

**Minnesota Department of Education  
Integration Revenue Replacement Task Force  
Hearing on School Diversity and Integration  
State Office Building, Room 10  
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**Testimony**

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**INTRODUCTION**

I am Derek W. Black, a former attorney with the Lawyers' Committee for Civil Rights Under Law, current law professor, current director of the Education Rights Center at Howard University School of Law, author of a forthcoming casebook on education law, and of various law review articles on racial segregation and segregated poverty. I appear today at this hearing on behalf of the National Coalition on School Diversity, a network of national civil rights organizations, university-based research institutes, local educational advocacy groups, and academic researchers seeking a greater commitment to racial and economic diversity in federal K-12 education policy and funding. It is my honor to be invited to testify here today on what remains the most pressing issue confronting our nation's schools: racial segregation and the poverty concentration that inevitably follows it.

As to this pressing issue, the state of Minnesota and its local school districts confront three distinct legal questions and a single significant policy question. The legal issues are: 1) whether any of the state's districts have a legal duty to desegregate; 2) whether segregation levels in any districts are impeding the delivery of a constitutionally adequate education under state law; and 3) whether the assignment plans of districts attempting to voluntarily diversify and integrate their schools are narrowly tailored. The policy question is simply whether integration produces positive outcomes and, if so, whether the positive outcomes outweigh the financial cost.

Various local facts are necessary to offer definitive answers to the legal questions, but the general answer is that desegregation is constitutionally required under any number of circumstances that likely exist in Minnesota and, where it is not, the plans are still constitutionally permissible if they are carefully tailored. More important, regardless of the legal framework under which racial integration is evaluated, racial integration produces positive social outcomes and the deconcentration of poverty that tends to narrow the racial achievement gap. The financial cost of integration, while often substantial, is a small price to pay for these improved outcomes and far less expensive than allocating the resources necessary later to offset the negative effects of concentrated poverty and racial segregation.

***Mandatory Desegregation***

The Supreme in *Green v. New Kent County* imposed an affirmative duty on every school district in the country to eliminate the vestiges of racial segregation and discrimination "root and branch."<sup>1</sup> The Court was emphatic that the time for delays and half-measures were gone. School districts were constitutionally obligated to come up with plans "that promis[e] realistically to

work, and promis[e] realistically to work now.”<sup>2</sup> Unfortunately, many districts continued to stall and took no action to desegregate until forced by the federal courts or the Department of Health, Education and Welfare. Many did not even begin any genuine effort to desegregate until well into the 1970’s and some took even longer.

The process of desegregation has consistently proven to be a long one. Historical patterns of segregation are stubborn and resistant to change. Plans that under normal circumstances might lead to integration were frequently undermined by changing school board compositions, recalcitrant parents, and the practicalities of operating a school system. The constitution, however, does not bend to these circumstances, and courts have mandated nothing less than that the districts completely undo the harm they have wrought. To accomplish this task, mandatory desegregation has lasted for decades rather than years in most districts. In fact, the U.S. Department of Justice alone still maintains a caseload of 400 districts that are under longstanding court orders to desegregate.<sup>3</sup> This is to say nothing of the cases maintained by the N.A.A.C.P. Education and Legal Defense Fund, the Mexican American Legal Defense and Education Fund, various other private litigants, and those districts operating under consent agreements with the Department of Education’s Office for Civil Rights.

Minnesota is no stranger to proceedings of this sort. Most notably, in 1972, the district court in *Booker v. Special School District* found that Minneapolis and the state had engaged in a pattern and practice of intentional school segregation. The court ordered the integration of the city’s school district.<sup>4</sup> Unfortunately, the district was slow to bring its schools into compliance with the court’s bright line requirements.<sup>5</sup> Rather than meet the integration goals, the school district continually developed new legal theories upon which it should be relieved of its duty and declared unitary. Between 1977 and 1980, the district requested and was denied unitary status at least five times.<sup>6</sup> In 1983, after changes in school district leadership and the state’s adoption of a new rule mandating and overseeing desegregation, the district court agreed to relinquish its continued supervision of the district.<sup>7</sup>

To be clear, in relinquishing its jurisdiction over the district, the court did not indicate that the school district had eliminated the vestiges of discrimination, nor that it had adequately discharged its duty to desegregate. It made no finding that is equivalent to a finding of unitary status, which the Supreme Court has indicated is a prerequisite to relieving a district of its duty to desegregate.<sup>8</sup> Rather, the district court’s opinion suggested that it believed that the conditions were in place for the district to meet its constitutional obligation in the coming years, and that state oversight would be sufficient to ensure the district remained on course. The court wrote that the district: “should have the opportunity for autonomous compliance with constitutional standards, that the State Department of Education should and will monitor implementation of the long range plan which includes integration/desegregation and that the North-Edison exchange program satisfies constitutional standards.”<sup>9</sup> This does not purport to be, nor is it tantamount, to a unitary status finding.

While the district achieved some successes in the ensuing years, whether the district did, in fact, reach unitary status during those years is not entirely clear. Before the end of the 1980s, the school district had already begun to resegregate and, in 1993, the board took steps to adopt a neighborhood schools policy that would even more drastically resegregate the schools.<sup>10</sup> In 1999, the state itself refused to enforce or strengthen its rules relating to racial desegregation.<sup>11</sup> Thereafter, segregation only worsened in Minneapolis. By 2004, there were 30 elementary schools in the districts that were all-minority.<sup>12</sup> In 2005, 39 of the district’s 65 schools were 75

percent or more minority.<sup>13</sup> In short, the premises under which the district court had relinquished its jurisdiction appear to have vanished.

It is altogether possible that the Minneapolis school district reached a level of desegregation that could be termed unitary in the short time between the court's final order in 1983 and the later part of the decade. I am not familiar enough with the facts to offer a definitive opinion. A complete understanding of the precise facts and their timing would be necessary to reach such a conclusion. But as a matter of law, unitary status is not equivalent to achieving racial balance in school assignments for a single moment in time. First, unitary status requires the maintenance of desegregated school district for a period of years.<sup>14</sup> Some appellate courts have interpreted this to mean five or more years, while others have required a minimum period that is slightly shorter. Second, the mere passage of time since the original acts of segregation is not by itself sufficient to sever the tie to current segregation.<sup>15</sup> Third, the Supreme Court has been explicit that unitary status involves an evaluation of multiple factors beyond student assignments, including faculty assignments, staff assignments, facilities, transportation, extra-curricular activities, and quality of education.<sup>16</sup> Lower courts have, likewise, included ability grouping, special education, gifted and talented programs, and discipline in their analysis.<sup>17</sup> Thus, if Minneapolis did not maintain desegregation in all of these respects for a period of years, then it is still under a continuing duty to desegregate.

A continuing duty to desegregate Minneapolis' schools would most likely mean that various steps taken by the district during the late 1980's and continuing up until today are unconstitutional. A district under a duty to desegregate does not have the freedom to allow its schools to re-segregate, nor does it have the authority to adopt neighborhood school assignment policies under the auspices that they are facially neutral. As the court in *Keyes v. School District* indicated: "Racially neutral' assignment plans . . . may be inadequate [because] such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation."<sup>18</sup> Thus, what might have appeared to be normal political or practical decisions regarding Minneapolis's schools over the past two decades would be patently unconstitutional if the district had never reached unitary status.

The evidentiary burden would be on Minneapolis to establish unitary status<sup>19</sup> and, even if it overcame this burden, it would not end the matter for the state. It is unlikely that Minneapolis is the only district in the state to have engaged in intentional segregation in the past. Other districts, just like Minneapolis, would bear the burden of establishing they have eliminated the vestiges of discrimination.<sup>20</sup> Surely many have eliminated the vestiges, but those who have not can still benefit immensely from state support, guidance, and funding in regard to desegregation. Finally, although I am not intimately familiar with the facts of the various school districts throughout the state, the circumstances, as I understand them, in some districts suggest that there may be new acts of intentional discrimination. Such acts, like historical ones, impose an immediate and continuing duty to desegregate.

The overall import of the foregoing legal principles for Minnesota is that it should proceed with extreme caution before taking any steps that would place its districts or the state in danger of falling into non-compliance with the affirmative duty to desegregate, or of furthering new acts of unconstitutional segregation. While my testimony paints with a broad brush, the state cannot. Each of its various districts either have or have not carried out their duty to desegregate and reached unitary status. This determination involves close attention to multiple facts and legal considerations in every district. Absent a searching inquiry, the state cannot

assume these districts are in constitutional compliance. Thus, state officials should be hesitant to cut off aid in advance.

### ***The Relevance of Segregation to Minnesota's Fundamental Right to Education***

Fulfillment of one's duty to desegregate under the federal constitution is not necessarily sufficient to comply with a state's constitutional duty in regard to education. The federal constitution only prohibits intentional segregation, but state constitutions can and do prohibit de facto segregation under certain circumstances. The most prominent example comes from Connecticut. In 1996, the Connecticut Supreme Court held that de facto school segregation in Hartford's schools violated the state constitution.<sup>21</sup> The Court reasoned that racial isolation in high poverty schools denied students equal education opportunity.<sup>22</sup> The remedy included the development of several interdistrict magnet schools and continuation of an interdistrict transfer program that enables students who live in Hartford to attend school in the surrounding suburbs.

The second state to explore the constitutionality of segregation under its state constitution is, of course, Minnesota. In the mid-1990's, two different cases were filed against the state, *Xiong v. State* and *NAACP v. Minnesota*<sup>23</sup> and later consolidated. Both charged that the concentrated poverty and racial segregation that the state maintains in its schools interferes with the delivery of a constitutionally adequate education. Plaintiffs emphasized that "68 percent of Minneapolis students were students of color and 66 percent were eligible for free or reduced price lunch, compared with a statewide population that was 14 percent minority and 26 percent FARM eligible."<sup>24</sup> To substantiate their claim that segregation in Minneapolis schools was inhibiting their ability to obtain an adequate education, plaintiffs also cited research that indicated low-income students were twice as likely to achieve at high levels in suburban schools.<sup>25</sup>

Based on the Minnesota Supreme Court's holding in *Skeen v. State* that education was a fundamental right and places a duty on the state legislature "to establish a general and uniform system of public schools,"<sup>26</sup> the plaintiffs alleged that the currently existing segregated education constituted a per se violation of the Minnesota Constitution's education and equal protection clauses.<sup>27</sup> The state moved to dismiss the case on more than one occasion, but its motions were denied by the trial court. After the Minnesota Supreme Courts refused to hear the state's appeal, the trial court found that the case should proceed to trial. But on the eve of trial, the state settled the case by promising to implement an inter-district transfer program that would allow students formerly trapped in high poverty and high minority schools to attend school in the surrounding school districts.<sup>28</sup> Thus, while the Minnesota courts never reached a definitive decision on whether segregation interferes with students' ability to receive a constitutional education, they have held that education is a fundamental right, permitted plaintiffs to proceed on their segregation claim, and approved a settlement agreement that affords students a remedy to de facto segregated education.

Of course, these prior cases do not explicitly obligate Minnesota or its school districts to eliminate de facto segregation, but if the circumstances in Minnesota in any way resemble national trends, students who attend Minnesota's high poverty racially isolated schools are at high risk of negative educational outcomes that would directly implicate their rights under the state constitution. The state would be required to explain why these students, in contrast to others, are consigned to schools that stack the odds against them.

In at least five major academic categories, predominantly poor and minority schools cause harm or deliver inferior educational opportunities to minority students. First, students in

predominantly poor and minority schools tend to receive a generally low quality curriculum and have unequal access to high level curricular offerings.<sup>29</sup> Second, even though research shows teacher quality is closely linked to student achievement,<sup>30</sup> students in predominantly poor and minority schools tend to have limited access to highly qualified teachers.<sup>31</sup> These schools find it extremely difficult to attract and/or retain high quality teachers<sup>32</sup> and experience exceptionally high teacher turnover,<sup>33</sup> which seriously undermines instructional continuity. Money alone cannot easily fix the problem, because the racial and socio-economic characteristics of schools significantly influence where teachers decide to teach.<sup>34</sup> Absent huge salary increases—the size of which is beyond the capacity of nearly all districts—teachers with options will tend to choose to teach in schools with fewer numbers of poor and minority students.<sup>35</sup>

Third, the unequal access to teachers and curriculum has the natural result of negatively impacting student achievement. Regardless of a student's individual race or socioeconomic status, students in predominantly poor and minority schools routinely achieve much lower than students in predominantly white schools.<sup>36</sup> Fourth, the depressed achievement of students in predominantly minority schools has compounding long term effects on graduation rates. On average, only four out of ten students graduate on time in the nation's predominantly poor and minority high schools.<sup>37</sup> These lower graduation rates hold true regardless of a student's individual race or wealth.<sup>38</sup> Finally, attending a predominantly poor and minority school tends to limit students' access to later opportunities in higher education and employment.<sup>39</sup>

For these reasons, several state courts have paid specific attention to the prevailing circumstances in districts with high concentrations of poor and at-risk students, and have treated those circumstances as prima facie evidence of inadequate education.<sup>40</sup> While they have not specifically held that de facto segregation violates the state constitution (except in Connecticut), they have found the conditions that de facto segregation produces are violations.<sup>41</sup> In short, treating the conditions that segregation creates as a constitutional violation is not very far removed from recognizing segregation itself as a violation, particularly if the only practical way to eliminate the conditions is through integration.

None of the foregoing is to say that it is impossible to improve the education of poor and minority students in high poverty schools without integration, nor that an adequate education is not being delivered in some of these schools. It is certainly possible and, as evidenced by a small high profile contingent of predominantly poor and minority schools, it is occurring.<sup>42</sup> The point is that these schools are defying the odds and that delivering a quality education to students under these circumstances of concentrated poverty can cost far more per pupil than it otherwise would.<sup>43</sup> First, because poor students are already at-risk of academic failure and that risk is further increased by attending a high poverty school, these schools need the best, not the worst, teachers.<sup>44</sup> Yet, as discussed earlier, it costs significantly more to lure high quality teachers to high minority, high poverty schools. Second, for various practical reasons, high poverty schools cost more to keep safe than other schools.<sup>45</sup> Third, the need for intensive instructional and social service programs tends to be significantly higher in high poverty schools.<sup>46</sup>

Federal legislation and studies explicitly recognize this reality. The federal government estimates that the cost of educating low-income students is approximately forty percent more than middle income students,<sup>47</sup> and that the per-pupil costs rise exponentially as both the percentage and overall number of poor students in a district increases.<sup>48</sup> Federal funding for low-income students, however, only offsets a portion of these additional costs. The fact that so many state supreme courts have found that their educational finance systems are providing inequitable and/or inadequate funds to students in such districts is persuasive evidence that states are either

unwilling or unable to devote the resources necessary to fund segregated education.<sup>49</sup> In short, the cost of delivering adequate education in segregated schools where poverty is concentrated is extremely high and economically inefficient. As such, states systematically fail to deliver an adequate education. I am aware of no evidence that indicates Minnesota is an exception to this rule. Thus, the state would proceed at its own peril under its state constitution if it abandoned its commitment to fostering integration.

### ***Voluntary Desegregation and Positive Academic Outcomes***

Even if Minnesota and some of its various school districts are under no mandate to integrate their schools, they are still free to integrate voluntarily. The Supreme Court endorsed voluntary integration in *Parents Involved in Community Schools v. Seattle* and found that schools have a compelling interest in fostering diversity and eliminating racial isolation that justifies the consideration of race in student assignments.<sup>50</sup> The particular plans in that case were not sufficiently narrowly tailored to meet constitutional requirements, but the Court indicated that, even when districts do not have a legal mandate to desegregate, they are free to consider race in assignment of individual students to schools so long as they engage in a holistic review of student applicants that includes relevant factors other than race.<sup>51</sup> The Court also indicated that schools are free to consider race in the redrawing of attendance zones, citing of new schools, and outreach programs. Because consideration of race in these contexts does not involve classifying individual students by race, these voluntary desegregation tools do not even warrant strict scrutiny by the Courts.<sup>52</sup> The same is true of plans that achieve racial desegregation through the consideration of non-racial factors, such as socio-economic status, neighborhood demographics, school performance.

As implied above in the discussion of the harms of racial isolation and concentrated poverty and as catalogued in the testimony of Drs. Roslyn Mickelson and Linda Tropp, these voluntary attempts to integrate and diversify schools are also good policy for other reasons, given the positive academic, civic, social, and employment outcomes. I will no reiterate this voluminous research, but I would like to share the highlights of a recent study I completed on what I term “racially unequal access to middle income peers.” The study included ten states: Alabama, Georgia, Mississippi, North Carolina, South Carolina, Virginia, Connecticut, Massachusetts, Michigan, Ohio, and Pennsylvania. I identified the racial and socio-economics of every public school in those states. I used this data to compare the percentage of middle-income students in the average white, African-American, and Latino student’s school by district.

The study revealed a serious problem with racially unequal access to middle income peers that stretches across all states. In four states, there were districts that provided whites twice as much access to middle income peers as minorities. In real word terms, this would mean that, even though they go to schools in the same district, whites are attending solidly middle income schools and minorities are attending solidly poor schools. The study also revealed that in several states a quarter of the districts were providing access that, although not shockingly unequal, was disparate enough to create qualitative different experiences for white and minority students.

The second aspect of the study was to compare variations in racially inequitable access to variations in the racial achievement gap. With the exception of Georgia, every state in the study revealed significant variations in the achievement gap that coincided with variations in the level of equitable access to middle class peers a district provides. Although each state’s achievement gap and inequity trends involve various nuances, the overall picture was clear: the districts that provided minorities the least equitable access to middle-income peers had the largest racial

achievement gaps and those with the most equitable access had the smallest achievement gaps. To be clear, an achievement gap persisted in all districts (which is most likely attributable to circumstances of individual students and factors related to policies other than student assignment), but the achievement gap was minimized in districts providing equitable access to middle income peers.

The chart below glosses over any number of details in the study, but offers a vivid picture of the study’s ultimate and most relevant findings:

CHANGE IN AFRICAN AMERICAN ACHIEVEMENT GAP BETWEEN DISTRICTS PROVIDING THE MOST EQUITABLE AND LEAST EQUITABLE ACCESS		
State	Raw Decline in Achievement Gap	Percentage of Change/Decline
Alabama	7.5	59.8%
Georgia	0.007	0.1%
Mississippi <sup>53</sup>	11.9	58.3%
North Carolina	6	20.7%
South Carolina	7.3	51.4%
Virginia	8.1	51.3%
Connecticut	10.8	34.5%
Massachusetts	4.1	88.8%
Michigan	20.7	45.5%
Ohio	5.4	56.1%
Pennsylvania	3.6	52.1%

I have not yet had the occasion to examine the data in Minnesota, but the lessons of racially equitable student assignments are clear elsewhere. Minnesota can and should devote all of the resources possible to improving the educational opportunities of minorities where integration cannot be had. It should not, however, delude itself into believing that these measures will be cheaper than integration, nor that such measures are an adequate substitute for integration.

### CONCLUSION

To the extent Minnesota and its school districts have yet to eradicate the vestiges of discrimination, a continuing obligation to desegregate exists. Neither the passage of time since its initial acts of intentional segregation, nor the subsequent temporary achievement of racial balance, is sufficient to extinguish this duty. Although the question is still technically open before the Minnesota courts, a similar duty to eliminate extreme forms of racial and poverty isolation likely exists, regardless of its cause. Yet, even if the state is under no obligation to integrate its schools, doing so is one of the best policies it could pursue if the aim is to reduce the racial achievement gap. The United States Supreme Court recognizes this fact and has sanctioned states and districts that wish to pursue this end so long as they carefully tailor their programs.

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<sup>1</sup> 391 U.S. 430, 438 (1968).

<sup>2</sup> *Id.* at 439.

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<sup>3</sup> U.S. COMM'N ON CIVIL RIGHTS, BECOMING LESS SEPARATE? SCHOOL DESEGREGATION, JUSTICE DEPARTMENT ENFORCEMENT, AND THE PURSUIT OF UNITARY STATUS 22-23 (2007), available at [http://www.usccr.gov/pubs/092707\\_BecomingLessSeparateReport.pdf](http://www.usccr.gov/pubs/092707_BecomingLessSeparateReport.pdf).

<sup>4</sup> 351 F. Supp. 799 (D. Minn. 1972).

<sup>5</sup> Cheryl W. Heilman, *Booker v. Special School District No. 1: A History of School Desegregation in Minneapolis, Minnesota*, 12 LAW & INEQ. 127, 141-50 (1993).

<sup>6</sup> *Booker v. Special School District No. 1*, No. 4-71 Civ. 382 (D. Minn. July 11, 1977); *Booker v. Special School District No. 1*, No. 4-71 Civ. 382, slip op. at 2 (D. Minn. Aug. 8, 1977); *Booker v. Special School District No. 1*, 451 F. Supp. 659 (D. Minn. 1978); *Booker v. Special School District No. 1*, No. 4-71 Civ. 382, (D. Minn. June 19, 1978); *Booker v. Special School District No. 1*, No. 4-71 Civ. 382, slip op. at 3 (D. Minn. May 1, 1980); *see also* Trial Transcript, *Booker v. Special School District No. 1*, No. 4-71 Civ. 382, 3 (D. Minn. Apr. 12, 1972) (requesting a modification of the court's order so as to permit higher levels of racial imbalance).

<sup>7</sup> *Booker v. Special School District No. 1*, No. 4-71 Civ. 382, slip op. at 6 (D. Minn. June 8, 1983).

<sup>8</sup> *Oklahoma v. Dowell*, 498 U.S. 237 (1991); *Green v. New Kent County*, 391 U.S. 430, 436 (1968).

<sup>9</sup> *Booker v. Special School District No. 1*, No. 4-71 Civ. 382, slip op. at 5 (D. Minn. June 8, 1983).

<sup>10</sup> Monika Bauerlein, *Separate But Equal*, CITY PAGES (Minneapolis, Nov. 1, 1995); *see also* RICHARD D. KAHLENBERG, *ALL TOGETHER NOW* 176 (2001).

<sup>11</sup> Myron Orfield, *Equal Protection, and Metropolitan Integration: The Hope of the Minneapolis Desegregation Settlement*, 24 LAW & INEQ. 269, 310 (2006).

<sup>12</sup> *Id.* at 299.

<sup>13</sup> *Id.*

<sup>14</sup> *Oklahoma v. Dowell*, 498 U.S. 237, 247-48 (1991).

<sup>15</sup> *Keyes v. School District*, 413 U.S. 189, 210-11 (1973).

<sup>16</sup> *Freeman v. Pitts*, 503 U.S. 467, 492 (1992); *Green v. New Kent County*, 391 U.S. 430, 435 (1968).

<sup>17</sup> *See, e.g., McNeal v. Tate County School District*, 508 F.2d 1017 (5th Cir.1975); *Thomas County Branch of NAACP v. City of Thomasville Sch. Dist.*, 299 F.Supp.2d 1340, 1366 (M.D.Ga.2004).

<sup>18</sup> *Keyes*, 413 U.S. at 212.

<sup>19</sup> *Id.* at 214.

<sup>20</sup> *Id.*

<sup>21</sup> *Sheff v. O'Neill*, 678 A.2d 1267 (1996).

<sup>22</sup> *Id.* at 1289.

<sup>23</sup> No. 95-14800 (Minn. Dist. Ct. filed 1995).

<sup>24</sup> KAHLENBERG, *supra* note 10, at 175.

<sup>25</sup> *Id.* at 176.

<sup>26</sup> 505 N.W. 2d 299, 313 (1993); M.S.A. CONST. ART. 13, § 1.

<sup>27</sup> NAACP Compl. at 13, 17-19; Xiong Compl., at 2, 18-20 (alleging per se violations of the education and equal protection clauses of the Minnesota Constitution).

<sup>28</sup> KAHLENBERG, *supra* note 10, at 176.

<sup>29</sup> RUTH B. EKSTROM, MARGARET E. GOERTZ, AND DONALD ROCK, *EDUCATION AND AMERICAN YOUTH* (Philadelphia: The Falmer Press, 1988); Jeannie Oakes, Adam Gamoran, and Reba N. Page, *Curriculum Differentiation: Opportunities, Outcomes, and Meanings*, IN HANDBOOK OF RESEARCH ON CURRICULUM 570-608 (Philip W. Jackson ed. 1992); Adam Gamoran, *The Stratification of High School Learning Opportunities*, 60 SOCIOLOGY OF EDUCATION 135 (1987).

<sup>30</sup> *See* Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 1 (2000), available at <http://epaa.asu.edu/ojs/article/viewFile/392/515>.

<sup>31</sup> STEPHEN J. CARROLL ET AL., *THE DISTRIBUTION OF TEACHERS AMONG CALIFORNIA'S SCHOOL DISTRICTS AND SCHOOLS* (Santa Monica, Calif.: Rand Corporation, 2000); SUSANNA LOEB AND MICHELLE REININGER, *PUBLIC POLICY AND TEACHER LABOR MARKETS: WHAT WE KNOW AND WHY IT MATTERS* (East Lansing, Mich.: The Education Policy Center at Michigan State Univ., 2004); U.S. DEPARTMENT OF EDUCATION, *MONITORING SCHOOL QUALITY: AN INDICATORS REPORT* (2000) <http://nces.ed.gov/pubs2001/2001030.pdf>; Charles Clotfelter, Helen Ladd & Jacob Vigdor, *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 ECONOMICS OF EDUCATION REVIEW 377-392 (2005); Catherine E. Freeman, et. al., *Racial Segregation in Georgia Public Schools, 1994- 2001* in SCHOOL RESEGREGATION, MUST THE SOUTH TURN BACK?, 157-59 (2005); Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: Why It Persists and What Can Be Done* (The Brookings Institution, Mar. 13, 2008) available at [http://www.brookings.edu/articles/1998/spring\\_education\\_jencks.aspx](http://www.brookings.edu/articles/1998/spring_education_jencks.aspx)

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("Predominantly white schools seem to attract more skilled teachers than black schools . . ."); Jay Mathews, *Top Teachers Rare in Poor Schools*, WASH. POST, Sept. 10, 2002, at A5 (discussing the dearth of high quality teachers in low income schools); Steven G. Rivkin, et. al., *Teachers, Schools, and Academic Achievement*, 73 *ECONOMETRICA* 417-58 (2005).

<sup>32</sup> Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39 *J. HUMAN RESOURCES* 326, 337 (2004); see also BARNETT BERRY & ERIC HIRSCH, CENTER FOR TEACHING QUALITY, *RECRUITING AND RETAINING TEACHERS FOR HARD-TO-STAFF SCHOOLS* (2005) (identifying recruiting and retention problems in high poverty, low performing schools); SUSAN MOORE JOHNSON, ET. AL. *WHO STAYS IN TEACHING AND WHY: A REVIEW OF THE LITERATURE ON TEACHER RETENTION* (2005).

<sup>33</sup> EDUC. TRUST, *THEIR FAIR SHARE, HOW TEXAS-SIZED GAPS IN TEACHER QUALITY SHORTCHANGE LOW-INCOME AND MINORITY STUDENTS* 6 (2008), [http:// www.theirfairshare.org/resources/TheirFairShareFeb08.pdf](http://www.theirfairshare.org/resources/TheirFairShareFeb08.pdf), (illustrating how most of Texas' districts, the poorest and mostly minority, also have the highest rate of teacher turnover); ERICA FRANKENBERG, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., *SEGREGATION OF AMERICAN TEACHERS* 25-26 (2006), available at [http://www.civilrightsproject.ucla.edu/research/deseg/segregation\\_american\\_teachers12-06.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/segregation_american_teachers12-06.pdf) (revealing that teacher dissatisfaction tends to rise as the percentage of minority students in a school rises, making it more likely that teachers will leave); UNC CTR. FOR CIVIL RIGHTS, *THE SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS: A CRUCIAL CONSIDERATION IN STUDENT ASSIGNMENT POLICY* 4-6 (2005), available at <http://www.law.unc.edu/documents/civilrights/briefs/charlottereport.pdf>.

<sup>34</sup> Jane L. David, *Teacher Recruitment Incentives*, 65 *POVERTY AND LEARNING* 84 (2008); Wendy Parker, *Desegregating Teachers*, 86 *WASHINGTON UNIVERSITY LAW REVIEW* 1, 35-37 (2008); Benjamin Scafidi, David L. Sjoquist, and Todd Stinebrickner, *Race, Poverty, and Teacher Mobility*, Working paper, Andrew Young School of Policy Studies Research Paper Series (Atlanta, Ga., August 2005); Susanna Loeb, Linda Darling-Hammond, and John Luczak, *How Teaching Conditions Predict Teacher Turnover in California Schools*, 80 *PEABODY J. OF EDUC.* 44 (2005).

<sup>35</sup> ALLIANCE FOR EXCELLENT EDUC., *IMPROVING THE DISTRIBUTION OF TEACHERS IN LOW-PERFORMING HIGH SCHOOLS* 7 (2008), [http://www.all4ed.org/files/TeachDist\\_PolicyBrief.pdf](http://www.all4ed.org/files/TeachDist_PolicyBrief.pdf) (indicating that several states already have incentive pay for low-performing schools, but pay increase alone is insufficient to attract teachers); Hanushek, *supra* note 33, at 350-51 (finding that a ten percent salary increase would be necessary for each increase of ten percent in minority student enrollment to induce white females to teach in the school).

<sup>36</sup> UNC CTR. FOR CIVIL RIGHTS, *supra* note 34, at 1-4; KAHLBERG, *supra* note 10, at 47-76 (2001); DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, *EQUALITY OF EDUCATIONAL OPPORTUNITY* 302-310 (1966), Molly McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 *HARV. L. REV.* 1355-56 (2004); Geoffrey Borman & Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman's Equality of Educational Opportunity Data*, 112 *TEACHERS COLL. REC.* 1201 (2010); Laura B. Perry & Andrew McConney, *Does the SES of the School Matter? An Examination of Socioeconomic Status and Student Achievement Using PISA 2003*, 112 *TEACHERS COLL. REC.* 1137 (2010); 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* (Boger & Orfield, eds. 2009); see also Roslyn A. Mickelson, *Segregation and the SAT*, 67 *OHIO ST. L. J.* 157 (2006); Roslyn A. Mickelson, *Subverting Swann: First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools*, 38 *AM. EDUC. RES. J.* 215 (2001) (even controlling for factors such as a student's family background, prior achievement, peer effects, and self-reported academic effort, the more time students spent in predominantly minority elementary schools in Charlotte Mecklenberg's school district the worse their academic achievement would be in middle and high school in terms of standardized tests and grade point averages).

<sup>37</sup> ANURIMA BHARGAVA ET AL., NAACP LEGAL DEF. AND EDUC. FUND, INC. & THE CIVIL RIGHTS PROJECT, *STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION* 21 (2008).

<sup>38</sup> CHRISTOPHER B. SWANSON, *WHO GRADUATES? WHO DOESN'T? A STATISTICAL PORTRAIT OF PUBLIC HIGH SCHOOL GRADUATION, CLASS OF 2001* (Washington, D.C.: The Urban Institute, 2004); CHRISTOPHER B. SWANSON, *WHO GRADUATES IN THE SOUTH?* (Washington, D.C.: The Urban Institute, 2005).

<sup>39</sup> Robert Teranishi, Walter R. Allen & Daniel G. Solórzano, *Opportunity at the Crossroads: Racial Inequality, School Segregation, and Higher Education in California*, 106 *TEACHERS COLLEGE RECORD* 2224-2245 (2004); JOSEPH B. BERGER, ET. AL., THE CIVIL RIGHTS PROJECT, *RACE AND THE METROPOLITAN ORIGINS OF POSTSECONDARY ACCESS TO FOUR YEAR COLLEGES: THE CASE OF GREATER BOSTON* (2004) <http://www.eric.ed.gov/PDFS/ED489181.pdf>; Derek Black, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 *N.C. L. REV.* 923, 953 (2001) ("Attending racially diverse schools opens up

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social networks to racial minorities, which often lead to additional job opportunities. As these benefits increase, they will perpetuate themselves naturally, and further integrate the job market and social networks.”); Eric M. Camburn, *College Completion among Students from High Schools Located in Large Metropolitan Areas*, 98 AMERICAN JOURNAL OF EDUCATION 551 (1990).

<sup>40</sup> See, e.g., *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475, 490 (2001); see also Derek W. Black, *Middle Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV (forthcoming Feb. 2012).

<sup>41</sup> Black, *supra* note 41.

<sup>42</sup> The most widely publicized today are the Harlem Children’s Zone charter schools and KIPP charter schools. For one state’s attempt to identify the common elements of successful high poverty schools see PATRICIA J. KANNAPEL AND STEPHEN K. CLEMENTS, *INSIDE THE BLACK BOX OF HIGH-PERFORMING HIGH-POVERTY SCHOOLS, A REPORT FROM THE PRICHARD COMMITTEE FOR ACADEMIC EXCELLENCE* (2005). A review of this report reveals that these schools largely seem to be operating in a similar fashion to middle-income schools. The insight to be had is that there are so few of these high performing low income schools, probably because they find it hard to replicate the environment found elsewhere.

<sup>43</sup> James E. Ryan, *Schools, Race and Money*, 109 YALE L.J. 249 (1999); See also Christopher E. Adams, *Is Economic Integration the Fourth Wave in School Finance Litigation?*, 56 EMORY L.J. 1613, 1627-31 (2007) (questioning whether money alone can deliver adequacy in concentrated poverty). In North Carolina in particular, research strongly suggests that more resources and more effective use of existing resources will be needed to offset the effects of schools with higher levels of segregation among minority students. See CHARLES THOMPSON & GARY HENRY, *NORTH CAROLINA HIGH SCHOOL RESOURCE ALLOCATION STUDY* (2008) (discussing chronically low-performing high schools, which also tend to be predominantly minority schools).

<sup>44</sup> CHARLES CLOTFELTER, ET AL, *HIGH-POVERTY SCHOOLS AND THE DISTRIBUTION OF TEACHERS AND PRINCIPALS 4* (2007) [http://www.caldercenter.org/PDF/1001057\\_High\\_Poverty.pdf](http://www.caldercenter.org/PDF/1001057_High_Poverty.pdf).

<sup>45</sup> See generally Michelle Parthum, *Using Litigation to Address Violence in Urban Public Schools*, 88 WASH. U. L. REV. 1021, 1031-37 (2011) (discussing the various disciplinary and safety challenges that high poverty urban schools face).

<sup>46</sup> See generally Ross Wiener & Eli Pristoop, Educ. Trust, *How States Shortchange the Districts that Need the Most Help*, in *FUNDING GAPS 2006*, at 6 (2006) <http://www.eric.ed.gov/PDFS/ED496559.pdf> (discussing low-income students’ need for additional supplemental resources); see also *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475, 490 (2001).

<sup>47</sup> Education Finance Incentive Grant Program, Pub. L. No. 107-110, § 1125(A), 115 Stat. 1425, 1525 (codified at 20 U.S.C. § 6337) (setting the standard for whether low-income schools are fairly funded as whether they receive a forty percent funding increase adjustment); NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., *INEQUALITIES IN PUBLIC SCHOOL DISTRICT REVENUES* 62 (1998) (identifying forty percent as the appropriate adjustment for low-income students).

<sup>48</sup> 20 U.S.C. §§ 6335(c)(1)(B), 6335(c)(2)(B), 6337(d)(1)(A), 6337(d)(1)(B).

<sup>49</sup> Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1500-05 (2006) (summarizing the litigation results).

<sup>50</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797-98 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>51</sup> *Id.* at 790.

<sup>52</sup> *Id.* at 789.

<sup>53</sup> Those few districts providing less than 50 percent access and those providing 100 percent or more access were excluded from Mississippi’s calculations in this table for the reasons related to sample size and demographic anomalies. The comparison in this table includes all of the districts in between.