, 1511 (2002) (to be codified at 20 U.S.C. § 6321(b)) (revising and recodifying 20 U.S.C. § 6322(b) (2000)). Maintenance-of-effort provisions are found in Title XIV, the General Provisions Title of the Elementary and Secondary Education Act. 20 U.S.C. § 8891 (2000) (repealed and recodified 2002). The No Child Left Behind Act also preserved these provisions. No Child Left Behind Act of 2001, § 1120A(b), 115 Stat. at 1511–12 (to be codified at 20 U.S.C. § 6321(a)) (revising and recodifying 20 U.S.C. § 8891 (2000)).

61. See, e.g., 20 U.S.C. § 6322(c) (2000) (revised and recodified 2002). The No Child Left Behind Act reclassified 20 U.S.C. § 6322(c), in virtually identical form, from 20 U.S.C. § 6322(c) to 20 U.S.C. § 6321(c). See No Child Left Behind Act of 2001, § 1120A(c), 115 Stat. at 1511 (to be codified at 20 U.S.C. § 6321(c)).

62. See 20 U.S.C.A. § 6321(c) (West Supp. 2003).

63. See generally Melissa C. Carr & Susan H. Furchman, *The Politics of School Finance in the 1990s*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE 136 (Helen F. Ladd et al. eds., 1999) (discussing the ways in which states fund public schools).

64. *Id.* at 165–66.

65. This is the case even when states themselves set aside funds for compensatory education since these funds ordinarily have only a small impact on closing the expenditure gap between poor and wealthy districts. COMM. ON EDUC. & LABOR, U.S. HOUSE OF REPRESENTATIVES, A REPORT ON SHORTCHANGING CHILDREN: THE IMPACT OF

Hopes that the vast inequities in public education funding might be redressed through litigation challenging state finance systems as denials of equal protection of the laws under the Fourteenth Amendment were dashed by the Supreme Court's 1974 decision in *San Antonio Independent School District v. Rodriguez*.⁶⁶ In that decision, a narrow 5-4 majority held that as inequitable as the Texas system was in its treatment of the education of children, the funding system served the State's policy of local control of education and was not subject to strict judicial scrutiny.⁶⁷

Since that time, efforts to level the playing field have been relegated to litigation in state courts relying on state constitutional protections.⁶⁸ The results have been varied, and, even when plaintiffs have prevailed in court, the decisions often have been followed by long political battles over remedy.⁶⁹

Accordingly, a study commissioned by the House Committee on Education and Labor in 1990 concluded that "[f]ederal funds are used in property-poor districts to meet needs that are routinely met through state and local expenditures in other districts."⁷⁰ In property-poor districts, the report added:

It is not unusual for economically disadvantaged students . . . to enter school without pre-school experience, to be retained in the early grades without any special help in reading, to attend classes with 30 or more students, to lack counseling and needed social services, to be taught by teachers who are inexperienced and uncertified and to be exposed to a curriculum in which important courses are not taught and materials are inadequate and outdated.⁷¹

That was the situation in 1994 when Congress overhauled Title I calling for states to adopt content and performance standards and establish systems of accountability that would hold officials responsible for student progress. Congress, however, refused to require states to adopt proposals for another type of standard,

FISCAL INEQUITY ON THE EDUCATION OF STUDENTS AT RISK, at x (Comm. Print 1990) (prepared by William L. Taylor & Dianne Piché) (Sup. Doc. No. Y4.ED 8/1:101-U).

66. 411 U.S. 1 (1973).

67. *Id.* at 54-56.

68. See Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE, *supra* note 63, at 34, 41 (indicating that advocates have turned from federal relief to state relief).

69. *Id.* at 41-43.

70. COMM. ON EDUC. & LABOR, U.S. HOUSE OF REPRESENTATIVES, A REPORT ON SHORTCHANGING CHILDREN, at x.

71. *Id.*

variously labeled “opportunity to learn” or “delivery” standards, that would require states to furnish resources to facilitate needed improvements in student progress. In broad political terms, the forces seeking reform of state financing formulas to meet the education needs of poorer urban and rural areas were outmatched by those areas (largely suburban) that benefited from fiscal systems based on property taxes and feared that federal legislation would be an “unfunded mandate” that would compel either a reallocation of state funds or a rise in taxes.

Nevertheless, legislators were surely aware that their new demands for accountability would not easily be met without increases in resources for underfunded schools. So they included several new provisions in the legislation, identifying the resources needed to help students meet standards. For example, school districts eligible and electing to establish schoolwide programs which focus on upgrading the education environment of the whole school are required to provide “instruction by highly qualified teachers”; to adopt strategies to attract such teachers to high-need schools; to provide effective professional development; to “strengthen the core academic program”; to “increase the amount and quality of learning time”; and to furnish “counseling, pupil services and mentoring services.”⁷² A similar set of requirements is set out for targeted assistance schools—those where assistance is designed to benefit eligible children only.⁷³

The difficulty is that, while furnishing these educational resources was framed as a statutory duty of school districts, the statute did not define general phrases like “high quality teachers,” and no guide was provided for what might be considered adequacy in other areas. Further, the statute did not identify any specific method of enforcing these requirements.

The 1994 law did, however, bring the state into the picture as a responsible party for providing needed educational resources. Section 1111(b)(8) specifies that each state plan which states are obligated to draft and submit to the Secretary of Education in order to receive Title I funds must describe “how the State educational agency will assist each local educational agency and school affected by the State plan to develop the capacity to comply with each of the

72. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1114, 115 Stat. 1425, 1471 (2002) (to be codified at 20 U.S.C. § 6314).

73. *Id.* § 1115, 115 Stat. at 1475 (to be codified at 20 U.S.C. § 6315).

requirements of sections 1112(c)(1)(D), 1114(b), and 1115(c) that is applicable to such agency or school."⁷⁴

In the NCLB, Congress bolstered section 1111(b)(8) by adding four subsections elaborating on state responsibility. Subsection (C), for example, requires the state plan to describe:

the *specific steps* the State educational agency will take to ensure that both schoolwide programs and targeted assistance schools provide instruction by highly qualified instructional staff as required by sections 1112(c)(1)(D), 1114(b), 1115(c) including steps . . . to ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified or out-of-field teachers, and the measure that the State educational agency will use to evaluate . . . the progress of the State educational agency with respect to such steps.⁷⁵

Although strengthened, the statutory language is still not a model of clarity regarding the state's obligations. Rather than explicitly stating that the state must accomplish certain ends, the Act obligates the state to say in its plan what it will do to accomplish those ends. Nor is the statute explicit as to what the penalty is for noncompliance. Presumably the array of remedies available to the Department of Education, including the deferral or termination of federal funds to a noncomplying recipient, would be available.⁷⁶ Whether an aggrieved parent would have a right of action in federal court is less certain.⁷⁷

74. Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 1111(b)(8)(A), 108 Stat. 3518, 3527 (codified as amended at 20 U.S.C.A. § 6311(b)(8)(A) (West Supp. 2003)). Sections 1112(c)(1)(D), 1114(b), and 1115(c) set out LEA and school duties under the Improving America's Schools Act. 20 U.S.C.A. §§ 6312(c)(1)(D), 6314(b), 6315(c) (West Supp. 2003).

75. Improving America's Schools Act of 1994, § 1111(6)(8)(c), 115 Stat. at 1453-54 (emphasis added).

76. See 20 U.S.C. § 1221 (2000).

77. In the decades following adoption of the ESEA, in excess of thirty lawsuits were brought by parents or other private parties to enforce provisions of Title I. Surprisingly, federal courts decided these cases on the merits without considering the threshold issue of whether there was an implied right of action. See, e.g., *Nicholson v. Pittenger*, 364 F. Supp. 669, 671 (E.D. Pa. 1973) (finding for parents who brought an action to enforce provisions of Title I). In 1975, the Supreme Court put Congress on notice that the Court would no longer imply a cause of action absent a clear expression of congressional intent. *Cort v. Ash*, 422 U.S. 66, 88-85 (1975).

In dealing with statutes already on the books, the Court has recently disdained the notion of implying a right of action from "contemporary legal context" or "expectations," except where Congress had enacted or reenacted verbatim the statutory text that courts had previously construed to create a private right of action. *Alexander v. Sandoval*, 532

Whatever the prospects are for private actions in the federal courts, Congress has laid down a mandate capable of implementation by the Department of Education. The success of the NCLB in achieving its stated purpose of closing the academic gap between various groups of children and having all children reach proficiency within twelve years clearly depends on obtaining major improvements in the quality of teaching made available to poor and minority children.

Certainly there are “specific steps” a state can take to upgrade the quality of instruction in high poverty schools and to ensure that the children in these schools are not taught at disproportionately high rates by “inexperienced, unqualified or out-of-field teachers,” as so many are now. States could, for example, offer monetary bonuses, loan forgiveness, or other incentives to teachers ready to take on the challenge of working in high poverty schools. Young teachers could be offered the opportunity for additional mentoring and professional development. People in other professions or in business who are interested in midcareer transfers into teaching might be encouraged to select high poverty schools, particularly if they bring needed skills in science or mathematics. States could make a five-year commitment to teach in high poverty schools a prerequisite for full teacher certification.

None of these measures are a guarantee that the statutory objective of having qualified teachers in all high poverty schools by 2005 will be achieved. But, together or in some combination, these “specific steps” along with others may help turn around the current system of incentives and disincentives which often discourages able teachers from coming to high poverty schools in the first place or impels them to leave after a very few years.

In many ways, efforts to seek compliance with section 1111(b)(8) would be a complementary approach to current litigation in state courts that invokes state constitutional provisions guaranteeing “a thorough and efficient” public education to seek “adequacy” in school resources.⁷⁸ Both approaches are designed to upgrade the

U.S. 275, 288 (2001) (citing *Merrill, Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378–379 (1982)).

In the ESEA, the language that would be relied on in section 1111(b)(8) is relatively new, although the basic framework of the statute has remained the same since 1965. Moreover, the Senate Report in 1994, when section 1111(b)(8) was added, took great pains to say that the new “procedures and remedies” were “designed to supplement and not replace other existing procedures and remedies” in the statute. S. REP. NO. 103-292, at 9 (1994).

78. See *Abbott v. Burke*, 495 A.2d 376, 381 (N.J. 1985).

educational offering for poor and minority children who are shortchanged by fiscal systems based on the property tax. Each seeks to deflect the inevitable political confrontations that come with claims for dollar equality by focusing on the need for adequate resources in the areas that make a difference in educational outcomes.

Whether judicial claims under Title I are ultimately upheld, the duties imposed by section 1111(b)(8) on the states and by other sections on local school systems can provide a useful tool for advocacy. State and local advocacy groups can use these provisions to highlight continuing disparities among districts and schools and the resource barriers that hamper progress by poor and minority children. They can make demands on state and local politicians and education agencies to fulfill their commitments, and, depending on state law, may be able to avail themselves of state administrative remedies. Advocacy groups can also call upon the Federal Department of Education to enforce Title I against noncomplying state and local education agencies and can file administrative complaints with the department when no action is forthcoming.

By taking these steps, advocacy groups can impel public officials and citizens to focus on the question of whether demands for school progress and accountability can be anything more than hollow rhetoric unless our leaders are prepared to make investments in high poverty schools to upgrade their teaching and curriculum.

CONCLUSION

Not since the *Brown* decision, the Civil Rights Act of 1964, and the desegregation remedy decisions of the early 1970s have the nation's policymakers spoken with moral clarity about the imperative of affording equal educational opportunity to all children.

In recent years, the progress produced by a national policy of equal opportunity has been halted by continuing fears that have kept people in racial isolation and by a reluctance of government officials to invest the resources needed to make an opportunity policy effective.

Even in times of stagnation, however, the idea of equality has continued force. The effort to secure national school reform was launched with congressional findings in 1994 that all children can learn and that all (except those who are severely cognitively impaired) can master challenging material.

The statutory guarantee that parents can transfer children out of failing schools to better (often desegregated) schools is couched in the

language of accountability, but it can be an instrument for equalizing opportunity. The statutory call for upgrading teaching and curriculum in high poverty schools is framed as a means to make these schools effective and bring all students to proficiency, but it too is animated by the idea of equality.

These days, it does seem that “the trumpet gives an uncertain sound,”⁷⁹ but all who profess a belief in equality should use whatever instruments are at hand to advance the prospects of children for a good education.

79. 1 *Corinthians* 14:18.

