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CHARTER SCHOOLS UNDER THE NCLB: CHOICE AND EQUAL EDUCATIONAL OPPORTUNITY

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INTRODUCTION

The purpose of the *No Child Left Behind Act of 2001* ("NCLB") "is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments."[2] One of the ways the NCLB hopes to achieve this purpose is to close the achievement gaps between minority and non-minority students by giving those students in failing schools options to transfer to schools where they can receive a high-quality education.[3] Charter schools are one such option for students seeking to transfer from low-performing schools.[4]

Supporters of charter schools assert that charter schools will address the "soft bigotry of low expectations" by providing students with equal educational opportunity through choice.[5]

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[2] 20 U.S.C. § 6301 (2006).

[3] *Id.* at § (3), (4) (differentiating also between "disadvanted" and "advantaged" students).

[4] *See* U.S. DEP'T OF EDUC., PUBLIC SCHOOL CHOICE, NON-REGULATORY GUIDANCE, DRAFT, E-1 (2004), *available at* http://www.ed.gov/policy/elsec/guid/schoolchoiceguid.pdf. (stating that except for specified situations, "students must be given the option to transfer to other public schools, which may be charter schools").

[5] *See* Abigail Aikens, *Being Choosy: An Analysis of Public School Choice Under No Child Left Behind*, 108 W. VA L. REV. 233, 234-35 (2005) (noting school choice advocates hope giving students opportunities to transfer to higher performing schools will incentivize underachieving schools to match high performing schools' scores, but those

The choice model, however, is a departure from previous paradigms to achieve equal educational opportunity.[6] The other paradigms are desegregation and school finance.[7] State legislatures are somewhat leery about the segregative effects of charter schools.[8] In light of this, a number of states have enacted statutes with the aim of achieving and maintaining racial balance in charter schools.[9]

The goal of this paper is to discuss charter schools and equal educational opportunity, particularly under the paradigm of choice. The first section of this paper provides an overview of the three major paradigms for educational equality: desegregation; school finance; and choice. This section will also explain how charter schools fit into the choice paradigm and will discuss how the NCLB deals with charter schools. The second section discusses policy issues. This section presents the conflict between charter schools and desegregation decrees. The paper then concludes asking the question whether charter schools actually improve educational performance.

goals have not yet been met due to implementation difficulties and lack of meaningful transfer options).

6 *See* Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 615-16 (2001) (noting differences between charter schools and previously used method, desegregation, and that in order to ensure that charter schools will not be segregated, states have explicitly required charter schools to comply with school desegregation orders or not interfere with desegregation process); *see also* Michael Heise, *Equal Educational Opportunity by the Numbers: The Warren Court's Empirical Legacy*, 59 WASH. & LEE L. REV. 1309, 1321, 1324, 1329, 1331 (2002) (distinguishing between desegregation, school finance, school choice, and progression of litigation resulting from each).

7 *See* Heise, *supra* note 6, at 1321, 1324, 1329, 1331 (discussing desegregation, school finance, and school choice as major efforts seeking to structurally enhance educational opportunity, and litigation that has ensued).

8 *See* Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes That Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 350-51 (2003) (adding "some worry that charter schools as a form of school choice will damage the democratic principles on which public education is based and may even allow parents effectively to self-segregate.").

9 *See* Suhrid S. Gajendragadkar, *The Constitutionality of Racial Balancing in Charter Schools*, 106 COLUM. L. REV. 144, 145 (2006) (noting troubling reality that charter schools suffer greater segregation than public schools, and eleven states have enacted racial balancing provisions in their statutes authorizing charter schools to counterbalance that trend).

I. EQUAL EDUCATIONAL OPPORTUNITY PARADIGMS

The three paradigms to achieve equal educational opportunity are desegregation, school finance, and choice. This section presents an overview of each of these paradigms.

A. Desegregation Paradigm

In *Brown v. Board of Education of Topeka, Kansas*,[10] the United States Supreme Court held that the segregation of public schools was unconstitutional, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[11] Overturning *Plessy v. Ferguson*,[12] the Court held the "separate but equal" doctrine unconstitutional.[13] The Court found that this doctrine would effectively psychologically damage black students as it creates in them "feeling[s] of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[14]

A year later, in *Brown v. Board of Education of Topeka, Kansas*,[15] the Supreme Court created what became known as the era of "all deliberate speed."[16] *Brown II* set out guidelines, with no deadlines or timelines, for eliminating de jure desegregation; instead, the Court held that public schools should desegregate "with all deliberate speed."[17] De jure segregation is segregation that is government-sanctioned; it is driven by intentional acts of the government.[18] This is distinguishable from de facto

10 347 U.S. 483 (1954).

11 *Id.* at 495 (holding separate educational facilities are inherently unequal and that plaintiffs were deprived of equal protection of laws guaranteed by the Fourteenth Amendment).

12 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

13 *See Brown*, 347 U.S. at 495.

14 *Id.* at 494.

15 Brown v. Bd. of Educ. of Topeka, Kansas, 349 U.S. 294 (1955) [hereinafter brown II].

16 *See* Preston Cary Green, *Can State Constitutional Provisions Eliminate De Facto Segregation in the Public Schools?*, 68 J. OF NEGRO EDUC. 138, 140 (1999) (labeling era immediately following *Brown II*).

17 *See Brown II*, 349 U.S. at 298-301(remanding to local courts for determination of what relief should be granted while also providing guidance for their analysis and stating that desegregation should be implemented "with all deliberate speed"); Green, *supra* note 16, at 140 (describing how Court provided guidelines for ending de jure segregation, choosing to require implementation with "all deliberate speed" rather than setting specific timetables).

18 *See* Keyes v. Sch. Dist., 413 U.S. 189, 205-06 (1973) (defining de jure segregation as "current condition of segregation resulting from intentional state action.").

segregation; de facto segregation is segregation that results from factors other than intentional acts by the government.[19]

Desegregation advocates welcomed the Supreme Court's decisions in *Brown I* and *Brown II*, with optimism that educating black children in white schools would provide black students with improved educational opportunities.[20] Advocates of desegregation policies have been greatly disappointed, however.[21] Soon after the *Brown* decisions, a number of states and southern school districts employed a number of strategies to prevent the success of school desegregation policies; this heralded the era of "massive resistance."[22] Federal troops were enlisted to confront sprouting "threats of violence and intimidation by state officials."[23] To effectively impede desegregation, Arkansas amended its constitution to make the *Brown* decisions unconstitutional.[24] Ten years after the "all deliberate speed" standard, 97.8% of black students in eleven southern states were still in segregated schools.[25]

In *Griffin v. County School Board of Prince Edward County*,[26] the Supreme Court declared the "[all] deliberate speed" standard constitutionally defective, stating that "[t]he time for mere

19 *See* Freeman v. Pitts, 503 U.S. 467, 494 (1992) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-2 (1971)) (distinguishing between de jure segregation and segregation resulting from "other demographic factors," and declaring that school districts have no duty to remedy the latter); *Keyes*, 413 U.S. at 208-09 ("differentiating factor between de jure segregation and so-called de facto segregation . . . is *purpose* or *intent* to segregate.").

20 *See* Sonia R. Jarvis, *Brown and the Afrocentric Curriculum.*, 101 YALE L.J. 1285, 1288 (1992) (explaining that by ending state-approved segregation in public schools, Supreme Court assumed "[b]lack schoolchildren would no longer be stigmatized by attending separate schools and would instead receive better educational opportunities in racially integrated school settings.").

21 *See id.* at 1286 (stating, "[s]ince *Brown*, numerous studies have shown that while some black children benefit from attending school with white children, others lose confidence and actually perform more poorly because of discriminatory tracking programs and teachers' negative attitudes toward black children.").

22 *See* Robin D. Barnes, *Group Conflict and the Constitution: Race, Sexuality, and Religion: Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2382 (1997) (describing several reactionary measures employed by various southern school districts).

23 *Id.*

24 *See id.* (explaining post-*Brown* Arkansas legislation relieved white school children from compulsory school attendance if they were enrolled in racially mixed schools); *see also* Aaron v. Cooper, 257 F.2d 33, 35 (8th Cir. 1958) (stating Arkansas adopted Amendment 44 to its constitution, which commanded General Assembly to oppose *Brown* decision).

25 *See* Barnes, *supra* note 22, at 2382 n.52 (citing U.S. Comm'n on Civil Rights, *Twenty Years After Brown: Equality of Educational Opportunity* 46 (1975)).

26 377 U.S. 218 (1964).

deliberate speed had run out."[27] *Griffin* paved the way for a series of Supreme Court decisions aimed at speeding up the end of de jure desegregation.[28] This was the era of federal activism.[29] *Green v. County School Board of New Kent County*,[30] was one such Supreme Court decision. In that case, New Kent County school system had two public schools, one for white students and the other for black students.[31] The county's freedom-of-choice plan provided that students could attend either school, irrespective of race.[32] However, no white student ever chose to attend the black school.[33] The Court held that freedom-of-choice plans should not be used if alternative means could be used to hasten desegregation.[34] The Court also laid out six factors, known as the *Green* factors, as a guide to determining if a school district has attained unitary status or desegregated.[35] The six *Green* factors are: student assignments; faculty assignments; transportation; facilities; student activities; and education quality.[36] Desegregation decrees led to white flight from city schools, and suburban school districts became almost 100% white.[37]

Further compounding the disappointment of advocates of desegregation was the dawning of the era of federal restriction and withdrawal.[38] In *Keyes v. School District No. 1, Denver, Colorado*,[39] the Supreme Court held that federal courts could not grant desegregation remedies for *de facto* segregation.[40] Then in

27 *Id.* at 234. (internal quotes omitted).

28 *See* Green, *supra* note 16, at 140 (stating "Supreme Court issued several rulings to hasten the eradication of de jure school segregation.").

29 *See id.* (referring to that time as "[t]he era of federal activism").

30 391 U.S. 430 (1968).

31 *See id.* at 432.

32 *Id.* at 433.

33 *Id.* at 441.

34 *Id.* at 440.

35 *Id.* at 435.

36 *See Green*, 391 U.S. at 437 (noting review of these factors as necessary in determining whether a school district had truly "effectuate[d] a transition to a racially nondiscriminatory school system.").

37 *See* Barnes, *supra* note 22, at 2383 (finding racial isolation to have increased resulting from decreases in number of white students in urban school districts).

38 *See* Green, *supra* note 16, at 141 (suggesting Supreme Court's distinction between de facto and de jure segregation to have allowed school districts to avoid desegregating).

39 413 U.S. 189 (1973).

40 *See id.* at 203 (holding that there must be *state-imposed* segregation in order for federal court to grant desegregation remedy) (emphasis added).

Milliken v. Bradley,[41] the Supreme Court prohibited the inclusion of suburban school districts in metropolitan desegregation remedies, where there was no proof that the suburban school districts had committed de jure desegregation.[42] In *Milliken*, the federal district court's desegregation decree included fifty-three of the eighty-five suburban school districts made up of mostly white students in a decree desegregating a metropolitan area.[43] The Supreme Court reversed, holding that in cases of single-district de jure school desegregation, multidistrict remedies cannot be imposed unless those other districts included in the remedy have engaged in de jure desegregation, a difficult standard to prove.[44]

Board of Education of Oklahoma City v. Dowell,[45] continued the withdrawal of federal courts from school desegregation. In that case, the Supreme Court held that if demographic changes or residential patterns reflecting choice are the cause of segregation, federal district courts can terminate desegregation decrees, effectively ensuring the school district's return to one-race schools.[46] The Supreme Court also stated that desegregation decrees are not to continue in perpetuity, adding that federal courts cannot resume jurisdiction where a school district has been released from a desegregation decree.[47] The era of federal restriction and withdrawal continued in *Freeman v. Pitts*.[48] In that case, the Supreme Court held that federal district courts could gradually withdraw from overseeing a desegregation decree, even before the school district has fully complied with the decree.[49] In *Freeman*, the DeKalb County school system had attained unitary status on a number of the Green factors, but not

41 418 U.S. 717 (1974).

42 *Id.* at 745.

43 *Id.* at 733.

44 *Id.* at 752-53.

45 498 U.S. 237 (1991).

46 *Id.* at 250; *see* Dowell v. Bd. of Educ. of the Oklahoma City Pub. Sch., 8 F.3d 1501, 1507 (10th Cir. 1993) (holding good faith compliance with desegregation decree and determination whether vestiges of past discrimination had been eliminated to extent practicable as relevant inquiries when termination was at issue).

47 *See generally* Dowell, 8 F.3d 1501.

48 503 U.S. 467 (1992).

49 *Id.* at 490 (holding that "in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations.").

with respect to faculty assignments and resource allocation.[50] The Court held that federal district courts need not wait until a school district has attained unitary status on all six of the *Green* factors before releasing judicial oversight of the school district.[51] In addition, the Court held that a school district that has remedied de jure segregation is under no obligation to remedy segregation caused by demographic changes, since de facto segregation is without constitutional import.[52]

In *Missouri v. Jenkins*,[53] the Supreme Court struck down a desegregation remedy that included suburban school districts, reaffirming its holding in *Milliken*.[54] The Court emphasized that the goal of desegregation was to remedy de jure discrimination, not to achieve greater desegregation where the cause of the segregation was not *de jure* desegregation.[55] David Armor[56] and Robin Barnes[57] claim that desegregation policies have negatively impacted the academic achievement and self-esteem of black students. However, these critiques fail to consider a benefit to desegregation: improvement of the "quality of education for all students by providing them with the opportunity to learn how to better relate to one another."[58] Despite any benefits desegregation has produced, "public education since Brown continues along separate and unequal lines."[59]

50 *Id.* at 481-84 (stating some reasons why DeKalb County school system had not reached unitary status with regard to faculty assignments and resource allocation).

51 *Id.* at 471 (holding that "district court need not retain active control over ever aspect of school administration until a school district has demonstrated unitary status in all facets of its system.").

52 *Id.* at 494 (arguing that once racial imbalance caused by de jure violation has been fixed, school districts no longer have duties to fix any imbalance which is brought about by demographic factors).

53 115 S.Ct. 2038 (1995).

54 *Id.* at 94 (stating that nothing in *Milliken*, "suggests that the District Court in that case could have circumvented the limits on its remedial authority by requiring the State of Michigan, a constitutional violator, to implement a magnet program designed to achieve the same interdistrict transfer of students that we held was beyond its remedial authority.").

55 *Id.* at 90 (quoting "proper response to an intradistrict violation is an intradistrict remedy that serves to eliminate the racial identity of the schools within the affected school district by eliminating, as far as practicable, the vestiges of de jure segregation in all facets of their operations.") (internal citations omitted).

56 *See* DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 101 (Oxford Univ. Press 1995) (finding school desegregation has adverse impact on black students).

57 *See* Barnes, *supra* note 22, at 2386 (noting "devastating impact on African-American children" who are subject to segregation).

58 *See* Green, *supra* note 15, at 143 (critiquing Armor's suggestions).

59 *See* Barnes, *supra* note 21, at 2397.

B. School Finance Paradigm

School finance litigation is one of the paradigms civil rights advocates have employed over the years in an effort to ensure equal educational opportunities.[60] The goal is to increase funding for the education of minority students and thus, improve their academic performance.

The earliest framework for equalizing state aid allocations to school districts was the foundation aid program.[61] This program sought to allocate state aid so as to ensure that any district levying a mandatory minimum local property tax would attain a foundation level of spending.[62] The combination of a mandatory minimum tax rate and the foundation level of spending, known as "primary policy levers" aim "to (a) increase minimum adequacy levels of spending in the poorest districts, (b) improve overall horizontal equity by raising that floor, and (c) reduce the extent that schooling resources are associated with local wealth (fiscal neutrality)"[63] With time, states increasingly made adjustments in foundation formulas so as to guarantee funding for the operation of public schools.[64] Unlike primary policy levers which are designed to improve fiscal neutrality, horizontal equity, or minimum adequacy level across schools, these cost adjustments, known as "secondary policy levers" are designed to adjust aid formulas so that aid allocations are more adequate,

60 *See* Bruce D. Baker & Preston C. Green, *Tricks of the Trade: State Legislative Actions in School Finance Policy That Perpetuate Racial Disparities in the Post-Brown Era*, 111 AM. J. EDUC. 372, 406 (2005) (concluding school finance litigation has been used since 1950's to ensure equal educational opportunities); *see also* Brian P. Marron, *Promoting Racial Equality Through Equal Educational Opportunity: The Case for Progressive School-Choice*, 2002 BYU EDUC. & L.J. 53, 67 (2002) (noting school finance suits have been brought in over forty states).

61 *See* Baker & Green, *supra* note 60, at 373 (crediting George Strayer and Robert Haig as presenting program); *see also* Hinkley A. Jones-Sanpei, *Comment and Note: Roosevelt v. Bishop: Balancing Local Interests with State Equity Interests in School Financing*, 1998 BYU EDUC. & L.J. 223, 226 (1998) (stating foundation aid programs are just first of many formulas used by states to finance elementary and secondary education).

62 *See* Jones-Sanpei, *supra* note 61, at 226 (explaining, "[t[his method guarantees a certain tax base for each district in the state, which uses state grants to 'match' the funds supplied through local taxes, thus reducing the price of education to the school districts.").

63 *See* Baker & Green, *supra* note 60, at 374.

64 *See id.* at 374 (illustrating common practice of different levels of foundation aid for elementary versus high schools).

thus promoting vertical equity, which in simple terms, means the "unequal treatment of unequals."[65]

School finance litigation has gone through three waves. In arguing for increased horizontal equity and fiscal neutrality, in the first wave, civil rights advocates relied on the Equal Protection Clause. However, in *San Antonio Independent School District v. Rodriguez*,[66] the United States Supreme Court foreclosed arguments that the Equal Protection Clause prohibits funding disparities between wealthy and poor school districts.[67] In the second wave, the civil rights advocates relied more on state equal protection clauses in arguing that school funding disparities were unconstitutional.[68] These efforts have been mostly unsuccessful however, as state courts have relied on the Supreme Court's analysis in *Rodriguez* in finding funding disparities constitutional.[69]

During the first and second waves of school finance litigation to increase equal educational opportunity, state legislatures felt pressured to search for "secondary policy levers" that would ensure that funding was retained for wealthier school districts.[70] Then, the third wave came when civil rights advocates relied on arguments that the state has failed to provide property-poor school districts with an adequate education guaranteed in the state's education clause.[71] This third wave was a shift in emphasis from equity to adequacy and has increased the focus of courts and legislatures on secondary policy levers.[72] The publication of *A Nation at Risk: The Imperative for Educational Reform*,[73] as well as the decision of the Kentucky high court in

65 *See id.* at 374 (observing "secondary policy levers" might also be used to consolidate funding in wealthier districts).

66 411 U.S. 1 (1973).

67 *Id.* at 6; *see also* Green, *supra* note 15, at 139 (discussing *Rodriguez's* findings).

68 *See* Green, *supra* note 15, at 139 (noting that any state measure must not violate the Equal Protection Clause).

69 *See* Marron, *supra* note 60, at 67 (finding that most states upheld these funding systems, though seven states overturned).

70 *See* Baker & Green, *supra* note 60, at 374 (reviewing different "policy levers" used to undo inequities).

71 *See* Marron, *supra* note 60, at 67 (declaring that "current wave has focused on the specific right to an education provided in 49 state constitutions.").

72 *See* Baker & Green, *supra* note 60, at 375 (writing that shift in emphasis from equity to adequacy has come with focus on costs and cost variations).

73 A Nation at Risk: The Imperative for Educational Reform: A Report to the Nation and the Secretary of Education (Nat'l Comm'n on Excellence in Educ. Apr. 1983), *available at* http://www.goalline.org/Goal%20Line/NatAtRisk.html.

Rose v. Council for Better Education,[74] effectively ensured that educational adequacy came to be defined as "the opportunity to achieve targeted educational outcomes."[75] In other words, educational adequacy was increasingly seen as funding to achieve vertical equity – the unequal treatment of equals – rather than horizontal equity –different school districts receive the same amount of funding.[76]

Christopher Adolph[77] and Kevin Carey[78] report that funding disparities persist between minority and nonminority school districts.[79] After *Brown I* and *Brown II*, state legislatures might have modified their aid policies in order to continue funding disparities along racial lines, through racially-neutral means.[80] During the Progressive Era (1890-1910), states gave county school boards absolute discretion in the disbursement of state aid distributed to the counties.[81] The county school boards used this discretion to perpetuate funding disparities between black and white school districts.[82] Harlan[83] points out that even though the

74 790 S.W.2d 816 (Ky. 1989).

75 *See* Baker & Green, *supra* note 60, at 375 (discussing impact of decisions including *Rose v. Council for Better Education*).

76 The shift from equity to adequacy may require an evaluation to fund schools in greater need rather than providing uniform funds to every school. *See id.* at 375.

77 Christopher Adolph, How Parties Distribute School Finance by Income and Race (2002) (unpublished Ph.D. dissertation, Kennedy School of Government, Harvard University), *available at* http://faculty.washington.edu/cadolph/homepage/AdolphPF.pdf.

78 Kevin Carey, *Low-Income and Minority Students Still Receive Fewer Dollars in Many States*, THE FUNDING GAP 2003 (The Educ. Trust Inst., Washington, D.C.) *available at* http://www2.edtrust.org/NR/rdonlyres/EE004C0A-D7B8-40A6-8A03-1F26B8228502/0/funding2003.pdf.

79 *See* Baker & Green, *supra* note 60, at 375 (citing both Carey and Adolph's work regarding funding disparity between white and minority schools).

80 Legislatures enacted policies that technically complied with the Supreme Court, but still produced inequitable disparities. For example, the Kansas legislature issued funds based on city population which had the effect of providing disparate funds. *See id.* at 386.

81 County school boards were given complete discretion to disburse funds to school districts. This discretion often led to increased racial disparities. *See id.* at 376.

82 County school boards used their discretion to create inequitable funding. Often, members of the school boards consisted of white trustees acting "for the best interests of the school district." *See id.* at 376. The discretion given to school boards to disburse funds created inequitable results in many of the Southern states such as Georgia. For example, in Georgia a black student received one-fourth the funds of a white student. *See* LOUIS R. HARLAN, SEPARATE AND UNEQUAL: PUBLIC SCHOOL CAMPAIGNS AND RACISM IN THE SOUTHERN SEABOARD STATES 1901-1915 5, 12-17 (1958). School boards that sat in jurisdictions with greater numbers of black students received more funds which they inequitably used for the benefit of white students. *See* ROBERT A. MARGO, DISENFRANCHISEMENT, SCHOOL FINANCE, AND THE ECONOMICS OF SEGREGATED SCHOOLS IN THE UNITED STATES SOUTH, 1890-1910 71-75 (Stuart Bruchey ed., Garland Publishing 1985).

discretion of white trustees responsible for the distribution of funds to counties with a majority of black students was not color-blind, an 1896 South Carolina law gave them great discretion in the allocation of funds.[84]

Legislatures in some states that once sanctioned de jure segregation continue to maintain policies that effectively ensure racial funding disparities.[85] Baker and Green[86] report that in Maine and New Hampshire, the greater the minority population of a school district, the less revenue that district is likely to receive per student.[87] Even though New Hampshire's black population is only 1% and its total minority population 4%, a school district's minority population in proportion to the state's minority population accounts for more than half of the variance in district revenues among school districts.[88] In New York, a school district's minority population accounts for 64% of the variance among school districts in state and local revenues per student; in Kansas, minority status of the school district accounts for 18% of the variance.[89] In Kansas, "racial funding disparities are the result of organizational and cost adjustments that are based on district size, which had the effect of underfunding those districts that had been subject to de jure segregation."[90] Among the reasons racial funding disparities have persisted is the fact that until recently, there were no real attempts to employ a racial perspective to explicitly address funding disparities.[91] This

83 HARLAN, *supra* note 81, at 174-75.

84 *See id.* at 174-75 (outlining how 1896 South Carolina gave considerable latitude to white district trustees of predominantly black counties, whose judgment was "not color-blind").

85 *See* Baker & Green, *supra* note 60, at 397 (analyzing racial funding disparities in two formerly de jure states – Alabama and Kansas).

86 *Id.*

87 *See id.* at 380-81 (referring to very large negative relationships between minority population and district revenues per pupil in Maine and New Hampshire).

88 *See id.* at 381 (noting that in New Hampshire, district minority share explains greater than half variance in district revenues even while New Hampshire's population is only 4% minority and 1% black).

89 *See id.* at 381 (stating that in New York, minority status explains 64% of variance in revenues per pupil and in Kansas, minority percentage of district explains 18% of variance per pupil).

90 *Id.* at 406.

91 Baker and Green's premise is that legislatures are using proxies for race that create funding disparities for schools in de jure segregated states. Since it seems a racial perspective is being employed in formulating these "creatively developed policies," it would only make sense to employ a racial perspective to ameliorate the problems created by these funding policies. *See* Baker & Green, *supra* note 60, at 373.

failure might have contributed to states and school districts alike cunningly codifying racial disparities in race-neutral policies.[92]

C. School Choice Paradigm

One of the goals of the school choice paradigm, in ensuring equal educational opportunity, is to counter the "monopoly" traditional public schools have over minorities by making educational choices available to minorities. Such educational choices include vouchers, intradistrict transfer choice, and charter schools. This section focuses on charter schools.

The 1983 publication of *A Nation at Risk: The Imperative for Educational Reform*, warning the nation of the dire state of the public school system and the resulting grave threats to the nation's future sparked a number of reform efforts directed at reforming the nation's education system.[93] Charter schools were one such reform. Ray Budde[94] introduced the concept of charter schools in his book *Education by Charter: Restructuring School Districts.* Former president of the American Federation of Teachers, Albert Shanker, catapulted the charter school concept into the national mindset in his weekly *New York Times* column.[95] In 1991, Minnesota passed the first charter school law in the nation.[96] Over the next twelve years, in all, forty states, Puerto Rico and the District of Columbia enacted charter school laws.[97]

92 *See generally* Baker & Green, *supra* note 60.

93 The National Commission on Excellence in Education was formed by the Secretary of Education T.H. Bell on August 26, 1981 to examine the quality of education in the United States. *See generally* A Nation at Risk, *supra* note 72.

94 *See generally* RAY BUDDE, EDUCATION BY CHARTER: RESTRUCTURING SCHOOL DISTRICTS. KEY TO LONG-TERM CONTINUING IMPROVEMENT IN AMERICAN EDUCATION (1988).

95 *See, e.g.*, Albert Shanker. *Where We Stand*, N.Y. TIMES, July 10, 1988, at E7 (representing precedent setting articles bringing forth changes in American education).

96 *See* PRESTON C. GREEN & JULIE F. MEAD, CHARTER SCHOOLS AND THE LAW: ESTABLISHING NEW LEGAL RELATIONSHIPS 1 (2004); Jonathan P. Krisbergh, Comment, *Marginalizing Organized Educators: The Effect of School Choice and 'No Child Left Behind' on Teacher Unions*, 8 U. PA. J. LAB. & EMP. L. 1025, 1037 (2006) (stating Minnesota charter school law started charter school movement).

97 *See* Kathryn Kraft, Comment, *Cyber Charter Schools—An Analysis of Their Legality*, 56 SMU L. REV. 2327, 2327 (2003) (commenting in 2003 that forty states permit charter schools).

Charter schools are governed by state law; therefore, the specifics of charter schools vary from state to state.[98] State statutes dictate persons or entities eligible to start a charter school and the duration of the charter.[99] Such persons or entities have to seek a charter from a chartering authority.[100] Most states grant chartering authority to state educational agencies and local school districts.[101] Florida, Indiana, Michigan, Minnesota, Missouri, North Carolina, Ohio and Wisconsin grant universities and colleges chartering authorities.[102] Other organizations and officials with chartering authority include charitable organizations, city councils, city mayors, state boards of charter schools, state commissioners of education and vocational school districts.[103] Among the many benefits supporters of charter schools point to are the following: charter schools promote healthy competition to prompt the improvement of traditional public schools; provide accountability, due to the lingering threat of charter revocation in case the charter school fails to live up to its charter agreement with the charter authorizer; and are a laboratory for developing innovative educational ideas.[104]

Charter schools share attributes of public schools in the sense that they can get funding from the government; they cannot charge tuition.[105] However, charter schools are also exempt from certain state laws and regulation in exchange for a commitment to live up to the educational mission and goals specified in the

98 *See* Krisbergh, supra note 96, at 1037 (observing "charter school laws differ among states").

99 *See* Julie F. Mead & Preston C. Green, III, *Keeping Promises: An Examination of Charter Schools' Vulnerability to Claims for Educational Liability*, 2001 BYU EDUC. & L.J. 35, 46 (2001) (discussing that state statutes specify "under what circumstances a charter school may be established" and "length of time a charter may be granted.").

100 *See* Kraft, *supra* note 97, at 2331 (explaining process of creating a charter school).

101 *See* Mead, *supra* note 8, at 353 (highlighting that most states give chartering authority to state educational agency and school districts).

102 *See* Mead, *supra* note 8, at 379 (listing states that grant chartering authority to colleges and universities).

103 *See* GREEN & MEAD, *supra* note 96, at 1-8 (mentioning that persons and entities seeking to start charter schools should consult their charter school statutes for information on specific and more detailed requirements because applicable chartering authority might have requirements for granting charter in addition to those specified in state statute); Mead, *supra* note 8, at 379 (cataloging organizations that have been given "charter-granting authority").

104 *See* Mead, *supra* note 8, at 350 (highlighting benefits of charter schools described by its supporters).

105 *See* Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 881 (2006) (commenting that charter schools are public because they "receive only public funds, and may not require tuition").

charter; this exemption makes charter schools a semblance of private schools.[106]

The NCLB seems to conflict with the concept of charter schools, however, in the sense that the NCLB spells out accountability standards that public schools, including charter schools, must comply with, while the charter school concept entails exempting charter schools from laws and regulations.[107] The NCLB allows state law to limit or exempt an LEA (local educational agency; school district) from offering public school choice under Title I only if such law explicitly forbids public school choice by restricting public school assignments or student transfer among public schools.[108] In addition, the NCLB takes precedence over any local school board policies or local laws limiting school choice under Title I.[109] However, "[p]ublic school choice is a critical component of NCLB because it offers a student enrolled in a Title I school that is in need of improvement an opportunity to attend another school, even as his or her original school is undergoing improvement."[110] The reason underlying this is the NCLB's recognition that "[t]he process of turning around a low-performing school typically takes time, and during that time that school's students are at risk of falling further behind if they do not have additional options."[111] Moreover, the NCLB embraces the notion that "public school choice can increase both equity and quality in education."[112]

The way the NCLB deals with charter schools depends on whether the charter school is part of an LEA or its own LEA.[113] State charter laws determine whether a charter school is a part of an LEA or its own LEA.[114]

106 *See id.* at 882 (mentioning charter schools are exempt from regulations but school must be accountable for terms of its charter).

107 *See* Robert J. Martin, *Rigid Rules for Charter Schools: New Jersey as a Case Study*, 36 RUTGERS L.J. 439, 489 (2005) (stating "that congressional goal [of imposing greater accountability on charter schools] was recently evidenced by several provisions of the No Child Left Behind Act of 2001.").

108 *See* PUBLIC SCHOOL CHOICE, *supra* note 4, at E-9 (citing 34 C.F.R. § 200.44).

109 *See id.* at E-10.

110 *Id.* at A-1.

111 *Id.*

112 *Id.*

113 No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1479, 1791 (2002).

114 *Id.* at 1789.

The NCLB requires states to develop academic achievement standards and assess the adequate yearly progress (AYP) of students toward those standards.[115] School districts and public schools, including charter schools receiving Title I funds must report AYP data.[116] Those schools and school districts not making AYP could be required to offer options for students to transfer to higher performing schools, provide supplemental educational services (SES), take corrective action, or restructure poor performing schools.[117]

An LEA must identify for School Improvement any school that fails to make AYP for two consecutive years.[118] When a school has been identified for Improvement, the LEA must give *all* students enrolled in that school the choice of transferring to another public school that is a part of the LEA.[119] Unless prohibited under state law, the choice of schools for transfer may include a charter school that has not been identified for School Improvement.[120] In making transfer decisions, the LEA shall give priority to the lowest performing students from low-income families.[121]

If the school identified for School Improvement fails to make AYP for two consecutive years, it must undergo Corrective Action.[122] Corrective Action entails a change in school staff or curriculum and other actions designed to substantially address the school's persistent failure to meet AYP and greatly increase the likelihood that the students meet or exceed the proficient levels of achievement on the state's assessment.[123]

115 *Id.* at 1458, 1487.

116 *Id.* at 1487.

117 *Id.* at 1484.

118 *Id.* at 1479.

119 Id. at

120 *See* No Child Left Behind Act of 2001 §1116(b)(1)(E)(i), 20 U.S.C. § 6316(b)(1)(E)(i) (2002) (stating that "local educational agency shall . . . provide all students enrolled in the school with the option to transfer to another public school . . . which may include a public charter school, that has not been identified for school improvement under this paragraph, unless such an option is prohibited by State law.").

121 *See* No Child Left Behind Act of 2001, *supra* note 120 at §1116(b)(1)(E)(ii) (noting that "[i]n providing students the option to transfer to another public school, the local educational agency shall give priority to the lowest achieving children from low-income families.").

122 *See id.* at § 1116(b)(7)(C) (setting a two-year period for making school improvements).

123 *See id.* at § 1116(b)(7)(A) (describing situations warranting Corrective Action).

If after one full school year of Corrective Action the school fails to make AYP, the LEA shall restructure the school.[124] Restructure of the school entails implementation, consistent with state law, of one of the following governance strategies: converting the school into a charter school; overhaul of the school staff identified with the failure to meet AYP; or contracting with a private management company to operate the school.[125]

During Corrective Action or Restructuring, the LEA must continue to avail students in the school the option of transferring to other public schools, including charter schools, meeting AYP.[126] In making admission decisions, the LEA must take into consideration parental preferences for schools, however the decision as to which school a student will be admitted to is the LEA's.[127] Any school identified for School Improvement, Corrective Action or Restructuring that meets AYP for two consecutive years shall no longer be required to offer choice to students to transfer out of the school.[128]

As with schools, an LEA that fails to make AYP for two consecutive years is to be identified for Improvement.[129] If the LEA fails to meet AYP for two consecutive years, the state shall ensure the LEA takes Corrective Action, which is very similar to the steps for restructuring schools, as described above.[130]

The latest Non-Regulatory Guidance from the United States Department of Education addressing the new requirements on Charter Schools, issued in March 2003, suggests that a charter school that is its own LEA and is identified for School

124 *See id.* at § 1116(b)(8)(A) (limiting duration of corrective action to one year).

125 *See id.* at § 1116(b)(8)(B) (describing alternative governance possibilities).

126 *See id.* at § 1116(b)(7)(C)(i), (8)(A)(i) (stating "local educational agency shall . . . continue to provide all students enrolled in the school with the option to transfer to another public school.").

127 *See* PUBLIC SCHOOL CHOICE, *supra* note 4, at E-3 (noting that "[i]f more than one school that meets the requirements . . . the LEA must offer more than one choice to eligible students . . . LEAs should strive to provide a full menu of choices to students and parents, and must take into account parents' preferences among the choices offered.").

128 *See* No Child Left Behind Act of 2001, supra note 120 at § 1116(b)(12) (requiring "[i]f any school identified . . . makes adequate yearly progress for two consecutive school years, the local educational agency shall no longer subject the school to the requirements of school improvement, corrective action, or restructuring or identify the school for school improvement for the succeeding school year.").

129 *See id.* at § 1116(c)(3) (stating that "[a] State shall identify for improvement any local educational agency that, for 2 consecutive years . . . failed to make adequate yearly progress as defined in the State's plan").

130 *See id.* at § 1116(c)(10)(B)(ii) (setting two-year time limit for corrective action).

Improvement, Corrective Action or Restructure is subject to the Title I provisions applicable to *schools*, not those applicable to LEAs.[131]

However, the distinction between a charter school that is part of an LEA and that which is its own LEA should not be lost, as this distinction is crucial in many respects to the way NCLB treats charter schools.[132] A charter school that is its own LEA is a single-school LEA; therefore, when it comes to offering choice options when that charter school is identified for School Improvement, Corrective Action or Restructuring, a question arises: what choice(s) should such a charter school provide?[133] The Non-Regulatory Guidance states that a charter school that is its own LEA must establish, to the extent practicable, cooperative agreements with other LEAs in order to offer choices for students choosing to transfer.[134] The charter school authorizer or the charter school must then notify parents of the list of choices of schools for transferring students, which must include the students' option to return to the charter school.[135]

If a charter school that is a part of an LEA is identified for School Improvement, Corrective Action or Restructure, the LEA may include any school within its jurisdiction, including charter schools, on the list of choices for students seeking to transfer.[136] Thus, when a charter school is a part of an LEA, the LEA may

131 *See* U.S. DEP'T OF EDUC., THE IMPACT OF THE NEW TITLE I REQUIREMENTS ON CHARTER SCHOOLS, NON-REGULATORY GUIDANCE, DRAFT, B-4 (2003), *available at* http://www.nsba.org/site/docs/11400/11331.pdf (declaring that "[a] charter school that is its own LEA and that is identified as in need of improvement is subject to the provisions of Title I that apply to schools in need of improvement. This is the same policy that applies to all single-school LEAs receiving Title I funds.").

132 *Compare id.* at B-5 (requiring charter schools that are part of an LEA to provide students with choice options when classified as in need of improvement, corrective action or restructuring) *with id.* at B-1 (2003) (stating that charter school that is its own LEA does not need to provide choice options to its students when classified as in need of improvement, corrective action or restructuring).

133 *See id.* at B-6 (2003) (addressing question of whether charter schools that are their own LEAs must, under state law, provide choice options to other students when charter school is identified as in need of improvement, corrective action or restructuring).

134 *See id.* (requiring this to avail choice in instances where "all public schools to which a student may transfer within LEA (including charter school LEAs) are identified for school improvement, corrective action, or restructuring.").

135 *See id.* (stating that where charter school is an LEA itself, authorizer or charter school itself should notify parents of school's status and their options, including returning children to their "home" public school).

136 *See id.* at B-5 (requiring charter schools that are part of LEAs to provide choice options and transportation to students when LEA is identified by State as in need of improvement, corrective action or restructuring).

include that school on the list of choices offered to students seeking to transfer, as long as that charter school is not identified for Improvement, Corrective Action or Restructuring.[137] The LEA is responsible for notifying parents of the list of choices of schools for transferring students, including the option of returning to the charter school.[138] If all the schools, including charter schools, within the LEA's jurisdiction are identified for Improvement, Corrective Action or Restructure, 34 C.F.R. Section 200.44(h) as well as the Non-Regulatory Guidance state that to the extent practicable, the LEA is required to enter into cooperative agreements with one or more LEAs in the area.[139] Where a charter school that is its own LEA is located within a larger LEA, the Non-Regulatory Guidance encourages the larger LEA with school(s) identified for Improvement, Corrective Action or Restructuring to enter into cooperative agreements with such charter school so as to be able to offer the charter school as an option for its students.[140]

Many states require charter schools to admit students on a first-come first-serve basis.[141] However, when oversubscribed, most states mandate that the charter school admit students on the basis of a lottery system.[142] To be eligible for funds under the United States Department of Education's Charter School Program (CSP, a federal grant program for charter schools) when oversubscribed, charter schools must admit students using a lottery system.[143] Requiring admission on the basis of lottery

137 *See id.* at B-1 (stating that LEAs should list charter schools that have not been identified for improvement, correction action or restructuring on list of schools to which students may transfer).

138 *See* THE IMPACT OF THE NEW TITLE I REQUIREMENTS, *supra* note 131, at B-4 (demanding that parents be notified of option to transfer their children to other schools, including child's "home" public school, if charter school is identified as in need of improvement, corrective action or restructuring).

139 *See id.* at B-6 (stating that charter school must, if practicable, establish cooperative agreements with other LEAs in area).

140 *See id.* at B-2 (requiring charter school that is its own LEA but falls into boundaries of larger LEA to work with charter school LEAs within its geographic boundaries to reach agreements allowing its students to transfer to these schools).

141 *See, e.g.*, New Hampshire's Public Charter Schools: A Look at the Successes and Challenges That Lie Ahead (N.H. Dep't of Educ.) *at* http://www.ed.state.nh.us/education/News/charter.htm (detailing how New Hampshire charter schools admit applicants on first-come, first-serve basis).

142 *See* GREEN & MEAD, *supra* note 96, at 111 (noting that charter schools generally use lotteries if more students apply for admission than can be admitted).

143 *See* THE IMPACT OF THE NEW TITLE I REQUIREMENTS, *supra* note 131, at B-3 (stating that in order to be an eligible charter school under Federal charter school grants

could present a challenge to the NCLB's school choice paradigm. Recall, the NCLB requires that schools identified for School Improvement, Corrective Action or Restructuring offer choices for students seeking to transfer to high performing schools.[144] If a charter school eligible to receive such students is oversubscribed and has to admit students on a lottery system, is that charter school really a "choice" for students seeking transfer, keeping in mind that since a lottery system is a random selection system, there is no guarantee that any student from a school failing AYP will be among those chosen through the lottery? The Public School Choice Non-Regulatory Guidance permits charter schools to adjust their lottery system to ensure students seeking to transfer get priority in admission.[145]

The federal regulations implementing the NCLB prohibit an LEA from using a lack of physical capacity to deny students the choice to transfer.[146] However, the LEA is permitted to take this lack of capacity into account, in determining which schools to list as options for students seeking to transfer.[147] For a charter school that is part of an LEA, this means that an oversubscribed charter school need not be offered as an option for students.[148] The Public School Choice Guidance states that LEAs lacking capacity to accommodate all students seeking to transfer must take creative steps, such as encouraging the formation of new charter schools, to accommodate such students.[149]

The NCLB provides that where public schools within an LEA's jurisdiction fail to meet AYP for three consecutive years or more, the LEA must offer Supplemental Educational Services (SES) to

program, charter school must use lottery to admit students if there are more applicants than openings).

144 *See* PUBLIC SCHOOL CHOICE, *supra* note 4, A-2 (explaining that LEAs receiving funds under Title I must make choice available to all students in qualifying schools).

145 *See id.* at E-5 (allowing charter schools to weight lottery in favor of covered students and to still remain compliant with CSP requirements).

146 See 34 C.F.R. § 200.44(d) (announcing "[a]n LEA may not use lack of capacity to deny students the option to transfer").

147 *See* PUBLIC SCHOOL CHOICE, *supra* note 4, at E-7 (explaining that lack of capacity cannot be used as excuse outright, but rather only factor taken into consideration in providing choice options).

148 *See id.* (providing that every student wishing to transfer must have opportunity, and if school in an LEA is oversubscribed, then that LEA must either create additional capacity or provide choices of other schools).

149 *See id.* at E-8 (explaining how LEAs can create additional capacity).

students from low-income families.[150] The LEA is required to offer SES as well in the cases of charter schools that are part of that LEA, pursuant to NCLB, Title I Section 1116(e)(1).[151] A charter school that is its own LEA must itself provide students with SES.[152] SES includes tutoring as well as other services, supplementing the school day instruction, that are designed to enrich the academic achievement of students from poor performing school.[153]

II. POLICY PROBLEMS

A. Choice under NCLB and Desegregation

Over the years, critics of charter schools have voiced concerns that charter schools may provide white students and parents with the opportunity to escape desegregation, perpetuating one-race schools.[154] In fact, in line with the theme of choice underlying charter schools, "[m]any families have exercised their power of choice by attending charter schools that are disproportionately one-race,"[155] thus "circumventing desegregation decrees."[156]

Many school districts are still under court-ordered desegregation decrees.[157] These decrees are designed to ensure

150 *See* No Child Left Behind Act of 2001 *supra* note 120, at § 1116(e)(1) (declaring that any LEA not meeting the AYP requirments must "arrange for the provision of supplementary educational services to eligible children in the school").

151 *See* THE IMPACT OF THE NEW TITLE I REQUIREMENTS, *supra* note 131, at C-2 (2003) (imposing requirement on charter schools in addition to other public schools).

152 *See id.* at C-3 (stating that "[a] charter school that is its own LEA must pay for such services on the same basis as any other LEA.").

153 *See* No Child Left Behind Act of 2001, *supra* note 120 at § 1116(e)(12)(C) (describing what supplementary educational services entails).

154 *See* GREEN & MEAD, *supra* note 96, at 7 (noting how this may subject charter school movement to litigation); Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 569 (2001) (stating that "[s]ome charter schools are integrated, but many others are deeply segregated.").

155 GREEN & MEAD, *supra* note 96, at 7.

156 *Id.* at 101; *see* Stephen Eisdorfer, *Racial Ceilings and School Choice: Public School Choice and Racial Integration,* 24 SETON HALL L. REV. 937, 943-44 (1993) (noting practical effect of public school choice proposals is to desegregate schools in North and West and resegregate schools in South because both white and minority parents are very reluctant to send their children to schools of predominantly opposite race).

157 *See* GREEN & MEAD, *supra* note 96, at 114 (detailing decrees and burdens they impose on schools); *see also* Nick Lewin, *The No Child Left Behind Act of 2001: The Triumph of School Choice over Racial Desegregation*, 12 GEO. J. ON POVERTY L. & POL'Y

that school districts eliminate vestiges of past segregation with respect to the *Green* factors: student assignments, faculty assignments, transportation, facilities, student activities and education quality.[158] Charter schools that are part of an LEA must comply with the desegregation decree applicable to the LEA.[159] Fears that charter schools might fuel segregation through the development and propagation of one-race schools may be one reason thirteen states - Arizona, Colorado, Delaware, Illinois, Iowa, Louisiana, Nevada, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee and Virginia - mandate by statute that charter schools comply with desegregation decrees.[160] Thus, even charter schools that are their own LEA might be required to comply with desegregation decrees.[161]

As with the theme of choice underlying the notion of charter schools, the theme of choice underlying the NCLB[162] has led to fears that one-race charters will be perpetuated.[163] If a great number of students of one-race opt to transfer from schools identified for School Improvement, Corrective Action or Restructuring, that could leave the poor performing school (charter or other school) in violation of a desegregation decree.[164] In addition, students opting to transfer to schools composed of student populations that are of their own race, could leave the

95, 112 (2005) (highlighting conflict facing school districts subject to both school choice provisions of NCLB and court-ordered desegregation decrees).

158 *See* GREEN & MEAD, *supra* note 96, at 114 (explaining how schools under decrees must operate); *See also* Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 435 (1968) (examining how segregation affected schools in "every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities.").

159 *See* Parker, *supra* note 154, at 617 (discussing "[i]f that school district or state board of education is subject to a school desegregation order, its actions vis-a-vis the charter school petition must be consistent with the school desegregation duty.").

160 *See* GREEN & MEAD, *supra* note 96, at 114 (noting prohibitions in state statutes against maintaining segregative policies).

161 *See* U.S. DEP'T OF EDUC., APPLYING FEDERAL CIVIL RIGHTS LAWS TO PUBLIC CHARTER SCHOOLS: QUESTIONS AND ANSWERS, OFFICE FOR CIVIL RIGHTS, 8, 22 n.10 (2000), *available at* http://www.uscharterschools.org/pdf/fr/civil_rights.pdf (explaining potential effect of charter school that is its own LEA on desegregation plan).

162 *See* PUBLIC SCHOOL CHOICE, *supra* note 4, A-2 (2004) (noting that "public school choice can increase both equity and quality in education.").

163 *See* Dan J. Nichols, *Brown v. Board of Education and the No Child Left Behind Act: Competing Ideologies*, 2005 BYU EDUC. & L.J. 151, 172 (2005) (explaining high-stakes accountability under NCLB, rather than racial integration, as conservative movement's answer to underachievement of minority students).

164 *See* Parker, *supra* note 154, at 618 (noting existence of charter school in district under desegregation decree could have effect of increasing segregation in traditional public school formerly attended by transferring students, as well as lead to an exodus of faculty and staff from public schools to charter schools).

receiving school(s) in violation of a desegregation decree, if the school is not already violating the decree.[165] Thus, the NCLB could foster charter school violations of desegregation decrees.

The question arises: Do charter schools have to comply with desegregation decrees if it would put them in violation of the "choice" mandates of the NCLB? The federal regulations implementing the NCLB state that an LEA subject to a desegregation plan that is voluntary or court-ordered is not exempt from the NCLB public school requirements.[166] However, the LEA is permitted to factor in the desegregation decree in deciding how it would offer choices to students.[167] Thus, the LEA might have the option of not including a charter school that is a part of the LEA in the list of choices available, if enrolling students in that school would put the school in violation of a desegregation decree, as long as the LEA does make other choices available to the students.[168] Moreover, should the LEA choose to include such charter school in the list of choices offered to students seeking to transfer, the LEA might be able to allocate students among the options in a manner that ensures that the charter school is not in violation of the desegregation decree.[169] The Public School Choice Guidance states:

> An LEA that is operating under a court-ordered [desegregation] plan should first determine whether it is able to offer choice within the parameters of its plan. If it is not able to do so, the LEA needs to seek court approval for amendments to the plan that permit a transfer option for students enrolled in schools identified for school improvement, corrective action or restructuring. If the LEA is unable to secure changes to the plan that permit a transfer option, the LEA will be out of compliance with Title I. If that

165 *See* Trisha Loscalzo Yates, *A Criticism of the No Child Left Behind Act: How the Convention on the Rights of the Child Can Offer Promising Reform of Education Legislation in America*, 5 WHITTIER J. CHILD & FAM. ADVOC. 399, 421 (2006) (stating further that school choice is disruptive to both transferring students and their peers at receiving schools and serves to overcrowd and reduce status of receiving school).

166 *See* 34 C.F.R. § 200.44(c)(1) (stating that desegregation plans do not affect requirements of schools identified for school improvement, corrective action, or restructuring by statute).

167 *See id.* at (c)(2) (requiring the LEA to take into account desegregation plan).

168 *See id.* (requiring transfer option but allowing LEA to consider desegregation plan in determining "how" to provide it).

169 *See id.* at (c)(3) (leaving flexibility to LEA in establishing transfer option that meets both 34 C.F.R. § 200.44(a)(1) and desegregation plan).

> occurs, it should notify the [State Educational Agency] SEA and this Department of its request to the court and of the court's decision *[34 C.F.R. Section 200.44(c)(3)].*
>
> If the plan has been agreed to with the Department's Office of Civil Rights (OCR), OCR will work with the LEA to identify permissible Amendments to the plan that will enable the LEA to comply with Title I public school choice requirements.[170]

As a single-charter school LEA, a charter school that is its own LEA and is subject to a desegregation decree has no other schools under its auspices, distinguishing it from multi-school LEAs.[171] The charter school is required to offer choices to students seeking to transfer but likely has no control or stake in whether the receiving schools are put in violation of a desegregation decree as a result of the transfer.[172]

What should a charter school identified for School Improvement, Corrective Action or Restructuring do when, in complying with the NCLB's choice provision that forces the charter school to let students transfer to high performing schools, the transferring students are mostly of one race, resulting in a situation where the charter school violates a desegregation decree? Where the charter school is a part of an LEA, the LEA or the charter school must seek a court order modifying the decree if complying with the decree would forbid the transfer of students.[173] Where the charter school is its own LEA, then it must seek modification of the decree if compliance with the decree would prevent the school from compliance with the NCLB.[174]

170 *See* PUBLIC SCHOOL CHOICE, *supra* note 4, at G-3.

171 *See id.* at G-1-G-4 (discussing charter schools operating as LEAs).

172 *See* 34 C.F.R. § 200.44(C)(1) (stating that when LEA is subject to desegregation decree whether or not "that plan is voluntary, court-ordered, or required by a Federal or State administrative agency, the LEA is not exempt" from offering the option to transfer to students).

173 *See* 34 C.F.R. § 200.44(C)(3) (declaring that if "desegregation plan forbids the LEA from offering the transfer option required . . . LEA must secure appropriate changes to the plan to permit compliance"); *See* PUBLIC SCHOOL CHOICE, *supra* note 4, G-1-G-4 (discussing compliance with desegregation plans).

174 *See* 34 C.F.R. § 200.44(C)(3) (applying rule to charter school that operates as its own LEA); PUBLIC SCHOOL CHOICE, *supra* note 4, at G-1-G-4.

Rufo v. Inmates of Suffolk County Jail,[175] a United States Supreme Court decision, suggests that federal courts could modify desegregation decrees if certain conditions are met.[176] In *Rufo*, a consent decree between county officials and prison inmates required the construction of a new jail to provide pretrial detainees single occupancy cells.[177] Work toward the jail's construction was delayed; meanwhile the inmate population outgrew projections.[178] The sheriff moved to modify the decree so as to permit double bunking in certain cells.[179] The federal district court and the First Circuit Court of Appeals denied the sheriff's motion.[180] The Supreme Court vacated the judgment and remanded the case for the district court to apply the standard it set forth.[181] This standard requires parties seeking to modify a consent decree to establish that a significant change in circumstances justifies the modification.[182] The modification may be justified when (1) a change in facts makes compliance with the decree substantially more difficult; (2) the decree is unworkable due to unforeseen obstacles; or (3) enforcing the decree without modifying it would be detrimental to the public interest.[183] Once the movant satisfies this standard, the district court must assess the proposed modification to ensure that it is suitably tailored to

175 502 U.S. 367 (1992).

176 *Id.* at 368-69 (permitting modification in event of change in factual circumstances and requiring it when necessary to conform to change in federal law).

177 *Id.* at 367 (arising from court decree declaring that conditions at jail were constitutionally deficient).

178 *Id.* (explaining overcrowding).

179 *Id.* (detailing sheriff's goal of increasing jail capacity).

180 *See* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 371-72 (1992) (describing reasons court denied motion).

181 *See id.* at 372 (stating that lower courts applied wrong standard in denying motion).

182 *See id.* at 383 (explaining that "party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstance warrants revision of the decree.").

183 *See id.* at 384 (highlighting fact that "[m]odification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous" and continuing to state that "when a decree proves to be unworkable because of unforeseen obstacles, or when enforcement of the decree without modification would be detrimental to the public interest"); *see also* GREEN & MEAD, *supra* note 96, at 116 (outlining that "modification may be warranted when (1) changed factual conditions make compliance with the decree substantially more onerous; (2) the decree proves to be unworkable because of unforeseen obstacles; or (3) enforcement of the decree without modification would be detrimental to the public interest.").

deal with the changed circumstances.[184] In line with this, the district court must ensure (1) the modification would not create or perpetuate a constitutional violation; (2) the modification would resolve the problems created by the changed circumstances; and (3) the court defers to local administrators, charged with the responsibility of evaluating and solving problems of prison reform, to work out the details of the implementation of a decree modification.[185] A charter school or applicant seeking to modify a desegregation decree pursuant to *Rufo* would have to satisfy the standard and requirements set forth above.[186]

To prevent charter schools from perpetuating segregation, another strategy a number of states have resorted to is the enactment of racial balancing statutes.[187] These statutes are of various forms. California, Florida, New Jersey, Ohio, Wisconsin and Wyoming merely require charter schools to adopt policies that will ensure that the student population reflects the racial composition of the surrounding school district.[188] Kansas, Minnesota, and North Carolina, on the other hand, mandate charter schools to ensure that the student population reflects the racial composition of the surrounding school districts.[189] Nevada requires charter schools to ensure that their student population falls within 10% of the racial composition of the surrounding school district.[190] Penalties states impose for the failure of the charter schools to comply with the racial balancing provisions range from the denial of a charter to revocation of a granted charter or school closure.[191]

184 *See Rufo*, 502 U.S. at 391 (stating that "if the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance.").

185 *See id.* at 391-92 (discussing constraints in striving to rewrite consent decree).

186 *See id.* at 393 (concluding that under flexible standards adopted in this case, "party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance.").

187 *See* GREEN & MEAD, *supra* note 96, at 102 (stating "[r]acial balancing provisions are one strategy employed by enabling statutes to prevent charter schools from becoming racially segregated.").

188 *See* GREEN & MEAD, *supra* note 96, at 103 (listing California, Florida, New Jersey, Ohio, Wisconsin, and Wyoming policies).

189 *See id.* (explaining Kansas, Minnesota, and North Carolina provisions).

190 *See id.* (specifying Nevada provision).

191 *See* Gajendragadkar, *supra* note 9, at 155-58 (discussing state racial balancing statutes).

Legal questions arise as to whether racial balancing provisions violate the Equal Protection Clause of the Fourteenth Amendment. When a racial balancing provision is challenged as violative of the Equal Protection Clause, the court has to determine what level of scrutiny to apply.[192] The three different levels of scrutiny a court can apply are: strict scrutiny, heightened scrutiny, and rational basis scrutiny. Strict scrutiny, the highest level of scrutiny, is applied when: (a) the government uses a classification that is suspect, for example, race; or (b) the government classification entails a fundamental right protected under the United States Constitution, such as the right of interstate travel and the right to vote.[193] To overcome strict scrutiny, the government must show that the classification is narrowly tailored to satisfy a compelling government interest.[194] In order to overcome heightened scrutiny, the government must show that the classification used is substantially related to an important government interest.[195] Courts most often apply heightened scrutiny to government classifications based on gender.[196] Rational basis scrutiny, the easiest level of scrutiny to satisfy, merely requires the government to demonstrate that the government interest is rationally related to a legitimate government interest.[197]

A racial balancing provision that mandates charter schools to account for race in admission decisions would be subject to strict

192 *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (creating new level of scrutiny to examines notion that stricter judicial standards should exist for legislation facially within "specific prohibition of the Constitution, such as those of the first ten amendments which are . . . embraced within the Fourteenth.").

193 *See* Robert F. Bodi, *Democracy at Work: The Sixth Circuit Upholds the Right of the People of Cincinnati to Choose Their Own Morality in Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997)*, 32 AKRON L. REV. 667, 671-73 (1999) (discussing three levels of judicial scrutiny).

194 *See* Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (stating "[w]hen race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.").

195 *See id.* at 309 (extrapolating that "Supreme Court applies strict scrutiny to all racial classifications to smoke out illegitimate uses of race, by assuring that the government is pursuing a goal important enough to warrant use of a highly suspect tool.")

196 *See e.g.*, United States v. Virginia, 518 U.S. 515, 574 (1995) (applying heightened scrutiny to Military Institute's exclusionary policy denying women admission).

197 *See e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (declaring "general rule . . . legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

scrutiny if challenged under the Equal Protection Clause.[198] Provisions that require charter schools ensure their student population reflects the racial composition of the surrounding school district are such an example.[199] Those provisions that merely require charter schools adopt policies to ensure that the student population reflects the racial composition of the surrounding school district might not be analyzed under strict scrutiny in an Equal Protection Clause challenge, as such provisions merely require charter schools employ strategies, like outreach and advertising, to increase their pool of minority applicants.[200] In states requiring such policies, race is not required as a factor in making the decision as to which students to admit.[201] "[M]ethods designed to avoid disparate impact are permissible when race-neutral selection occurs."[202]

The leading case on Equal Protection Clause challenges to racial balancing provisions is *Beaufort County Board of Education v. Lighthouse Charter School Committee*.[203] In that case, applying strict scrutiny, the trial court found that the racial balancing provision in question violated the Equal Protection Clause because the provision was not narrowly tailored and failed to satisfy a compelling government interest.[204] That case involved the Beaufort County Board of Education's denial of a charter school application for failure to identify the students the school would enroll, thereby making it difficult for the board to decide whether the school would comply with South Carolina's balancing provision.[205] Ruling that a charter school application could be denied for failure to satisfy the racial balancing provision, which in this case required that a charter school's

198 *See* Wessmann v. Gittens, 160 F.3d 790, 808-09 (1998) (holding that Boston Latin School's use of racial balancing in admission policy violated Equal Protection Clause because it was not narrowly tailored).

199 *See e.g.*, Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm., 335 S.C. 230, 233, 516 S.E.2d 655, 656 (1999) (reviewing challenge to South Carolina law requiring that charter school enrollment not deviate more than 10% from surrounding area of school district).

200 *Id.* at 238 (remanding to determine whether school raised enough funds).

201 *Id.*

202 Parker, *supra* note 154, at 592.

203 No. 97-CP-7-794 (S.C. Ct. Com. Pleas May 8, 2000).

204 *See id.*

205 *See Beaufort*, 516 S.E.2d 655 at 656, 659 (stating that Beaufort Board found that Lighthouse's application failed to meet several requirements of Act and therefore was denied).

student population not differ from the school district's racial composition by greater than 10%, the Supreme Court of South Carolina remanded the case to the trial court to determine whether the racial balancing nonetheless violated the Equal Protection Clause.[206] Applying strict scrutiny, the trial court held that the balancing provision violated the Equal Protection Clause because it was an admissions policy that employed a classification based on race.[207] The court rejected the board's argument that the provision had a compelling interest of increasing student diversity in charter schools.[208] The court disagreed with United States Supreme Court Justice Powell's decision in *Regents of the University of California v. Bakke*,[209] that to ensure the educational benefit of diversity, universities had a compelling interest in taking race into account in making admission decisions.[210] Assuming *arguendo* that diversity was a compelling interest, the trial court in *Beaufort* held that the balancing provision was nonetheless unconstitutional, as it was not narrowly tailored to satisfy the compelling interest.[211] In deciding whether the racial classification was in fact narrowly tailored, the trial court applied the five-factor test the United States Court of Appeals, Fourth Circuit set out in *Tuttle v. Arlington County Sch. Board* as:

> (1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met, and (5) the burden of the policy on innocent third parties.[212]

206 *See id.* at 659 (specifying that the constitutionality of such provision concerning racial composition must be determined on remand).

207 *See Beaufort*, 97-CP-7-794.

208 *See id.*

209 438 U.S. 265 (1978).

210 *See id.* at 320 (finding that state has "substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin").

211 *Beaufort*, 97-CP-7-794.

212 *Id.* slip op. at 4 (outlining five factor test (quoting Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 706 (4th Cir. 1999))).

Applying the first factor, the court had no knowledge of the efficacy of race-neutral alternatives.[213] The court held that the balancing provision did not satisfy the second factor because the racial composition had to be complied with in perpetuity.[214] With respect to the third factor, the court found that there was no relationship between the provision's numerical goal and the percentage of minorities in the charter school's pool of students.[215] Applying the fourth factor, the court held that the provision was inflexible, as it would compel charter schools to recruit students as far as fifty or more miles away, and to require students to travel such distances to school every day would result in excessive transportation costs.[216] The court held that these transportation burdens were not in tandem with the goal of diversity.[217] Finding that the racial classifications and the transportation costs were burdensome to innocent third parties, the court held that the provision failed to satisfy the fifth factor.[218] Concluding that the provision could not be severed from the charter school statute, the court declared the entire statute unconstitutional.[219] South Carolina's Attorney General and the charter school appealed the trial court's ruling on the provision's severability to the Supreme Court of South Carolina; the board cross-appealed the court's ruling that the provision was unconstitutional.[220] The state's legislature amended the charter school statute while the appeal was pending, adding a severability clause, and later changing the racial composition requirement.[221] As a result, the Supreme Court of South Carolina dismissed the appeal as moot.[222] The statute now requires that the racial composition of the student population of charter schools differ by not more than 20% from that of the

213 *See id.*
214 *See id.*
215 *See id.*
216 *See id.*
217 *See id.*
218 *See id.*
219 *See id.*
220 *See* County Bd. of Educ. v. Lighthouse Charter Sch. Comm., 353 S.C. 24, 27 (2003) (providing background information).
221 *See id.*
222 *Id.* at 29 (stating "[b]ecause the original provision under which this case was brought is no longer applicable and the new requirements . . . are substantially different, we vacate the order of the circuit court and dismiss this appeal as moot.").

school district the charter school seeks to serve.[223] The statute also states that should the racial composition of the applicant's or charter school's differ from the school district's by more than 20%, the school district must take into account the racial composition of the applicant pool as well as the applicant's or charter school's recruitment efforts in making a determination as to whether the charter school is discriminatory or nondiscriminatory.[224]

The United States Supreme Court's decision in *Grutter v. Bollinger*,[225] is unlikely to change the trial court's finding in *Beaufort*, since the trial court rejected Justice Powell's opinion in *Bakke* which formed the basis of the Supreme Court's holding in *Grutter*.[226] In *Grutter*, the Court held that the University of Michigan's admissions policy which used race as a "plus" factor in admission decision was not violative of the Equal Protection Clause, since race was only one of several factors the school considered in admission decisions.[227] Other factors include letters of recommendation, personal statement, undergraduate grade point average, the Law School Admissions Test (LSAT) score, essay on how the applicant intends to contribute to the school's diversity and "soft variables" such as the enthusiasm of the recommenders and the difficulty level of the undergraduate courses the applicant took.[228] The Court agreed with the law school's arguments that the enrollment of a "critical mass" of underrepresented groups would serve an educational benefit and ensure that members of such groups have the ability to contribute to the legal profession.[229] The Court held that using race as a "plus" factor differs from a quota system.[230] Furthermore, the Court stated that narrow tailoring does not

223 S.C. Code Ann. § 59-40-50(B)(7) (2003) (reflecting new percentage requirement).

224 S.C. Code Ann. § 59-40-70(D) (2003) (stating that if racial composition falls beyond 20% threshold new considerations must be made).

225 539 U.S. 306 (2003).

226 *See id.* at 363 (noting that "only source for the Court's conclusion that public universities are entitled to deference even within the confines of strict scrutiny is Justice Powell's opinion in *Bakke*.").

227 *Id.* at 343 (describing how the Equal Protection Clause is not violated in such instances).

228 *Id.* at 315 (listing the admissions decision criteria).

229 *Id.* at 316 (stating that by allowing the Law School to enroll minority applicants it can ensure unique contributions to the school atmosphere).

230 *See id.* at 334 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978)).

require the law school to exhaust all conceivable race-neutral alternatives before employing a race-conscious admission policy.[231] The Court found that the law school's policy was limited in duration and not significantly burdensome to innocent third parties.[232]

It is possible that other state and federal courts might find racial balancing provisions requiring charter schools to take race into account in admission decisions to satisfy compelling interests not considered in *Beaufort*: preparing students to live and work in a multicultural society; and the elimination of the effects and vestiges of de facto segregation.[233]

Charter schools in states with racial balancing provisions might be faced with a situation where compliance with the balancing provision would prevent the school from complying with the NCLB's public school choice requirements or compliance with the NCLB would put the school in violation of the state's racial balancing provision.[234] What is the charter school to do under such circumstances? The Public School Choice Guidance does not explicitly address the conflict between the NCLB and racial balancing provisions.[235] It seems the best answer available from the federal regulations as well as the Public School Choice Guidance is as follows: 34 C.F.R. Section 200.44(a)(5) and (b), as well as the Public School Choice Guidance suggest that the only state law an LEA can invoke to avoid complying with the NCLB's public school choice requirements is a state law that "prohibits choice through restrictions on public school assignments or the transfer of students from one public school to another public

231 *Id.* at 309.

232 *Id.* at 341-43 (noting that Court was "satisfied that the Law School's admissions program" did not unduly burden others and that it would end use of race as factor as soon as possible).

233 *See id.* at 330 (noting that racially balanced schools are seen as preparing students to work in "an increasingly diverse workforce and society."); *see also* Julie F. Mead, *Conscious Use of Race as a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived from Recent Judicial Opinions*, 8 MICH. J. OF RACE & L. 63, 64 (2002) (stating that many schools have used race in determining student admissions to eliminate problems of segregation).

234 *See* Benjamin Michael Superfine, *Using the Courts to Influence the Implementation of No Child Left Behind*, 28 CARDOZO L. REV. 779, 802 (2006) (highlighting one potential conflict between following NCLB's public school choice requirement and court order); *see also* Mead, *supra* note 233, at 130 n. 363 (noting that charter schools must comply with Charter Schools Expansion Act, which mandates use of random lottery in order to receive federal funds).

235 *See* PUBLIC SCHOOL CHOICE, *supra* note 4, at E-9-10 (discussing state law conflict with NCLB, but not directly discussing racial balancing provisions).

school."[236] A charter school faced with a conflict between compliance with the NCLB and the state's racial balancing provision might argue that the balancing provision forbids choice through restrictions on transfers that would lead to racial imbalance in student population. That might be a tough argument to win however, since a counter argument could just as well be made that the balancing provisions do not explicitly prohibit transfers between public schools.[237] The Public School Choice Guidance states: "Other laws, such as those that mandate specific student-teacher ratios, may make providing choice options more difficult, but may not be used to prohibit parental choices."[238] This suggests that "other laws," for example, state laws other than those forbidding choice through restricting public school assignments or student transfers between public schools (including charter schools), can only make the provision of choice options more difficult; not prohibit choices under the NCLB.[239]

As with the filing of a motion with a court to modify a desegregation decree, discussed above, the charter school could lobby the state legislature to amend the statute or challenge the balancing provision in court, making federalism arguments or arguments under the Supremacy Clause of the United States Constitution.

CONCLUSION

As this paper indicates, among its many noble goals, the NCLB seeks to close academic achievement gaps between minority and nonminority students by "mandating" choice and giving students the opportunity to transfer from poor performing schools to high performing schools. Charter schools also have an underlying goal of providing the choice of better quality education to students in a school that has many of the same features of a private school, such as exemption from many state laws and regulations, while at the same time receiving government funds. Over the years, in

236 34 C.F.R. § 200.44(b); *see* PUBLIC SCHOOL CHOICE, *supra* note 4, at E-9 (examining the conflict of law).

237 *See* PUBLIC SCHOOL CHOICE, *supra* note 4, at E-9 (noting other state laws existence, but suggesting they may not be used to prohibit choice).

238 *Id.*

239 *See id.* (stating that although some state laws may make providing choice to parents or students more difficult, they do not always prohibit).

a bid to ensure educational equity and improve the educational performance of minority students, civil rights advocates and others have employed three paradigms: the desegregation paradigms; school finance paradigm; and choice paradigm. As discussed above, charter schools fall under the choice paradigm. The National Assessment of Educational Progress (NAEP) 2003 pilot study, however, reveals that charter school students do not necessarily perform better than students in public schools.[240] For example, the study found that fourth-grade charter school students did not perform as well as their counterparts in public school.[241] The study found no measurable differences in the mathematics and reading performances between fourth-grade charter school students and students of similar races in other public schools.[242] Thus, it is not clear whether charter schools actually improve educational performance. More studies would need to be done before that question is settled.

240 *See* U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, AMERICA'S CHARTER SCHOOLS: RESULTS FROM THE NAEP 2003 PILOT STUDY, 1 (2004), *available at* http://nces.ed.gov/nationsreportcard/studies/charter/2005456.asp (noting lack of expected difference between performance of students in charter schools compared to students in public schools).

241 *Id.* (describing research results).

242 *Id.* (analyzing study conducted on performance of White, Black and Hispanic students).