

Exploring Implications of *Brown* for Schools of Choice and Raising Academic Standards

Richard A. King, Linda Vogel
and Kathryn Whitaker

After the 1954 *Brown v. Board of Education* decision,¹ policies designed to comply with the decision were often declared to be unconstitutional. In celebration of the 50th anniversary of this historic event, we return to these subsequent holdings to provide a context for understanding issues facing today's policymakers and educational leaders. Our two foci will be schools of choice and expectations for all students to meet high academic standards.

Remedies to End Segregation and Promote Equity

In 1954, the U.S. Supreme Court reviewed the segregation of students by race in the public schools of Kansas, South Carolina, Virginia, and Delaware. The unanimous decision in *Brown* held that segregation violated the equal protection clause of the Fourteenth Amendment, stating "We conclude that in the field of public education the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal."² This landmark holding ended *de jure* segregation – that created by official state law or other policies – of public schools. However, the court did not specify remedial actions for dismantling dual school systems.

One year later, *Brown II* required desegregation of schools "with all deliberate speed."³ This uncertain timeline recognized the complex "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas ... and revision of local laws and regulations which may be necessary in solving the foregoing problems."⁴ The justices also differentiated the roles of school leaders and the courts that would later review remedies, as follows: "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."⁵ The court not only permitted

Richard A. King is Professor in the Division of Educational Leadership and Policy Studies at the University of Northern Colorado. Linda Vogel is Assistant Professor in the Division of Educational Leadership and Policy Studies at the University of Northern Colorado. Kathryn Whitaker is Professor in the Division of Educational Leadership and Policy Studies at the University of Northern Colorado.

a lax timeline for change, but also it gave states and school districts great latitude to fashion policies that often delayed or avoided action to achieve the goals of admitting students to schools without regard to race and promoting equal educational opportunities.

Ending de jure Segregation

Within only a few years, the U.S. Supreme Court responded to states' resistance to create a unitary system of public schools to serve students of all races. After President Eisenhower sent federal troops to enforce a desegregation order, the Arkansas governor ordered the national guard to prohibit African-American students from entering schools to which they had been assigned. The court articulated clearly that states could not avoid federal court orders:

In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."⁶

Several decisions have implications for restructuring schools, particularly through choice policies. Fearing resegregation, the court struck down a Knoxville, Tennessee, policy that would have permitted students to transfer back to their original segregated schools.⁷ Virginia repealed the state's compulsory education law, making school attendance a local option. When one county funded private schools for white students with public funds, the court ordered the locality to raise taxes and operate a nondiscriminatory public school system.⁸ Another Virginia county initiated a freedom-of-choice plan to allow parents to choose schools for their children. The court's review of this policy indicated a preference for other approaches such as zoning to achieve quicker, more effective conversions to unitary status. However, in *Green*, the court found adopting schools of choice had merit when implemented effectively, stating: "Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation."⁹

Frustrated by the slow pace of meaningful integration, activists urged Congress to adopt legislation promoting equal educational opportunities and incentives for desegregation. The Civil Rights Act of 1964 prohibited discrimination by race and other characteristics in educational programs and employment. This law also initiated the policy of withholding federal funds to encourage school systems to comply with mandates. The Elementary and Secondary Education Act of 1965 brought financial assistance to improve language and mathematics skills in schools serving children from low-income families.¹⁰ The 1972 Emergency School Assistance Act (ESAA) rewarded school systems that had already desegregated and encouraged others to do so voluntarily with financial assistance. Facing the threat of the loss of funding or investigations by the newly created Office of Civil Rights, school officials began to take seriously their duty to desegregate schools.

Reversing the Effects of Discriminatory Policies

More troubling to the courts in years following *Brown* was deciding whether public policies that did not require, but had an effect of, separating students by race violated the Fourteenth Amendment. So-called *de facto* segregation often resulted from housing patterns

as individuals chose to live in given neighborhoods; from decisions of banks to approve mortgages for African-Americans in only certain sections of a city, or redlining; or from such school board actions as establishing neighborhood attendance areas that encompass students of one race, i.e., gerrymandering. Federal courts concluded that there is an affirmative duty to integrate schools when segregation is created by official action.¹¹ State and local officials are then required to assign students and personnel and to construct facilities in ways that bring about integration when the *de facto* segregation is found to be unconstitutional *de jure* segregation.¹²

In 1971, the U.S. Supreme Court examined the effects of a North Carolina school district's policies after state-mandated *de jure* segregation had officially ended and presented alternatives to remedy the continuing *de facto* segregation.¹³ School authorities could assign teachers on a racially-neutral basis, consider racial quotas as a starting point rather than a rigid requirement, ensure that school construction or abandonment would not perpetuate the dual system, scrutinize one-race schools to ensure that the racial composition did not result from discriminatory actions, alter attendance zones, or bus students to dismantle the dual system.¹⁴

In 1973, the court further clarified these forms of segregation in ordering busing in Denver in *Keyes*, stating: "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred to in *Swann* is *purpose* or *intent* to segregate."¹⁵ The plaintiffs argued that manipulating student attendance zones, school site selection, and a neighborhood school policy had maintained segregated schools. The court concluded that evidence of "an unconstitutional policy of deliberate racial segregation" in one area of the school district was sufficient to hold the board responsible for perpetuating a dual school system.

Whereas initial remedies centered on the assignment of students and personnel to alter the racial makeup of schools, recent options are designed to enrich the learning experiences of minority students. These might include early childhood interventions, curriculum development, remedial reading, reduction in class size, counseling and career guidance, and professional development.¹⁶ When the cost of such remedies was of issue, the U.S. Supreme Court in *Missouri v. Jenkins* agreed with a lower court's imposition of a tax increase in excess of statutory limitations.¹⁷ The Kansas City school district could thus raise revenue for educational programs, summer school, full-day kindergartens, tutoring, class size reduction, magnet schools, and facility improvements to overcome the effects of segregation. A subsequent decision, however, denied a plan that called for state funds to increase teacher and staff salaries above suburban school districts.¹⁸ The state was then able to end support for desegregation, and the district could discontinue its commitment to magnet schools.

The adequacy of funds to enable excellent schools for all students has been the subject of judicial reviews in other states. Segregated schools under the *Plessy* standard were to have access to equal facilities, teachers, instructional materials, and transportation.¹⁹ In reality, schools were far from equal at the time of *Brown*, and inequities persist today despite several decades of efforts to equalize revenues among school districts. Yet, in 1973, the U.S. Supreme Court declared that funding inequities did not offend the equal protection clause of the U. S. Constitution and were thus a matter for state legislatures and courts.²⁰ Subsequent decisions had mixed outcomes with the majority of state courts finding education to be a fundamental interest to be provided to all on equal terms. However, other state courts upheld

policies that allowed unequal funds due to variations in local property values as being rationally related to state interests in furthering local control of education.²¹

School finance challenges have shifted in recent years from urging equity through resource distribution to ensuring an adequate level of funds in poor communities. In 1989, the Kentucky Supreme Court declared that the entire system of public schools to be unconstitutional.²² The court specified seven competency areas that would enable students to compete in academics or the labor market and ordered the legislature to revamp the finance structure to equalize revenue so that all districts could educate to the higher standards. In a series of challenges to the state's finance system, the New Jersey Supreme Court ordered unequal spending and supplemental programs and services to the advantage of 28 urban areas, stating:

For these special needs districts, a thorough and efficient education— one that will enable their students to function effectively in the same society with their richer peers both as citizens and as competitors in the labor market— is an education that is the substantial equivalent to that afforded in the richer districts.²³

These decisions and others in the late 1990s held states responsible for providing adequate resources to improve educational opportunities. They also demonstrated the willingness of courts to influence policies in ways that enable students, many of whom are racial and ethnic minorities, in poor communities to access high quality education.

Achieving Unitary Status

Judicial reviews in the past decade have considered the point at which school districts once found to have operated a "dual" system have subsequently achieved "unitary" status. The U.S. Supreme Court defined a unitary school system as one "within which no person is to be effectively excluded from any school because of race"²⁴ Another decision identified several factors that continue today to assist lower courts and school authorities determine unitary status: the composition of the student body, faculty, staff, transportation, extracurricular activities, and facilities.²⁵

In reviewing the status of the DeKalb County (Atlanta) school district, the court stated an objective of restoring state and local control of school operations was as follows: "Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system."²⁶ The lower court could thus grant the district control over the four satisfied factors (student assignment, transportation, facilities, and extracurricular activities) while retaining court supervision of faculty, administrative assignments, and a seventh criterion, the quality of education.

We conclude this discussion of past decisions by revisiting *Brown*. Several lower court reviews over the years noted that the Topeka school district had not fulfilled its affirmative duty to fully desegregate. However, in 1999, the U.S. District Court for Kansas declared that the district had achieved unitary status, stating: "... defendant has complied in good faith with mandates of the court over a reasonable period of time; the vestiges of past discrimination in the school district have been eliminated to the extent practicable; and defendant has demonstrated a good faith commitment to the law and the Constitution which presages no future need for judicial intervention."²⁷

Schools of Choice and Heightened Academic Standards

This overview of remedies to undo prior segregation and promote equality of opportunities provides a context for exploring issues that face policymakers today. In particular, policies that grant greater choice among schools to parents and that demand high academic standards should be examined in relation to the goal of *Brown* to ensure non-segregated schools.

Promoting Choice Among Schools

For many years, educators, policymakers, and other constituent groups have called for greater choice among schools. The primary varieties of school choice are magnet schools under the control of local school boards, semi-autonomous charter schools within the public school system, and vouchers that permit public-private school choice. We examine these forms of choice and consider this policy in relation to goals articulated in *Brown*.

Magnets, Charters, and Vouchers. In an effort to desegregate school systems through voluntary movement of students among schools, many urban districts embraced the magnet school concept. These schools typically concentrate on a particular strength, specialty, or educational subject area in order to attract students. Consequently, parents can choose an educational program that most closely fits their children's needs. Some of the most common magnet school specialties are science and technology, mathematics, and fine arts/performing arts. The movement to create magnet schools grew rapidly in response to federal grant programs, particularly under ESAA to promote desegregation and maintain a racial balance.²⁸ Magnet schools have been a valuable tool for urban districts trying to implement desegregation laws.²⁹

Another form of choice gaining momentum is charter schools. These schools represent a grassroots effort to provide opportunities for students, parents, teachers, administrators, and community members to create innovative educational programs.³⁰ When legislative or citizen initiatives failed to bring vouchers to advance public-private school choice, many advocates embraced the charter school concept as an acceptable policy option. Charter schools that operate via a contract with a school district or other government entity are free of many of the restraints of school district governance.³¹ Legislation today grants charter schools fiscal and educational autonomy in exchange for accountability for improving pupil achievement. Currently 40 states have enabling legislation, and the number of charter schools has increased substantially since Minnesota enacted the first legislation in 1991.³² According to the National Center for Education Statistics, there were 2,348 charter schools during the 2001-2002 school year.³³

In addition to promoting parental choice, reasons cited for starting charter schools include the opportunity to provide enhanced teaching and learning, ability to operate a school according to a particular philosophy, freedom to innovate, increased parental control over education, and opportunity to serve at-risk youth.³⁴ Despite a promise of improved achievement, results are mixed as to whether charter schools have greater achievement gains than traditional schools. Some suggest that there are no data that show charter schools perform better than other public schools.³⁵

Opening the door to an even greater degree of school choice, some districts and states have initiated pilot programs to test whether including private and parochial school options via vouchers can increase academic achievement of low-income and minority students.³⁶ A voucher is a publicly funded scholarship that allows parents to select

what they believe to be the best school for their children. Two of the best known voucher programs allow low-income children in Milwaukee and Cleveland access to educational opportunities beyond those offered in their home school districts.³⁷ The U.S. Supreme Court permitted this form of public assistance for families to choose private schools without offending the Establishment Clause of the First Amendment.³⁸ Another program implemented in Florida adopted vouchers as an accountability tool. Students in low performing schools can opt out and receive a voucher to attend a private school.³⁹

Proponents of school choice include liberals, conservatives, minorities, religious leaders and those from every socioeconomic status.⁴⁰ Advocates cite the likelihood of increased student achievement, improved educator professionalism, more responsiveness to parents, decreased bureaucracy, greater parent involvement, and overall renewal in educational institutions as reasons for adopting choice proposals.⁴¹ Supporters argue that charter schools give better options to parents, allow for innovation and improved student achievement, and are not hampered by school district boundaries that produce segregated patterns.⁴² Perhaps the most cited reason given in support of school choice is the enhanced possibility for equal educational opportunity for low socioeconomic families and low achieving students.⁴³

In contrast, critics of school choice maintain that accountability to the public will likely be reduced, and minimum standards will not be maintained. Under choice systems, some argue that the selectivity of students would likely increase inequality between and among schools. Furthermore, the geographic distribution of students by race and economic class can produce inequitable choices and increase segregation by race, ethnicity, and poverty. Critics also maintain that providing information on schools can be costly, inadequate, and more readily available to families of higher socioeconomic status.⁴⁴ Opponents of school vouchers criticize the blurring of boundaries between private and public sectors. They claim that private schools are not held to the same stringent accountability measures as public schools.⁴⁵ Research has not yet determined the overall success of voucher programs in producing high quality schools.⁴⁶ Additionally, issues of equity persist. Critics suggest that the amount of a voucher would not cover the tuition of many private schools, placing poor families at a disadvantage. Also parents from low socioeconomic backgrounds may not be able to provide transportation to schools outside their neighborhoods. Critics of voucher programs argue that poor students would be relegated to the worst schools, further hampering equity efforts.

Segregation by Choice. A major fear of school choice opponents is resegregation along racial, ethnic, and socioeconomic lines if parents were given free rein over where they send their children to school. Data already support the fact that many urban public school districts are more segregated presently than in past years. A Harvard University report found "virtually all school districts analyzed are showing lower levels of inter-racial exposure since 1986, suggesting a trend towards resegregation, and in some districts, these declines are sharp."⁴⁷ Other reports cite a trend toward resegregation in public schools as well.⁴⁸ The question becomes: Does providing choice among schools contribute to resegregation? If so, courts may ask to what degree do policymakers adopt choice plans with the intent of segregating schools by race or ethnicity?

A recent RAND report noted that the effects of choice programs on integration efforts are largely unknown. Across the United States, charter schools have a similar racial and ethnic balance as public schools, but according to this report, evidence from other nations

suggests that large-scale, unregulated choice programs can lead toward greater racial and ethnic stratification.⁴⁹ For example, in New Zealand's, schools that were relatively high in minority enrollment at the outset of school choice initiatives came to have a higher minority enrollment as a consequence of choice.⁵⁰ In a study conducted in a large school district in Colorado, race and ethnicity were prominent features in open enrollment patterns related to school choice.⁵¹ The study found that whites left high minority schools at a disproportionate rate. Due to the repetition of this pattern since the 1990s, the schools became significantly more stratified in terms of race and ethnicity.⁵² The data also demonstrated that school choice had not improved academic achievement, but rather school choice contributed to a two-tiered system of advantaged and disadvantaged schools.⁵³

A report from the Civil Rights Project at Harvard University posits that white students are most racially isolated in Catholic and other religious private schools.⁵⁴ This trend has implications for the implementation of voucher programs. Proponents suggest that minority students would have greater access to private schools. However, the Harvard report maintains that African American students in private schools are just as segregated from whites in public schools. Moreover, since most private schools do not provide free transportation, segregation would likely be increased with the implementation of vouchers.

Some critics of charter schools maintain that these schools further stratify students along racial and socioeconomic lines as well.⁵⁵ Frankenberg and Lee found that charter schools have high levels of segregation and that African American students enrolled in segregated charter schools experienced high levels of racial isolation and were exposed to very low percentages of white students.⁵⁶ Based on the findings of this study, there is little evidence that charter schools foster more integrative environments. In order to promote integration, these researchers suggested that charter schools should ensure that all potential students and parents receive full information, provide free transportation, and avoid screening children for admission to charter schools.

Various policymakers have stressed the importance of school choice as a policy tool to promote racial equity and integration. They have suggested the need for government regulation of education markets, including the redesign of charter laws so that mechanisms exist to promote racial integration.⁵⁷ In addition, state education agencies should be charged with the responsibility to develop policies to ensure racial integration. If various configurations of school choice continue, and in fact expand, issues of racial and ethnic segregation must be closely monitored so that our system of elementary and secondary education does not return to the conditions present in 1954.

Demanding Higher Academic Standards

The 2001 reauthorization of the Elementary and Secondary Education Act as the No Child Left Behind Act (NCLB) Act made the closing of the achievement gap between minority and disadvantaged children and their counterparts an explicit goal.⁵⁸ This education reform centers on holding all states, school districts, and schools accountable for ensuring that all students meet high academic standards. If a school repeatedly fails to adequately educate disadvantaged students, NCLB provides guidelines to allow disadvantaged students to use Title I funds to transfer to a higher-performing public or private school or to receive supplemental educational services from a provider of choice. While declaring the equity of educational achievement of minority students as the intent, a closer examination of the implementation of NCLB casts doubts on the ability of the legislation to achieve this goal and may

even call into question if having all students meet the same learning expectations is the real intent of this policy. Indeed, the resegregation of schools along poverty lines, dominated by minority groups, might be an unintended consequence of this noble-sounding policy.

NCLB codifies and mandates the development of state learning standards and testing systems to measure student achievement to an identified level of competency with individual schools being held accountable for students' meeting of the required level of mastery via state assessments. The fashioning of standards is a tricky task in itself; standards that are too vague become meaningless, but too narrowly defined standards constrain local curriculum and instructional choice.⁵⁹ The development of reliable and valid large scale state assessment instruments is even trickier and difficult to use for anything but a superficial snapshot comparison of student testing performance.⁶⁰

Even if a state assessment is soundly constructed, the consequences of testing and accountability systems for minority students can be quite negative.⁶¹ An examination of student performance on the Illinois Standards Assessment Test (ISAT) demonstrated that low income, minority status, mobility rate, and limited English proficiency factors accounted for 80% of the variance of test achievement.⁶² The state accountability system became a ranking of schools from "high-income, predominantly White, affluent schools with stable student bodies to low-income, minority schools with highly mobile students," with corresponding rewards and punishments. NCLB goes beyond the ranking of schools to require states to provide a system of support for schools that fail to demonstrate adequate yearly progress (AYP) among minority and disadvantaged subgroups. While NCLB does not specify what interventions can be effectively used to support or reform schools that repeatedly fail to demonstrate AYP, repeated failure to show AYP will result in students first being allowed to transfer to more successful schools and, if failure to show AYP persists, the reorganization of that school under charter school status.

The growth of charter schools and voucher programs as standards and assessments drive parental decisions about schools may intensify the trend toward resegregation. Particularly in urban areas, studies suggest that the flight of more affluent white parents to schools that are high achieving will accelerate if test scores and school labels are the means for measuring the quality of education.⁶³ This is particularly alarming in such major metropolitan areas as Denver, Colorado where the court-ordered school desegregation plan under the previously described *Keyes* decision appeared to be successful according to 1989-90 data. However, despite little change in neighborhood composition, one study concluded that the degree of school segregation had risen dramatically in the past decade.⁶⁴

Under NCLB, assessment results must be reported by student subgroups—poverty, race, ethnicity, disability, and limited English proficiency. There are numerous studies that document the existence and severity of an achievement gap between minority and white students.⁶⁵ The identification of these subgroups is detrimental in itself by reinforcing "for many the notion that some groups are 'naturally' inferior to others in cognitive ability."⁶⁶ The policy extension of such a belief is that there is little point in spending public resources to level the playing field, possibly bringing standards and performance down for white students. This subgroup identification also encourages policymakers to think in terms of ethnicity or race, immutable conditions, rather than focusing on the issue of poverty and related dysfunction that could be addressed through more general social policies. The issues related to poverty found to be the biggest determinant of test

performance can include family dysfunction, poor parenting skills, transience, substance abuse, the devaluing of academic performance, and violence.⁶⁷ The NCLB policy definition of low achieving groups in terms of race or ethnicity might obfuscate the roots of low student performance, justifying subsequent actions that do nothing to assist the low performing students.

The *Brown* decision centered around the issue of equal access to educational quality of equal worth.⁶⁸ The process of education was judged according to the diversity of the student population. Policies enacted through the mid-1980s focused explicitly on reducing opportunity barriers and equalizing access and treatment in public school. While complete integration, as well as equal access and treatment, were never fully realized, several studies concur that significant advances were made, producing a high-water mark of public school integration in the late 1980s.⁶⁹ As public attention shifted to public education outputs in the form of standardized test achievement, resegregation began, according to these same studies. Accountability policies that labeled and ranked schools raised parental awareness of “achieving” and “failing” schools (the latter label was eventually softened to “low performing”). Affluent families that were able relocated to “better” schools or enrolled their students in charter or private schools.⁷⁰

NCLB facilitates this *de facto* resegregation by intensifying public awareness of school labels, but does perhaps more damage in promoting a competition of test scores among schools. This competition leads to many practices that discourage the achievement of minority students while dividing class and school composition along racial lines. First, disadvantaged students may be retained or “red-shirted,” particularly in kindergarten, on the premise that they will be more prepared, academically and socially, to achieve better on tests given in the early primary grades. There has been an increase of “red-shirting” of kindergartners, as well as fourth, fifth, and seventh graders in Chicago public schools “due to the unrelenting pressure to raise test scores.”⁷¹ Red-shirting of students does result in better test results when the students are one year older.⁷² The long-term effects of retention, however, are continued low achievement and higher likelihood of dropping out of school.⁷³ Several studies suggest that tying promotion to test scores could increase racial/ethnic disparities in retention.⁷⁴ By extension, this would also increase racial/ethnic disparities in school dropout rates, retaining whites while encouraging minorities to dropout.

Another educational practice that has become increasingly justified under NCLB is the practice of homogeneous tracking. Minority students have been consistently found to be under-represented in “upper” track or college preparatory classes, even during the high-water period of integration.⁷⁵ Homogeneous ability grouping is the logical method of providing NCLB-identified subgroups, such as limited English proficient students or students qualifying for free or reduced lunches (the common school criteria for poverty), the special services needed to increase their test achievement. Although the goal of increased student achievement for all students is the motivation for this new round of tracking, the effect is *de facto* within-school segregation. Groups of minority students may pass white students in the hallway but never have more than a handful of white students in their classes and perhaps not even a common lunch period. The few white students in these classes too often share one or more risk factors with the low tracked minority students and provide a very limited exposure to any diversity of socioeconomic backgrounds. After-school academic remediation programs for at-risk or disadvantaged students encouraged by NCLB

and Title I funds might also limit extracurricular interaction of minority students with white or more affluent peers.

Advancing Equity Goals While Encouraging Choice and High Standards

Ending government-sanctioned segregation, the *Brown* decision ushered in several phases of judicial and legislative activity. In the 1960s and 1970s, federal courts imposed remedies to balance the racial composition of faculty and students in reversing the effects of *de jure* and *de facto* segregation. Federal funds encouraged schools to equalize educational opportunities, and state courts pressed many legislatures to reduce inequities in resources among districts. During the 1980s and 1990s, courts wrestled with the difficult question of when is a school system free of the vestiges of intentional segregation, and thus achieved “unitary” status. Although many policymakers and school administrators celebrated the end of court-ordered desegregation, critics might characterize this phase as court-sanctioned resegregation of schools as policymakers once again favored neighborhood schools.

In yet another phase that continues into the 2000s, state and federal legislatures are sanctioning school choice programs and tightening academic standards with a goal of ensuring that all children can access a high quality education. Congress enacted far-reaching legislation to require state standards and assessments and to encourage school choice. At the same time, the U.S. Supreme Court upheld vouchers to enable low-income students to attend private schools at public expense. Whereas the stated purpose of these actions is to improve education for all children, these two policy approaches will have great impacts on the racial, ethnic, and economic segregation of students. To the extent that these policies are designed with the intent to segregate by race or ethnicity, or that they have the effect of segregation, they work against the equity goals articulated in *Brown* and other judicial decisions.

Policymakers, courts, and the public must address the following questions as we strive to reach goals of achieving a desegregated system:

- How do we know when the goals of desegregation and equal educational opportunity have been achieved? Is it a reflection of racial balance of students and personnel among schools; balances within classes and programs of a given school; or racially neutral outcomes, e.g., educational achievement?
- Which policies best ensure that racial balances achieved under court orders, including mandatory busing, continue once unitary status is achieved? How can school boards and educators guard against the likely resegregation of schools?

Schools of choice have been a policy option for many years. Examining the freedom-of-choice plan adopted in Virginia, the U.S. Supreme Court sanctioned the use of choice where it could be implemented effectively.⁷⁶ Magnet schools have been a favored remedy in many cities, encouraging students of all races and economic backgrounds to attend specialized schools. To the degree that current choice plans – charter schools and vouchers – are effective, the public and the courts should embrace these policies as furthering the goals articulated in *Brown* and other decisions. Indeed, many parents and policymakers argue that these forms of educational choice offer an opportunity to improve the quality of education for all students. However, the studies examined in this paper suggest that these choice programs may work against equity goals. Policymakers should consider the following questions:

- Is there an intent to segregate schools on the basis of race or ethnicity when adopting magnet schools, charter schools, or vouchers?
- Under what conditions should choice options operate to prevent the resegregation of America's schools? What regulations are essential in this new decentralized environment to ensure that policies enabling schools of choice are not in reality the tools of segregationists?
- How can school choice plans enhance student achievement and provide better educational options for all students, and not just for higher socioeconomic groups?

Similarly, the public and school officials should applaud efforts to improve schools' abilities to provide equal and adequate opportunities for all students to achieve high academic standards. Recently enacted federal legislation will impact schools throughout the nation as they struggle to achieve these goals. However, schools are demonstrating low levels of diversity exposure and the acceleration of resegregation through racial identification, ability tracking, and school choice. These are emerging consequences of NCLB, a policy intended ostensibly to equalize the opportunity and learning of minority students with their more advantaged peers. Several points deserve consideration of policymakers as they weigh the educational measurement process and value of educational outcomes:

- How can schools prevent unintended consequences of accentuating achievement gaps and raising dropout rates of poverty students when strengthening academic standards?
- To what extent must federal and state resources provide essential capacity building, i.e., improving schools' access to adequate human and financial resources, to enable all schools in all communities to raise student performance to meet high expectations?
- Is the spirit of *Plessy's* "separate but equal" ruling being reborn through tracking systems that place a disproportionate number of minority students in remedial classes and reduce interracial exposure within schools? How can the potential effects of identifying achievement subgroups by race and ethnicity be minimized?

Only through a reawakening of the public to the perils of policies that hasten a return to the segregated schools will meaningful change occur. Policymakers, courts, educators, and citizens must speak out about the potential negative consequences of schools of choice and heightened academic standards. We must adopt policies at all governance levels – federal, state, and local – that guard against a society in which children learn in settings that are characterized primarily by racial, ethnic, and economic segregation rather than by the nature of the educational programs within.

Endnotes

- ¹ *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686 (1954).
- ² *Ibid.*
- ³ *Brown v. Board of Education of Topeka*, 349 U.S. 294, 75 S.Ct. 753 (1955).
- ⁴ *Ibid.*
- ⁵ *Ibid.*
- ⁶ *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401 (1958).
- ⁷ *Goss v. Board of Education*, 373 U.S. 683, 83 S.Ct. 1405 (1963).
- ⁸ *Griffin v. School Board of Prince Edward County*, 377 U.S. 218, 84 S.Ct. 1226 (1964).
- ⁹ *Green v. School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689 (1968).
- ¹⁰ Elementary and Secondary Education Act of 1965. P.L. 89-910.
- ¹¹ *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 90 S.Ct. 29 (1969).
- ¹² Kern Alexander and M. David Alexander, *American Public School Law*, 5th ed. (Belmont, California: Wadsworth Group, 2001).
- ¹³ *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267 (1971).
- ¹⁴ Michael W. LaMorte, *School Law: Cases and Concepts*, 7th ed. (Boston, Massachusetts: Allyn and Bacon, 2002).
- ¹⁵ *Keyes v. School District No. 1, Denver*, 413 U.S. 189, 93 S.Ct. 2686 (1973).
- ¹⁶ Alexander and Alexander, *American Public School Law*.
- ¹⁷ *Missouri v. Jenkins*, 495 U.S. 33, 110 S.Ct. 1651 (1990).
- ¹⁸ *Missouri v. Jenkins*, 515 U.S. 70, 115 S.Ct. 2038 (1995).
- ¹⁹ *Plessy v. Ferguson*, 163 U.S. 537; 16 S. Ct. 1138; 41 L. Ed. 256; 1896.
- ²⁰ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).
- ²¹ See Richard A. King, Austin D. Swanson, and Scott R. Sweetland, *School Finance: Achieving High Standards with Equity and Efficiency*, 3d ed. (Boston, Massachusetts: Allyn and Bacon, 2003).
- ²² *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989).
- ²³ *Abbott v. Burke*, 643 A.2d 575 (1994).
- ²⁴ *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 90 S.Ct. 29 (1969).
- ²⁵ *Green v. School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689 (1968).
- ²⁶ *Freeman v. Pitts*, 503 U.S. 467, 112 S.Ct. 1430 (1992).
- ²⁷ *Brown v. Unified School District No. 501*, 56 F.Supp.2d 1212 (Kan. 1999).
- ²⁸ Erika Frankenberg and Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*. (Cambridge, Massachusetts: The Civil Rights Project, Harvard University, 2002).

- ²⁹ See Kevin J. Dougherty and Lizabeth Sostre, "Minerva and the Market: The Sources of the Movement for School Choice," in *The Choice Controversy*, ed. Peter W. Cookson (Newbury Park, California: Corwin, June, 1992), 24-45; LaMorte, *School Law*.
- ³⁰ Lori A. Mulholland and Louann A. Bierlein, *Understanding Charter Schools*, Fastback No. 383 (Bloomington, Indiana: Phi Delta Kappa Educational Foundation, 1995).
- ³¹ Brian P. Gill, P. Michael Timpane, Karen E. Ross, and Dominic J. Brewer, *Rhetoric Versus Reality: What We Know and What We Need to Know About Vouchers and Charter Schools* (Santa Monica, California: RAND, 2001).
- ³² U. S. General Accounting Office, *School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee*, GAO-01-914 (Washington, D.C.: U. S. General Accounting Office, 2001).
- ³³ Lee M. Hoffman, *Overview of Public Elementary and Secondary Schools and Districts: School Year 2001-2002* (Washington, D.C.: National Center for Education Statistics, May 2003).
- ³⁴ Alex Medlar and Joe Nathan, *Charter Schools: What Are They Up To?* (Denver, Colorado: Education Commission of the States, 1995).
- ³⁵ Erika Frankenberg and Chungmei Lee, *Charter Schools and Race: A Lost Opportunity for Integrated Education* (Cambridge, Massachusetts: The Civil Rights Project, Harvard University, 2002).
- ³⁶ See Joseph P. Viteritti, *Choosing Equality: School Choice, The Constitution, and Civil Society* (Washington, D.C.: Brookings Institution Press, 1999); Gill et al. *Rhetoric Versus Reality*.
- ³⁷ U.S. General Accounting Office, *School Vouchers*.
- ³⁸ *Zelman v. Simons-Harris*, 536 U.S. 00-1751, 153 L.Ed.2d 604 (2002), <http://laws.findlaw.com/us/000/00-1751.html>
- ³⁹ Martin Carnoy, "School Choice: Or Is It Privatization?" *Educational Researcher* 29 (October 2000): 15-20.
- ⁴⁰ Myron Lieberman, *Public Education: An Autopsy* (Cambridge, Massachusetts: Harvard University Press, 1993).
- ⁴¹ See John Chubb and Terry M. Moe, *Politics, Markets, and America's Schools* (Washington, D.C.: Brookings Institution Press, 1990); Gill, et al. *Rhetoric Versus Reality*.
- ⁴² Chester Finn, Jr., Bruno V. Manno, and Greg Vanourek, *Charter Schools in Action: Renewing Public Education* (Princeton, New Jersey: Princeton University Press, 2000).
- ⁴³ Mary A. Raywid, "Choice Orientations, Discussions, and Prospects," in *The Choice Controversy*, ed. Peter W. Cookson, Jr. (Newbury Park, California: Corwin, 1992), 3-23.
- ⁴⁴ See Gill et al. *Rhetoric Versus Reality*; Carnoy, "School Choice."
- ⁴⁵ Timothy McDonald, "The False Promise of Vouchers" *Educational Leadership* 59 (April 2002): 33-37.
- ⁴⁶ Gill et al. *Rhetoric Versus Reality*.
- ⁴⁷ Frankenberg and Lee, *Race in American Public Schools*.
- ⁴⁸ John R. Logan, *Choosing Segregation: Racial Imbalance in American Public Schools, 1990-2000* (Albany, New York: Mumford Center for Comparative Urban and Regional Research, 2002).
- ⁴⁹ Gill et al. *Rhetoric Versus Reality*.
- ⁵⁰ Edward B. Fiske and Helen F. Ladd, *When Schools Compete: A Cautionary Tale* (Washington, D.C.: Brookings Institution Press, 2000).
- ⁵¹ Kenneth Howe, Margaret Eisenhart, and Damien Betebenner, "The Price of Public School Choice," *Educational Leadership* 59 (April, 2002): 20-24.
- ⁵² Ibid.
- ⁵³ Ibid.
- ⁵⁴ Sean F. Reardon and John T. Yun, *Private School Racial Enrollments and Segregation* (Cambridge, Massachusetts: The Civil Rights Project, Harvard University, 2002).
- ⁵⁵ Casey D. Cobb and Gene V. Glass, "Ethnic Segregation in Arizona Charter Schools," *Education Policy Analysis Archives* 7 (January, 1999): 23-46.
- ⁵⁶ Frankenberg and Lee, *Charter Schools and Race*.
- ⁵⁷ Cobb and Glass, "Ethnic Segregation in Arizona Charter Schools."
- ⁵⁸ No Child Left Behind Act of 2001, Public Law 107-110.
- ⁵⁹ Linda Darling-Hammond, *The Right to Learn: A Blueprint for Creating Schools that Work* (San Francisco, California: Jossey-Bass, 1997).
- ⁶⁰ National Research Council, *Knowing What Students Know: The Science and Design of Educational Assessment* (Washington, D.C.: National Academy Press, 2001).
- ⁶¹ *Education Week*, "Gaining Ground: States Have Come a Long Way in Designing Standards and Tests, But Not Far Enough," in *Quality Counts 2001: A Better Balance* (Bethesda, Maryland), 11 January 2001.
- ⁶² William Rau, Mark N. Shelley, and Frank D. Beck, "The Dark Engine of Illinois Education: A Sociological Critique of a 'Well-crafted (Testing) Machine,'" *Educational Policy* 15 (July, 2001): 404-431.
- ⁶³ See Frankenberg and Lee. *Race in American Public Schools*; Logan, *Choosing Segregation*; Gary Orfield and Chungmei Lee, *Brown at 50: King's Dream or Plessy's Nightmare?* (Cambridge, Massachusetts: The Civil Rights Project, Harvard University, 2004).
- ⁶⁴ Logan, *Choosing Segregation*.
- ⁶⁵ See, for example, Christopher Jencks and Meredith Phillips, ed., *The Black-white Test Score Gap*. (Washington, D.C.: The Brookings Institute, (1995); L. Scott Miller, *An American Imperative: Accelerating Minority Educational Advancement* (New Haven, Connecticut: Yale University Press, 1995); Abigail Thernstrom and Steven Thernstrom, *No Excuses: Closing the Racial Gap in Learning*. (New York: Simon & Schuster, 2003); Julian Weissglass, "The SAT: Public-spirited or Preserving Privilege?" *Education Week* (Bethesda, Maryland), 15 April 1998.
- ⁶⁶ Kenneth Carlson, "Test Scores by Race and Ethnicity," *Phi Delta Kappan* 85 (January 2004): 379-380.
- ⁶⁷ See Carlson, "Test Scores"; J. David Hawkins, Todd I. Herrenkohl, David P. Farrington, Devon Brewer, Richard F. Catalano, Tracy W. Harachi, and Lynn Cothorn, "Predictors of Youth Violence," *Juvenile Justice Bulletin*, April 2000 (Washington, D.C.: U. S. Department of Justice, April 2000). Rau et al., "The Dark Engine."

⁶⁸ Caroline Hendrie, "In U.S. Schools, Race Still Counts: Despite Progress, Challenges Loom." *Education Week* (Bethesda, Maryland), 16 January 2004.

⁶⁹ See Rebecca Gordon and Libero D. Piana, *No Exit? Testing, Tracking, and Students of Color in U.S. Public Schools* (Oakland, California: Applied Research Center, 1999), <http://arc.org/Pages/Estudy.html>; Frankenberg and Lee, *Charter Schools and Race*; Hendrie, "In U.S. Schools, Race Still Counts"; Nancy Kober, *It Takes More Than Testing: Closing the Achievement Gap*. (Washington, D.C.: Center on Education Policy, 2001); Logan, *Choosing Segregation*; Orfield and Lee, *Brown at 50*; Reardon and Yun, *Private School Racial Enrollments and Segregation*.

⁷⁰ See Frankenberg and Lee, *Race in American Public Schools*; Orfield and Lee, *Brown at 50*.

⁷¹ Rau et al. "The Dark Engine."

⁷² George F. Madaus and Maguerite Clarke, *The Adverse Impact of High-stakes Testing on Minority Students: Evidence from 100 Years of Test Data* (Boston, Massachusetts: National Board of Educational Testing and Public Policy, 1998).

⁷³ See, for example, Shane R., Jimmerson, Phillip Ferguson, Angela D. Whipple, Gabrielle E. Anderson, and Michael J. Dalton, "Exploring the Association Between Grade Retention and Dropout: A Longitudinal Study Examining Socio-emotional, Behavioral, and Achievement Characteristics of Retained Students," *The California School Psychologist* 7 (January 2002): 51-62; Madaus and Clarke, *The Adverse Impact of High-stakes Testing on Minority Students*.

⁷⁴ See Robert M. Hauser, Devah I. Pager, and Solon J. Simmons, "Race-Ethnicity, Social Background, and Grade Retention," a paper presented at the annual meeting of the American Sociological Association, Washington, D.C., August, 2000; Gill et al. *Rhetoric Versus Reality*; Jimmerson et al., "Exploring the Association Between Grade Retention and Dropout."

⁷⁵ Jeannie Oakes, "Two Cities' Tracking and Within-School Segregation," *Teachers College Record* 96 (Summer 1995): 681-691; Jomills H. Braddock and Marvin Dawson, Marvin, "Ability Grouping, Aspirations and Attainments: Evidence from the National Educational Longitudinal Study of 1988," *Journal of Negro Education* 62 (Summer, 1993): 324-337.

⁷⁶ *Green v. School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689 (1968).