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Choice, Equal Protection, and Metropolitan Integration: The Hope of the Minneapolis Desegregation Settlement

Myron Orfield*

Introduction

The Minneapolis-St. Paul metropolitan area is one of the whitest and most affluent regions in the country.¹ In the state of Hubert Humphrey, and many other national civil rights leaders, central city school districts contain many public schools that are overwhelmingly poor and enroll virtually no White students.² These schools are segregated both racially and economically from their city and suburban counterparts—some are “hypersegregated,”³ with nearly 90% Black students and similarly large concentrations of poverty.⁴

The effects of neighborhood segregation and poverty are greatly magnified in schools, which are much more segregated than their neighborhoods. Moreover, while more than two-thirds of poor White children live in low-poverty neighborhoods, only

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1. See U.S. Census Bureau, Summary File 3, http://factfinder.census.gov/servlet/CTTable?_caller=geoselect&_ts=144858684577 (last visited Sept. 11, 2005). The Minneapolis-St. Paul area is about 86% White, and slightly more than 5% Black. *Id.* The median income by household is more than \$54,000—fourth in the nation. *Id.*

2. See INST. ON RACE AND POVERTY, RESEARCH, EDUCATION AND ADVOCACY, SELECTED DEMOGRAPHICS, MINNEAPOLIS PUBLIC ELEMENTARY SCHOOLS, 2003-2004 (2004).

3. DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID 10 (1993) (coining the term “hypersegregation” to describe intense, multidimensional segregation).

4. See INST. ON RACE AND POVERTY, *supra* note 2.

about 25% of poor Black children and less than 33% of poor Hispanic children live in low-poverty neighborhoods.⁵ Only 52% of Black children and 20% of Hispanic children in Minneapolis will graduate from high school, in significant part because of racial and social segregation.⁶ Those who do graduate or obtain an equivalency degree will likely have tremendous difficulty finding a path to college or a well-paying job with benefits in the overwhelmingly White-dominated higher education system and economy. If this kind of racial and socioeconomic segregation can happen in the Twin Cities, it conceivably can happen anywhere.

Fifty years after the United States Supreme Court decreed segregated schools to be intrinsically wrong and later ordered that desegregation proceed by "meaningful and immediate progress,"⁷ separate schooling still exists for Whites and minorities.⁸ While county-wide educational systems throughout the South effectively and stably desegregated *de jure* school districts,⁹ Northern districts—contained within fragmented areas with many districts—were less amenable to stable integration. Minneapolis, for example, engaged in city-only desegregation.¹⁰ Hemmed in by many independent suburban districts and the Supreme Court's decision in *Milliken v. Bradley*,¹¹ these Northern cities were ordered to desegregate their schools without suburban

5. PAUL JARGOWSKY, POVERTY AND PLACE 75 (1997).

6. Minn. Dep't of Educ., School Report Card: Minneapolis Public School Dist.: AYP Graduation, http://education.state.mn.us/ReportCard2005/aypGraduation.do?SCHOOL_NUM=000&DISTRICT_NUM=0001&DISTRICT_TYPE=03 (last visited Sept. 11, 2005).

7. Green v. County Sch. Bd., 391 U.S. 430, 439 (1968) (ruling that the "freedom of choice" system of public education established by the school board of New Kent County, Virginia, after *Brown v. Board of Education*, 347 U.S. 483 (1954), was still unconstitutional).

8. See, e.g., Richard Thompson Ford, *Brown's Ghost*, 117 HARV. L. REV. 1305, 1309 (2004) (noting that "green follows White," meaning integrated schools will ensure that minorities from low-income communities will not be ignored by the State if they attend the same middle-class schools as do Whites).

9. Gary Orfield and Susan Eaton, *Dismantling Desegregation*, in DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 1, 14-16 (Gary Orfield & Susan Eaton eds., 1996) [hereinafter DISMANTLING DESEGREGATION].

10. See Booker v. Special Sch. Dist. No. 1, 351 F. Supp. 799, 801 (D. Minn. 1972); see also MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 15-38 (1997); Myron Orfield, *Economic and Racial Polarization in Twin Cities Schools*, 17 HAMLIN J. PUB. L. & POL'Y 271 (1996); John Powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 HAMLIN J. PUB. L. & POL'Y 337 (1996).

11. 418 U.S. 717 (1974) (ruling that Detroit's plan to desegregate its city schools did not require the participation of the public schools outside Detroit).

assistance.¹² While the county-wide systems in the South remained stably integrated for decades, the results in the Twin Cities were consistent with city-only desegregation plans throughout the country: temporary integration eventually overwhelmed by White flight.¹³

In Minnesota, “separate and much more than equal funding” of inner-city schools has been the response to the problem of regional segregation.¹⁴ Minnesota increased funding to segregated schools when it was under the threat of a metropolitan desegregation suit both in the 1970s under the federal equal protection clause and in the 1990s under the state’s.¹⁵ Since 1995, state funding formulas have spent 15% more on central city schools than on any other group of schools in the Twin Cities.¹⁶

As in so many other places in the country, the city schools made an implicit bargain with the state: “we’ll keep them here if you send us money.”¹⁷ At the time, it seemed like a good bargain for Whites, who were afraid of Black students, and for central-city education administrators who liked the idea of new resources. But it wasn’t a good deal. It was a deal that likely destroyed countless lives, deeply hurt city and suburban neighborhoods where the schools became racially identifiable, and ultimately diminished the quality of life and the economy of the Twin Cities.

This new funding, which has not changed the tragedy and harm caused by the segregation of the inner-city schools, is unlikely to increase further. It is unlikely that the legislature will grant more money to inner-city schools when they are increasingly failing and when property taxes and enrollment are growing rapidly in the developing, low-property tax, and politically pivotal suburbs.¹⁸

Racially and economically isolated schools are often attacked by opportunistic politicians who use the pathologies created by segregation to fuel White resentment against the segregated schools.¹⁹ Segregated schools with high spending and poor test

12. Orfield & Eaton, *supra* note 9, at 29-30.

13. ORFIELD, *supra* note 10, at 44-45.

14. *See id.* at 91.

15. *See id.* at 45, 91.

16. *Id.*

17. *Id.*

18. *See generally id.*

19. *See, e.g.,* Doug Grow, *Was Day Crude? Or Just Stupid?*, STAR TRIB. (Minneapolis), May 22, 2004, at 1B (quoting the Minnesota Senate Minority Leader

scores are often used as an affirmation of conservative views of government and a powerful wedge issue to divide suburban voters, many of whom live in low-wealth school districts which directly compete with the central cities for aid.²⁰ There has been little or no effective liberal response to these attacks. But the failure of segregated schools is not necessarily due to corruption or mismanagement, although both are more likely to occur in central cities without politically powerful middle-class families to monitor school quality and performance. It is because, as decades of national experience have shown, students are overwhelmingly disadvantaged by the learning environments of majority poor and segregated schools.²¹ While racially and economically isolated schools fail, the few examples of socially integrated schools are meeting expectations and effectively educating children from diverse racial and social backgrounds.²²

Urban school advocates and leaders across the political spectrum throughout the nation have also hailed charter schools as an answer to failing urban schools.²³ Charter schools, pioneered in Minnesota as a national model, have failed to yield better results, have deepened racial segregation, and appear to be frequently mismanaged and financially unstable.²⁴

who was recently forced to apologize for "repeatedly and angrily sa[ying] that Minneapolis and St. Paul schools 'suck'").

20. *See id.* These leaders generally fail to mention the manifold difference between educating students in schools with 90% or more children coming from poor homes and educating students in affluent or middle-class suburbs.

21. *See, e.g.,* RICHARD KAHLBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 25 (2001) (discussing effects of concentrated poverty, parent educational achievement, "oppositional culture," and influence of peers on educational attainment among students).

22. *See* Minn. Dep't of Educ., School Report Card: Lake Harriet Upper (121), http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=121&DISTRICT_NUM=0001&DISTRICT_TYPE=03 (last visited Sept. 11, 2005) (showing demographics and links to Adequate Yearly Progress and Basic Skills Testing results). As an example, Lake Harriet Upper Campus in Southwest Minneapolis has 18% minorities, 11% free and reduced lunch enrollment, and the school is making adequate yearly progress and exceeding testing goals for children of all races. *Id.*

23. *See, e.g.,* U.S. Charter Schools, http://www.uscharterschools.org/pub/uscs_docs/o/movement.htm (last visited Sept. 11, 2005). Much of the rhetoric surrounding charter schools is based on upsetting the notion of what a "public" school is.

24. *See* ERICA FRANKENBERG & CHUNGMEI LEE, HARVARD UNIV., THE CIVIL RIGHTS PROJECT, CHARTER SCHOOLS AND RACE: A LOST OPPORTUNITY FOR INTEGRATED EDUCATION 4, 7 (2003), http://www.civilrightsproject.harvard.edu/research/deseg/Charter_schools03.pdf (noting that 70% of Black students in charter schools are likely to be in intensely

Schools are more than textbooks, facilities, and dedicated teachers. Schools are also social networks which establish connections and relationships that are important in college, careers, and for general access to opportunity. Poor, segregated schools cannot expose children to these networks, and the larger institutions associated with opportunity in society are harder for students from racially and socially segregated high schools to access, which hinders the ability of Black and Latino children to lift themselves out of poverty.²⁵ In addition, Whites, who are the racial group most segregated in their schooling—segregated from both low-income students and students of color—are injured by decreased opportunities to interact with diverse groups in an increasingly diverse country.²⁶ The trend across the nation is for increased diversity at all grades, and Whites will soon be in the minority.²⁷

Like Minneapolis in the 1960s and 1970s, older suburban school districts are experiencing rapid racial change, increased segregation, and its attendant harms. In several of these school districts, recent attendance boundary changes have concentrated minorities in racially identifiable schools through a pattern of conduct which may violate the federal and state constitutions.²⁸ Suburban racial change and policies that contribute to White flight and segregation are hurting these communities by creating identifiably White schools and non-White schools, thereby encouraging the spatial separation of Whites and minorities not only in schools, but also in suburban neighborhoods.²⁹

segregated schools as opposed to 34% in standard public schools; also noting that the uniqueness of charter schools makes it difficult or impossible to evaluate the quality of education); see also Scott Abernathy, *Charter Schools, Parents, and Public Schools in Minnesota*, 34 CURA REP. 1, 6-7 (2004) (discussing positive and negative consequences associated with charter schools, particularly the siphoning of the most active parents from traditional public schools).

25. See Joleen Kirschenman & Kathryn Neckerman, "We'd Love to Hire Them, But . . .": *The Meaning of Race for Employers*, in THE URBAN UNDERCLASS 203, 231 (Christopher Jencks & Paul E. Peterson eds., 1991) (documenting discrimination by employers in Chicago who turned down applicants from low-income neighborhoods and high schools more frequently).

26. See Ford, *supra* note 8, at 1311 (quoting the reasoning of Justice O'Connor in *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

27. Eric Schmitt, *The New Urban Minority*, N.Y. TIMES, May 6, 2001, at 4.2 (noting that Whites constitute a minority in the largest 100 cities in the country).

28. See, e.g., Bloomington Public Schools, Middle School Attendance Areas, http://www.bloomington.k12.mn.us/departments/superintendent/assistant_supt/imagemap_ms.jpg (last visited Mar. 5, 2006).

29. Recent evidence shows that real estate agents, in violation of federal law,

More segregation is not inevitable, however. The legal response has been largely halted in the federal courts, as they have essentially "dismantled" desegregation remedies and allowed school districts to return to segregated schooling. Yet important federal remedies remain relevant to the setting of attendance boundaries in newly diverse, older suburbs.

Perhaps more importantly, civil rights plaintiffs' lawyers have shifted their tactics to state courts. *Sheff v. O'Neill*, a state case filed in Connecticut in 1989, is the leading case advocating desegregation through state constitutional law.³⁰ Local attorneys and the Minneapolis NAACP filed a similar suit in 1995 to require the state of Minnesota to desegregate Minneapolis's troubled schools with neighboring suburban districts. A settlement arose in 2000 that pushed the state towards creating a solution and provided opportunity for poor children and children of color to attend middle-income schools. The Choice is Yours Program ("CIY"), created by the settlement, made space for 2,000 low-income Minneapolis children from poor neighborhoods to attend suburban schools over four years.³¹

Early experiences in the program have been positive and the legislature, on a bipartisan basis, recently continued CIY after the settlement expired.³² The parents of the CIY children say the schools are safer and stronger educationally, despite long bus rides and the ever-present problem of racism by Whites unaccustomed to Black and Latino students. Moreover, fewer than 15% of students enrolling in a suburban school through the program elected to return to the Minneapolis School District ("MSD").³³ This Article argues that, in order to combat desegregation in Minneapolis, CIY should be extended and expanded to operate in conjunction with a stronger regional approach to affordable housing.

systematically steer Whites toward White areas in the suburbs and Blacks toward Black areas of the suburbs. See, e.g., LAWRENCE A. WINANS & CHRISTY L. SNOW, FAIR HOUSING AUDIT: A COMMUNITY AUDIT TESTING FOR RACIAL BIAS IN RENTAL HOUSING IN THE CITIES OF BLOOMINGTON, BURNSVILLE, AND ST. CLOUD 12-21 (1997).

30. *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996).

31. See West Metro Education Program, The Choice is Yours, <http://www.wmep.net/choice.html> (last visited Aug. 10, 2005) (explaining CIY in detail for parents and children).

32. Allie Shah, *School-choice Plan Extended*, STAR TRIB. (Minneapolis), Jan. 8, 2004, at 1B (summarizing the achievements of the first two years of the program).

33. ELISABETH A. PALMER, THE CHOICE IS YOURS AFTER TWO YEARS: AN EVALUATION 18 (2003).

This Article will discuss the barriers to integration that have been created since *Brown v. Board of Education*³⁴ and the relevance that struggles from the 1970s and 1980s have for the increased segregation in the Twin Cities and around the country today. The Article details the legal structure that has been created in Minnesota to address segregation, state equal protection lawsuits, and desirable outcomes and needed reforms. I support a slightly different position than some recent commentators by noting that racial integration is a required element to improving our schools and cities—economic class cannot effectively serve as a proxy for the benefit of increased cross-cultural interaction.

The Article concludes by showing that comprehensive state regional integration can be achieved if sound, regional strategies are used to discourage White flight by creating low-poverty, high-achieving schools throughout the region. New research from the Institute on Race and Poverty (“IRP”) shows that, far from encouraging White flight, as city-only desegregation does, metropolitan-wide school desegregation helps to create stably integrated schools and residential neighborhoods. These findings have ramifications for the future administration of CIY and future discussions on the crisis in United States public schools. With a strong choice program permitting low-income minority families to enter middle-class suburban schools and a more targeted low-income housing program reinforcing integration of those schools, there is no reason why an area as White and affluent as the Twin Cities cannot become a fully and stably integrated region.

Parents and students, understanding all the options, do not choose segregated schooling and its attendant disadvantages—the overwhelming interest in CIY demonstrates as much. Moreover, it is ultimately untenable to spend twice the suburban average in funding on schools of concentrated poverty without achievement results. In theory and in practice, a transportation voucher and a seat in a middle-class suburban school cost less and provides more opportunity, while contributing to residential stability. Furthermore, creating and maintaining cross-cultural relationships is as important as ever in a society that is increasingly diverse and is only served well through desegregated schools.

All of these considerations give rise to a moral as well as a

34. 347 U.S. 483 (1954) (finding segregated schooling unconstitutional).

legal obligation for overwhelmingly White and middle-class schools to allow space for children of all backgrounds and to share resources and experience to help educate the state's poorest children. More funding is not enough to meet that obligation. Fifty years after the initial decree in *Brown*, civil rights leaders have proved themselves prophetic in arguing that segregated schools are not equal schools, even if you spend twice as much as affluent White schools.

I. History and Demographic Change of Minnesota School Segregation: From Minneapolis to the Inner Suburbs

A. How Segregation Happens

Segregation and its socioeconomic consequences were carved into the nation's landscape and psyche by the century of discrimination that followed slavery. A century after the Civil War, the Kerner Commission reported to the nation in 1968 on the conditions igniting hundreds of urban riots.³⁵ It said of the racial ghetto: "White institutions created it, White institutions maintain it, and White society condones it."³⁶ School segregation arises out of institutions that affect both schools and housing because quality education is a significant factor influencing parents' choice of neighborhood.

Even though overt racial discrimination became illegal during the second half of the 1900s, housing, zoning, and school policies persist in protecting segregation. Public officials recognize that these policies, abetted by local government fragmentation, can be used to shield private decisions that sometimes include race-based motivations. Thus, acceptance of the policies and practices that maintain segregation as "natural," and the ongoing dynamics they perpetuate, overlooks both discrimination's history and the chance to "walk the talk" of equal access to opportunity for all races and ethnicities.

Pervasive housing discrimination by private actors helped to create and currently maintains poor, minority neighborhoods.³⁷ Until at least the end of World War II, physical violence, racial zoning, and discriminatory real estate practices kept Blacks

35. UNITED STATES KERNER COMM'N, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

36. *Id.* at 2.

37. MASSEY & DENTON, *supra* note 3, at 12-14.

tightly confined in ghetto areas and out of White areas.³⁸ In many cities, White property owners attached restrictive covenants to deeds that forbade Blacks from buying homes in their neighborhoods.³⁹ Real estate agencies engaged in a variety of discriminatory practices, including racial steering of Blacks and Whites away from each other and blockbusting, which involves selling a few homes in a White neighborhood to Black tenants, buying neighboring homes at lower prices from panicked White homeowners, and then selling the homes to middle-income Blacks at a premium.⁴⁰

To this day, Blacks and Latinos at all income levels are discriminated against by real estate agents, who show them only a small subset of the market and steer Whites away from communities with people of color.⁴¹ Mortgage lenders also systematically lend less mortgage money to Blacks and Latinos compared to Whites of comparable income and background.⁴² These patterns of housing discrimination and resegregation do not stop at central city borders; they also affect large parts of suburbia. A recent study of metropolitan Boston showed that nearly half of Black homebuyers were concentrated in only 7 of 126 communities.⁴³

38. *Id.* at 36-37.

39. *Id.* Racially restrictive covenants were declared unconstitutional in the 1940s. See *Shelley v. Kramer*, 334 U.S. 1 (1948).

40. See MASSEY & DENTON, *supra* note 3, at 38.

41. See MARGERY AUSTIN TURNER ET AL., URBAN INST., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS 3-1 to 3-19, 6-1 to 6-13 (2002), available at http://www.huduser.org/Publications/pdf/Phase1_Report.pdf (summarizing discrimination data from 2000); JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST 51-61 (1995) (examining racial and ethnic steering phenomena); see generally George C. Galster, *Racial Steering in Urban Housing Markets: A Review of Audit Evidence*, 18 REV. BLACK POL. ECON 105 (1990) (same).

42. See John Yinger, *Cash in Your Face: The Cost of Racial and Ethnic Discrimination in Housing*, 42 J. URB. ECON. 339, 340 (1997) (providing research based on Home Mortgage Disclosure Act ("HMDA") data finding that discrimination in housing and financing markets costs Blacks and Hispanics, on average, more than \$3,000 whether or not they actually encounter discrimination); YINGER, *supra* note 41, at 69-70 (1995) (analyzing HMDA data and finding stark racial differences in lending policy, even when controlling for differences in lenders and individual economic characteristics of the borrower).

43. GUY STUART, HARVARD UNIV. THE CIVIL RIGHTS PROJECT, SEGREGATION IN THE BOSTON METROPOLITAN AREA AT THE END OF THE 20TH CENTURY (2000), available at http://www.civilrightsproject.harvard.edu/research/metro/housing_boston.pdf (referring to evidence presented in the report's unpaginated executive summary). Additionally, White suburbanites are not shown integrated markets. TURNER ET. AL, *supra* note 41, at 6-1.

The resegregation of urban neighborhoods is a complex process that contributes substantially to the isolation of poor minorities. White demand for housing declines when Black or Latino residents move to new neighborhoods that are integrated or very White.⁴⁴ This occurs first in households with children and later for the broader middle-class.⁴⁵ In a housing market where American households change housing locations on average every six years, Black and Latino members of the middle-class are not, by themselves, capable of sustaining a middle-class housing market.⁴⁶ When White middle-class families withdraw, the reality of supply and demand will lower prices.⁴⁷ When the price of housing falls, low-income minorities move into the housing left behind.⁴⁸ Businesses and jobs, seeing this disinvestment by the broader middle-class, soon follow, taking with them a portion of the tax base.⁴⁹

Racial change in schools is often a precursor to change in the housing market. In most cases, when schools become more Black and Latino, they become poorer; within a short span of time, the neighborhood follows suit.⁵⁰ Once the minority share in a community school increases to a threshold level (perhaps 10% to 20%), racial transition accelerates until minority percentages reach very high levels (greater than 80%).⁵¹

A study by the IRP found striking evidence of resegregation in some of the largest metropolitan areas in the United States.⁵² An

44. See MASSEY & DENTON, *supra* note 3, at 96.

45. MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* 11 (2002).

46. *See id.* at 12-13.

47. *See id.* at 11.

48. *See id.*

49. The pattern of resegregation, flight, and tipping is complex. *See generally* George Galster et al., *Identifying Neighborhood Thresholds: An Empirical Exploration*, 11 HOUSING POLY DEBATE 701 (2000); Roberto Quericia & George Galster, *Threshold Effects and Neighborhood Change*, 20 J. PLAN. EDUC. & RES. 146 (2000); George Galster et al., *The Fortune of Poor Neighborhoods*, 39 URB. AFF. REV. 205 (2003). Some have argued that the "invasion-succession" model may be less applicable in contexts involving Hispanic and Asian residents. *See* DAVID FASENFEST ET AL., *LIVING TOGETHER: A NEW LOOK AT RACIAL AND ETHNIC INTEGRATION IN METROPOLITAN NEIGHBORHOODS* 15 (2004), *available at* http://www.brookings.edu/urban/pubs/20040428_fasenfest.pdf.

50. ORFIELD, *supra* note 45, at 10.

51. *Id.* at 9-15. Change occurs fastest at levels of 20% to 50% and proceeds in most cases until schools are highly segregated. *Id.*

52. Myron Orfield & Tom Luce, *Minority Suburbanization and Racial Change* (May 5, 2005) (unpublished paper, on file with the author), *available at* http://www.irpum.org/uls/resources/projects/MinoritySubn_050605wMAPS.pdf.

analysis of fifteen large metro regions between 1980 and 2000 found that a majority of Blacks and Latinos now live in suburban cities.⁵³ IRP found that many neighborhoods which at one point in time appeared to be integrated were actually in a period of racial transition.⁵⁴ Many of these neighborhoods experienced racial transition only if the non-White population exceeded 20% to 30%.⁵⁵

Census data also shows that integrated census tracts which had a Black population percentage in the mid-thirties in 1980 were more likely to make the transition to predominantly Black during the next twenty years than they were to remain integrated.⁵⁶ Resegregation is not inevitable, but integrated areas with a majority of Black residents tend to become more Black over time.⁵⁷ Communities that have practiced “managed integration” with a series of pro-integrative financial incentives, careful oversight of real estate practices, and use of marketing strategies geared to maintaining the housing demand of Whites when evidence of resegregation appeared have been frequently successful in maintaining social and economic integration for generations.⁵⁸

Despite evidence that discrimination plays a large role in residential segregation,⁵⁹ conventional wisdom holds that patterns of segregation are simply the result of individual preferences. The Supreme Court’s opinion in *Freeman v. Pitts*⁶⁰ exemplified this view by finding that a pattern of segregation was the result of private choices, approvingly citing a lower court’s reliance on a

53. *Id.* at 1.

54. *See id.*

55. *Id.* at 8.

56. *Id.* at 9.

57. Lynette Rawlings et al., *Race and Residence: Prospects for Stable Neighborhood Integration*, 3 NEIGHBORHOOD CHANGE IN URB. AM. 1, 4-5, 8 (2004), http://www.urban.org/UploadedPDF/310985_NCUA3.pdf.

58. ORFIELD, *supra* note 45, at 125-26.

59. *See, e.g.*, TURNER ET AL., *supra* note 41, at 3-1 to 3-19, 6-1 to 6-13 (“In 2000, African American renters were significantly more likely to be denied information about available housing units than comparable white renters.”); *see also* Yinger, *supra* note 42, at 340 (finding that discrimination in housing and financing markets costs Blacks and Hispanics, on average, more than \$3,000 whether or not they actually encounter discrimination); YINGER, *supra* note 41 (finding stark racial differences in lending policy, even after controlling for differences in lender policy and individual economic characteristics of the borrower).

60. 503 U.S. 467 (1992) (holding that a district court is permitted to withdraw judicial supervision with respect to discreet categories in which the school district has achieved compliance with a court-ordered desegregation plan).

study.⁶¹ The Court implied that the preferences of Black and Latinos for 50/50 integrated neighborhoods and Whites' being uncomfortable with more than a 10% Black and Latino population make segregation inevitable.⁶² Courts and legal commentators have cited this finding as fact, and it has cast a huge shadow over the law and the landscape of reform. But the study's authors have recently written that the Court's analysis was inadequate and that significant and increasing evidence demonstrates the ability of Blacks and Whites to live together on a long-term stable basis, particularly when a conscious integration plan is in place.⁶³

The forces that work to create resegregation, as described above, are certainly complex, but there is little question that discrimination plays at least some role in maintaining residential segregation. Because of the widespread use of neighborhood schooling, residential segregation is then translated into school segregation.⁶⁴ The next section describes how the segregation of minorities by race and income devastates their life prospects.

B. The Consequences of Segregation

Segregated schools harm children. They harm schools, communities, and entire metropolitan regions. Segregated schools mirror a region's severely segregated residential patterns, concentrate poverty, magnify its harms, and isolate those most in need of opportunity from social structures, jobs, and education.

1. Segregated Schools Hurt Kids

More than three-quarters of the difference in academic achievement among students is explained by the socioeconomic status of their peers, as a recent comprehensive study of hundreds of the nation's secondary schools confirmed.⁶⁵ Not only do racially

61. *Id.* at 495.

62. *See id.*

63. Reynolds Farley et al., *The Residential Preferences of Blacks and Whites: A Four-Metropolis Analysis*, 8 HOUS. POL'Y DEBATE 763, 794 (1997). The district court relied on an earlier study of Detroit by Reynolds Farley. *Id.* at 771-73 (noting that the court cited Reynolds Farley et al., *Chocolate City, Vanilla Suburbs: Will the Trend Towards Racially Separate Communities Continue?*, 7 SOC. SCI. RES. 319 (1978)).

64. KAHLENBERG, *supra* note 21, at 22.

65. Russell W. Rumberger & Gregory J. Palardy, *Does Resegregation Matter? The Impact of Social Composition on Academic Achievement in Southern High Schools*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 127, 135-37 (John Charles Boger & Gary Orfield eds., 2005) (national, longitudinal study of eighth through twelfth graders).

and economically segregated schools hurt children, they harm disproportionate numbers of minority children simply because they are minorities.

a. Concentrated Poverty Hurts Kids

“The percentage of poor children in a school is an extremely strong predictor of inequality in educational outcomes.”⁶⁶ As “fifty years of sociological data have made clear: being born into a poor family places students at risk, but to be assigned then to a school with a high concentration of poverty poses a second, independent disadvantage that poor children attending middle-class schools do not face.”⁶⁷ The harms of economically segregated schools fall disproportionately on non-White children because residential segregation permits most poor White children nevertheless to live and be educated in middle-class settings.

Because of segregation by race and poverty, poor Latino and Black children are 2.3 times more likely than poor White students to attend schools of concentrated poverty, cut off from meaningful exposure to middle-class culture.⁶⁸ In contrast, because they are White, four out of five poor White children attend schools with meaningful middle-class enrollments.⁶⁹

Although poor students have, on average, lower math test scores than do non-poor students, all children do better in middle-class schools, and all children do worse in schools of concentrated poverty.⁷⁰

Among the harms of attending poor schools is the risk of being poor as an adult. When researchers control for individual achievement and family background, they still find that “attending a school with high concentrations of poverty increases the chances of adult poverty by a factor of between three and four compared with attending a low-poverty school.”⁷¹ Other harms of

66. Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, in IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY 121, 141 (John Powell et al. eds., 2001) (citing Gary Orfield & Sean Reardon, *Race, Poverty, and Inequality*, in NEW OPPORTUNITIES: CIVIL RIGHTS AT A CROSSROADS (Citizens Comm'n on Civil Rights ed., 1993)).

67. KAHLBERG, *supra* note 21, at 25.

68. Rumberger & Palardy, *supra* note 65, at 127-28. In addition to the racially disproportionate burden on non-White children of attending poor schools, the rate of individual poverty is 2.5 times higher among non-White children. *Id.*

69. *Id.* (reporting that 81% of White children attend middle-class schools).

70. *Id.* at 128.

71. KAHLBERG, *supra* note 21, at 31.

economically segregated schools (and neighborhoods) include the harms associated with racially segregated schools, discussed below, and with dropping out of school.⁷² On average, high school “dropouts are far more likely to be unemployed, in prison, and living in poverty.”⁷³

Schools of concentrated poverty offer fewer resources, weaker educational preparation, and “substantially lower overall achievement levels.”⁷⁴ Compounded by racial isolation, segregated schools prevent access to the social contacts and cultural familiarity “necessary for career and educational advancement,” especially for Black children.⁷⁵ In short, students in segregated schools “are ‘deprived of the most effective educational resources contained in the schools: those brought by other children as the result of their home environment.’”⁷⁶

b. Racial Segregation Hurts Kids

While the harms of segregated schools stem largely from the challenges associated with concentrated poverty, racially segregated schools additionally isolate children who must function in a multicultural society from ongoing interactions that teach those competencies. Segregation deprives minority children of middle-class cultures that model and support hopeful futures and offer social networks to information and opportunity.

Racially segregated schools tend to be overcrowded, staffed by larger shares of uncertified teachers, and have low expectations and limited facilities.⁷⁷ In addition, non-White segregated schools “often transmit lower expectations to minority students and offer a narrower range of educational and job-related options.”⁷⁸ Thus,

72. See generally GARY ORFIELD et al., HARVARD UNIV., THE CIVIL RIGHTS PROJECT, LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS 3 (2004), available at www.civilrightsproject.harvard.edu/research/dropouts/LosingOurFuture.pdf.

73. *Id.* at 1.

74. Jacinta Ma & Michael Kurlander, *The Future of Race-Conscious Policies in K-12 Public Schools*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?, *supra* note 65, at 239, 248.

75. *Id.*

76. KAHLBERG, *supra* note 21, at 24 (quoting James Coleman’s testimony before the Senate Select Committee on Equal Educational Opportunity).

77. See U.S. DEPT OF EDUC., GREAT EXPECTATIONS: REFORMING URBAN HIGH SCHOOLS—AN EDUCATION FORUM WITH URBAN EDUCATORS AND LEADERS (2000).

78. Brief of the Civil Rights Project as Amicus Curiae in support of Defendants-Appellees and Affirmance of the Judgment of the District Court at 12, *Comfort v. Lynn Sch. Committee*, 418 F.3d 1 (1st Cir. 2005) (No. 03-

studies have found, for example, that Black students from racially segregated schools obtain lower paying and more racially isolated jobs than Whites.⁷⁹ Racially segregated schools too often do not encourage students “to develop the levels of self-esteem or the styles of presentation which employers perceive as evidence of capacity or ability.”⁸⁰

Segregated schools also deprive non-White students of exposure to a sufficiently strong success culture to support them in breaking free from the oppositional culture of many peers. Children, particularly impoverished Black students coming from deeply disadvantaged families, too often are surrounded by “oppositional” cultures at home, in their segregated neighborhoods, and, tragically, at school, if they attend segregated schools. These cultures deride and punish individuals seeking to succeed in the dominant culture.⁸¹ The intense pressure not to give in to what is seen as a White educational and social system can weigh heavily on Black students who wish to succeed at school.⁸²

This oppositional culture perpetuates segregation and its harms. It stems from a set of beliefs regarding victimization from discrimination that is understood as permanent and institutionalized.⁸³ Tragically, oppositional culture among Black students discourages academic accomplishment “regardless of income level or class.”⁸⁴ This can perpetuate negative social networks.⁸⁵ In contrast, integration is valuable in offering “social networks and interpersonal skills that in turn may provide access, information, contact, and sponsorship.”⁸⁶

Indeed, even disadvantaged students who were committed to succeeding found they “lacked the knowledge or access necessary

2415), *cert. denied*, 126 S. Ct. 798 (2005) [hereinafter *Lynn Brief*].

79. *Id.* at 14 (citing numerous studies).

80. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* 103 (1987).

81. Case studies vividly relate this intense peer pressure, and its effects. See, e.g., ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE* xi (1991); RON SUSKIND, *A HOPE IN THE UNSEEN* 365 (1999).

82. See, e.g., Signithia Fordham & John Ogbu, *Black Students' School Success: Coping with the Burden of "Acting White"*, 18 *URB. REV.* 176, 177 (1986).

83. Teresa Wasonga & Dana Christman, *Perceptions and Construction of Meanings of Urban High School Experiences Among African American University Students: A Focus Group Approach*, 35 *EDUC. & URB. SOC.* 181, 181 (2003).

84. *Id.* at 182.

85. *Id.*

86. *Id.* at 183.

to implement a plan of action."⁸⁷ The racially integrated school environment offers these ingredients for success, and provides "alternative role models and opportunities as well as affection and validation."⁸⁸

2. Segregation Hurts Twin Cities Kids and Schools

The Twin Cities region is severely segregated by class and race, and districts such as Minneapolis are dangerously segregated as a result. The acutely segregated schools in Minneapolis are crushed by poverty enrollments of 80% to nearly 100%. That gives students not opportunity, but a culture of intergenerational poverty and its attendant challenges.

a. Twin Cities Schools are Severely Segregated

The Twin Cities metro region has one of the nation's lowest poverty rates, 6.7% in 2000.⁸⁹ While poverty is borne disproportionately by the central cities, at 16.4% versus the suburbs' 4.0%,⁹⁰ school segregation is entirely out of proportion even to that disparity: two-thirds of students in Minneapolis Public Schools receive free and reduced-price lunches,⁹¹ and many Minneapolis schools enroll essentially no middle-class students.⁹²

By 2003, 60% of reporting Minneapolis schools were terribly segregated, with enrollments 81% to 100% non-White.⁹³ Sixty-eight percent of Minneapolis students presently are on free or reduced price lunch.⁹⁴ This concentration of poverty is extreme in

87. *Id.* at 198.

88. *Id.*

89. ALAN BERUBE & WILLIAM H. FREY, A DECADE OF MIXED BLESSINGS: URBAN AND SUBURBAN POVERTY IN CENSUS 2000 15 (2002), available at <http://www.brookings.edu/es/urban/publications/berubefreyepoverty.pdf>.

90. *Id.*

91. See INST. ON RACE & POVERTY, *supra* note 2. A student is eligible for free lunch if her household has an income at or below 130% of federal poverty guidelines. During the 2001-2002 school year, a student from a four-person household would be eligible if household income did not exceed \$22,945. Food and Nutrition Service Child Nutrition Programs—Income Eligibility Guidelines, 66 Fed. Reg. 15827-29 (Mar. 21, 2001), available at www.fns.usda.gov/cnd/governance/notices/iegs/IEGs01-02.pdf.

92. See INST. ON RACE & POVERTY, *supra* note 2.

93. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 2002-03 28 (2005), available at <http://nces.ed.gov/pubs2005/2005312.pdf>.

94. Minn. Dep't of Educ., School Report Card: Minneapolis Public School Dist., Student Demographics, <http://education.state.mn.us/ReportCard2005/schoolDistrict>

the national context and is especially so within the Twin Cities regional context.

Minneapolis makes the list (although barely) of the largest one hundred school districts in the nation, which includes districts in the nation's most troubled cities. Economic segregation in Minneapolis schools exceeds that of districts like Detroit, Miami, and Mobile, Alabama, and approaches that of districts like Baltimore.⁹⁵ Looking within the Twin Cities metro region reveals more vividly not only the extent of economic segregation, but the opportunities for reversing it. Minneapolis's poverty average is forty percentage points higher than Bloomington's and sixty-one percentage points higher than Edina's.⁹⁶

When poverty burdens become too large in a school, enrollments can change rapidly until concentrated poverty is extreme. This concentration puts neighborhoods at risk of changing quickly as the middle-class goes elsewhere in search of "good" schools.⁹⁷ School segregation and residential segregation thus are inextricably intertwined.

Thus, if concentrated race and poverty create a poor learning environment, one solution is the deconcentration of race and poverty. Over the years, integration of classrooms by race and class has proven to be one of the most effective methods for raising student achievement. The next section illustrates some of the gains students have made by attending integrated schools.

C. What are the Benefits of Integration?

Students benefit from economically and racially integrated schools; so do neighborhoods and metro regions. Anything short of integration does not compensate for what is missing in segregated schools: a large share of students who bring to school the high expectations, aspirations, and access to opportunity networks associated with living in middle-class families.

Info.do?SCHOOL_NUM=000&DISTRICT_NUM=0001&DISTRICT_TYPE=03 (last visited Feb. 11, 2006).

95. See U.S. DEPT OF EDUC., *supra* note 93, at 29-30.

96. Data for each district can be accessed through the school report card index at the Minnesota Department of Education's website. Minn. Dep't of Educ., School Report Card (2005), <http://education.state.mn.us/ReportCard2005/index.do> (last visited Feb. 11, 2006).

97. ORFIELD, *supra* note 10, at 39.

1. Integrated Schools Help Students

Since James Coleman's seminal 1966 report, empirical research has continued to show "that a student's achievement is highly related to characteristics of other students in the school."⁹⁸ As the Supreme Court confirmed in 2003, "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'"⁹⁹ The reasons for this range from the effects of a student's peers on aspirations and attitudes toward education, to the attention policy-makers give to middle- and upper-class parents and schools.

a. Social and Opportunity Benefits

For both White and Black students, interracial contact in primary and secondary school makes it more likely that they will live, work, and attend college in more integrated settings.¹⁰⁰ For Black students, interracial contact helps reverse perpetual segregation, in part because desegregated schools permit "access to high-status institutions and the powerful social networks within them."¹⁰¹

For Black and, especially, White students, integrated classrooms improve the stability of interracial friendships,¹⁰² and make adult interracial friendships more likely.¹⁰³ Desegregated schools decrease racial prejudice among students and increase comfort around people with different backgrounds.¹⁰⁴ These outcomes flow from the interactions between the races that,

98. Rumberger & Palardy, *supra* note 65, at 128.

99. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (quoting Brief for American Educational Research Association et al. as Amici Curiae Supporting Respondents at 3, *Grutter*, 539 U.S. 306 (2003) (No. 02-241)).

100. See generally Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. ED. RES. 531 (1994) (reviewing twenty-one research studies).

101. *Id.* at 531.

102. Lynn Brief, *supra* note 78, at 19 (citing Maureen Hallinan & Richard Williams, *The Stability of Students' Interracial Friendships*, 52 AM. SOC. REV. 653, 661-63 (1987)).

103. KAHLENBERG, *supra* note 21, at 44 (citing *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting)).

104. See Amy Stuart Wells et al., *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society* (Mar. 2004), in IN SEARCH OF BROWN 16 (forthcoming), http://cms.tc.columbia.edu/ia/782_ASWells041504.pdf (discussing reduced stereotyping and lessened anxiety towards members of other races of students who attended integrated schools).

consistent with the widely accepted¹⁰⁵ intergroup contact theory, enhance understanding and empathy, and reduce stereotyping.

Integrated schools are important settings for intergroup contact because students in that setting are to be accorded equal status; there are authorities to facilitate the contact; students are engaged in common activities and goals; and personal contacts displace stereotyping.¹⁰⁶ A similar process can occur when parents from diverse backgrounds work together on behalf of their children's schools. These are important aspects of promoting democratic values and bringing members of society together.

The most recent research confirms that both White and Black children who attend desegregated schools are "less likely to express negative views about members of the other race," and Black graduates "are less likely than graduates of segregated schools to believe that antiblack discrimination is wide-spread."¹⁰⁷ In addition, many studies had already confirmed that these students were "more likely to attend integrated colleges, live in integrated neighborhoods as adults, and send their children to integrated schools."¹⁰⁸

b. Academic Attainment and Achievement

Without reducing the academic results for middle-class and White children,¹⁰⁹ integrated schools improve outcomes for poor children and non-White children. Among the important reasons for improved outcomes is that "ambition is contagious:" the drive to achieve is greatly fueled when disadvantaged children attend school with middle-class students.¹¹⁰

Attainment. Black students who attend racially integrated¹¹¹ and economically integrated¹¹² schools complete more years of

105. Lynn Brief, *supra* note 78, at 9; see also Christopher Ellison & Daniel A. Powers, *The Contact Hypothesis and Racial Attitudes Among Black Americans*, 75 SOC. SCI. Q. 385, 385 (1994); Lee Sigelman & Susan Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes*, 71 SOC. FORCES 781, 781 (1993).

106. Lynn Brief, *supra* note 78, at 8-9.

107. KAHLENBERG, *supra* note 21, at 45 (quoting Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 822, 822-23 (1996)).

108. *Id.* at 44.

109. *Id.* at 44-45 (citing Denton, *supra* note 107, at 822-23).

110. See, e.g., KAHLENBERG, *supra* note 21, at 51-58.

111. See generally Michael A. Boozer et al., *Race and School Quality Since Brown v. Board of Education*, 1992 Brookings Papers Econ. Activity (Microeconomics) 269, 301-06.

schooling than those who attend segregated schools. This is true for post-secondary educational attainment as well. College attendance rates are higher among Black students attending racially integrated schools, and especially for Blacks in Northern states, than for students attending segregated schools.¹¹³ For example, research on desegregation achieved by school choice in St. Louis found that attending a racially integrated school correlated with twice the rate of college enrollment compared with those among the 12,000 students studied who attended segregated schools.¹¹⁴

Achievement. “[M]inority students who attend more racially integrated schools show increased academic achievement and progress, which are typically measured by scores on achievement tests.”¹¹⁵ For Black students, the achievement gains are especially consistent when their desegregated school experience begins in the primary grades.¹¹⁶ Test scores for Latino students also are higher on average when they attend desegregated schools.¹¹⁷ In addition, studies consistently find achievement gains for students attending economically diverse schools, as contrasted with those attending schools of concentrated poverty.¹¹⁸

112. See, e.g., Stephen Schellenberg, *Concentration of Poverty and the Ongoing Need for Title I*, in *HARD WORK FOR GOOD SCHOOLS: FACTS NOT FADS IN TITLE I REFORM* 130, 137 (Gary Orfield & Elizabeth DeBray eds., 1999).

113. Robert Crain & Rita Mahard, *School Racial Composition and Black College Attendance and Achievement Test Performance*, 51 *SOC. EDUC.* 81, 81 (1978); see also Boozer et al., *supra* note 111, at 301-06.

114. Goodwin Liu & William Taylor, *School Choice to Achieve Desegregation*, 8 (Aug. 8, 2003) (unpublished draft, on file with author) (citing Boozer et al., *supra* note 111, at 269-338).

115. *Lynn Brief*, *supra* note 78, at 10. Social science research surveys reviewing four decades of research confirm the proposition. See Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 99* (Gary Orfield & Michael Kurlander eds., 2001); Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, in *HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597* (James Banks & Cherry McGee Banks eds., 1995); Robert Crain & Rita Mahard, *The Effect of Research Methodology on Desegregation Achievement Studies: A Meta-Analysis*, 88 *AM. J. SOC.* 839 (1983); Robert Crain, *School Integration and the Academic Achievement of Negroes*, 44 *SOC. EDUC.* 1 (1971).

116. Crain & Mahard, *supra* note 115, at 839.

117. Schofield, *Review of Research*, *supra* note 115, at 597.

118. See KAHLENBERG, *supra* note 21, at 26-28 (citing numerous studies).

c. Aspirations and Occupational Attainment

By attending desegregated middle-class schools, poor and non-White students obtain equal access to cultures of high educational and occupational expectations often taken for granted by the middle and upper classes. Desegregated middle-class schools also permit access to the social networks associated with opportunity. The schools with the ingredients for pursuing “the American dream” are those where most students come from homes providing these experiences and connections—homes that are middle-class.¹¹⁹

As the Supreme Court has found, the benefits of diversity “are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”¹²⁰ For Black students, examples of the occupational benefits of attending non-segregated schools include higher occupational aspirations and access to professions from which minorities have historically been excluded.¹²¹

In addition, *both* White and Black students tend to have higher educational aspirations if they have cross-race friendships, as contrasted with students who had only same-race friendships.¹²² Finally, as to the overall benefits of middle-class schools, they “will raise the achievement and improve the life chances of the poor without reducing the achievement of the middle class . . . further[ing] the secondary goal of promoting a vibrant democracy and unity amid diversity.”¹²³

D. The Failure of City-only Integration Plans Compared to the Success of Metropolitan Plans

Analysis of neighborhood demographic data shows that during the period from 1980 to 2000, metropolitan areas that employed busing on large geographic scales (county or region-level

119. *Lynn Brief*, *supra* note 78, at 12 (citing Marvin Dawkins & Jomills Braddock, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO EDUC. 394 (1994); Schofield, *Review of Research*, *supra* note 115, at 597).

120. *Grutter v. Bollinger*, 539 U.S. 306, 307 (2003).

121. Schofield, *Maximizing the Benefits*, *supra* note 115, at 100.

122. Maureen Hallinan & Richard Williams, *Students’ Characteristics and the Peer Influence Process*, 63 SOC. EDUC. 122, 122 (1990).

123. KAHLENBERG, *supra* note 21, at 25.

programs) showed *better or more stably integrated* housing market outcomes than areas *that did not have busing*.¹²⁴ Metropolitan areas with large-scale busing showed larger increases in the number of residents living in integrated settings than non-busing metros, and integrated neighborhoods were less likely to become segregated in busing metros. Both metropolitan areas with metro busing and those without showed similar patterns during the twenty year period: the percentages of Whites and Blacks living in integrated settings¹²⁵ increased while the percentages of Hispanics in integrated settings declined. However, the integrative trends were significantly stronger in the metropolitan areas with busing. In those places, the percentage of the total population living in integrated settings increased by seventeen points, from 25% to 42%. In the other eighty-five metropolitan areas, the total percentage increased only nine points, from 26% to 35%.¹²⁶

IRP's finding with respect to the success of metropolitan desegregation in stemming White flight affirms research from the 1980s about the power of metro-wide integration. Diana Pearce noted that school desegregation—if it is metropolitan in nature—can have an unexpected effect: integration of living patterns and the prevention of White flight or “disenrollment.”¹²⁷ These findings were based on the wave of integration that occurred subsequent to *Brown* and continued court oversight of school integration. Other researchers, as a corollary, have studied a similar time period to note that metro-wide school desegregation is also the most effective method for increasing Black achievement.¹²⁸ While their findings indicated that all

124. See Orfield & Luce, *supra* note 52, at 1. The information in the following section is derived from the statistics reported in this paper.

125. The definitions for the neighborhood types are the following: Predominately White—tracts where both the Black and Hispanic shares of the population are less than 10%; Predominately Black—Black share greater than 50% and Hispanic share less than 10%; Predominately Hispanic—Hispanic share greater than 50% and Black share less than 10%; Black and Hispanic—Black share greater than 10%, Hispanic share greater than 10% and White share less than 40%; White/Black Integrated—Black share greater than 10% and less than 50%, Hispanic share less than 10%; White/Hispanic Integrated—Hispanic share greater than 10% and less than 50%, Black share less than 10%; W/B/H Integrated—Black share greater than 10%, Hispanic share greater than 10% and White share greater than 40%. Black and White shares are for non-Hispanic Black and non-Hispanic White population. *Id.* at 4.

126. *Id.* at 7-10.

127. DIANA PEARCE, BREAKING DOWN BARRIERS: NEW EVIDENCE ON THE IMPACT OF METROPOLITAN SCHOOL DESEGREGATION OF HOUSING PATTERNS 3-4 (1980).

128. ROBERT CRAIN & RITA MAHARD, DESEGREGATION PLANS THAT RAISE BLACK

desegregation plans increased achievement, metropolitan desegregation had the greatest effect on the achievement of Black students.¹²⁹ Moreover, for children who desegregated at earlier ages, starting with kindergarten, the effect on their achievement increased dramatically.¹³⁰

These studies prove that desegregation and an integrated learning environment can be powerful forces in raising achievement at all levels. In addition, these studies indicate that metropolitan desegregation is effective in stabilizing neighborhoods and in reducing the education gap. An expanded CIY program, combined with targeted low-income housing programs, can conceivably reduce and eliminate segregation in an area as White as the Twin Cities.

E. On the Ground in Minneapolis

Trends in Minneapolis schools mirror the trends in national segregation statistics, showing that schools segregated by race are invariably poor schools as well. Before the litigation in *Booker v. Special School District No. 1*—Minneapolis's first desegregation lawsuit—the MSD was 85% White.¹³¹ Now, after the subsequent shift of the White middle-class to suburban enclaves, the MSD is 73% non-White and has 68% of its students receiving free or reduced lunch.¹³²

The severely segregated MSD graduates only 55% of its students.¹³³ Yet nearly 91% of adults in the Twin Cities region have at least a high school diploma and more than 33% have at least a college degree.¹³⁴ In contrast to the 55% graduation rate in

ACHIEVEMENT: A REVIEW OF THE RESEARCH vi (1982).

129. *Id.*

130. *Id.*

131. See 351 F. Supp. 799, 802 (D. Minn. 1972) (finding that 55,735 of 65,201 MSD students were Caucasian).

132. Minn. Dep't of Educ., *supra* note 94.

133. *Id.* "According to the most recent [Minneapolis] district data, the city's seven high schools had a 78 percent graduation rate. However, add in the contract alternatives, such as the Center School, . . . The City, Inc. . . . and others, and the graduation rate drops to 54.5 percent." Scott Russell, *Schools Become Big Issue in Mayor's Race*, SKYWAY NEWS (Minneapolis), Sept. 26, 2005, available at <http://www.skywaynews.net/articles/2005/09/26/news/news02.txt>.

134. In 2000, the percentage of adults with a high school diploma in the thirteen-county Twin Cities region was 90.6%. U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000, GEOGRAPHIC AREA: MINNEAPOLIS--ST. PAUL, MN--WI MSA (MN PART) 2 (2000), <http://censtats.census.gov/data/MN/390275120.pdf>. The nationwide high school graduation rate as of 2000 was 80.4%. KURT J. BAUMAN & NIKKI L. GRAF, U.S.

Minneapolis, adjacent school districts graduate 88% to 100% of their students.¹³⁵

Academic attainment and achievement declined as economic and racial segregation became more severe, as illustrated by the MSD. As the poverty concentration in the MSD increased from 46%¹³⁶ to 68%,¹³⁷ the graduation percentage rate dropped by more than 13%.¹³⁸

With the exception of schools in the southwest lakes area of the city, families are not choosing most Minneapolis schools. Minneapolis enrollments have dropped sharply, declining 18% in the new millennium, from 48,000 to 39,913 students.¹³⁹ In contrast, during the four years from 2000 to 2004, public school enrollments declined only 2.1% statewide.¹⁴⁰ In addition, for every

CENSUS BUREAU, EDUCATIONAL ATTAINMENT: 2000 1 (2003), <http://www.census.gov/prod/2003pubs/c2kbr-24.pdf>.

135. Minnesota's state-wide graduation rate in 2005 was 89%. Minn. Dep't of Educ., School Report Card: Statewide (2005), http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=000&DISTRICT_NUM=9999&DISTRICT_TYPE=99 (last visited Feb. 11, 2006). Data for individual districts and schools are accessible from the index at Minn. Dep't of Educ., *supra* note 96.

136. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 1992-93 36 (1995), *available at* <http://nces.ed.gov/pubspubs95/95800.pdf>.

137. Minn. Dep't of Educ., *supra* note 94.

138. In the 1989-1990 school year, the Minneapolis School District enrolled 2,945 students in the ninth grade. Minn. Dep't of Educ., 1989-1990 Enrollment, <http://education.state.mn.us/mde/static/DEG8990.XLS> (last visited Mar. 22, 2006). The District graduated 1,664 students in the 1992-1993 school year. Minn. Dep't of Educ., 1992-1993 Graduates, <http://education.state.mn.us/mde/static/pg9293.xls> (last visited Mar. 22, 2006). In the 2001-2002 school year, the Minneapolis School District enrolled 3,584 students in the ninth grade. Minn. Dep't of Educ., 2001-2002 enrollment, <http://education.state.mn.us/mde/static/deg0102.xls> (last visited Mar. 22, 2006). The District graduated 1,757 students in the 2004-2005 school year. Minn. Dep't of Educ., 2004-2005 Graduates, <http://education.state.mn.us/mde/static/GradsGenEthn-Public0405.xls>. (last visited Mar. 22, 2006).

139. HAZEL REINHARDT, A REPORT TO THE MINNEAPOLIS SCHOOL DISTRICT AS PART OF THE FACILITIES UTILIZATION PLAN: AN ANALYSIS OF ENROLLMENT AND ENROLLMENT PROJECTIONS 26 (2004), *available at* http://www.mpls.k12.mn.us/sites/f707122598444da696c0996b9c74b221/uploads/demography_report.pdf.

140. Declines were especially large in Ramsey and Hennepin counties. Martha McMurry, *Enrollment Declines are Widespread Since 2000*, POPULATION NOTES (Minn. State Demographic Ctr., St. Paul, Minn.), Apr. 2005, at 3, *available at* <http://www.demography.state.mn.us/PopNotes/Enrollment%20Declines.pdf>. During those four years, sixteen of eighty-seven counties experienced enrollment growth, and they were mostly in Twin Cities suburban counties, especially Scott, Sherburne, Wright, Dakota, and Carver. *Id.*

student who transfers into the MSD, six transfer out, by far the largest negative ratio in the state.¹⁴¹

These disparities are also becoming apparent in suburban districts surrounding Minneapolis. Robbinsdale, a nearby inner-ring suburb and the largest recipient of CIY suburban transfer students, is 64% White and has a free and reduced lunch population of 32%.¹⁴² Several other suburban districts, such as Richfield and Bloomington, have also experienced substantial racial change. It is important to note that these districts have also experienced White flight, but were never under a court order to desegregate.

Adjacent to Minneapolis is the Edina School District, which enrolls 88% White students, with a 6% free or reduced lunch enrollment.¹⁴³ Parents take notice of these demographics and the quality of a school district as evidenced by its test scores. Transfer statistics are one indication of this: Edina has a four to one ratio of students transferring in to their district versus students leaving the district, compared to a six to one outflow in Minneapolis.¹⁴⁴

II. Legal Responses to Segregation in Minnesota

School segregation of this magnitude matters because the racially discriminatory effects are unfair to children. The mechanisms that brought about this state of affairs can be explained to some degree, but there are no easy solutions as to how to achieve integration and share the opportunity of middle-class schools with children of all races. The following sections attempt to describe the history of school desegregation in Minneapolis and the demographic change in both Minneapolis and its neighboring suburbs.

A. *Booker v. Special School District No. 1: Desegregation in Minneapolis and Resegregation in the Suburbs*

The story of segregation in Minneapolis schools and the resultant White flight from the city-only desegregation plan begins

141. *Id.*

142. Minn. Dept. of Educ., School Report Card: Robbinsdale, http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=000&DISTRICT_NUM=0281&DISTRICT_TYPE=01 (last visited Nov. 1, 2005).

143. Minn. Dept. of Educ., School Report Card: Edina, http://education.state.mn.us/ReportCard2005/SchoolDistrictInfo.do?SCHOOL_NUM=0273&DISTRICT_TYPE=01 (last visited Feb. 11, 2006).

144. *Id.*

with *Booker v. Special School District No. 1*.¹⁴⁵ Because the court's desegregation remedies were contained only within the Minneapolis city boundaries, middle-class Whites could easily flee the city and those remedies to suburban jurisdictions. Lifting of the desegregation order in the 1980s, coupled with a return to neighborhood schools, had the predictable effect of re-segregating Minneapolis's schools. Nevertheless, the lessons of *Booker* remain important because many of the methods of segregative school policies remain the same today.

1. *Booker's* Impact on School Enrollment in Minneapolis

Racial discrimination was a fact of life in Minneapolis's public schools throughout the 1950s and 1960s.¹⁴⁶ Like many Northern cities, Minneapolis had segregated neighborhoods that undoubtedly contributed—and continue to contribute—to creating segregated schools.¹⁴⁷ Desegregation played out in Minneapolis as it played out across the rest of the nation—against the backdrop of President Nixon's anti-busing Southern strategy and the resultant decimation of federal desegregation remedies by the United States Supreme Court.¹⁴⁸

The first Supreme Court case to test Northern desegregation was *Keyes v. School District No. 1*.¹⁴⁹ The *Keyes* Court held that *de jure* racial segregation could be found in a district that had no history of state-mandated school segregation, as long as the prerequisite "segregative intent" could be found.¹⁵⁰

145. 351 F. Supp. 799 (D. Minn. 1972).

146. Cheryl W. Heilman, *Booker v. Special School District No. 1: A History of School Desegregation in Minneapolis, Minnesota*, 12 LAW & INEQ. 127, 129 (1993).

147. *See id.* at 130 (describing all-White and all-Black neighborhoods as contributing to segregation).

148. *See, e.g.*, Nathaniel Jones, *The Judicial Betrayal of Blacks Again: The Supreme Court's Destruction of the Hopes Raised by Brown v. Board of Education*, 32 FORDHAM URB. L.J. 109, 114-15 (2004) (observing the difficulty of implementing truly equal education in wake of Supreme Court education jurisprudence); *see also* JOHN W. DEAN, *THE REHNQUIST CHOICE* 47 (2001) (quoting Richard Nixon as follows: "I don't care if he's a Democrat or a Republican . . . he must be against busing").

149. 413 U.S. 189 (1973).

150. *See id.* at 211. In *Keyes*, the plaintiffs had conceded that segregative intent was a necessary component of finding segregation in a school where *de jure* legal separation of the races had not been explicitly enforced by law in the past. *See id.* at 198. For this reason, *Keyes* should not be viewed as being overturned by a later case, *Washington v. Davis*, 426 U.S. 229 (1976), as the plaintiffs in *Washington* conceded that no discriminatory intent existed; rather, *Keyes* was modified to the extent that proof of disparate impact is now insufficient to show a constitutional

Moreover, segregative intent in a substantial part of the district could be imputed to the district as a whole, providing a supervising court with the authority to order district-wide relief.¹⁵¹ Denver's public schools had acted with segregative intent by making teacher and student assignments based on race, aligning school attendance boundaries to segregate on the basis of race, and by increasing density in segregated schools, as opposed to Southern-style desegregation where assignments were explicitly based on race.¹⁵² *Keyes* begins with the analysis that what is or is not a segregated school depends on the facts of each case, but also outlines a number of factors that could establish segregative intent.¹⁵³

Back in Minneapolis, racial separation was encouraged and intensified by changing attendance boundaries, giving "special transfers" to White students at their parents' request, and permitting White students to opt out of attending minority schools.¹⁵⁴ Two suits by the NAACP forced the District to remedy segregation, one in the 1970s which led to busing within the city of Minneapolis, and one in the 1990s which led to the creation of the CIY. The 1970s suit relied on federal court oversight, while the 1990s lawsuits turned to state court remedies after the demise of desegregative case law in the federal courts. The 1990s cases are discussed in greater detail later in this Article.

The *Booker* court detailed findings of segregation extensively in its opinion.¹⁵⁵ It noted that segregation was probably starkest in the elementary schools, which tend to be much smaller than secondary schools.¹⁵⁶ Nearly three-quarters of Whites attended elementary schools with virtually no minorities, while 55% of

violation. *See id.* at 239.

151. *See Keyes*, 413 U.S. at 208 ("[W]e hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious.").

152. *Id.* at 201-02 (listing acts which, when aggregated, convinced the Court of segregative intent).

153. *Id.* at 196 (listing the factors the Court looks for in deciding if a school is segregated).

154. *Booker v. Special Sch. Dist. No. 1*, 351 F. Supp. 799, 804 (D. Minn. 1972); *see also* Heilman, *supra* note 146, at 130. Heilman served as a law clerk to Judge Larson, who oversaw the *Booker*-led desegregation, just as the court supervision was ending. *See id.* at 127. Her article supplements much of the background for this narrative where the reported case is silent. *See id.*

155. *See Booker*, 351 F. Supp. at 802.

156. *See id.*

Black children attended schools that were more than 30% minority.¹⁵⁷ At least three elementary schools had minority enrollments totaling more than 70%, while several schools had fewer than six minority students total.¹⁵⁸ Noting that the size and location of Bethune Elementary “were intended to have the effect of continuing the pattern of [racial segregation,]” Judge Larson found that Bethune could only have more obviously been a school for minorities if the MSD had written the words “Black school . . . over the door.”¹⁵⁹ Enrollments of minority students in Minneapolis’s junior and senior high schools followed similar but less extreme patterns, due in part to the fact that they were generally fewer in number and had larger enrollments.¹⁶⁰

The *Booker* court found that the District promoted segregation by maintaining over-capacity minority schools when nearly adjacent White schools could easily handle the overflow.¹⁶¹ For example, Washburn High School received additions in 1967 to deal with being around 600 students over-capacity.¹⁶² Nearby Central High School ran about 600 students under-capacity.¹⁶³ Washburn’s minority enrollment was less than 3% Black, while Central enrolled about 23% Black students.¹⁶⁴ The MSD offered no reasoning for this decision during the trial.¹⁶⁵

Similarly, the MSD encouraged segregation through the construction of new buildings.¹⁶⁶ Judge Larson found that the MSD built smaller-than-average White schools in White neighborhoods that were adjacent to Black neighborhoods.¹⁶⁷ The nearby minority communities received larger-than-average elementary schools.¹⁶⁸ As an example, Page Elementary—an all White school—built in 1958, could hold 300 students and was the fifth smallest elementary in the district; nearby Field—a largely Black school—could handle nearly 600 students.¹⁶⁹ To Judge

157. *Id.*

158. *Id.*

159. *Id.* at 803.

160. *Id.* at 802-03 (stating similar statistics as those of the secondary schools).

161. *Id.* at 803-04.

162. *Id.* at 803.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 803-04 (concluding this from statistics expounded upon later).

167. *Id.* at 803.

168. *Id.*

169. *Id.* at 804. In an attempt to ward off the looming desegregation lawsuit,

Larson, the implications were obvious: Minneapolis intended to concentrate as many minority students as possible in each "Black school," while permitting Whites to remain in segregated, White schools.¹⁷⁰

Boundary changes also permitted the MSD to perpetuate segregation. Changing attendance boundaries permitted the MSD to shift minority students from overwhelmingly overcrowded schools to only slightly overcrowded schools.¹⁷¹ For example, the MSD instituted boundary changes in 1968 to maintain Washburn and Southwest high schools as segregated Black environments.¹⁷² In addition, the MSD permitted one-way flight out of its attendance boundaries by granting special transfers from largely high-minority schools.¹⁷³ Finally, the creation of "optional" attendance zones on the boundaries of minority neighborhoods permitted Whites to opt out of attending increasingly minority schools.¹⁷⁴

Judge Larson eventually ceded control of the district after several years of progress on a desegregation plan. He did so in reliance on the State's assumption of responsibility for monitoring and enforcing a rule to maintain integrated schools.¹⁷⁵ The supervision was based on the 15% rule, which required each school in a district to have minority enrollment no higher than 15% of the district's average minority enrollment.¹⁷⁶ Each district was viewed on its own terms; there was no inter-district operation of the rule. As might be expected, it produced integration for a time, but also stimulated White flight.¹⁷⁷

Desegregation was for a time successful, such that ten years after the desegregation process began in earnest, racially identifiable schools arguably did not exist in Minneapolis. Reporter Gregor Pinney noted, "[n]o longer does the city have minority schools in the center and 'white schools' everywhere

the District combined Field with Hale Elementary School, which was 98% White. Judge Larson noted that the community resistance to this plan was "vehement." *Id.* at 806.

170. *Id.* (coming to this conclusion after seeing statistics dealing with different schools' capacity issues).

171. *See id.* at 804.

172. *See id.*

173. *See id.* (finding that race played a role in these special transfers).

174. *See id.* (concluding this from the general course of conduct of the district).

175. *See Heilman, supra* note 146, at 171-73.

176. *See id.* at 175.

177. *See id.* at 170.

else."¹⁷⁸ Dissolution of the federal decree relied primarily on the oversight of the MSD, with the State monitoring compliance, for continuing desegregation. Despite his decision to give up jurisdiction over the MSD, Judge Larson continued to have doubts about the willingness of a school district to desegregate without continued oversight and pressure from a federal judge.¹⁷⁹ With the increasingly evident segregation in the metro-area schools, Judge Larson's doubts have proven to be well-founded.

During the 1980s, with significant in-migration of Blacks and Latinos after the lifting of federal supervision, Minneapolis's schools underwent a sweeping racial transformation. White enrollment had fallen to less than 50% by 1989.¹⁸⁰ Minneapolis and St. Paul were in an untenable position; as White flight and minority enrollment increased and as many neighborhood schools underwent racial transition, White parents and politicians stepped up the call again for neighborhood schools. In 1993, a Black mayoral contender sought political backing from a largely White electorate by echoing this call for a return to neighborhood schools.¹⁸¹ The School Board followed the mayor's lead, the MSD went back to neighborhood schools in 1995, and many city schools—already experiencing flight and decreased enrollment by the middle-class—became deeply segregated.¹⁸² Sadly, documents uncovered after the decision reveal that school leaders in Minneapolis knew in advance that a return to neighborhood schools and increased funding was doomed to fail.¹⁸³

178. Gregor W. Pinney, *Desegregation Strips Race Labels Off Schools*, STAR TRIB. (Minneapolis), Aug. 31, 1981, at 1A.

179. See Heilman, *supra* note 146, at 172.

180. Nat'l Ctr. For Educ. Statistics, U.S. Dep't of Educ., Common Core of Data (table on file with author).

181. Monika Bauerlein, *Separate But Equal*, CITY PAGES (Minneapolis), Nov. 1, 1995, <http://www.citypages.com/databank/16/778/article2353.asp> (last visited Feb. 28, 2006). Proposals to return to neighborhood schooling are sometimes framed in the context of funding shortfalls, prompting school officials to reduce bus services and school choice. See Sanjay Bhatt, *Seattle Won't Close Schools*, SEATTLE TIMES, May 18, 2005, at A1.

182. See Bauerlein, *supra* note 181. Not only did White enrollment decline and move to the suburbs, but minority suburbanization is increasing among the Black middle-class, with more than half of the country's minorities living in the suburbs. See Orfield & Luce, *supra* note 52.

183. See KAHLBERG, *supra* note 21, at 176. Political leaders in other regions around the country have also accepted accelerated funding in exchange for the withdrawal of desegregation suits. See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 263-64 (1999) (explaining the use of desegregation lawsuits to extract money from the state for poor schools).

Achievement and graduation in those schools began to plummet. The MSD built schools of various sizes in poor segregated neighborhoods that would be virtually all-minority the day they opened. It added mobile class rooms to the increasingly White and in-demand schools on the city's affluent southwest side.

As the MSD went through massive racial change in the 1990s, it experienced a catastrophic loss of enrollment clearly related to the pattern of school resegregation.¹⁸⁴ As each neighborhood school would become majority poor and lower-class, a wave of White, Black, Asian, and Latino middle-class households would move to more stably integrated neighborhoods in the city or the suburbs. In the few areas with consistent access to magnet schools designed to maintain racial integration and in the majority White school areas on the far south side, middle-class White enrollment grew and housing prices soared.

B. School Enrollment Today

After the return to neighborhood schools, at least fifteen elementary schools in Minneapolis were virtually all-minority; by 2004, that number rose to nearly thirty.¹⁸⁵ On the south side, a wave of Latino emigration transformed elementary schools like Jefferson and Anderson.¹⁸⁶ North Minneapolis elementary schools like Broadway and Jordan Park were heavily minority, with few or no White students in many of their grades.¹⁸⁷ By 2005, thirty-nine standard public schools out of sixty-five were more than 75% minority in a region that was 9% minority.¹⁸⁸

Concomitant with these demographic changes, the poorest and most racially isolated schools have not closed the achievement gap. A recent newspaper article noting the success of some Minneapolis and St. Paul schools in statewide testing also

184. ORFIELD, *supra* note 10, at 92.

185. See Institute on Race and Poverty, Twin Cities Demographics, slides 2-9, <http://www.irpumn.org/uls/resources/projects/irppres%2009-12-04.ppt> (last visited Feb. 28, 2006) (showing pictorial presentation of demographics).

186. *See id.*

187. *Id.*

188. *Id.* The alternative schools within the district are even more segregated than the standard schools. See Minn. Dep't of Educ., 2005-2006 Enrollments-School—Special Populations, <http://education.state.mn.us/mde/static/GenderEthnicityGrade-Schl0506.xls> (last visited Mar. 22, 2006) [hereinafter *Minn. Dep't of Educ., 2005-2006 Enrollments-School—Special Populations*]. For example, 613 of 703 students (87%) of students enrolled in MSD alternative high schools in October 2005 were minorities. *See id.*

mentioned abysmal test scores in some schools.¹⁸⁹ Jordan Park K-8, for example, saw a decline from 28% to 13% in math test passing rates.¹⁹⁰ Central city schools like these receive the most state funding because they contain some of the poorest and, therefore, neediest children.¹⁹¹

Examples of specific schools reveal that in certain areas segregation is even worse than the general area-wide data indicates. Hall Elementary School had 350 students in 2001-2002, 313 of whom were Black, and now has a 96% enrollment of free or reduced lunch students.¹⁹² Bethune is nearly 100% non-White and has seen a rapid decline in enrollment from a high of 668 elementary students to 334 in 2003, with a corresponding poverty rate of 95% free or reduced lunch enrollment.¹⁹³ These examples are not atypical, as many of the schools in near North and South Minneapolis enrolled similarly high numbers of poor children.¹⁹⁴

There have also been schools in inner-ring suburbs that have experienced substantial racial change. Robbinsdale's Northport

189. Norman Draper & Steve Brandt, *State's Schools Meet the Test*, STAR TRIB. (Minneapolis), Apr. 2, 2005, at B1.

190. *Id.*

191. John Biewen, AMERICAN RADIOWORKS, *Schooling Poor Kids in Minneapolis*, in THE FORGOTTEN FOURTEEN MILLION, http://americanradioworks.publicradio.org/features/14_million/poor2.shtml (last visited Sept. 26, 2005). Inner-city schools receive above-average per pupil resources, but it cannot be said they receive the highest per pupil expenditures because some rural districts are, per pupil, very expensive to operate. See, e.g., Minn. Dep't of Educ., School Report Card: Red Lake: Report to Taxpayers, http://education.state.mn.us/ReportCard2005/loadFinanceAction.do?SCHOOL_NUM=000&DISTRICT_NUM=0038&DISTRICT_TYPE=01 (last visited Oct. 25, 2005). However, the inner-city districts receive, total, far more resources than any other districts in the state because they have the most students. The state average hovers around \$8,000—almost exactly that of the national average. See U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, COMMON CORE OF DATA, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 2002-03 10 (2005), <http://nces.ed.gov/pubs2005/2005353.pdf>. Minneapolis schools receive about \$3,000 more per student. See Minn. Dep't of Educ., School Report Card: Minneapolis: Report to Taxpayers, http://education.state.mn.us/ReportCard2005/loadFinanceAction.do?SCHOOL_NUM=000&DISTRICT_NUM=0001&DISTRICT_TYPE=03 (last visited Nov. 1, 2005) [hereinafter Minn. Dep't of Educ., *School Report Card: Minneapolis: Report to Taxpayers*].

192. Minn. Dep't of Educ., School Report Card: Hall Elementary, http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=287&DISTRICT_NUM=0001&DISTRICT_TYPE=03 (last visited Nov. 6, 2005).

193. See Minn. Dep't of Educ., School Report Card: Bethune Elementary, http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=107&DISTRICT_NUM=0001&DISTRICT_TYPE=03 (last visited Feb. 28, 2006).

194. See Institute on Race and Poverty, *supra* note 185.

Elementary, for example, saw a precipitous decline in White students and a corresponding increase in Black students.¹⁹⁵ Its minority enrollment was at 27% in 1995, with 340 White children; in 2003 the school went to 66% minority and 174 White children enrolled.¹⁹⁶

C. Declining Enrollment and Charter Schools in Minneapolis

The statistics above tell the story of the rapid racial and socioeconomic change that Minneapolis experienced after the end of the *Booker* court's supervision.¹⁹⁷ Still, change continues to affect Minneapolis schools. The MSD recently has begun to see steep drops in enrollment, particularly in the most segregated schools, and is projecting even further changes. Down from 49,242 students in 1998,¹⁹⁸ the school district enrolled about 43,000 students in 2003,¹⁹⁹ with part of the loss going to open enrollment. Today, Minneapolis enrolls slightly fewer than 40,000 students.²⁰⁰ The Minnesota Department of Education reported that Minneapolis is losing a total of more than 7,500 children to other districts and charter schools and gaining only 1,200 from other areas.²⁰¹ Minneapolis projects that by 2008, enrollment may drop near 30,000 students—slightly more than half that of the previous decade.²⁰²

In some of Minneapolis's neighborhoods, as the quality and opportunity associated with their schools has declined, some students have chosen to attend charter schools.²⁰³ Charter schools were once proposed as a remedy to poorly run inner-city schools, teaming up parental involvement with less administrative

195. See Minn. Dep't of Educ., *supra* note 142.

196. *Id.*

197. See Institute on Race & Poverty, *supra* note 185, slide 22. One statistic indicates the number of preschool children, ages 0 to 4, declined sharply. *Id.* at slides 19-25. Areas like Minnetonka and Maple Grove saw double-digit increases in the percentages of young White children in their jurisdictions. *Id.* This data should be interpreted carefully and not simply attributed to White flight because other demographic factors could play a role.

198. NAT'L CTR. FOR EDUC. STATISTICS, COMMON CORE OF DATA, 1987-2002 School Years (table on file with author).

199. Tim Pugmire, *Charter School Competition Heats Up in Minneapolis*, MINN. PUB. RADIO NEWS, Nov. 25, 2003, http://news.minnesota.publicradio.org/features/2003/11/25_pugmiret_charter/.

200. Minn. Dep't of Educ., *supra* note 94.

201. See *id.*

202. REINHARDT, *supra* note 139, at 33.

203. Pugmire, *supra* note 199.

oversight and management.²⁰⁴ Indeed, charters operate independently of the school district in which they reside and permit parents or their sponsors to try to create innovative learning strategies.²⁰⁵ Minnesota was the first state to enact charter school legislation and has seen a relatively large increase in the number of children attending charter schools. Between 2000 and 2004 alone, the number of children in Minnesota charter schools increased 126.5%, or by nearly 8,000 students.²⁰⁶ Among Minneapolis residents, the number of K-12 students attending charters increased to nearly 3,500 students in 2003.²⁰⁷ Because of their proximity to urban neighborhoods with residential segregation, charter schools also tend to be heavily minority—approximately 53% in 2004—and poor.²⁰⁸ Many schools within Minneapolis were more than 80% minority, sometimes nearly 100%.²⁰⁹

Several studies recently commissioned found widespread failure to engage in good accounting practices among Minnesota's charter schools.²¹⁰ In particular, many schools neglected to adequately divide accounting duties among a sufficient number of individuals, a measure that increases financial accountability and helps protect against fraud.²¹¹ These studies found limited

204. See PATRICIA ANDERSON, MINN. OFFICE OF STATE AUDITOR, FINANCIAL TRENDS OF MINNESOTA SCHOOL DISTRICTS AND CHARTER SCHOOLS: FOR PERIOD 2000 TO 2004 35 (2005), available at http://www.auditor.state.mn.us/reports/gid/2004/schooldistrict/schooldistrict_04_report.pdf. A recent report by the state auditor found that many charter schools have failed due to lack of oversight and poor management. *Id.* at 35-36. The Minnesota Department of Education only recently required management training for leaders in charter schools. *Id.* at 35-38.

205. WILLIAM LOWE BOYD ET AL., WHAT REALLY HAPPENED: MINNESOTA'S EXPERIENCE WITH STATEWIDE PUBLIC SCHOOL CHOICE PROGRAMS 11 (2002). As charters are independent of the school district, a student attending a charter school within the city limits of Minneapolis is not considered in the "head count" of the MSD. We may speak of declining enrollment in the MSD, even if 100% of the outflow is to charter schools wholly within the city limits.

206. ANDERSON, *supra* note 204, at 2, 6, 35-38.

207. REINHARDT, *supra* note 139, at 26.

208. ANDERSON, *supra* note 204, at 5-6; see also Institute on Race and Poverty, Charter School Demographics, slide 4 (Jan. 23, 2006) (unpublished study, on file with author).

209. Institute on Race and Poverty, *supra* note 208, at slide 5.

210. Matt Entenza, Charter Schools Study 2003, 1, 2-3 (2003) (unpublished study, on file with author); see also Duchesne Paul Drew, *Entenza to Call for Charges in Charter-School Cases*, STAR TRIB. (Minneapolis), Mar. 7, 2001, at B3; Duchesne Paul Drew & Anthony Lonetree, *A Call to Act on Charter School Woes*, STAR TRIB. (Minneapolis), Feb. 7, 2001, at A1.

211. Entenza, *supra* note 210, at 2-3. Of the thirty schools that had filed their year 2000 reports by January 24, 2001, 73% had not adopted national accounting

segregation of duties in 84% of charter schools in 2002,²¹² concluding that there was improper assurance that fraud did not occur in at least one internal operation in more than 70% of charter schools.²¹³ Similarly, Minnesota's charters schools have increasingly failed to keep an updated list of General Fixed Assets, which is an important safeguard against theft.²¹⁴

In addition to problems with accounting, Minnesota's charter schools have not been in compliance with other oversight measures. For example, many of the state's charter schools have routinely failed to file their audits on time with the Department of Children, Families, and Learning.²¹⁵ Without the transparency provided by audits and access to board meeting minutes, opportunities for hiding financial problems and perpetrating fraud increase.²¹⁶

With Minnesota charter schools getting more than \$100 million from the state, the lack of oversight is a serious matter.²¹⁷ Within Minneapolis and St. Paul, at least eight schools have closed because of financial mismanagement or ineptitude.²¹⁸ Closure of charter schools because of mismanagement or financial failure is not only a serious problem because of the misuse of public funds, but because it inevitably leaves hundreds of children stranded in the middle of their education.²¹⁹

standards designed to prevent excessive control by any one individual over a school's spending and record-keeping. Drew & Lonetree, *supra* note 210, at A1. The studies indicated that the schools viewed the staff increases necessary to comply with proper accounting practices as cost prohibitive. Entenza, *supra* note 210, at 3.

212. Entenza, *supra* note 210, at 2.

213. For example, in 2001, Excel Academy for Higher Learning was found to have no policy of issuing receipts or other standard method for handling incoming funds, the school failed to document the amounts of salaries that were paid to employees, and it lacked a system for obtaining formal approval of expenditures by individuals with spending authority. *Id.* at 6-7.

214. *See id.* at 4.

215. *See id.* at 3.

216. *See id.*; *see also* Norman Draper, *Charters Improve as They Struggle*, STAR TRIB. (Minneapolis), Jan. 27, 2003, at B1.

217. *See* James Walsh, *Entenza Calls Many Charter Schools Lax*, STAR TRIB. (Minneapolis), Aug. 13, 2004, at B3.

218. *See* Institute on Race & Poverty, *supra* note 208, at slide 11.

219. *See, e.g.*, Lourdes Medrano Leslie & Anne O'Connor, *Closing of School Hits Hard*, STAR TRIB. (Minneapolis), June 1, 2000, at A1 (reporting on the early closing of Success Academy, a St. Paul charter school).

D. Effect of Instability in Minneapolis Schools

In addition to a loss of enrollment due to charter schools and open enrollment options, the racial change in the wake of *Booker* and the return to neighborhood schools played a large role in the declining enrollment in Minneapolis schools. During the *Booker* era of desegregation in Minneapolis, White enrollment in Minneapolis public schools declined by almost half, reducing the percentage of Whites in the MSD by 20%.²²⁰ Middle-class people of color followed this trend of disinvestment from declining communities, with more than half of their households moving to the suburbs.²²¹

At the outer edge of the city, as schools experience rapid White flight and transition, neighborhoods rapidly lose population.²²² Schools in North Minneapolis like Bethune and Lincoln all saw rapid declines in enrollment in the late 1990s and the early 2000s.²²³ Bethune elementary is nearly 100% minority²²⁴ and has seen a rapid decline in enrollment from a high of 640 students in 1998²²⁵ to a low of 260 in 2005²²⁶—nearly a 60% loss in enrollment. Some schools, such as the well-integrated Lake Harriet Upper Campus and Barton, saw an increase in enrollment over the same period.²²⁷

220. Heilman, *supra* note 146, at 169.

221. See Orfield & Luce, *supra* note 52, at 1 (reporting neighborhood-level data showing that nearly half of the minority population lives in the suburbs of the 102 largest metropolitan regions of the United States).

222. See ORFIELD, *supra* note 10, at 39-40.

223. Bethune declined from 640 enrolled students in 1998-1999 to 260 enrolled students in 2005-2006. Compare Minn. Dep't of Educ., 2005-2006 Enrollments-School-Special Populations, <http://education.state.mn.us/mde/static/FallPopulSchl0506.xls> (last visited Mar. 22, 2006) [hereinafter *Minn. Dep't of Educ., 2005-2006 Enrollments*] with Minn. Dep't of Educ., 1998-1999 Enrollments-School-Special Populations, <http://education.state.mn.us/mde/static/fps9899.xls> (last visited Mar. 22, 2006) [hereinafter *Minn. Dep't of Educ., 1998-1999 Enrollments*]. Lincoln declined from 739 enrolled students in 2000-2001 to 625 enrolled students in 2005-2006. Compare Minn. Dep't of Educ., 2000-2001 Enrollments-School-Special Populations, <http://education.state.mn.us/mde/static/FPS0001.xls> (last visited Mar. 22, 2006) [hereinafter *Minn. Dep't of Educ., 2000-2001 Enrollments*] with *Minn. Dep't of Educ., 2005-2006 Enrollments, supra*.

224. *Minn. Dep't of Educ., 2005-2006 Enrollments-School—Special Populations, supra* note 188.

225. *Minn. Dep't of Educ., 1998-1999 Enrollments, supra* note 223.

226. *Minn. Dep't of Educ., 2005-2006 Enrollments, supra* note 223.

227. Lake Harriet Upper Campus increased from 453 enrolled students in 2000-2001 to 640 enrolled students in 2005-2006. Compare *Minn. Dep't of Educ., 2000-2001 Enrollments, supra* note 223 with *Minn. Dep't of Educ., 2005-2006 Enrollments, supra* note 223. Barton increased from 570 enrolled students in 1998-

The instability created by declining enrollment causes some of Minneapolis's most talented teachers to leave in search of a district with increasing enrollment.²²⁸ Suburban schools with increasing diversity need the skills teachers from Minneapolis possess from working with low-income and minority children, and thus have incentive to lure Minneapolis teachers away.²²⁹ After their departure and the continuing decline in enrollment, the school board finds itself in a position of having to close schools despite vehement local opposition.²³⁰ On top of the already-difficult problems of educating children in schools of concentrated poverty, the inner-city districts now face insurmountable problems from declining enrollment and staffing.

E. Segregation in Inner-ring Suburbs

Inner-ring suburban school districts are also undergoing the same sort of transformation Minneapolis schools experienced a generation before. The Bloomington and Osseo school districts provide concrete examples of this increasing stratification. Osseo has been in violation of the state desegregation rules since 1993, but the state has yet to take action that would correct the problem.²³¹ In Osseo, more than one-third of the district's schools are "racially identifiable,"²³² as the Minnesota desegregation rules define them.²³³ Osseo's Park Center Senior High is more than 55%

1999 to 761 enrolled students in 2005-2006. Compare *Minn. Dep't of Educ., 1998-1999 Enrollments*, *supra* note 223 with *Minn. Dep't of Educ., 2005-2006 Enrollments*, *supra* note 223.

228. See Steve Brandt, *Urban Teacher Exodus Swells*, STAR TRIB. (Minneapolis), Aug. 11, 2005, at A1. Declining enrollment, if severe enough, can lead to school closures and teacher layoffs. Combined with an already-stressed administration and lack of attention to teacher needs, the threat of future layoffs has driven some qualified teachers to seek employment in Bloomington and other nearby districts with booming enrollment. *Id.* One teacher noted that in the six years of her employment with Minneapolis, she had received five layoff notices but had been hired back each year. *Id.*

229. *Id.*

230. See Mary Jane Smetanka, *Plan Rekindles Memories of '82*, STAR TRIB. (Minneapolis), Feb. 10, 2004, at A8 (noting threat of school closures due to decline in enrollment); see also Sanjay Bhatt, *Draft Plan to List School Closures*, SEATTLE TIMES, Apr. 20, 2005, at B1; John Gehring, *Dips in Enrollment Posing Challenges for Urban Districts*, EDUC. WEEK, Mar. 2, 2005, at 1 (discussing nationwide enrollment losses in urban school districts).

231. Orfield, *supra* note 10, at 287.

232. See The Data Ctr., Minn. Dep't of Educ., <http://cfl.state.mn.us/datactr/> (last visited June 22, 2005) (compilation of data on file with author).

233. See MINN. R. 3535.0110, subp. 6 (2005).

minority,²³⁴ twenty-six points higher than the district high school student average.²³⁵ Conversely, nearby Maple Grove Senior High has 8% minority enrollment.²³⁶ The spatial separation of Whites and minorities in the Osseo schools is even starker in the elementary schools, which are typically smaller schools with higher racial concentrations.²³⁷

In Osseo, parents fought to keep the status quo, as residential segregation within the district was inevitably translated into school segregation.²³⁸ The district now contains nine racially identifiable schools out of twenty-seven standard high, middle, and elementary schools.²³⁹ Its total minority enrollment is 36%, more than 20% higher than neighboring Wayzata, which is at 14%, barely qualifying Osseo as a racially isolated district.²⁴⁰

Contemporaneous to this increasing racial isolation in Osseo's schools was a contentious disagreement over the redrawing of attendance lines in the 1990s. Parents protested and the superintendent declared that no east-west busing would occur—the remedy that could conceivably bring Osseo's schools into racial balance.²⁴¹ Dan Schulman, an attorney for the NAACP, blamed board members for orchestrating segregation.²⁴² The *Star Tribune* noted that the school plan was reminiscent of a highly visible controversy in Maple Grove, a suburban city at the western edge of the Osseo school district. That issue involved an attempt to prevent the building of low-income housing in the community.²⁴³ The result of the controversial boundary adjustments was that the school board chose neighborhood schools over integration, and Osseo's schools have become predictably more and more

234. MINN. DEPT OF EDUC., RACE DATA BY SCHOOL FOR THE 2004-05 SCHOOL YEAR (2005) (on file with author).

235. *Id.*

236. *Id.*

237. *Id.*

238. See Norman Draper, *Battle of the Borders*, STAR TRIB. (Minneapolis), Jan. 29, 2001, at A1 ("Recently, Osseo parents revolted over a plan to turn one school into an early-education center and another into a kindergarten center . . . parents were up in arms over what they feared was an effort to redraw school boundaries to lessen the racial imbalance . . .").

239. The Data Ctr., *supra* note 232.

240. MINN. DEPT OF EDUC., *supra* note 234.

241. See Mike Kaszuba, *District Wrestles with Racial Imbalance*, STAR TRIB. (Minneapolis), Oct. 11, 1998, at B1.

242. *Id.* at B9.

243. *Id.*; see also ORFIELD, *supra* note 10, at 127-28.

segregated.²⁴⁴

Recent boundary adjustments in Bloomington provide another example of the effect that racial change and neighborhood schooling have on the segregation of opportunities in suburban districts. Before the fall of 2001, Bloomington's public schools included a combination of neighborhood and district-wide schools from kindergarten to high school.²⁴⁵ Two district-wide "intermediary" schools were used for grades five through eight.²⁴⁶ The school board planned to consolidate the grades into middle schools so that the children would have fewer transition points as they progressed to high school, providing stronger school and peer ties by increasing the amount of time spent in each school.²⁴⁷

In facts similar to those found in the Supreme Court's decision in *Columbus Board of Education v. Penick*,²⁴⁸ the district proposed four attendance boundary plans for the Bloomington middle schools.²⁴⁹ They varied in terms of the segment of the city they captured but ultimately focused on achieving certain goals: keeping contiguous boundaries with existing elementary schools, maintaining racial balances, and increasing the proportion of children within walking distance of the school they attend.²⁵⁰ Bloomington was out of compliance with the state desegregation rules, as some other districts had been since the enactment of the new rules in 1999.²⁵¹ Opposition from the Bloomington School

244. See ORFIELD, *supra* note 10, at 50.

245. See Bloomington Public Schools, *Actions*, SCH. BOARD NEWS, Feb. 9, 1999 (outlining the district's reorganization plan).

246. *Id.*

247. See *id.* (noting the intended effects of the new grade level organization).

248. 443 U.S. 449 (1979).

249. Bloomington Public Schools, *Transition Reports: Pros and Cons of Middle School Boundary Options A-D* (2000) (on file with author).

250. See *id.*

251. See MINN. OFFICE OF THE LEGISLATIVE AUDITOR, SCHOOL DISTRICT INTEGRATION REVENUE 29 (2005), available at <http://www.auditor.leg.state.mn.us/ped/pedrep/integrevf.pdf> (noting that Bloomington has had at least one racially identifiable school since 1997, the inception of Minnesota's Integration Revenue Program). Bloomington currently has one racially identifiable elementary school—meaning that the minority enrollment at the school is twenty percentage points above the district minority enrollment—and one that is on the cusp of becoming racially identifiable. Compare Minn. Dep't of Educ., *School Report Card: Bloomington* (2005), http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=000&DISTRICT_NUM=0271&DISTRICT_TYPE=01 (last visited Feb. 28, 2006) with Minn. Dep't of Educ., *School Report Card: Valley View Elementary* (2005), http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=459&DISTRICT_NUM=0271&DISTRICT_TYPE=01 (last visited Feb. 28, 2006)

Board and residents to the most integrative plan seemed to focus mostly on the time it would take to bus certain children; others were troubled by the fact that the buses would pass by the nearest schools and proceed to schools farther away.²⁵² Another group of concerned residents, 250 in all, signed a petition asking the School Board not to choose a plan that would worsen racial and social segregation.²⁵³ Seventeen residents also testified to the School Board about the boundaries and the negative impact school segregation would have on their community.²⁵⁴ The District chose what was termed "Plan D," which kept contiguous boundaries with elementary schools, but did not maintain racial balance in the three schools.²⁵⁵

The redistricting in Bloomington may have caused one middle school to concentrate rapidly by race and class. In 2001, when the boundary change went into effect, the racial averages of the three schools were slightly different; Olson Middle School was 16.8% minority, Oak Grove was 21.6% minority, and Valley View was 32.8% minority.²⁵⁶ However, the average minority enrollment at Valley View has increased since the middle school boundaries were redrawn in 2000-2001.²⁵⁷ Presently, Olson Middle School is 18.5% non-White; Oak Grove is 27% non-White; and Valley View is about 40% non-White.²⁵⁸ The district-wide average of minority students in Bloomington middle schools is 27.9%.²⁵⁹ Thus the trend in minority enrollment has generally been increased diversity, though at a greater rate in some schools.²⁶⁰

(showing that Valley View Elementary minority enrollment is more than twenty percentage points above the Bloomington minority average).

252. See Bloomington Public Schools, *supra* note 249, at 1-2.

253. Bloomington Sch. Bd., Meeting Minutes (Jan. 8, 2001) (on file with author).

254. *Id.*

255. See Bloomington Sch. Bd., Meeting Minutes (Jan. 22, 2001) (on file with author); Bloomington Public Schools, *supra* note 249.

256. The Data Ctr., *supra* note 232.

257. See *id.*

258. *Id.*

259. *Id.*

260. See *id.*

**T.1 Middle School Enrollment in Bloomington, by Grade
2004-05 School Year²⁶¹**

	Grade	Minorities	Total Enrollment	Minority Percentage
Oak Grove	6 th	86	301	28.57143
	7 th	67	271	24.72325
	8 th	71	259	27.41313
	Total	224	831	26.95548
Valley View	6 th	97	217	44.70046
	7 th	104	246	42.27642
	8 th	83	240	34.58333
	Total	284	703	40.39829
Olson	6 th	57	244	23.36066
	7 th	51	288	17.70833
	8 th	49	317	15.45741
	Total	157	849	18.49234

The trend in all three middle schools is increased minority enrollment, as each sixth grade class in the 2004 fall enrollment had a higher percentage of minority students.²⁶² Table 1 indicates that Oak Grove has the least amount of racial transition between its three grades. An analysis of the enrollment patterns is beyond the scope of this paper, but the Oak Grove attendance area tends to traverse east-west boundaries in Bloomington.²⁶³ Plans that could have conceivably drawn all three schools into a closer racial balance were not selected, most likely for reasons such as walking distance, elementary boundary cohesiveness, and opposition to busing.²⁶⁴ Bloomington should have been able to create a system that did not segregate its schools by creating school boundaries that captured a diverse population in Bloomington and incorporated distinct neighborhoods.

261. MINN. DEPT OF EDUC., *supra* note 234 (figures may not add up to 100% due to rounding).

262. *See id.*

263. *See* Bloomington Public Schools, *supra* note 249.

264. *See id.* at 1-5.

III. The Choice Is Yours: An Attempt to Desegregate Minneapolis Public Schools From 1995 to Today

After Judge Larson ended court supervision, integration became an elusive goal in Minneapolis's public schools. The MSD began operating under the state 15% rule.²⁶⁵ In 1995, the state Board of Education officially abandoned the 15% rule.²⁶⁶ A metropolitan rule requiring schools across the region to be in balance was proposed and rejected in 1999 in favor of less stringent rules.²⁶⁷ By then, seven of the MSD's elementary schools were in violation of the rule.²⁶⁸

A. *The NAACP and Xiong Lawsuits*

Dismayed by this increasing segregation, the Minneapolis Branch of the NAACP filed suit in state court on September 19, 1995, on behalf of all children enrolled in Minneapolis public schools.²⁶⁹ The named defendants included the State of Minnesota, the Board of Education, both chambers of the Minnesota legislature, the Metropolitan Council,²⁷⁰ and various state officials.²⁷¹ The complaint in the suit began by noting the racial and economic disparity between Minneapolis schools and suburban schools.²⁷² Minneapolis schools were more than 59% minority and 55% poor at the time of the complaint, while the schools of surrounding suburbs were "overwhelmingly white" and more affluent.²⁷³ By the time the *Xiong* complaint was filed in 1998, the statistics had increased to about 70% each.²⁷⁴

265. See *supra* note 176 and accompanying text.

266. Bauerlein, *supra* note 181.

267. Adoption of Rules Relating to Desegregation, Case No. 9-1300-10448-1, ¶ 56 (State of Minn., Office of Admin. Hearings Mar. 19, 1999), <http://www.oah.state.mn.us/aljBase/130010448.rr.htm> (noting Roundtable proposal for a metropolitan-wide desegregation rule).

268. *Id.*

269. See Class Action Complaint at 2, Minneapolis Branch of the NAACP v. State, No. 95-14800 (Minn. Dist. Ct. Sept. 19, 1995) [hereinafter *NAACP Compl.*]. The allegations in this complaint were substantially the same as those filed on February 23, 1998. See Class Action Complaint, *Xiong v. State*, No. 98-2816 (Minn. Dist. Ct. Feb. 23, 1998) [hereinafter *Xiong Compl.*].

270. The Met Council is a powerful regional government authority in the Twin Cities with substantial control over the development priorities of the region. See ORFIELD, *supra* note 10, at 173-180.

271. See *NAACP Compl.*, *supra* note 269, at 2-3.

272. *Id.* at 2; see also *Xiong Compl.*, *supra* note 269, at 2.

273. *NAACP Compl.*, *supra* note 269, at 11.

274. *Xiong Compl.*, *supra* note 269, at 10 ("[T]he public schools of the City of

The plaintiffs argued that this segregated education constituted a *per se* violation of the Minnesota Constitution's education and equal protection clauses.²⁷⁵ The year before the filing of the NAACP complaint, the Minnesota Supreme Court had found that the state's education clause—which places a duty on the state legislature “to establish a general and uniform system of public schools”²⁷⁶—created a fundamental right to education.²⁷⁷ The NAACP's framing of segregation as a state constitutional problem mirrored the strategy of plaintiffs who had been successful to varying degrees using state equal protection and education clauses to promote school funding equity.²⁷⁸ The claim that segregated schools violated a state constitutional education clause was argued in a contemporaneous action by plaintiffs from Hartford, Connecticut, under that state's constitution.²⁷⁹ The final decision in that case, which was argued nine days after the filing of the NAACP complaint, held that the state's education clause, along with other constitutional provisions, required Connecticut to remedy Hartford's segregated schools.²⁸⁰

The plaintiffs in *NAACP v. State* alleged that the segregated Minneapolis schools also, as an issue of fact, provided an inadequate education, “[b]ecause the Minneapolis public schools must devote disproportionately large resources to dealing with the many problems and difficulties that accompany poverty and racial segregation”²⁸¹ This inadequate education was reflected, the plaintiffs alleged, in the lower test scores and higher non-graduation rates of Minneapolis students as compared with state

Minneapolis are approximately 70 percent children of color and approximately 70 percent low-income.”).

275. *NAACP Compl.*, *supra* note 269, at 13, 17-19; *see also Xiong Compl.*, *supra* note 269, at 2, 18-20 (alleging *per se* violations of the education and equal protection clauses of the Minnesota Constitution).

276. MINN. CONST. art. XIII, § 1.

277. *See Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993) (holding that education is a fundamental right under the Minnesota constitution both because of its importance to the state and the language of the education clause); *see also NAACP Compl.*, *supra* note 269, at 17 (noting the fundamental right to an adequate education under the education clause of the Minnesota constitution).

278. *See Michael Heise, State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995). The choice of plaintiffs to proceed in state court on adequacy theories is discussed; the article particularly focuses on *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996).

279. *See Sheff*, 678 A.2d 1267.

280. *Id.* at 1270-71.

281. *NAACP Compl.*, *supra* note 269, at 13; *see also Xiong Compl.*, *supra* note 269, at 11-12, 19.

suburban students.²⁸² The NAACP complaint also alleged that the segregation of the Minneapolis Public Schools had a negative effect on its students' chances for employment and higher education.²⁸³

The NAACP plaintiffs charged that Minneapolis's failure to enforce current state rules on capping minority enrollment in its schools, among other actions, showed that the state had not taken effective action to desegregate Minneapolis schools.²⁸⁴ Additionally, they claimed that the state reinforced racial and economic inequality through its school construction policies and failure to promote integrated housing.²⁸⁵ The plaintiffs asked the court to order the state to end its segregative practices and provide the children of Minneapolis's public schools with "an adequate and desegregated education."²⁸⁶

The defendants claimed that Minnesota's education clause created only a limited duty to establish schools,²⁸⁷ and that there was no equal protection violation because no intentional acts were alleged.²⁸⁸ The district court judge, after hearing arguments in April 1996, ordered several defendants dismissed but allowed the case to go forward.²⁸⁹ The district court also determined that the issues raised in the case were sufficiently novel and important enough to be decided directly by the Minnesota Supreme Court.²⁹⁰ The higher court refused to hear the certified questions, and the

282. See *NAACP Compl.*, *supra* note 269, at 14; see also *Xiong Compl.*, *supra* note 269, at 13-14.

283. See *NAACP Compl.*, *supra* note 269, at 14; see also *Xiong Compl.*, *supra* note 269, at 14.

284. See *NAACP Compl.*, *supra* note 269, at 15; see also *Xiong Compl.*, *supra* note 269, at 15-16.

285. *NAACP Compl.*, *supra* note 269, at 16; see also *Xiong Compl.*, *supra* note 269, at 16-17 (noting, as an example, the failure of Metropolitan Council to ensure that the suburb of Maple Grove fulfilled its fair housing obligations).

286. *NAACP Compl.*, *supra* note 269, at 19; *Xiong Compl.*, *supra* note 269, at 21.

287. See Defendants' Amended Notice of Motion and Motion to Dismiss Plaintiffs' Complaint at 1-2, Minneapolis Branch of the NAACP v. State, No. 95-14800 (Minn. Dist. Ct. Feb. 27, 1996); Memorandum of Law in Support of Defendants' Motion to Dismiss at 4, 10-19, Minneapolis Branch of the NAACP v. State, No. 95-14800 (Minn. Dist. Ct. Feb. 27, 1996) [hereinafter *Mem. of Law in Supp. of Defs.' Mot. to Dismiss*].

288. See *Mem. of Law in Supp. of Defs.' Mot. to Dismiss*, *supra* note 287, at 21-23.

289. See Minneapolis Branch of the NAACP v. State, No. 95-14800, slip op. at A24 (Minn. Dist. Ct. June 26, 1996) (order granting defendants' motion to dismiss in part and denying plaintiffs' motion for summary judgment).

290. Minneapolis Branch of the NAACP v. State, No. 95-14800 (Minn. Dist. Ct. Nov. 21, 1996) (order for certification of questions on appeal).

defendants subsequently sought unsuccessfully to have the case dismissed on jurisdictional grounds.²⁹¹

The effort of the NAACP to join the Metropolitan Council for a combined schools and housing remedy was defeated on *res judicata* grounds because of the consent decree in the housing discrimination case *Hollman v. Cisneros*.²⁹² This was an important loss in the NAACP case because of the remedial power of the Metropolitan Council to coordinate affordable housing and school desegregation.²⁹³

Not to be confused with the 1995 filing of the NAACP case, a later suit, *Xiong v. State*, was filed in 1998,²⁹⁴ and contained virtually identical claims to the NAACP case. Dan Shulman, the attorney for the NAACP in the original lawsuit, noted that the new case contained an additional due process claim and could possibly help move the state toward a settlement, though settlement was not the reason *Xiong* was filed.²⁹⁵ The Hennepin County District Court later consolidated both cases for purposes of trial.²⁹⁶

On the verge of proceeding to trial, the attorneys for the Minneapolis NAACP felt that settlement best served the interests of the children in Minneapolis and would provide the best remedy.²⁹⁷ A settlement that precluded extensive litigation and provided a pilot program for Minneapolis children would at least

291. Minneapolis Branch of the NAACP v. State, No. 95-14800, slip op. at 1-2 (Minn. Dist. Ct. July 21, 1997) (order denying motion for judgment on the pleadings).

292. See NAACP v. Met. Council, 125 F.3d 1171, 1175 (8th Cir. 1997), *vacated*, 522 U.S. 1145 (1998). *Hollman* was a class action challenging the concentration of public housing in certain neighborhoods in Minneapolis. *Id.* at 1172.

293. See Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, FORDHAM URB. L.J. (forthcoming 2006) (manuscript at 27, on file with author).

294. See *Xiong Compl.*, *supra* note 269.

295. See Debra O'Connor, *Parents File Lawsuit Over Minneapolis Schools*, PIONEER PRESS (St. Paul), Feb. 24, 1998, at 2B.

296. See Settlement Agreement at 1, Case Nos. 95-14800, 98-2816 (Minn. Dist. Ct. May 8, 2000) ("On October 16, 1998, the Court ordered that the actions be consolidated for purposes of trial only.") (on file with author) [hereinafter *Settlement Agreement*].

297. See Dan Shulman, Address at the Institute on Race and Poverty Race and Regionalism Conference, (May 7, 2005), http://www.kirwaninstitute.org/news/RnR2005/Session6_DanShulman.m3u (noting that while the Plaintiffs recognized the possibility that the suit might lead to mediation, there were other reasons to bring suit or to settle).

298. *Id.*

provide support for a future, more extensive effort.²⁹⁸ In early 1999, the parties began to work on the settlement, first by exchanging proposals and then by mediated settlement negotiations.²⁹⁹ In 2000, before the case was to be tried, the parties reached an agreement.³⁰⁰

The settlement agreement established three key programs: 1) allow low-income Minneapolis students to attend suburban schools; 2) give low-income Minneapolis students preferred access to magnet schools within the MSD; and 3) increase the accountability of the MSD to parents.³⁰¹ The suburban plan set aside 2,000 spaces over four years for Minneapolis students from low-income families to attend suburban schools which are part of the West Metro Education Program, a consortium of school districts in the western metropolitan area.³⁰² Although the suburban program aspect was set to expire at the end of the 2004-05 school year, it has been extended to the 2005-06 school year.³⁰³ The settlement also increased access for low-income children to existing magnet school programs and intradistrict transfers.³⁰⁴

B. CIY and Participant Response to the Program

CIY works by expanding upon Minnesota's open enrollment laws.³⁰⁵ CIY children may transfer into suburban districts, bringing with them a substantial portion of state aid.³⁰⁶ Likewise, because CIY children are by definition poor, they bring in more money than a middle-class child would due to Minnesota's funding

299. *Id.*

300. See *Settlement Agreement*, *supra* note 296; see also KAHLBERG, *supra* note 21, at 176-77 (noting that the settlement was reached in 2000 to expand upon the existing suburban transfer program).

301. See *Settlement Agreement*, *supra* note 296, at ex. B.

302. *Id.* at ex. B. The initial plan included the following districts: Richfield, St. Louis Park, Wayzata, Columbia Heights, Edina, Hopkins, Robbinsdale, St. Anthony/New Brighton. *Id.* Sometime thereafter, Eden Prairie was also added. See *West Metro Education Program*, *supra* note 31.

303. See Shah, *supra* note 32, at B1.

304. See *Settlement Agreement*, *supra* note 296, at ex. C. Minneapolis agreed to adopt an Enhanced Choice program and an Accountability program. *Id.* at 2. These are important aspects of the choice plan, though they are not the primary focus of this Article. Intra-district transfer can only achieve so much in a school district that is overwhelmingly poor and minority. Thus, the lion's share of the discussion is reserved for the suburban transfer program, which is at the same time the most controversial and promising aspect of CIY.

305. See PALMER, *supra* note 33, at i-ii.

306. *Id.*

schemes.³⁰⁷ These features, combined with free transportation for the children,³⁰⁸ make CIY an attractive program for all sides.

Children are already permitted under state law to attend schools outside their district,³⁰⁹ but they must pay for their own transportation to the district and compete for available spaces.³¹⁰ The suburban CIY program gives priority access to open spaces in certain suburban districts to Minneapolis students who are eligible for free or reduced lunch.³¹¹ If demand for the program outstrips availability, then residents in certain regions within Minneapolis receive higher priority.³¹² Suburban districts may only refuse to accept a CIY student if there is not space available in the program.³¹³ Interstate 94/394 is a north/south dividing line,³¹⁴ and Minneapolis residents north of the freeway may have priority in suburban districts north of the freeway, and similarly in suburban districts south of the freeway.³¹⁵

At the beginning of its fifth year in the fall of 2005, 1,680 students were participating in the suburban choice component of the program.³¹⁶ More than 3,500 had participated in the program over its five year lifetime.³¹⁷ The majority of the participating suburban schools had considerably fewer children of color than Minneapolis schools.³¹⁸ In the first two years, only eight of the sixty suburban schools had more than 35% minority enrollment.³¹⁹ The suburban schools also enrolled relatively few students who were eligible for free or reduced price lunches.³²⁰ A study covering

307. TIM STROM, MINN. HOUSE RESEARCH DEP'T, MINNESOTA SCHOOL FINANCE: A GUIDE FOR LEGISLATORS 19 (Nov. 2005) ("The formula that generates compensatory revenue is a concentration formula based on each school building's count of students that are eligible for free or reduced price meals.").

308. See *Settlement Agreement*, *supra* note 296, at ex. B.

309. See PALMER, *supra* note 33, at i (noting that more than 30,000 students participated in open enrollment in the 2002-03 year).

310. See *id.*

311. See *id.* at i-ii.

312. See *id.* at 1-9. The neighborhoods are roughly near-North Minneapolis, downtown, parts of Northeast near the river, Seward, and South Minneapolis. *Id.* at 19.

313. See *id.* at 8, 10.

314. See *id.* at 1 n.3.

315. See *id.* at 1.

316. Minneapolis Public Schools, Student Accounting Department, Choice is Yours Enrollment (Sept. 27, 2005) (on file with author).

317. See *id.*

318. See PALMER, *supra* note 33, at 3.

319. See *id.*

320. See *id.*

the first three years of CIY showed 52% of the program's participants came from two zip codes in north Minneapolis, which had mostly racially isolated schools.³²¹ By far the largest percentage of students (37.2%) went to Robbinsdale, followed by Richfield (14.4%).³²² Both these districts were drawn to the program in part based on their declining enrollment, and in part based on a desire to help with a west-metro desegregation program.

The earliest years of CIY suffered from poor publicity.³²³ In an evaluation of the first several years, the Minnesota Department of Education found that of the families that were eligible and did not utilize or apply for CIY, nine of ten did not even know that it existed.³²⁴ Even among families that utilized the suburban CIY program, some did not realize they were participating in it.³²⁵ This probably demonstrates that there is an information gap for low-income or minority families that can keep them from accessing the program. Moreover, the state and school districts had difficulty making the program known to parents, as name recognition was so low.³²⁶

Parents chose to enroll their children in suburban school districts as part of CIY primarily because of academic quality.³²⁷ Parents of CIY participants were also more likely to give school safety as a reason for choosing the school than parents of students in Minneapolis schools.³²⁸ Interviews with parents of participants in the programs showed great satisfaction with the programs.³²⁹

Interest in the suburban transfer program is highest among Black families. Before the creation of the CIY program, 56% of suburban transfer students were White.³³⁰ Now, nearly 46% are

321. See ASPEN ASSOCS., MINNESOTA VOLUNTARY PUBLIC SCHOOL CHOICE 2003-2004 14 (2004).

322. See *id.*

323. See PALMER, *supra* note 33, at 29-30; Randy Furst, *School-Choice Info Misses Some Parents*, STAR TRIB. (Minneapolis), May 27, 2001, at B1.

324. See PALMER, *supra* note 33, at 29 ("Only 1 in 10 parents of eligible, non-participating students . . . recognized the program by name.").

325. See *id.* at 30.

326. See *id.*

327. See *id.* at 40 (finding that 32.8% of parents cited academic quality as their primary reason for enrolling their children).

328. See *id.* at 44 tbl.2.16.

329. See ASPEN ASSOCS., *supra* note 321, at 14 (reporting that 90% of CIY parents would choose the same school again).

330. See *id.* at 13.

Black and only 37% are White.³³¹ Forty-seven percent of CIY participants were previously enrolled in a Minneapolis public school, and 7% were previously enrolled in a charter or private school.³³²

Parents rated the schools well on a wide variety of indicators, including setting high standards for achievement, creating community, and making students feel welcome.³³³ Though parents seemed pleased with the suburban schools' approach to diversity, interviews with teachers showed that they were less comfortable talking about racism and prejudice than parents believed and that teachers believed students of different races did not work well together.³³⁴ Only 17% of CIY withdrawals in the first four years returned to the Minneapolis Public Schools,³³⁵ indicating perhaps that parents were more satisfied with suburban schools than with their previous schools. The remainder of those withdrawing may have chosen to attend charter schools or some other non-MSD, non-CIY school. Some anecdotal evidence also suggests that families may be moving out of Minneapolis to relocate in the districts where their children attend school.³³⁶ In that case, the families would no longer be CIY enrollees, but new suburban residents eligible for local enrollment.

There is little hard data measuring the achievement of CIY students in relation to those students in Minneapolis schools.³³⁷ A comparison of program participants in suburban schools with students in Minneapolis schools, which did not control for other factors, showed increases in scores for suburban choice students in four out of five comparisons.³³⁸ The group responsible for releasing the first two reports on CIY and the Minnesota Department of Education planned to release data on student achievement in June of 2005, but as of January 2006, has not

331. *See id.*

332. *Id.* at 14.

333. *See* PALMER, *supra* note 33, at 66 tbl.3.2.

334. *See id.* at 67-68.

335. Minneapolis Public Schools, Student Accounting Department, Choice is Yours Enrollment (Jun. 17, 2005) (on file with author).

336. *See* PALMER, *supra* note 33, at 18 n.13.

337. *See* ASPEN ASSOCS., *supra* note 321, at 22.

338. PALMER, *supra* note 33, at 86 (showing increases in year one participants in eighth grade reading and year two participants in third grade reading, third grade math, and fifth grade reading; showing lower scores for year one participants in fifth grade math).

followed through with a public release.³³⁹

Focus groups held during the 2002-03 school year showed that 50% of students had an easy transition into their new schools.³⁴⁰ The vast majority of students stated that they felt welcome in their new schools.³⁴¹ Students at nearly half of the participating schools, however, reported difficulties transitioning due to the new cultural environment or not knowing anyone at their new school.³⁴² Some students reported being unfavorably singled out in class, while others reported that teachers gave them extra help.³⁴³ Students often faced stereotypes held by fellow students and, to a lesser extent, teachers.³⁴⁴ When students were asked what advice they would give to the program's administrators, the most common suggestion was to improve transportation.³⁴⁵

Although students were not asked about their overall satisfaction with the program, a third of the respondents replied to that effect on their own.³⁴⁶ Overall, an analysis of the students' responses in focus groups found that the students utilizing CIY interpreted their experiences in their new schools "quite positively."³⁴⁷

C. Minnesota's Desegregation Rules

Contemporaneous with the CIY settlement and the end of the NAACP litigation, the Minnesota Department of Education enacted administrative rules to deal with segregation. Minnesota administrative rules provide guidance for assessing racial balance in schools and school districts. A "racially identifiable" school is defined as one that is twenty percentage points above the district average for that grade level in terms of minority enrollment.³⁴⁸ A "racially isolated" school district is one where the enrollment of minority students exceeds twenty percentage points of district-

339. In discussions with staff at the Minnesota Department of Education, it appears that the student achievement data will be publicly available at some point, but the Department indicated no plans to make a public release of the data.

340. See PALMER, *supra* note 33, at 96.

341. See *id.* at 98.

342. See *id.* at 97.

343. See *id.* at 98-99.

344. See *id.* at 99-100.

345. See *id.* at 107.

346. See *id.* at 109.

347. *Id.*

348. See MINN. R. 3535.0110, subp. 6 (2005).

wide enrollment at any adjoining school district.³⁴⁹ Some types of schools are specifically exempted from the effect of the rules. These include charter schools and schools designed to “address limited English proficiency.”³⁵⁰ For segregated schools not the result of intentional discrimination, a separate plan exists.³⁵¹ All districts are required to provide the Commissioner of the Department of Education with racial composition data each year in order to determine which schools are racially isolated.³⁵²

The remedy for isolated school districts is similar to that for segregated schools not the result of intentional discrimination. After a finding that the district is isolated, the Commissioner is required to notify the isolated district and the surrounding districts.³⁵³ The affected districts must then establish a “multidistrict collaboration council” to “identify ways to offer cross-district opportunities to improve integration.”³⁵⁴ A plan is then approved, which may include incentives listed in the rules.³⁵⁵ Some of the incentives involve transportation aid, developing cooperative magnet schools, creating cooperative efforts to recruit minority teachers, and creating community education programs.³⁵⁶ A plan remains in effect for four years from the time it is created.³⁵⁷

While the rules generally will not create a mandatory integration remedy,³⁵⁸ they can increase interaction between districts to encourage voluntary desegregation. Under the present statute, broad authority resides in the Commissioner of the Department of Education to “address the need for equal educational opportunities for all students and racial balance” through the use of administrative guidelines.³⁵⁹ Administrative rules create voluntary remedies for districts that are segregated or

349. *See id.* subp. 7.

350. *Id.* subp. 8. Schools that are designed to address individual education needs, special education, or alternative education are also exempted. *Id.*

351. *See id.* 3535.0160, subp. 1.

352. *See id.* 3535.0120, subp. 1.

353. *See id.* 3535.0170, subp. 1. The same exceptions exist for American Indian concentrations. *Id.*

354. *Id.* subp. 2.

355. *See id.* subp. 5. The plan is required to include community outreach preceding the plan, identification of cross-district integration issues, goals of integration, and methods to accomplish the goals. *Id.* subp. 6(A).

356. *See id.* subp. 6(B).

357. *See id.* subp. 8.

358. *See supra* notes 353-357 and accompanying text.

359. MINN. STAT. § 124D.896 (b) (2004).

have segregated schools.³⁶⁰ The practical effect of the rules has been to encourage “collaboration councils” that work to support integration initiatives between racially isolated and non-racially isolated school districts.³⁶¹ Unfortunately, a recent review of this system by the Legislative Auditor revealed that the Department of Education is not following through with the rules by evaluating district desegregation plans.³⁶²

With the enactment of the rules in 1999, seven school districts in the metro area were found to be racially isolated.³⁶³ Twenty-six districts were within the auspices of the administrative rule requiring multidistrict collaboration.³⁶⁴ The West Metro Education Program, an administrator of CIY, is one such example of this.³⁶⁵ Another is the Northwest Suburban Integration School District, which was created specifically to address the identification of Brooklyn Center and Osseo school districts as racially isolated following the enactment of the 1999 rules.³⁶⁶

IV. The Leading Edges of Integration Today

The increasing school segregation witnessed in inner-ring suburbs in the Twin Cities mirrors the pattern of segregation that occurred in the central cities a generation ago.³⁶⁷ Legal challenges to these patterns are the new frontier of civil rights in *Brown*-like principles of integration.

The inner-ring suburbs are arguably seeing the same types of boundary adjustments and indifference to segregation that produced the lawsuit in *Booker*.³⁶⁸ Resegregation in the early 1990s, after decades of fighting to produce equality, has brought schools throughout the country back to the level of segregation existing early before the Supreme Court’s first busing decision in

360. See MINN. R. 3535.0170.

361. See *id.* subp. 2, 3.

362. MINN. OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 251, at 28.

363. See In re Proposed Adoption of Rules Relating to Desegregation, Case No. 9-1300-10448-1, ¶ 56 (State of Minn., Office of Admin. Hearings Mar. 19, 1999), <http://www.oah.state.mn.us/aljBase/130010448.rr.htm>.

364. See *id.*

365. See West Metro Education Program, *supra* note 31.

366. See Northwest Suburban Integration School District, <http://www.nws.k12.mn.us/background.html> (last visited Aug. 5, 2005).

367. See *supra* notes 232-240 and accompanying text (Osseo and Bloomington discussion).

368. See *supra* Part II.E.

1971.³⁶⁹ Moreover, remedies that rely exclusively on funding have failed to equalize opportunity and achievement.³⁷⁰ Indeed, as the segregated urban school districts receive greater and greater funding per pupil, we have an education system that is "separate and more than equal."³⁷¹

The recent half-century anniversaries of the *Brown* decisions have produced much discussion and more than a few symposia trying to answer the question of what exactly *Brown* accomplished.³⁷² First, Southern schools were radically altered when *de jure* segregation was struck down in *Brown*.³⁷³ Conversely, Northern schools were faced with a more fragmented system of government that permitted Whites to flee to suburban enclaves.³⁷⁴ Thus, Northern schools might have also faced substantial integration were it not for the *Milliken* decision.³⁷⁵ *Brown* accomplished much, but since the early 1990s institutions have faced the threat of resegregation in previously integrated schools.³⁷⁶ This threat is becoming more and more prevalent in suburbs, where school boundaries are transforming residential segregation into segregation in public schools.³⁷⁷ If this kind of drastic resegregation and socioeconomic concentration can happen in a region as wealthy and as White as the Twin Cities, it can conceivably happen anywhere in the country. The principles of integration must be brought to bear on the problem of fragmented government that permits these separate school systems to exist in metropolitan regions.

If federal desegregative lawsuits were the vehicle for bringing

369. Gary Orfield, *The Growth of Segregation*, in DISMANTLING DESEGREGATION, *supra* note 9, at 53, 54-55.

370. See *supra* notes 189-191 and accompanying text.

371. Susan Eaton et al., *Still Separate, Still Unequal: The Limits of Milliken II's Monetary Compensation to Segregated Schools*, in DISMANTLING DESEGREGATION, *supra* note 9, at 143-178.

372. See, e.g., 24 LAW & INEQ. 1 (2006).

373. See Gary Orfield, *Turning Back to Segregation*, in DISMANTLING DESEGREGATION, *supra* note 9, at 1, 7-8.

374. See *id.* at 10-11.

375. See Ford, *supra* note 8, at 1309-14. Ford refers to *Milliken v. Bradley*, 418 U.S. 717 (1974). Northern schools are often in smaller districts, more closely aligned with municipal boundaries, while Southern school districts are more closely aligned with county boundaries, permitting the type of metro-wide relief that is necessary for effective integration. See AMY STUART WELLS & ROBERT CRAIN, *STEPPING OVER THE COLOR LINE* 31-32 (1997).

376. See Orfield, *supra* note 373, at 19-22.

377. See Gary Orfield, *Segregated Housing and School Resegregation*, in DISMANTLING DESEGREGATION, *supra* note 9, at 291-92.

the system of *de jure* segregation to a halt, then the newer state constitutional remedies are the leading edge of *Brown* and the desegregation movement today, promising to end *de facto* segregation. The first part of the following section discusses the continuing validity of some of the federal case law. Next, the article turns to the relatively new area of state constitutional desegregation lawsuits. Beginning with *Sheff* and paralleled in the Minnesota cases *NAACP* and *Xiong*, plaintiffs are avoiding the federal courts and enforcing their state fundamental education rights in an attempt to do away with *de facto* segregation in our nation's schools. In Minnesota, the result of state litigation has been a promising choice program that could be an effective element of a more comprehensive desegregation plan.

However, while federal desegregation remedies still exist for new constitutional violations, pursuing lawsuits against each suburban school district would be both difficult and ultimately unproductive. Without a metro-wide plan to desegregate the entire region, individual suburban districts would simply experience White flight as Minneapolis did. On the other hand, if a metropolitan-wide remedy does not become available, plaintiffs may be forced to sue for the temporary relief that district-by-district remedies can provide.

A. *The Decline of Federal Legal Remedies for Desegregation*

1. The "Dismantling" of Desegregation

Since the 1990s, academics have documented the "quiet reversal" of the school integration created by *Brown* and its progeny.³⁷⁸ The Supreme Court, since the time of *Milliken*, treated integration, or "unitary" status, as a one-time goal that, once reached, cured the harms segregation had wrought in the past.³⁷⁹ School districts were free to dismantle their desegregation programs and return to neighborhood schools.³⁸⁰

Minneapolis returned to neighborhood schools promptly after

378. *E.g.*, DISMANTLING DESEGREGATION, *supra* note 9.

379. *See Milliken*, 418 U.S. 717. In later cases, on a showing of "unitary" (i.e. non-segregated) status and "[operation] in compliance with the commands of the Equal Protection Clause," the Court permitted a school district to dismantle its integrative programs. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247 (1991); *see also Freeman v. Pitts*, 503 U.S. 467, 499 (1992) (giving district courts authority to return oversight to school districts even when full compliance is not yet reached).

380. *See Milliken*, 418 U.S. 717.

Sharon Sayles Belton, a Black mayor, was elected to office and convinced the School Board to do so.³⁸¹ Minneapolis now features an open enrollment policy and a limited intradistrict transfer program as options for inner-city children,³⁸² but most schools in the district are undeniably segregated by race and income.³⁸³

Milliken is a bad precedent for an integrated society for several reasons, including its presaging of the dismantling of federal desegregation law.³⁸⁴ Most importantly, it remains the worst precedent for integration because it bars metropolitan desegregation under the federal constitution.³⁸⁵ Without a violation that somehow crosses municipal boundaries, federal courts are without power to order interdistrict remedies—arguably the most effective remedies for creating stable educational integration and for boosting student achievement and opportunity.³⁸⁶ Municipal and school district boundaries are creations of state law;³⁸⁷ limiting remedies to these boundaries may make the efforts futile because the state enjoys broad discretion to control the pace of integration.

It is clear that federal legal remedies are currently inadequate to address *de facto* segregation. The Minnesota Rules dealing with desegregation coincide precisely with the federal case law of the past fifteen years permitting a return to segregated schools. Minnesota law permits separate schooling for Whites and minorities as long as the state is not foolish enough to advertise its intent to segregate its schools.

Gary Orfield discusses this tendency in his book, *Dismantling Desegregation*, noting that the United States Supreme Court can have a normalizing and legitimizing effect on government actions.³⁸⁸ When, for example, the Supreme Court approved the

381. See Russell, *supra* note 133.

382. See *supra* notes 301-304 and accompanying text.

383. See *supra* Part I.E.

384. See *supra* notes 379-380 and accompanying text.

385. See *Milliken*, 418 U.S. at 745.

386. See, e.g., ROBERT CRAIN ET AL., DESEGREGATION PLANS THAT RAISE BLACK ACHIEVEMENT: A REVIEW OF THE RESEARCH 28-31 (1982).

387. See, e.g., Richard Briffault, *Our Localism*, 90 COLUM. L. REV. 1, 30 (1990) (explaining local government's powerlessness against state intrusion). Briffault goes on to show that in the area of school finance and land use, the local government gains some real legal authority, although it is still ultimately subject to state supreme control. See *id.* at 24-39, 40-58.

388. Gary Orfield, *Plessy Parallels: Back to Traditional Assumptions*, in DISMANTLING DESEGREGATION, *supra* note 9, at 23, 26-27.

“separate but equal” doctrine in *Plessy v. Ferguson*,³⁸⁹ it accepted the idea that racial segregation is natural and unsolvable. Orfield draws this parallel a hundred years later, noting that the Court in *Dowell* and *Milliken* claimed natural boundaries and local preferences make true integration impossible.³⁹⁰ Likewise with the desegregation rules in Minnesota: the law is only concerned with obvious and stark racism that rarely exists in reality.³⁹¹

2. The Continuing Validity of *Keyes*

Booker clearly anticipated the Supreme Court’s decision in *Keyes*, relying on the district court’s decision in *Keyes* and other lower federal court decisions.³⁹² In both *Booker* and *Keyes*, *de facto* segregation was labeled a product of explicit school and housing segregation.³⁹³ *Keyes* imposes a requirement that an entire district will be subject to court supervision if even the smallest portion of its attendance boundaries are gerrymandered to produce racial isolation in schools.³⁹⁴

It is fascinating to examine recent boundary adjustments in suburban Minneapolis districts under the holdings of *Booker* and *Keyes*. Although the facts are not fully developed for this Article, the conduct observed strongly suggests repeated federal constitutional violations as the racially diverse suburbs set their attendance boundaries.³⁹⁵

Keyes outlined the elements of intentional segregation a plaintiff would have to prove in a Northern desegregation case. The court declared:

Where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system First, it is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating “feeder” schools on the basis of race has the reciprocal effect of keeping other

389. 163 U.S. 537, 548-50 (1896).

390. Gary Orfield, *Unexpected Costs and Uncertain Gains of Dismantling Desegregation*, in *DISMANTLING DESEGREGATION*, *supra* note 9, at 73, 96.

391. *See supra* Part III.C.

392. *Booker v. Special Sch. Dist. No. 1*, 351 F. Supp. 799, 807-808 (D. Colo. 1972) (citing *Keyes v. Sch. Dist. No. 1*, 313 F. Supp. 61, 73 (D. Colo. 1970)).

393. *See supra* notes 150-153, 155-174 and accompanying text.

394. *See supra* notes 150-153 and accompanying text.

395. *See supra* Part II.E.

schools predominantly white. Similarly the practice of building a school . . . "with *conscious knowledge* that it would be a segregated school" has a substantial reciprocal effect on the racial composition of other nearby schools. So also the use of mobile class-rooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff on racially identifiable bases have the clear effect of earmarking schools according to their racial composition.³⁹⁶

The Court continued, stating that the effects of segregated schools led directly to residential segregation.³⁹⁷

In *Washington v. Davis*³⁹⁸ and *Massachusetts v. Feeney*,³⁹⁹ the Supreme Court clarified the need to prove intent to establish a violation of the equal protection clause and the 1964 Civil Rights Act.⁴⁰⁰ In light of these cases, the Supreme Court reaffirmed the *Keyes* standard of establishing segregative intent in a school desegregation case in two separate cases.⁴⁰¹ In both cases, the court found that segregative boundary decisions that have a "foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose [segregative intent]."⁴⁰²

396. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 201-202 (1973) (citation omitted) (quoting *Keyes v. Sch. Dist. No. 1*, 303 F. Supp. 279, 285 (D. Colo. 1973)) (emphasis added).

397. *Id.* at 202.

398. 426 U.S. 229 (1976).

399. 442 U.S. 256 (1979).

400. *See id.* at 274-75. *See generally Washington*, 426 U.S. 229.

401. *See Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977) (*Dayton I*); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979) (*Dayton II*); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979).

402. *Columbus*, 443 U.S. at 464. The court specifically declared that "adherence to a particular policy or practice 'with full knowledge of the predictable effects of such adherence upon racial balance in a school system is one factor among many others.'" *Id.* at 465 (quoting *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229, 255 (S.D. Ohio 1977)). In *Dayton II*, the Court found the following: 1) segregated schools, 2) segregated faculty assignments, 3) optional attendance zones that allowed Whites to avoid integrated schools, and 4) school construction policies that enhanced segregation were sufficient to establish a presumption of segregative intent and shift the burden to the defendant school district. 443 U.S. at 541. This burden could only be satisfied with evidence to support a finding that the segregative actions "were not taken in effectuation of a policy to create or maintain segregation." *Id.* at 535 (citing *Keyes*, 413 U.S. at 214). Similarly, in *Columbus* the Court found that 1) segregated schools 2) segregated faculty assignments, 3) discontinuous attendance areas, and 4) segregative boundary changes established such intent. 443 U.S. at 461-63. The Court in *Columbus* confirmed the lower courts which found that choosing between two boundary plans, one which was integrative and one which was segregative, could be used as evidence of segregative intent. *Id.* at 462 n.10 (citing *Penick*, 429 F. Supp. at 248-50) ("The Board chose the segregative option, and the district court was unpersuaded that it had any

Subsequent case law decided under *Keyes*, *Dayton*, and *Columbus* indicates that segregative intent will be presumed if a number of factors are present; once these factors are established, they warrant "an inference and a finding . . . that segregative actions 'were not taken in effectuation of a policy to create or maintain segregation or were not among the factors . . . causing the existing condition of segregation in these schools.'"⁴⁰³ The relevant factors are:

- [1] Discriminatory drawing or altering of an attendance zone . . .
- [2] Discriminatory location of new schools . . .
- [3] Discriminatory expansion of existing schools (such as enlarging minority schools rather than transferring minority students to nearby white schools with available space) . . .
- [4] School board's failure to relieve overcrowding at white schools by transferring white students to nearby minority schools with available space . . .
- [5] Discriminatory hiring of teachers and administrators . . .
- [6] Discriminatory promotion of teachers and administrators . . .
- [7] School board's perpetuation or exacerbation of school segregation by strict adherence to neighborhood school policy after a segregated school system had been developed . . .
- [8] School board's failure to adopt a proposed integration plan or implement previously adopted plan . . .
- [9] School board's adoption of open enrollment or free transfer policies with the effect of allowing whites to transfer out of black schools without producing a significant movement of blacks to white schools or whites to black schools . . .
- [10] School segregation de facto rather than the result of state action.⁴⁰⁴

It appears from *Keyes*, *Dayton*, and *Columbus* that foreseeable consequences of segregation, in addition to the

legitimate educational reasons for doing so."). In footnote 11 the Court noted: "The District Court found that, of the 103 schools built by the Board between 1950 and 1975, 87 opened with racially identifiable student bodies and 71 remained that way at the time of trial. This result was reasonably foreseeable under the circumstances . . ." *Id.* at 462 n.11. Interestingly, and relevant to modern cases, the Court also noted that "[l]ocal community and civil rights groups, [a blue-ribbon University commission] . . . , 'and officials of the Ohio State Board of Education all called attention to the problem of segregation and made curative recommendations' . . . [but the] Board[s] response was 'minimal.'" *Id.* at 463 n.12 (citation omitted) (quoting *Penick*, 429 F. Supp. At 255).

403. *Dayton II*, 443 U.S. at 535 (quoting *Keyes*, 413 U.S. at 214).

404. See GARY ORFIELD, *MUST WE BUS?* 20-21(1978).

presence of several of the above factors, establish a presumption of segregative intent, which must be rebutted by the defendant school district.⁴⁰⁵ Unless a school board could then convince the court that the segregative action was isolated in its effect and that it had never been influenced by racial considerations, the presumption is established. The shifting of the burden, in the vast majority of desegregation cases, has been determinative.⁴⁰⁶

B. State Constitutional Remedies: The Promise of Sheff v. O'Neil

An abolition of legal formalities in segregation—refusing to pretend that segregation in the housing market and in public schooling are independent results of personal preference—is a worthwhile goal but not likely a winning argument in court. Federal legal remedies remain discouraging for metro-wide relief, but some relatively recent state constitutional cases have become the new basis for legal attacks on segregation.

Litigants have turned to state constitutional law to argue that school officials must act to prevent segregation. A certain degree of wariness about legal remedies to enforce integration is warranted, but plaintiffs' groups should not submit to the kind of pessimism that allows school officials to make their decisions in a vacuum. State constitutions are a sound basis for recent pro-integration decisions and settlements in both Connecticut and Minnesota.

The Connecticut case *Sheff* and the Minnesota case *Xiong* provide examples of integrative lawsuits at work today. Faced with a choice between settling for increased resources and proceeding to sue to desegregate their school districts, these plaintiffs rejected the sidetrack strategy of increasing funding to segregated schools. While the *Sheff* court stopped short of ordering a remedy, its sweeping opinion declaring segregated schooling to be an inherently inadequate education provides the best example of what desegregation litigation can achieve if vigorously pursued.

The Supreme Court of Connecticut first found a right to equal education for every child in the 1970s in *Horton v. Meskill*.⁴⁰⁷ Like

405. *See id.* at 16-19.

406. *See id.* at 23-24.

407. 376 A.2d 359, 374 (Conn. 1977) ("We conclude that . . . in Connecticut, elementary and secondary education is a fundamental right, that pupils in the

many states, Connecticut's constitution requires the state to provide a free education to all children within the state.⁴⁰⁸ Since *Horton*, this principle has been interpreted as a requirement to provide adequate funding and to equalize the funding disparities that appeared between school districts with high property wealth and poorer inner-city districts.⁴⁰⁹ *Horton*, however, declined to address race as a possible avenue for equalizing education.⁴¹⁰ The *Sheff* litigation sought to remedy that oversight.

As in *Brown*, the *Sheff* plaintiffs attempted to prove that a segregated education is an inherently unequal education for all children, White or minority.⁴¹¹ Based in part on the same claims pursued in *Horton*,⁴¹² and in part on Justice Douglas's keen insight into the nature of *de facto* segregation,⁴¹³ the plaintiffs argued that no intent need be shown for a constitutional violation to occur; *de facto* segregated schooling violated the state's equal protection clause, regardless of whether it resulted from housing discrimination, attendance boundary gerrymandering, or the spatial separation of wealth and poverty.⁴¹⁴

The Supreme Court of Connecticut considered four claims, the first of which, and the prevailing claim, was a "garden variety *Brown*" claim.⁴¹⁵ The second claim accused the defendants of maintaining and perpetuating racial and social segregation in Hartford in a discriminatory manner, thereby violating both equal protection guarantees and the state education clause.⁴¹⁶ This second claim recognizes that, while intentional state action may not have created segregated schools, state knowledge of *de facto* segregation and the continued maintenance of such a school

public schools are entitled to the equal enjoyment of that right . . .").

408. CONN. CONST. art VIII, § 1 ("There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.").

409. See Lauren Wetzler, *Buying Equality: How School Finance Reform and Desegregation Came to Compete in Connecticut*, 22 YALE L. & POL'Y REV. 481, 482-85 (2004).

410. See *id.* at 487-88 (explaining the plaintiffs' desire not to "mix up race" in the lawsuit).

411. See *id.* at 496.

412. See *id.*

413. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 214-17 (1973) (Douglas, J., concurring).

414. Wetzler, *supra* note 409, at 496-97 (discussing the *Sheff* plaintiffs' claims and arguments).

415. *Id.* at 498.

416. *Sheff v. O' Neill*, 678 A.2d 1267, 1271 (Conn. 1996).

system remains unconstitutional, particularly if the district has used a neighborhood schooling plan.⁴¹⁷

The third claim, some have noted, resembled a school finance claim.⁴¹⁸ By comparison to neighboring school districts, Connecticut maintained the Hartford district in such poor condition so as to disadvantage the children residing there, again in violation of equal protection guarantees and the state education clause.⁴¹⁹ The fourth claim is not usually discussed and is not relied upon here.

Connecticut attempted to defend the case on appeal based on a state action theory that it won at trial and with which the Supreme Court of Connecticut promptly disagreed.⁴²⁰ Proof that the state acted to segregate schooling was unnecessary, the court stated, because Connecticut law "imposes an affirmative constitutional obligation on the legislature to provide a substantially equal educational opportunity for all public schoolchildren . . ."⁴²¹ Principles of state action and proof of discriminatory intent which would have been fatal to the *Sheff* claims if brought in federal court provided no defense in state court precisely because the plaintiffs sued under the state constitution.⁴²²

The court found that the fundamental right to an education, established in *Horton*,⁴²³ was denied to inner-city children in Hartford because of the extreme racial segregation, thereby violating the state's equal protection clause.⁴²⁴ The court ordered the state to fix the problem and provide Connecticut's inner-city children with an adequate education.⁴²⁵ The court found that, since the duty to provide an adequate education is an affirmative

417. *See id.* at 1287-88.

418. *See* Wetzler, *supra* note 409, at 497.

419. *See Sheff*, 678 A.2d at 1271-72.

420. *See id.* at 1277-78.

421. *Id.* at 1280.

422. *Id.* (noting that the state, not federal, constitution obviates need for proof of discriminatory intent).

423. *See id.* at 1286 ("[I]n Connecticut the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized." (quoting *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977))).

424. *See id.* at 1287. The three-step test from *Horton* was used to show (a) a more than *de minimis* disparity in educational disadvantage, (b) a shifting of the burden to the state to prove that the disparities are legitimate objectives, and a failure to hold that burden, and (c) if proving the burden, the continuing disparities still may not be so great as to be unconstitutional. *See id.*

425. *See id.* at 1290-91.

obligation, the state action doctrine that bars most federal desegregation litigation would not bar the claims asserted in *Sheff*.⁴²⁶

An important and sometimes overlooked aspect of *Sheff* is the fact that the court ordered the state to act, as opposed to the traditional "command and control" model utilized by the federal courts in the heyday of desegregation.⁴²⁷

The fundamental right to an education found in *Horton* and used in *Sheff* is precisely the right that federal courts denied to plaintiffs in *San Antonio Independent School District v. Rodriguez*.⁴²⁸ It provides the best hook on which to base a *Brown*-style desegregation claim and is perhaps more appropriate than a lawsuit brought in federal court, as state governments are best equipped to deal with their own schools. While *Keyes* remains good law and potentially provides a valuable claim in federal litigation, *Sheff* obliterates the distinction between intentional state action to segregate schools and the *de facto* segregation that already exists in housing and schooling. A *Sheff*-like result also requires the input of both parties to reach enumerated goals and acquires the legitimacy of a remedy crafted by consent of the democratically elected legislature. Any lawsuit brought to desegregate a school district should be tailored in such a way as to take advantage of the theories in *Sheff* in the hope that it will convince more courts to take a hard look at *de facto* segregation.

C. Adequacy Through Funding: An Inadequate Remedy

Some have commented that desegregation rarely fails because it has been tried and found wanting; more often, however, "desegregation has been . . . found difficult and not tried at all."⁴²⁹ Such is not the case with strategies to increase school funding. School finance litigation has touched many states—almost all of

426. *Id.* at 1280. The court noted:

The fact that the legislature did not affirmatively create or intend to create the conditions that have led to the racial and ethnic isolation in the Hartford public school system does not, in and of itself, relieve the defendants of their affirmative obligation to provide the plaintiffs with a more effective remedy for their constitutional grievances.

Id.

427. See Charles F. Sabel & William F. Simon, *Destablization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1024 (2004) (explaining "vast provinces of administration" of federal oversight in desegregation cases).

428. 411 U.S. 1, 35 (1972).

429. Liu & Taylor, *supra* note 114, at 2.

them—and finance systems have been found unconstitutional in at least twenty-six states.⁴³⁰ After failure in the federal courts,⁴³¹ and on a suggestion of then-Supreme Court Justice William Brennan,⁴³² plaintiffs' lawyers went to state courts to pursue justice in equalizing education finance. They have achieved some notable successes.⁴³³ In a period of twenty years, from 1972 to 1992, court-ordered finance reform provided the hammer that legislation could not, reducing inequities in spending by 16% to 38%.⁴³⁴ In the early 1970s, states covered 40% of the cost of education; today, that figure is closer to 60%.⁴³⁵

Increased resources to inner-city schools have generally not translated into improved educational outcomes.⁴³⁶ Inner-city Minneapolis has many schools of concentrated poverty, some of the neediest children in the country, and students that speak over seventy different languages,⁴³⁷ producing the most difficult-to-educate district in the state. In 2005, the average student in Minnesota generated \$8,516 for his or her school.⁴³⁸ The large, inner-city district of Minneapolis now receives about \$3,000 more

430. See Campaign for Fiscal Equity, State-by-State, http://www.schoolfunding.info/states/state_by_state.php3 (last visited Nov. 15, 2005). Recently, the Kansas Supreme Court ordered the Kansas legislature to double the amount it planned to spend on its schools to provide adequate funding. See Gretchen Ruethling, *Court Orders More School Funding*, N.Y. TIMES, June 4, 2005, at A12.

431. See, e.g., *Rodriguez*, 411 U.S. 1.

432. William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("State constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.").

433. See Access, Litigation Overview, <http://www.schoolfunding.info/litigation/litigation.php3> (last visited Sept. 11, 2005). Forty-five states have seen litigation, and twenty-nine have rendered decisions in contested cases. *Id.*

434. See Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 136, 149 (Helen Ladd et al. eds., 1999).

435. *Id.* at 143.

436. Molly McUsic notes that socioeconomic integration would be more effective than increased funding in improving the educational attainment of poor, minority children. See Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1353-56 (2004) (noting that increased funding has not succeeded in providing poor students with an "equal education" while class integration has produced positive results).

437. See CITY OF MINNEAPOLIS, MINNEAPOLIS EMPOWERMENT ZONE APPLICATION 8, available at <http://www.ci.minneapolis.mn.us/ez/docs/ez-ch2.pdf>.

438. Minn. Dep't of Educ., *School Report Card: Minneapolis: Report to Taxpayers*, *supra* note 191.

per pupil than the state average, or about \$11,393 per student.⁴³⁹ These figures include costs for non-General Education revenue, such as special education and building expenditures.⁴⁴⁰

Some schools within the MSD spend much more than even the Minneapolis per pupil average and invariably these are racially isolated schools of concentrated poverty. For example, Barton Elementary is integrated (47% minority), has a lower than average free lunch ratio, and receives about \$9,101 per pupil, less than the Minneapolis average.⁴⁴¹ On the other hand, North Star elementary is segregated (97% minority) and more than 96% of its students receive free or reduced lunch; the school receives more than \$13,000 per pupil.⁴⁴² These statistics are in some respects truisms because state financing schemes direct increased funding to schools with high proportions of poor students.⁴⁴³

It is clear that increased funding cannot by itself address the problems that schools of concentrated poverty are creating in Minneapolis. Scholars have long known that educating children from low-income families is different and more difficult than educating middle-income children.⁴⁴⁴ Because funding does not address the root problem—broken homes, parents working two jobs, poor health, and oppositional culture—it cannot effectively increase poor students' educational outcomes.⁴⁴⁵ This is not to say that low-income children cannot be adequately educated; low-income children can be most effectively educated in schools that

439. *Id.*

440. *Id.*

441. Minn. Dep't of Educ., School Report Card: Barton Open Elementary, http://education.state.mn.us/ReportCard2005/loadFinanceAction.do?SCHOOL_NUM=106&DISTRICT_NUM=0001&DISTRICT_TYPE=03 (last visited Sept. 10, 2005).

442. Minn. Dep't of Educ., School Report Card: North Star Elementary, http://education.state.mn.us/ReportCard2005/loadFinanceAction.do?SCHOOL_NUM=185&DISTRICT_NUM=0001&DISTRICT_TYPE=03 (last visited Sept. 12, 2005).

443. See *supra* note 307 and accompanying text.

444. See, e.g., JAMES COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY 22 (1966). This phenomenon is well observed and exceeds even spending in importance for life outcomes. See generally KAHLENBERG, *supra* note 21, at 26. More and more, modern scholars call for socioeconomic integration only, as opposed to racial and socioeconomic integration, as a way of avoiding the thorny legal problems associated with race. See *id.*; see also McUsic, *supra* note 436. This tactic may achieve some similar objectives, as race often corresponds with poverty, but does not fully address the issue of racial integration by requiring interaction between people of different races.

445. See KAHLENBERG, *supra* note 21, at 208-12.

have fewer children with similar problems, peers who will influence positive attitudes about school achievement, and teachers who have the time and training to work with them. Programs designed to assist low-income children should not be based on the exception to the rule—such as the shining example of the charter school that worked—but should be based upon creating stable middle-class schools with students from diverse backgrounds because these are known to work.

D. Adequacy Through Choice: Expanding and Improving on CIY

While Minnesota already provides open enrollment, a low-income student's freedom to choose is meaningless without the means to get to the school.⁴⁴⁶ CIY improves on open enrollment by providing transportation.⁴⁴⁷ Another key asset of the program is its broad bipartisan support in Minnesota, as evidenced by its recent continuation.⁴⁴⁸ Moreover, the force behind the settlement—the NAACP and *Xiong* litigation—utilized theories and remedy-building strategies similar to those employed in *Sheff*.⁴⁴⁹ The following recommendations are based on the belief that creating middle-class schools throughout the region is in everyone's best interest. Two key recommendations are to expand CIY throughout the region to include more districts and to solve the transportation problem by tying affordable housing into the structure of the program. Part of this section also addresses the issue of what will become of the MSD if CIY is permitted to expand.

1. Expanding CIY to More School Districts

Encouraging student mobility will have the effect of reducing student enrollment in the immediate future. Indeed, the number of children that are required to move to stabilize the region's

446. PALMER, *supra* note 33, at i (noting that families usually provide their own transportation under open-enrollment policy).

447. *Id.* at ii.

448. See Bruce Fuller et al., *Policy-Making in the Dark: Illuminating the School Choice Debate*, in WHO CHOOSES? WHO LOSES?: CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE 1, 3 (Bruce Fuller et al. eds., 1996). The authors note that school choice has always had a broad appeal, between conservatives who wanted to improve local schools, and by "the Left as a way to empower poor and working-class families to challenge paternalistic bureaucracies." *Id.* at 3.

449. See *supra* note 278 and accompanying text.

schools seems daunting. Recent research conducted by IRP has determined that more than 15,000 Black students would need to leave majority Black schools to bring the seven-county metro-area schools into some semblance of racial stability. Slightly less than 9,000 students would need to come from Minneapolis alone.⁴⁵⁰ However, these numbers are similar in comparison to some successful metropolitan plans.⁴⁵¹

Increasing open enrollment options for low-income children can be a benefit for Minneapolis schools. Tough decisions about closing neighborhood schools will certainly have to be made, but fewer or smaller schools may help Minneapolis focus on narrowing the gap with the children that remain.⁴⁵²

Moreover, as noted above, Minneapolis expects to face severe enrollment declines in the next five years whether or not CIY is extended and expanded. The region experienced a similar turn of events in the 1990s when enrollment dropped off and recently built schools were rendered unnecessary. At the least, this demonstrates the volatility of the enrollment in public schools and the tough decisions about school closures that school board officials are sometimes required to make.

However, the promise of integrated schools and an integrated region—which is achievable in the Twin Cities—is too great a goal not to at least encourage integration through choice. CIY should be expanded to accommodate interest in the program. Minneapolis will need to craft a strategy that can encourage Minneapolis residents to enroll in MSD schools, thereby replacing the loss of low-income minority students and creating a diverse student body. A consolidation of schools that focuses on the students that remain and attempts to lure the middle-class back is Minneapolis's best hope of creating an attractive educational climate.

450. IRP's findings are based on a ceiling of no more than 35% Black students in any metro-area school. See Institute on Race and Poverty, Memo from IRP Staff to Myron Orfield (Jan. 17, 2006) (unpublished memorandum, on file with author).

451. See, e.g., WELLS & CRAIN, *supra* note 375, at 102.

452. New York City, for example, recently started a small schools program, attempting to reduce dropout rates and the problems of densely crowded schools. See David Herszenhorn, *In New York's Smaller Schools, 'Good Year and a Tough Year,'* N.Y. TIMES, Aug. 8, 2005, at A1. The program is still in the initial stages with the attendant growing pains, but school boards around the country are taking notice. *Id.*

2. Tying School Choice Into Affordable Housing

The largest federal housing program for new housing developments, the Low Income Housing Tax Credit,⁴⁵³ operates in some ways like CIY, in that the prime motivator is private action. The program funds low-income housing developments by granting a tax credit to developers who promise to maintain a certain percentage of their units for low-income tenants only.⁴⁵⁴ Developers sometimes build these units in areas of low opportunity and high-minority populations, exacerbating the problems of concentrated poverty and race.⁴⁵⁵ Sometimes they do not, however, and the distribution of these units in areas of opportunity can help moderately low-income residents access good jobs and schools.⁴⁵⁶

State housing agencies can prioritize awards of tax credits and, as such, can direct affordable housing production into appropriate areas.⁴⁵⁷ Housing agencies can locate areas that can sustain low-income populations, such as those with adequate public transportation and a surplus of lower-wage jobs. The flexibility of the state to prioritize the location of affordable housing production, with the tax credit in particular, makes the prioritization of housing starts aimed at CIY families possible and productive.

IRP has also considered preliminary evidence about the ability of well-sited housing policies to increase suburban integration. While the research is preliminary and beyond the scope of this paper, it shows that the number of minority children that would have to transfer to suburban schools for racial equality would be significantly fewer if proactive housing policies had been pursued.⁴⁵⁸

Maintaining racially and socially integrated schooling in the suburbs is important not only for the life opportunities of children, but also for the maintenance of integrated housing markets.

453. See 26 U.S.C. § 42 (2004).

454. See Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low-Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1749 (2005).

455. See *id.*

456. See John A. Powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUS. & COMMUNITY DEV. 188, 188-89 (2003).

457. See Orfield, *supra* note 454, at 1749-50.

458. Institute on Race & Poverty, *Research on Housing Integration* (Jan. 23, 2006) (unpublished research, on file with author).

Middle-class homebuyers undoubtedly make their decisions based in part on the quality of the public schools in the area.⁴⁵⁹ When every school is a middle-class school that is more or less racially integrated, the housing market becomes homogenous and reduces the possibility of creating White, middle-class enclaves.

3. Solving Transportation Limitations

One of the inherent problems with school choice is that parents are only willing to send their children a certain distance to be educated. To remedy some of the inherent transportation problems in CIY, affordable units, as indicated above, should be prioritized by the state housing finance agency that distributes the credits to favor CIY participants who send their children to outlying suburban districts. Thus, if parents like a school in the extreme western region of Osseo or Eden Prairie—a trip that could take up to an hour or more—and benefit from increased opportunity in that neighborhood, they should receive priority for housing in that area. Likewise, proposals for credits could be given priority if they are within a certain distance of a CIY destination school in one of the participating districts.⁴⁶⁰

Disparate government agencies that work in these areas—the Minnesota Housing and Finance Agency, which oversees the tax credit program, and the Minnesota Department of Education—should work together on a memorandum of understanding. They should coordinate their efforts as noted above to improve access for low-income and minority families to opportunity-rich areas and high-achieving schools.

4. Ensuring Racial Integration

Recent commentators have ducked the thorny issue of racial integration in schools and instead turned to class integration, almost as a proxy.⁴⁶¹ The best work by one of these commentators, Richard Kahlenberg's *All Together Now*, argues that the current legal structure makes racial integration impossible and that a

459. See ORFIELD, *supra* note 45, at 9.

460. Because of the "not-in-my-backyard" ("NIMBY") issue with low-income housing, however, this could have the perverse incentive of turning suburban attitudes against the CIY program, as it would be more likely to bring low-income housing into their neighborhoods. However, the result of creating mixed-income neighborhoods and mixed-income schools is too important to permit NIMBYism to interfere.

461. See, e.g., McUsic, *supra* note 436.

focus on race reduces the likelihood of class integration.⁴⁶² Kahlenberg is correct in noting that the creation of overwhelmingly poor, yet integrated inner-city schools would not be the best step forward.⁴⁶³ Kahlenberg also argues that racial integration runs the risk of alienating “white working-class voters.”⁴⁶⁴ While Kahlenberg is also correct in requiring the social integration of schools—low-income students are proven to learn better when surrounded by middle-income children⁴⁶⁵—we cannot ignore the benefits of racial diversity and the pitfalls of racial isolation.

A similar concern with race-neutral remedies is the historical experience in housing cases. After the New Jersey Supreme Court’s ruling in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*,⁴⁶⁶ thousands of units of affordable housing were built in the suburbs in an attempt to deconcentrate poverty for the largely minority poor of New Jersey’s inner cities.⁴⁶⁷ Unfortunately, because the program was race-neutral, much of the suburban housing went to low-income Whites, and minorities retained their dilapidated housing stock in the impoverished inner cities.⁴⁶⁸

Part of this sense of defeatism with respect to racially integrative policies is a fixation on busing as the method of integration.⁴⁶⁹ But school choice, even if it grants preferences to minorities, is not comparable to busing because White suburban voters are not required to send their children back into the city. The recent Supreme Court case *Grutter v. Bollinger* may have breathed new life into voluntary school desegregation remedies, allowing districts to be cognizant of race while also allowing school choice to predominate.⁴⁷⁰

462. See KAHLENBERG, *supra* note 21, at 92-96.

463. See *id.* at 93.

464. *Id.* at 96.

465. See *id.* at 58-61.

466. 336 A.2d 713 (N.J. 1975).

467. Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1268-76 (1996).

468. *Id.* (analyzing data collected by the New Jersey Affordable Housing Management Service).

469. See KAHLENBERG, *supra* note 21, at 96 (referring to busing as a politically charged issue in his reference to working-class voters).

470. *Grutter v. Bollinger*, 539 U.S. 306, 307 (2003) (holding that the “narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not

Judicial review under the federal standard is strict scrutiny when dealing with a race-conscious plan, and strict scrutiny has often been referred to as "strict in theory, but fatal in fact."⁴⁷¹ Nevertheless, the legal landscape surrounding the use of race consciousness and school choice to integrate schools is encouraging. The First Circuit recently upheld a voluntary desegregation plan in Lynn, Massachusetts, permitting the school district to deny voluntary transfers to maintain racial balance in the district's schools.⁴⁷² Similarly, the Ninth Circuit upheld the use of racial tiebreakers in Seattle's high school assignment plan.⁴⁷³ Finally, the Sixth Circuit also upheld a similar program in Louisville that considered race as an assignment factor.⁴⁷⁴

The programs in these cases share many similarities. First, they are all the product of voluntary choices. In Seattle, students rank their preferred schools and school administrators do their best to take student preferences into account.⁴⁷⁵ At the same time, race is one of several factors used to create a stably integrated school district.⁴⁷⁶ None of the plans involved involuntarily busing students or the use of rigid quota systems. Thus, it could be expected that the schools would not have a uniform enrollment of Whites and minorities, but would each fall within a range around the district's average enrollment.⁴⁷⁷ Importantly, however, the range around each school's enrollment would reflect the district average, thereby discouraging racial identification of schools.

Minnesota currently does not use similar methods to encourage racial integration, although it has the legal means to do so. Many of the metro-area districts belong to a collaboration council or have their own desegregation plan. Minnesota's open enrollment laws permit a district receiving a non-resident student application for enrollment to deny that student admission if the

prohibited by the Equal Protection Clause . . .").

471. *See, e.g., Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980).

472. *See Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005).

473. *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005).

474. *McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513 (6th Cir. 2005) (per curiam), *aff'd* 330 F. Supp. 2d 834 (W.D. Ky. 2004).

475. *See Parents Involved in Comm. Sch.*, 426 F.3d at 1169-70 (noting that Seattle Plan used four tiebreakers if student's preference resulted in oversubscribed high schools).

476. *See McFarland*, 330 F. Supp. 2d 834.

477. *See id.* at 857-58 (noting discussion of what does and does not constitute a quota).

enrollment of that student would conflict with the district's desegregation plan.⁴⁷⁸ Thus, through the use of desegregation plans—and limited to students taking advantage of open enrollment or CIY—school districts can encourage minority enrollment in schools with few minorities, and curtail minority enrollment in schools that are on the verge of “tipping.” Likewise, suburban school districts can discourage White flight from Minneapolis or inner suburban districts with high-minority schools by de-prioritizing White transfer students.

Any improvement on CIY must be cognizant of race, giving preference to minority students in racially isolated schools, or to White students transferring to integrated schools if they are leaving all-White schools. Likewise, CIY-participating districts should have the power to deny transfers to students who do not make integrative transfers. CIY is now only required to look at applicants by free or reduced lunch status. Instead, CIY could give preference to minorities in racially isolated schools who intend to transfer to suburban schools with a certain racial makeup. If CIY children are attending schools in danger of reaching a tipping point, then the rules should be revised to steer children away from these schools. Desegregation of the Minneapolis schools by resegregating the suburban districts is not an acceptable option.

5. CIY Allows a Future for the MSD

The next logical question becomes, if CIY is fully implemented, what happens to the Minneapolis schools and the children left behind? In a choice regime, the children not choosing to leave will be worse off, particularly if CIY continues to skim off motivated, high-achieving poor students.

It is true that if CIY is expanded and fully implemented, Minneapolis and St. Paul would likely have fewer students, would have to close school buildings, and would lay off teachers. But this

478. See MINN. STAT. § 124D.03, subd. 4 (2005). Thus, the power to deny nonresident student admission based on race under these circumstances is limited to districts with approved desegregation plans. The Minnesota Rules governing desegregation, however, do limit the ability of districts to discriminate on the basis of race. They define segregation as the “intentional acts” of a school district that discriminate against a student based on race, and have the effect of increasing a concentration of protected students at a school. MINN. R. 3535.0110, subp. 9 (2005). While this could be construed to prohibit any race “discrimination” in school assignments, it is more likely that the text only applies to actions that are taken with the discriminatory purpose of creating minority schools, such that Whites do not have to interact with minorities in the district.

possibility must be viewed in light of the reality of what is now happening—not an ideal alternative where segregated school districts are stable and provide an adequate education.

CIY also must be evaluated in terms of the experience of stably integrated regions to stop White flight and rebuild White and middle-class enrollment in central cities and older suburbs. In reality, the process of flight caused by racial and social segregation and resegregation in the Minneapolis schools is already at catastrophic levels and enrollment declines will continue for Minneapolis.⁴⁷⁹ Decline is attributable to both flight to the suburbs and inner-city flight to charter schools. Moreover, this flight is present and gaining strength in the older suburbs with diversifying neighborhoods. Flight to the suburbs from Minneapolis cannot be attributed solely to White flight; it is also flight by more than half of Blacks and Latinos to suburban neighborhoods.⁴⁸⁰

If this process is not interrupted, Minneapolis's schools will further deteriorate, resembling the economically and racially segregated schools on Chicago's south side, in Cleveland, or in Washington, DC. Any potential short-term transitions from offering expanded choice under CIY must be judged in light of rapidly worsening conditions that have already left many of the poorest children with the fewest life choices behind in the worst schools in the region. We can preserve status quo school systems—or we can protect children and their rights to educational opportunity.

Finally, in evaluating the potential effects of an expanded school choice program, we must remember that the present ongoing catastrophe is occurring with the poorest and most segregated schools for which funding has not been a successful remedy. As stated above, funding is not likely to be increased significantly by the State because of resistance to and resentment toward inner-city schools. High spending and poor results are already tools for opportunistic politicians seeking to divide individuals and communities on the basis of race by blaming the victim. It is an age-old strategy, and it works. It works even better when what politicians are saying is partly true, because the beleaguered districts have no realistic strategy to make a difference with the funding. This aid, which is forthcoming only

479. See REINHARDT, *supra* note 139, at 2.

480. See Orfield and Luce, *supra* note 52.

because of the threat of integration,⁴⁸¹ will disappear if integrationists grow complacent in a segregated society.

If CIY were fully expanded, there would be more socio-economic balance in school enrollments, and stable racial and social integration for all children would be possible. Minneapolis would have fewer children and schools in the short term, but its children, schools, and neighborhoods would do better. And as its performance improved, so would public support for Minneapolis, both within the city and in the region.

Most optimistically, if the experience of other cities and regions with strong metropolitan desegregation holds true, a smaller, stably integrated, and uniformly strong Minneapolis school system would begin to gain students. In many of the regional desegregation cities, places like economically booming Raleigh, North Carolina, and Charlotte-Mecklenburg, where metropolitan school desegregation was fully implemented, central city neighborhoods experienced "reverse White flight."⁴⁸² Reverse White flight also has meant reverse middle-class flight. When the central city schools became stably integrated, middle-class White families started to move back.⁴⁸³

Minneapolis's own experience with its stably integrated schools and majority middle-class schools in its southwest quadrant bears this out. While the enrollment in segregated and re-segregated schools continues to plummet, stably integrated and majority middle-class schools experience strong, constant demand. White middle-class families with choices move into their boundaries and participate in competitive lotteries to attend them. White middle-class families living in neighborhoods with segregated schools often apply and are content to have their children bused across town to go to an opportunity-rich, racially and socially integrated school while they continue living in the neighborhoods they like.

In Minneapolis, White parents with high incomes and suburban choices remain in their neighborhoods if their children are admitted to stably integrated schools, even if it means riding a bus. If forced to attend severely segregated neighborhood schools that children can walk to, they leave. This is increasingly true

481. See *supra* note 15 and accompanying text (discussing threat of lawsuits for increased funding).

482. Alan Finder, *As Test Scores Jump, Raleigh Credits Integration by Income*, N.Y. TIMES, Sept. 25, 2005, at 1.

483. Orfield, *supra* note 66, at 133.

with middle-income non-White families as well. The experience in Minneapolis and other places shows how more access to integrated magnet schools, like Barton, has the possibility to create stability in other neighborhoods across the city, even if these schools are not “neighborhood schools.”

Two further examples in southwest Minneapolis also illustrate the rebuilding power of stably integrated schools. Lake Harriet Upper Campus (formerly Minneapolis Audubon) and Burroughs Elementary, because of the effect of city-only desegregation, became majority minority and poor schools. They, like all the other resegregating schools, were losing White and middle-class enrollment within their attendance areas. When the MSD resumed assigning students to neighborhood schools, these schools’ boundaries were redrawn so that their White neighborhoods would contribute to no more than two-thirds of their enrollment.

In 2004, growing Lake Harriet Upper, with 11% poor and 18% non-White students, averaged state test scores that were higher than all but a handful of elementary schools across the region.⁴⁸⁴ Moreover, because of the peculiarities in the state funding formula, Lake Harriet Upper is one of the lowest-spending schools in the metro area, compared with some schools in Minneapolis spending much more with worse results.⁴⁸⁵ These schools, while still integrated, could soon become all White, unless—as in county-wide school systems like Raleigh—their boundaries are adjusted to allow more children of color to attend, and more integrated school opportunities are created throughout the region.

Conclusion

The threat of suburban segregation is real and imminent. In the past fifteen years we have witnessed the “quiet reversal” of many of the gains from *Brown v. Board of Education*. These policies and the pessimistic belief that the law has nothing to say about contemporary segregation contribute to the widening spatial and socioeconomic gap between Whites and minorities in the United States. As Blacks and Latinos continue to migrate to suburban communities, questions of segregation and resegregation

484. Minn. Dep’t of Educ., *supra* note 22; *see also* Draper & Brandt, *supra* note 189, at B4.

485. Minn. Dep’t of Educ., *supra* note 22. Lake Harriet spends more than the state average per building due to high special education and building costs, but spends less than the state average on general education funds. *Id.*

become vitally important to preserving integrated and balanced communities. Funding remedies have proven inadequate in mooring inner-city schools from the disastrous effects of concentrated poverty.

With so few remedies remaining to try to bring children out of poorly performing schools and the ill effects of urban poverty and racial isolation, it is essential that proven remedies are considered. Minnesota is known for being a progressive state. Minnesota's Republicans all supported civil rights in the 1960s. Walter Mondale was a senior author and staunch advocate of the Fair Housing Act. Hubert Humphrey, a pro-civil rights and integrationist mayor from Minneapolis, led the charge to include desegregation in the 1948 Democratic platform, helping encourage the shift of Southern votes to the Republican Party.⁴⁸⁶ Minnesota was also a pioneer of charter schools as an innovative solution to failing, high-poverty schools. That reform has shown itself to be, in some instances, a way for parents to have input on curriculum and educational issues. Many charter schools in Minnesota have, however, faced significant challenges to their viability as a result of financial mismanagement.⁴⁸⁷ Choice programs that permit poor children to access high-achieving schools are not a panacea, but they are the most promising new development in recent years.

Sheff and *Xiong* provide examples of litigation that can work to further the goal of desegregation. In *Sheff*, litigation pushed the legislature to provide a desegregation plan and adequate funding to encourage desegregation. *Xiong* created a well-funded voluntary plan in the Twin Cities that has benefited 2,000 children so far. Integrating communities through wise housing policy also promises to create effective schools throughout the metropolitan region. Plaintiffs and courts can advance the cause of desegregation even further when they work to show that the high level of racial and socioeconomic concentration in Minnesota schools is not merely the result of personal preference, but is instead the legacy of decades of discriminatory policies that have created and maintained urban ghettos. *Sheff* and *Xiong* prove there is no cause for pessimism and that school desegregation can really happen.

486. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 190 (2004).

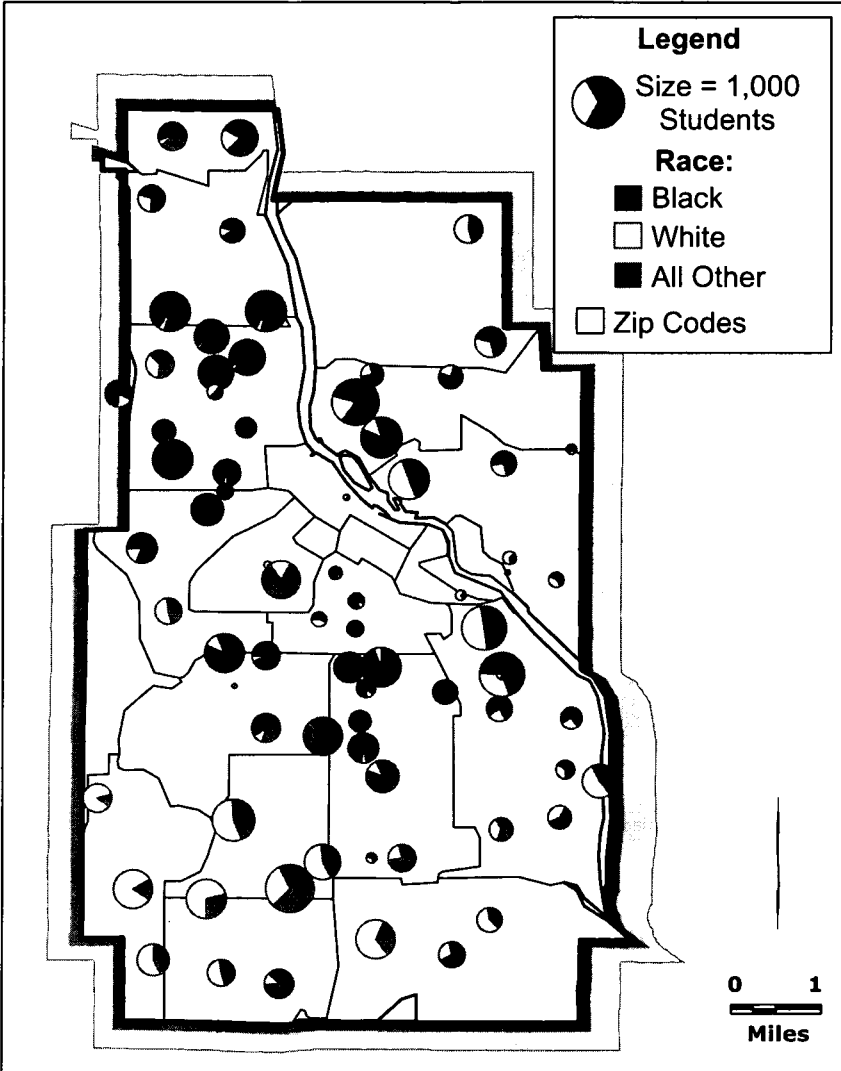
487. See ANDERSON, *supra* note 204, at 35-36.

The examples and scenarios contemplated in this Article show that once cities have stable, middle-class, and integrated schools, demand and enrollment will increase. This strategy is particularly likely to make a difference in parts of the city that have comparatively affordable family housing. Housing in desirable school districts is rapidly becoming beyond the reach of many middle-class families. Segregation and resegregation limit the choices not only of non-White families, but also of White families who want their children prepared to excel in a multicultural world by attending stably integrated schools.

If more comprehensive options are offered to students of color to make gains against the achievement gap, then it will become more likely that Minneapolis will be able to overcome the image of failed schools and rebuild its reputation. It is in the interest of all Minnesotans to begin the process today. Those who would oppose offering the choice of educational opportunity to the poor must have a reason to deny choice. Otherwise, they should stand aside.

Appendix 1:

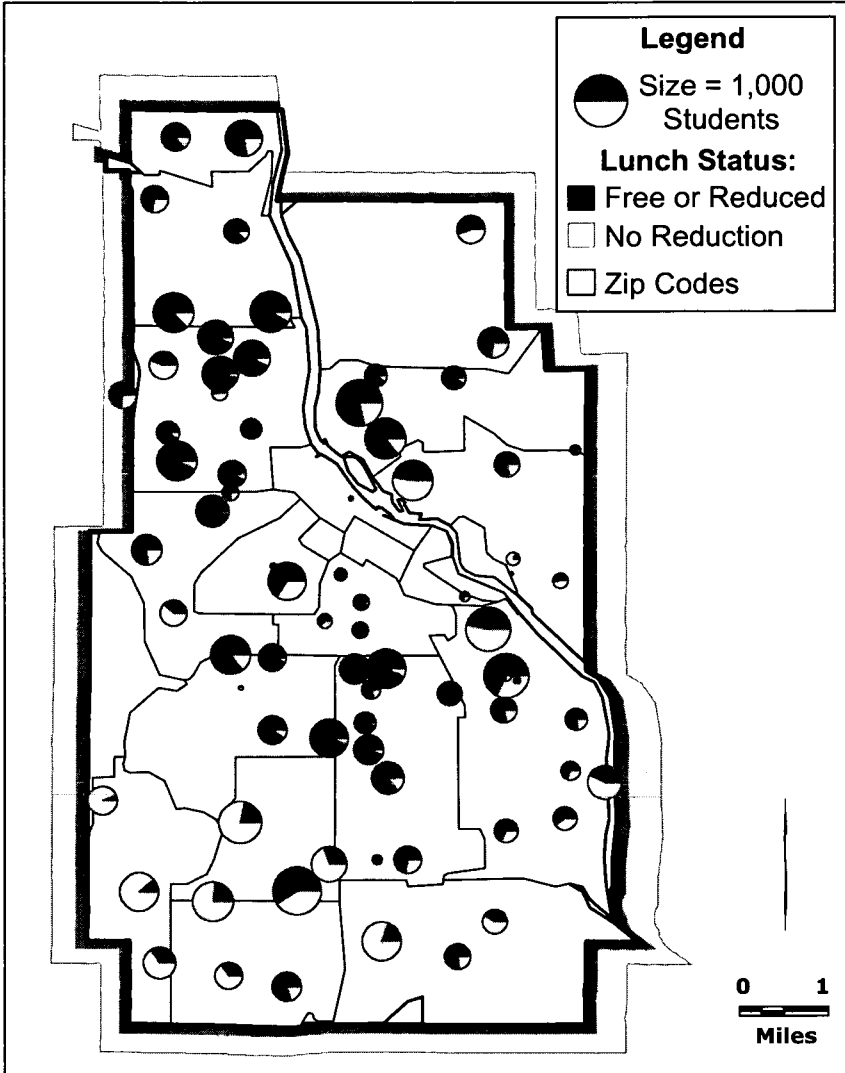
Minneapolis Public Elementary Schools Racial and Ethnic Distributions, 2004-2005



Source: Minnesota Department of Children Families and Learning, Data Center

Appendix 2:

Minneapolis Public Elementary Schools Lunch Status Distributions, 2004-2005

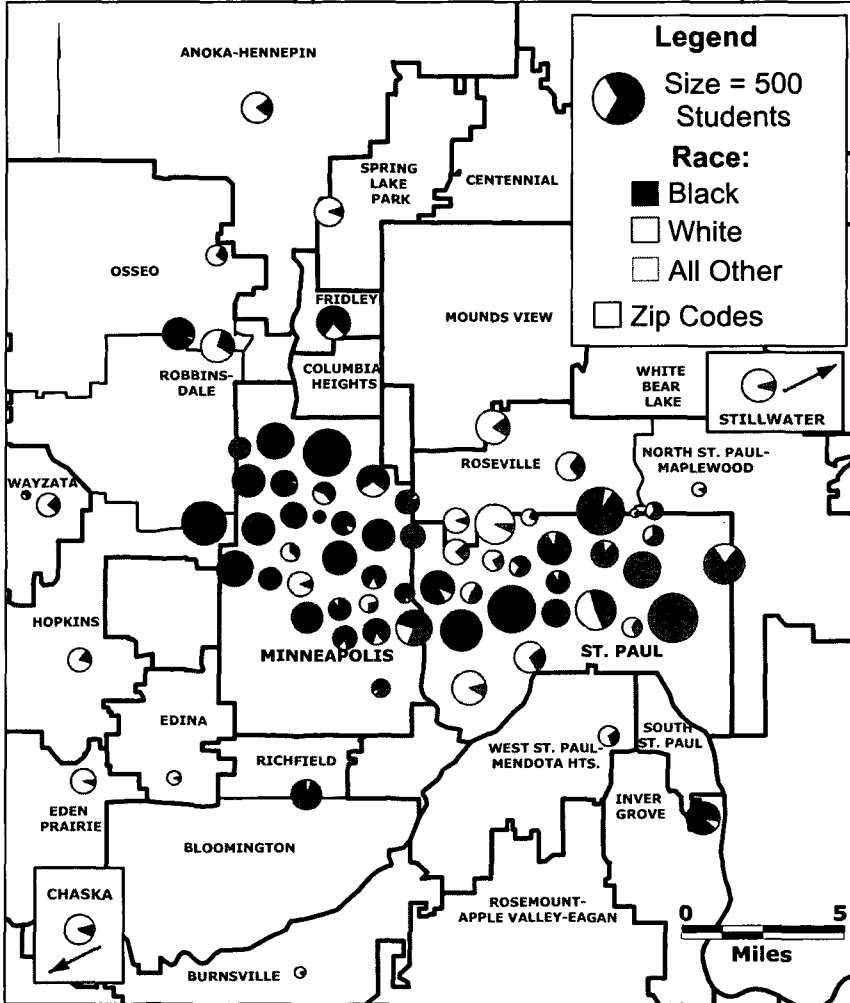


Source: Minnesota Department of Children Families and Learning, Data Center

Appendix 3:

Twin Cities Public Charter School Racial-Ethnic Distribution, 2004-2005

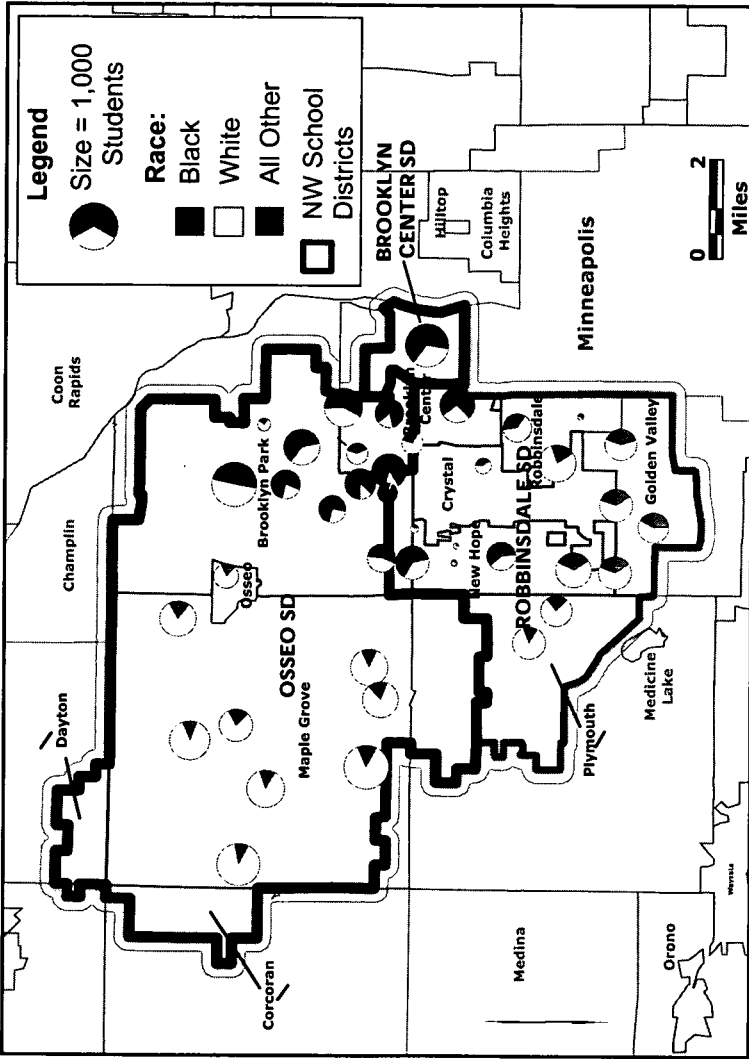
Note: schools are approximate locations on the map



Source: Minnesota Department of Education

Appendix 4:

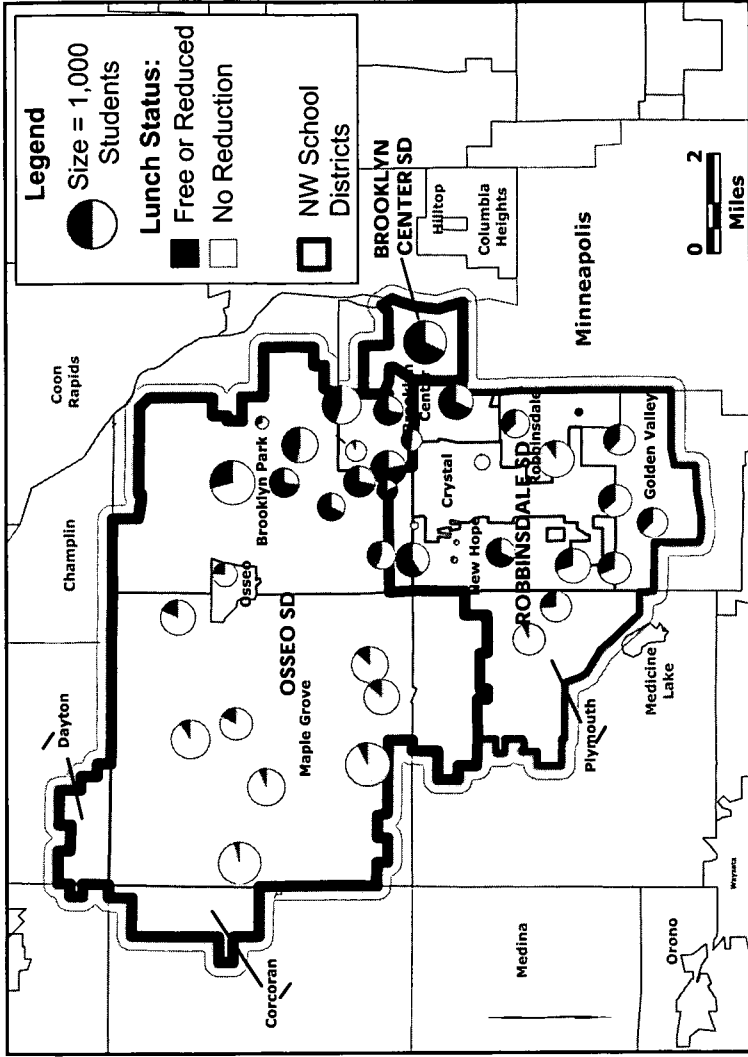
Northwest Twin Cities Suburban Public Elementary Schools Racial and Ethnic Distributions, 2004-2005



Data Source: Minnesota Department of Children Families and Learning, Data Center

Appendix 5:

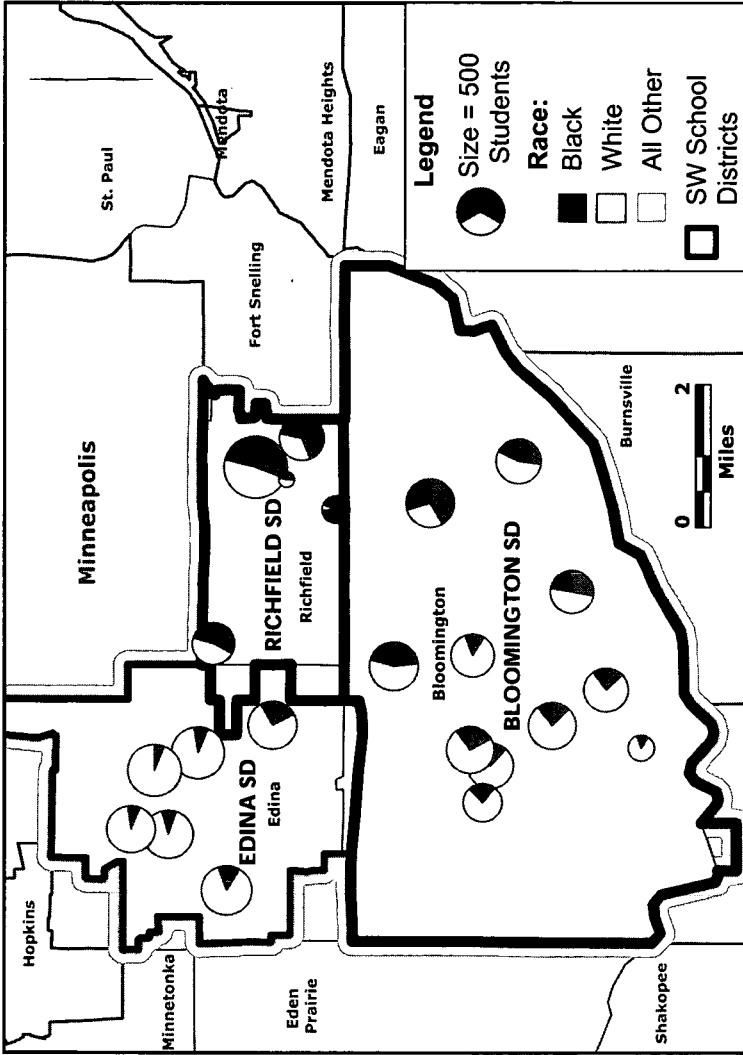
Northwest Twin Cities Suburban Public Elementary Schools Lunch Status Distributions. 2004-2005



Data Source: Minnesota Department of Children Families and Learning, Data Center

Appendix 6:

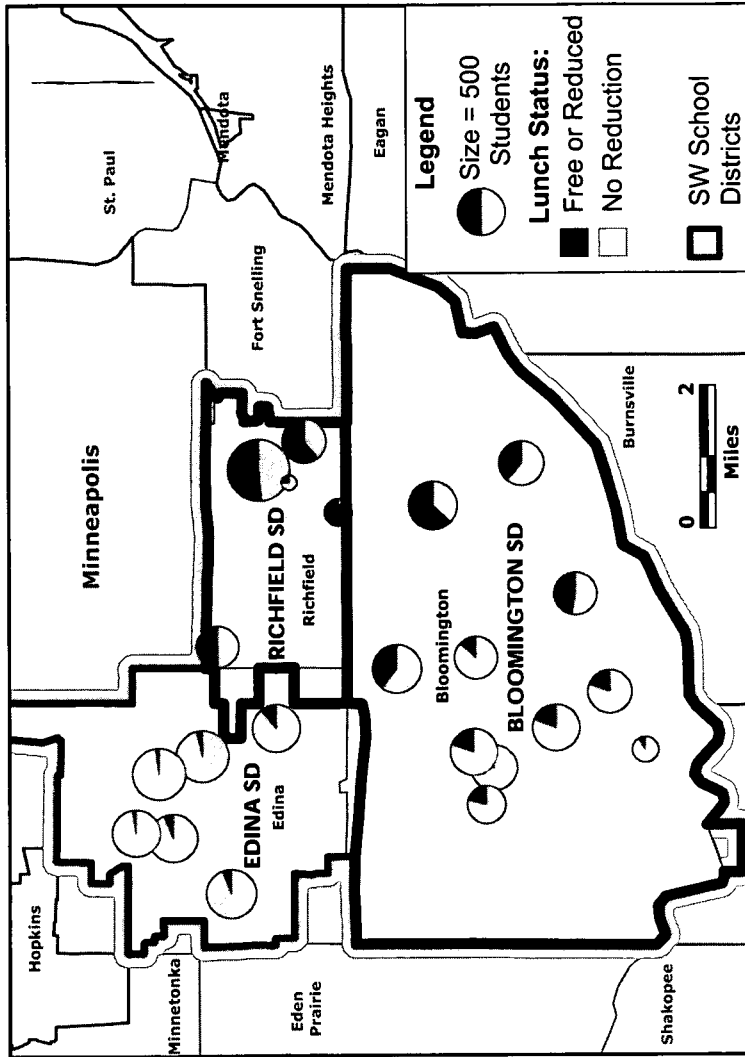
Southwest Twin Cities Suburban Public Elementary Schools Racial and Ethnic Distributions, 2004-2005



Data Source: Minnesota Department of Children Families and Learning, Data Center

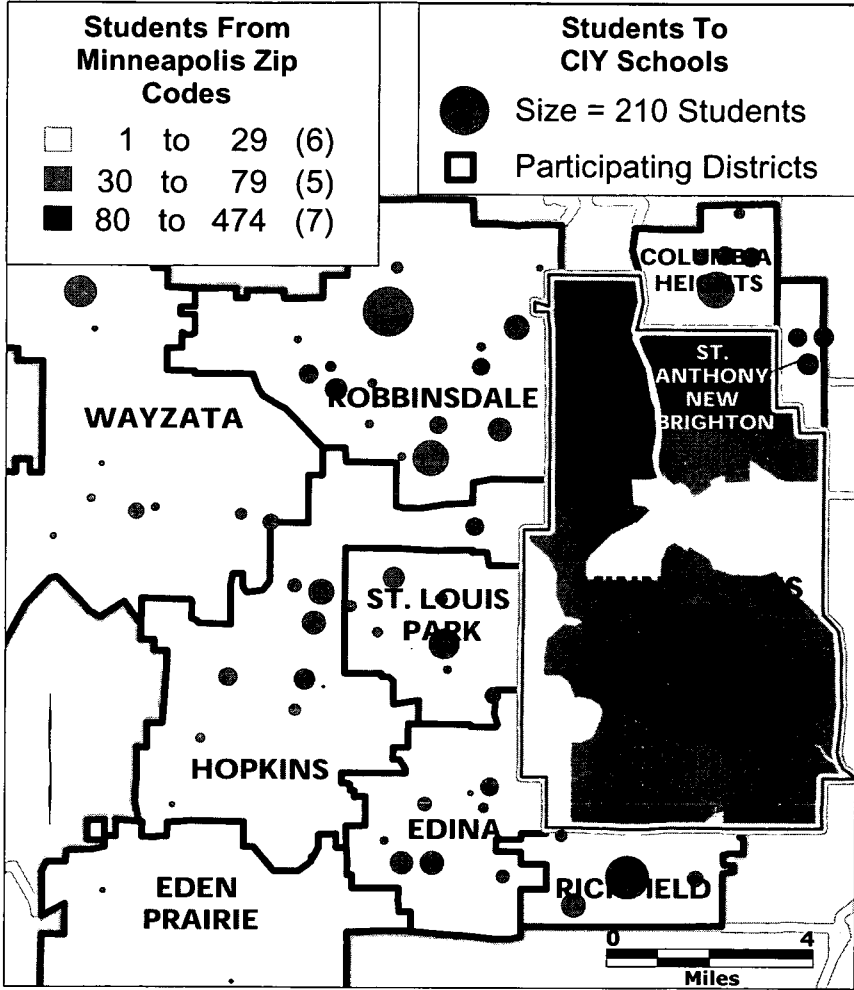
Appendix 7:

Southwest Twin Cities Suburban Public Elementary Schools Lunch Status Distributions, 2004-2005



Appendix 8:

"Choice Is Yours" (CIY) Students From Minneapolis to Surrounding Suburban Schools, 2005-2006



Sources: 2005 Wide Area Transportation System, Hopkins and St. Anthony School Districts