

COMMENTS

INVESTING IN INTEGRATION: A CASE FOR “PROMOTING DIVERSITY” IN FEDERAL EDUCATION FUNDING PRIORITIES

I. INTRODUCTION	624
II. BACKGROUND: THE EBB AND FLOW OF FEDERAL COMMITMENT TO INTEGRATED EDUCATION	630
A. <i>BROWN</i> AND THE DOWNFALL OF STATE-MANDATED SEGREGATION.....	631
B. SETBACKS CAUSING THE FEDERAL GOVERNMENT TO LOSE TRACTION.....	635
C. SCHOOLS RESEGREGATE AS THE SUPREME COURT RELENTS.....	637
1. DILUTION OF JUDICIAL REMEDIES	637
2. INTRODUCTION OF VOLUNTARY MEASURES	640
III. A CRITICAL LOOK AT INTEGRATED EDUCATION, CHARTER SCHOOLS, AND CURRENT FEDERAL EDUCATION POLICY	642
A. THE BENEFITS OF RACIALLY AND SOCIOECONOMICALLY INTEGRATED SCHOOLING	643
B. AN OVERVIEW OF THE CHARTER SCHOOL MOVEMENT...	647
1. DEFINING CHARACTERISTICS	649
2. FEDERAL INVOLVEMENT	653
a. The Charter School Program	655
b. Race to the Top	657
C. THE REALITY OF CHARTER SCHOOLS	658
D. CURRENT FEDERAL PROGRAMS REVEAL QUESTIONABLE COMMITMENT TO “PROMOTING DIVERSITY” IN CHARTER SCHOOLS.....	661
IV. MAKING DIVERSITY A REAL PRIORITY.....	667
V. CONCLUSION.....	671

“This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest

*exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population.”*¹

I. INTRODUCTION

The United States Department of Education (DOE) first identified school diversity as a priority in granting discretionary federal funding to schools in 2011.² This came nearly four years after a majority of the United States Supreme Court declared school integration³ a “compelling government interest” in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*⁴ and after staunch criticism from the U.N. Committee on Racial Discrimination for the intensification of racial and socioeconomic disparity in United States public schools.⁵

Priority 11, titled “Promoting Diversity,” was one of sixteen funding priorities listed in the DOE’s “Supplemental Priorities for Discretionary Grant Programs” in 2010.⁶ Although its

1. *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).

2. Supplemental Priorities for Discretionary Grant Programs, 75 Fed. Reg. 78,486 (Dec. 15, 2010), available at <http://www.gpo.gov/fdsys/pkg/FR-2010-12-15/pdf/2010-31189.pdf>.

3. For purposes of this Comment, “integration” means bringing students together from various racial and socioeconomic backgrounds.

4. *Id.* at 720-23 (“[T]he school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is “narrowly tailored” to achieve a “compelling” government interest.”).

5. Philip Tegeler & Saba Bireda, *Incentivizing Integration? The Potential of New Funding Priorities at the U.S. Department of Education*, INTEGRATION REP. (Jan. 19, 2011), <http://theintegrationreport.wordpress.com>; see Supplemental Priorities for Discretionary Grant Programs, 75 Fed. Reg. 78,486; Comments on the United States Response to the Recommendations of the 2011 Universal Periodic Review from Philip Tegeler, Exec. Dir., Poverty & Race Research Action Council (Feb. 2011), available at http://www.prrac.org/pdf/PRRAC_comments_on_the_US_response_to_the_UPR_Recommendations.pdf.

6. Supplemental Priorities for Discretionary Grant Programs, 75 Fed. Reg. at 78,500. The list includes: (1) Improving Early Learning Outcomes, (2) Internationally Benchmarked Academic Standards, (3) Improving The Effectiveness And Distribution Of Effective Teachers Or Principals, (4) Turning Around Persistently Lowest-Achieving Schools, (5) Improving School Engagement, School Environment, and School Safety and Improving Family and Community Engagement (6) Technology, (7) Core Reforms, (8) Increasing Postsecondary Success, (9) Improving Achievement and High School Graduation Rates, (10) Promoting Science, Technology, Engineering, and Mathematics (STEM) Education, (11) Promoting Diversity, (12) Support for Military Families, (13) Enabling More Data-Based

2013] **Diversity in Federal Education Funding** 625

appearance likely excited advocates of integrated education, some integrationists remain skeptical as to whether the DOE will implement the plan aggressively or allow it to simply disappear among the myriad other priorities.⁷ *Fisher*,⁸ the Court's most recent pronouncement on affirmative action in education, illustrates that while the legal tide appears to be drifting in the direction of allowing race-conscious admissions policies in higher education, only time will tell what effect Priority 11 will have, if any, on K–12 schools.

Frustration with the tragic state of public education over the past few decades has generated robust experimentation with alternatives to traditional public schooling.⁹ In recent years, reform policies have centered on programs that are generally exempt from “onerous aspects of federal, state, and local bureaucracies.”¹⁰ Reformists have effectively nominated school choice programs, which provide parents and students with flexibility in selecting schools, as the fix-all policy du jour.¹¹

Of the school choice concepts in circulation, Americans have become most enchanted by the charter school movement.¹²

Decision-Making, (14) Building Evidence of Effectiveness, (15) Supporting Programs, Practices, or Strategies for Which There Is Strong or Moderate Evidence of Effectiveness, (16) Improving Productivity. Supplemental Priorities for Discretionary Grant Programs, 75 Fed. Reg. 78,486.

7. See, e.g., Tegeler & Bireda, *supra* note 5.

8. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013) (holding that the Court of Appeals failed to analyze the university's admission policy under the correct standard of strict scrutiny, which “does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice”).

9. Tomiko Brown-Nagin, *Toward A Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 756 (2000) (discussing the birth of the alternative school movement as a result of the “crisis” state of public schools in the 1990s).

10. Derek W. Black, *Education's Elusive Future, Storied Past, and the Fundamental Inequities Between*, 46 GA. L. REV. 557, 596 (2012).

11. Genevieve Siegel-Hawley & Erica Frankenberg, *Does Law Influence Charter School Diversity? An Analysis of Federal and State Legislation*, 16 MICH. J. RACE & L. 321, 322 (2011).

12. *Id.* at 323. See generally *The Public Charter Schools Dashboard: Total Number of Schools*, NAT'L ALLIANCE FOR PUB. CHARTER SCH., <http://dashboard.publiccharters.org/dashboard/schools/page/overview/year/2013> (last visited Sept. 26, 2013) (providing information that charter schools now comprise approximately 6.3% of the nation's public schools, a statistic that continues to grow each year). Researchers have estimated that during the 2012–2013 school year, there were nearly 6,000 charter schools serving 2.3 million students in the United

Charter schools are publicly funded institutions that receive autonomy in exchange for results.¹³ Their nearly superstar status can be traced back to films such as *Waiting for Superman*¹⁴ and *The Lottery*,¹⁵ which highlight the decline of traditional public schools and the utopian solution that charters allegedly offer.¹⁶ The movement's ability to garner support from both sides of the political spectrum has contributed to the model's publicity and expansion.¹⁷ However, it is President Obama's rigorous support and funding for charter schools that has, in particular, catapulted the movement to the forefront of education reform.¹⁸

Proponents praise charter schools generally for their potential to provide remedies that are unavailable in existing public schools.¹⁹ With freedom to design innovative curricula,

States, an 80% increase from 2009. See *id.*; *The Public Charter Schools Dashboard: Total Number of Students*, NAT'L ALLIANCE FOR PUB. CHARTER SCH., <http://dashboard.publiccharters.org/dashboard/students/page/overview/year/2013> (last visited Oct. 7, 2013). Several school districts are requesting increases in charter schools. See Michigan Radio Newsroom, *32 new Michigan charter schools set to open in fall 2013*, MICH. RADIO (May 23, 2013, 7:39 PM), <http://www.michiganradio.org/post/32-new-michigan-charter-schools-set-open-fall-2013>; Rebecca Klein, *Chicago Requests More Charter Schools After Massive Wave of Public School Closings*, HUFFINGTON POST (Aug. 15, 2013, 11:02 AM), http://www.huffingtonpost.com/2013/08/15/chicago-charter-schools_n_3757911.html; Darcy Thomas, *Are there too many charter schools?*, FOX13 MEMPHIS (Aug. 14, 2013, 2:39 PM), <http://www.myfoxmemphis.com/story/23137838/are-there-too-many-charter-schools>.

13. Paul T. O'Neill & Renita K. Thukral, *The Unique System of Charter Schools in New Orleans After Hurricane Katrina: Distinctive Structure, Familiar Challenges*, 11 LOY. J. PUB. INT. L. 319, 321 (2010). The phrase "charter schools" can be traced back to Dr. Ray Budde, a professor at the University of Massachusetts at Amherst, in his 1988 report, *Education by Charter. The George H.W. Bush Years: Charter Schools, Summary*, U.S. DEP'T OF EDUC.: N.Y. STATE ARCHIVES, http://www.archives.nysed.gov/edpolicy/research/res_essay_bush_ghw_charterschls.s.html (last visited Sept. 26, 2013).

14. *WAITING FOR SUPERMAN* (Electric Kinney Films, Participant Media, & Walden Media 2010).

15. *THE LOTTERY* (Great Curve Films 2010).

16. Black, *supra* note 10, at 596.

17. Brown-Nagin, *supra* note 9, at 757.

18. Black, *supra* note 10, at 596-97.

19. See Brown-Nagin, *supra* note 9, at 771; see also Christopher Lubienski & Peter Weitzel, *Choice, Integration, and Educational Opportunity: Evidence on Competitive Incentives for Student Sorting in Charter Schools*, 12 J. GENDER RACE & JUST. 351, 354 (2009) ("[C]harter schools have the potential to counteract attendance patterns based on segregated neighborhoods . . ."). Unlike traditional public school students, who are assigned to attend their neighborhood public schools, charter school students are not assigned to any particular charter school. Lubienski &

2013] **Diversity in Federal Education Funding** 627

admit students across district lines, and command results, charter schools can seem a perfect solution at first blush. However, as the saying goes, all magic comes with a price.

Over the past decade, scholars have tracked the progress of charter schools only to find that the majority of these schools are reinforcing racial and socioeconomic isolation²⁰ and have yet to collectively out-perform traditional public schools in academic performance.²¹ The movement acknowledges that poverty plus segregation spells disaster in education.²² Yet much of its response has been to locate schools in the most segregated neighborhoods specifically for the purpose of educating the most impoverished students.²³ As one commentator has noted: “Rather than attempting to destroy the walls of poverty and segregation structures, charter schools largely accept and work within them.”²⁴ Indeed, the fundamental failure of the charter movement today stems not from its exemption from certain administrative burdens, but rather, from its persistence in adhering to the counterproductive model of getting high poverty schools to succeed.

Weitzel, *supra*. They must choose to enroll. Lubienski & Weitzel, *supra*.

20. Richard D. Kahlenberg, *Charter Schools that Work: Economically Integrated Schools with Teacher Voice*, CENTURY FOUND. 11 (2010) [hereinafter Kahlenberg, *Charter Schools that Work*], available at http://tcf.org/assets/downloads/tcf-Charter_Reality.pdf (stating that charter schools have even greater concentrations of poverty than traditional public schools).

21. Black, *supra* note 10, at 602; see also Benjamin Wood, *Study: Majority of U.S. charter schools perform equal or worse than traditional schools*, DESERET NEWS (June 24, 2013, 10:00 PM), <http://www.deseretnews.com/article/865582169/Study-Majority-of-US-charter-schools-perform-equal-or-worse-than-traditional-schools.html?pg=all> (discussing a 2013 study conducted by the Center For Research on Education Outcomes at Stanford University which found that “charter schools had improved some since its 2009 study,” however, 75% of charter schools in the study displayed similar or weaker test scores in reading and 71% displayed similar or weaker test scores in math) (26 states participated in the study, accounting for 95% of the nation’s charter school students).

22. See Black, *supra* note 10, at 602-03.

23. See *The KIPP Foundation*, KIPP FOUND., <http://www.kipp.org/about-kipp/the-kipp-foundation> (last visited Sept. 26, 2013). One of the largest charter school operators, “KIPP” is designed to “help[] students from educationally underserved communities develop the knowledge, skills, character and habits needed to succeed in college and the competitive world beyond . . . KIPP believes that K-12 public schools today are preparing far too few low-income and students of color for college and careers.” *Id.* KIPP even heavily recruits teachers and staff who “share the life experiences or racial backgrounds of [their] students.” *Id.*

24. Black, *supra* note 10, at 601.

Current federal policies have unfortunately encouraged this development of racially and socioeconomically segregated charter schools.²⁵ The Obama administration has created several competitive grant programs in an effort to improve education comprehensively.²⁶ The keystone program, Race to the Top Fund (RTF), provides over \$4.35 billion to eligible schools and awards federal funding to states that lift the cap on the number of charters they allow to operate.²⁷ However, RTF provides virtually no incentive for charters to promote diversity. Under the current plan, states can win RTF funding without any effort to reduce concentrations of poverty and racial isolation within their schools.²⁸ RTF is indicative of the failure by the federal government to adequately emphasize the importance of voluntary integration in its programs.

This Comment contends that charter schools are uniquely positioned to promote diversity in education, but have fixated on a flawed agenda. By prioritizing high poverty schools over all others, charters have made a failed attempt to overcome the weight of history suggesting that separate schools are not better for anyone.²⁹ For one reason or another, federal and state officials have lost the taste for aggressively attacking segregation, and as a result, current federal and state laws do little to combat existing racial and socioeconomic isolation. However, charter schools could become agents of voluntary integration should the federal government incentivize such a direction. Regardless of

25. RICHARD D. KAHLENBERG & HALLEY POTTER, DIVERSE CHARTER SCHOOLS: CAN RACIAL AND SOCIOECONOMIC INTEGRATION PROMOTE BETTER OUTCOMES FROM STUDENTS? 2 (2012), available at http://www.tcf.org/assets/downloads/Diverse_Charter_Schools.pdf.

26. Black, *supra* note 10, at 597 (stating that the Obama Administration has expanded charter schools through competitive grant programs that preference states enacting pro-charter legislation).

27. U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 2, 11 (2009) [hereinafter RTF EXECUTIVE SUMMARY], available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

28. See *id.* at 11. Race to the Top funding to states is based on the following selection criteria: state success factors (25%); standards and assessments (14%); data systems to support instruction (9%); great teachers and leaders (28%); turning around the lowest achieving schools (10%); general selection criteria that includes ensuring successful conditions for high-performing charters (11%); and emphasis on science, technology, engineering, and math (3%). *Id.* at 3.

29. See Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445, 483-84 (2013) ("A rule flatly mandating that charter enrollments reflect the community in which they reside would mean that a charter school in a high-poverty, predominantly minority district could not be diverse.").

2013] **Diversity in Federal Education Funding** 629

the varying opinions concerning their merits, charter schools are here to stay.³⁰ Rather than joining the debate over whether states should be allowed to operate charter schools in the first instance, this Comment chooses to focus on improving their quality.³¹ Although Priority 11 is a step in the right direction in reaffirming the nation's commitment to school integration, this Comment proposes ways to effectuate Priority 11 on a federal level particularly for charter schools, which should be furthering goals of equal educational opportunity, including racial and socioeconomic diversity—not frustrating them.

Section II of this Comment summarizes the federal involvement in the integration movement in education and discusses the setbacks that have caused policy makers and the public to lose traction.

Section III delves into the latest research on the benefits of a racially and socioeconomically diverse education, with particular focus on increased access to human and financial networks, resources tethered to academic advancement, and civic awareness that reduces stereotypes. This Section also explores the rise of the charter school movement, focusing on the schools' defining characteristics and the federal government's involvement therein. Finally, this Section criticizes current federal education policy as a vehicle for school segregation and identifies the federal government's failure to adequately promote diversity as one source of the problem.

Section IV proposes changes at the federal level to advance the goal of the DOE's Priority 11. Competitive federal grants like RTF should incentivize diversity by making it a competitive

30. See *The Public Charter School Dashboard: Total Number of Schools*, *supra* note 12; see also Motoko Rich, *Enrollment in Charter Schools is Increasing*, N.Y. TIMES, Nov. 14, 2012, available at 2012 WLNR 24211526 (discussing the increase in the proportion of charter schools across major metropolitan cities, on some level signifying a deficiency in the public school system).

31. Three overriding assumptions guide the recommendations in this Comment: "(1) charter schools will be part of our public educational system for the foreseeable future; (2) charter schools are neither inherently good, nor inherently bad; (3) charter schools [can and] should be employed to further [the object] of equal educational opportunity for all children." Assumptions are adopted from Julie F. Mead & Preston C. Green III, *Chartering Equity: Using Charter School Legislation and Policy to Advance Equal Educational Opportunity*, NAT'L EDUC. POLICY CENTER 1 (2012), <http://nepc.colorado.edu/publication/chartering-equity>.

preference priority.³² Schools taking affirmative constitutional steps to become racially and socioeconomically integrated would be rewarded with points equal to those currently awarded to schools educating a disproportionate number of high-needs students. Accomplishing this requires adding diversity language to RTF's "Notice of Proposed Priorities, Requirements, Definitions, and Selection Criteria."

Section V concludes the Comment by reiterating the correlation between bold federal involvement in desegregation efforts and successes therein, and suggests that the federal government revive its more vigorous role in school integration and utilize charter schools in a way that promotes equal educational opportunities for all children.

II. BACKGROUND: THE EBB AND FLOW OF FEDERAL COMMITMENT TO INTEGRATED EDUCATION

The strength of the federal government's commitment to school integration has historically been a sound indicator of the movement's success.³³ As commitment levels have varied, so too has the concentration of poverty and racial isolation in our nation's public schools.³⁴ This Section provides an overview of the federal government's role in school desegregation from its beginnings to illustrate the impact of federal involvement on achieving diverse schools.

During the Civil Rights Era, *Brown v. Board of Education* effectively abolished state-sanctioned racial segregation in public schools, though not without widespread resistance.³⁵ The Supreme Court decisions immediately thereafter expanded on *Brown's* promise of equal opportunity for all students by

32. See, e.g., Applications for New Awards, 78 Fed. Reg. 35,001, 35,001-03 (June 11, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-06-11/pdf/2013-13846.pdf>. When making awards to applicants under federal grant competitions like RTF and The Charter Schools Program, the Department of Education will only consider grant applications that meet the "absolute" priorities specified in each respective program. *Id.* However, the Department of Education awards points to applications depending on how well it meets certain "competitive" priorities. *Id.*

33. Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725, 726 (2010).

34. See *id.* at 726-28.

35. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); Lia B. Epperson, *True Integration: Advancing Brown's Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 179-81 (2005).

2013] **Diversity in Federal Education Funding** 631

curtailing the powers of municipal authorities and state legislatures in charge of educational policy and increasing federal power to implement remedies.³⁶ Subsection A reviews *Brown* and the federal decisions that facilitated desegregation during the height of the Civil Rights era. Subsection B highlights the restrictive federal policies that began in the 1970s, believed by many scholars to have marked the beginning of the end for school integration. Subsection C examines more recent federal policies and Supreme Court cases that have contributed to the “resegregation” of America’s public schools.

A. *BROWN* AND THE DOWNFALL OF STATE-MANDATED SEGREGATION

In 1954, the Supreme Court in *Brown* unanimously overturned *Plessy v. Ferguson* by declaring that racially “separate educational facilities are inherently unequal” and “the doctrine of ‘separate but equal’ has no place” in public education.³⁷ The decision essentially shattered what was the prevailing standard of education for a half-century and initiated the era of rights expansion.³⁸ However, *Brown* was not received without resistance, as many schools initially refused to cooperate voluntarily.³⁹

36. Epperson, *supra* note 35, at 181-83; *see, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (granting federal courts the discretion to include busing, magnet schools, and other appropriate remedies as desegregation tools to achieve racial balance); *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 437-38 (1968) (holding that school authorities are “clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch”).

37. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

38. Black, *supra* note 10, at 580-81. The “civil rights era” consisted of a series of political movements for equality under the law that peaked in the 1960s. During this time, Congress passed The Civil Rights Act of 1964 (prohibiting discrimination on the basis of race, color, religion, sex, or national origin and provided the government with the power to enforce desegregation); The Voting Rights Act of 1965 (prohibiting states and local governments from imposing any “voting qualification or prerequisite to voting, or standard, practice, or procedure . . . , to deny or abridge the right of any citizen of the United States to vote on account of race or color”); The Civil Rights Act of 1968 (prohibiting discrimination in the sale, rental, or financing of housing); and The Equal Pay Act (making it illegal for employers to pay a woman less than what a man would receive for the same job). *See generally* Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000a-2000h-6 (1964); Voting Rights Act of 1965, 42 U.S.C.A. §§ 1971-1973bb-4 (1965); Civil Rights Act of 1968, 42 U.S.C.A. §§ 3601-3631 (1968); Equal Pay Act of 1963, 29 U.S.C.A. §§ 201-206 (1963).

39. Black, *supra* note 10, at 581.

Because the Court faced difficulties with how to enforce desegregation, it delayed ruling on that question until a year after *Brown* was initially decided.⁴⁰ When it finally did speak on the issue in 1955, *Brown v. Board of Education II* simply ordered that desegregation proceed “with all deliberate speed.”⁴¹ This ambiguous language provided little insight into what that meant for school districts; thus for a decade, *Brown’s* impact on desegregation was miniscule.⁴² As a result, southern states easily finagled their way out of compliance through various state laws that retarded desegregation efforts.⁴³ Many laws relieved white students who were enrolled in racially mixed schools from compulsory attendance requirements.⁴⁴ Other “pupil placement” laws granted local school boards the authority to place children in certain schools.⁴⁵ Still other laws allowed districts to close public schools altogether and then use state tax credits and grants to support all-white private schools.⁴⁶ A full decade after *Brown*, almost 98% of black students in Southern states still attended segregated schools.⁴⁷

By the early 1960s, however, the federal government began to set forth clear guidelines for desegregation plans.⁴⁸ Frustrated by the severe resistance from Southern school districts, the Supreme Court in *Green v. County School Board* adopted a corrective approach, under which it invalidated discriminatory “freedom of choice” plans and placed an affirmative duty on school districts to eliminate the vestiges of segregation “root and

40. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495-96 (1954) (requesting further argument, due to the variety in local conditions and the wide applicability of its decision, from the parties on the manner in which relief was to be accorded to fully implement the Court’s finding).

41. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

42. *See Le, supra* note 33, at 731.

43. *See Brown v. Board of Education: Virginia Responds*, LIBR. OF VA., <http://www.lva.virginia.gov/exhibits/brown/resistance.htm> (last visited Sept. 27, 2013) (discussing U.S. Senator Harry F. Byrd, Sr.’s campaign of “massive resistance” in Virginia to unite white politicians around the goal of defying *Brown* by passing a series of laws that forbade integrated schools from receiving state funds and authorized tuition grants to parents who opposed integration).

44. Monique Langhorne, *The African American Community: Circumventing the Compulsory Education System*, 33 BEVERLY HILLS B. ASS’N J. 12, 18 (2000).

45. *Id.*

46. *Id.* at 19.

47. Danielle Holley-Walker, *A New Era For Desegregation*, 28 GA. ST. U. L. REV. 423, 428 (2012).

48. Langhorne, *supra* note 44, at 19.

2013] **Diversity in Federal Education Funding** 633

branch.”⁴⁹ The decision also gave federal district courts the power to evaluate whether school districts had created unitary systems under identifiable measurements.⁵⁰ The “*Green* factors” for unitary status⁵¹ included racial composition of students, faculty, and staff; facilities; transportation; and extracurricular activities.⁵²

Shortly thereafter, the Supreme Court struck down race-neutral student assignment plans that produced school segregation due to school districts based on segregated housing patterns and went on to implement busing as a remedy.⁵³ This decision gave district courts ample power to fashion remedies where necessary to achieve desegregated schooling, including mandatory busing and redrawing of attendance zone lines.⁵⁴ For remedial purposes, district courts could now judge desegregation plans by their effectiveness; use mathematical ratios as legitimate “starting points” for solutions; closely scrutinize exclusively black schools; enforce non-contiguous attendance zones; and order busing where assigning students to their neighborhood schools would thwart desegregation efforts.⁵⁵ The Court’s aggressive desegregation decisions achieved significant results, increasing the number of Southern black students

49. *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 437-38 (1968).

50. *Green*, 391 U.S. at 436, 439/

51. *Freeman v. Pitts*, 503 U.S. 467, 480-83, 486 (1992) (“The *Green* factors are a measure of the racial identifiability of schools in a system that is not in compliance with *Brown*. . .”). School districts under desegregation orders must take court-ordered steps to desegregate. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249 (1991). To obtain unitary status, a school district must establish that it has complied with its desegregation orders for a reasonable period of time and that “the vestiges of past discrimination [have] been eliminated to the extent practicable.” *See id.* at 249-50; *Tasby v. Woolery*, 869 F. Supp 454, 456 (N.D. Tex. 1994) (“A declaration of unitary status signals the beginning of the end of federal judicial supervision over [the District’s] operations.”); *Holley-Walker*, *supra* note 47, at 428 (discussing *Green* and the “clear measurements for unitary status, including racial composition of staff, school resources, and of course, the student body” which were set forth by *Green*).

52. *See Green*, 391 U.S. at 435.

53. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 29-30 (1971). In *Swann*, the Charlotte-Mecklenburg school system educated more than 84,000 students in 107 schools in the 1968-1969 school year. *Id.* at 1. Approximately 29% (24,000) of the pupils were black, nearly 14,000 of whom attended twenty-one schools that were at least 99% black. *Id.* The Court noted that the statistics resulted from a “race-neutral” desegregation plan approved by the District Court in 1965. *Id.*

54. *See Swann*, 402 U.S. at 29-30, 27-29; *see also* *Siegel-Hawley & Frankenberg*, *supra* note 11, at 329.

55. *See Swann*, 402 U.S. at 23-31.

attending majority white schools by nearly 10% between 1972 and 1988.⁵⁶

In the decade after *Brown*, the executive and legislative branches shared the Supreme Court's resolve for promoting school integration and were instrumental in furthering the cause.⁵⁷ Congress passed the Civil Rights Act in 1964,⁵⁸ followed one year later by the Elementary and Secondary Education Act (ESEA).⁵⁹ The Civil Rights Act expanded federal funding for education while at the same time refusing to allow schools that discriminated on grounds of race, color, or national origin to benefit from such funds, creating a powerful incentive for schools to take heed.⁶⁰ The ESEA meanwhile allocated over \$1 billion to meet the needs of educationally deprived children, making it "the most expansive federal education bill ever passed."⁶¹ The Act effectively pushed school districts to comply with desegregation orders by refusing funding to those who resisted.⁶² Together, these benchmark laws were crucial in expanding the notion of equality beyond race to other disadvantaged groups.⁶³ Scholars identify the two decades after *Brown* as the pinnacle of American corrective justice because the federal government in unison so actively exercised its authority to craft remedies to achieve integration.⁶⁴ The result was the transformation of a public school system that once had the freedom to exclude certain students without cause to a system both constitutionally and

56. Holley-Walker, *supra* note 47, at 429 (discussing that by 1972, 36.4% of southern black students attended majority white schools, and by 1988, this number reached 43.5%).

57. Siegel-Hawley & Frankenberg, *supra* note 11, at 329 (discussing the role of the political branches in promoting desegregation in the decade after *Brown*).

58. Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000a-2000h-6 (1964).

59. Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 (1965).

60. Black, *supra* note 10, at 581-82.

61. *Elementary and Secondary Education Act of 1965*, SOC. WELFARE HIST. PROJECT, <http://www.socialwelfarehistory.com/events/elementary-and-secondary-education-act-of-1965/> (last visited Sept. 27, 2013).

62. See Siegel-Hawley & Frankenberg, *supra* note 11, at 329 (discussing that the ESEA withheld federal funding opportunities from districts failing to comply with desegregation orders).

63. Black, *supra* note 10, at 582-83 (stating that Congress passed additional legislation to improve educational opportunities for "women in 1972, language minorities in 1974, students with disabilities in 1975, and homeless students in 1987").

64. Epperson, *supra* note 35, at 182-83; Siegel-Hawley & Frankenberg, *supra* note 11, at 329.

2013] **Diversity in Federal Education Funding** 635

statutorily mandated to increase educational opportunity for all students, without regard to race, ethnicity, sex, language ability, or disability.⁶⁵

B. SETBACKS CAUSING THE FEDERAL GOVERNMENT TO LOSE TRACTION

Just as enforcement mechanisms started to take hold in the South, the Court pulled back the reins on desegregation. Although the ESEA supported the importance of financial parity in creating equal educational opportunities through a directive to prioritize low-income children,⁶⁶ several Supreme Court decisions in the mid-1970s restricted many of the remedies available for desegregation.⁶⁷ For example, the Court established that school districts were only obligated to remedy segregation that they had intentionally perpetuated.⁶⁸ In *San Antonio Independent School District v. Rodriguez*, the Supreme Court limited relief to low-income students attending underfunded public schools in holding

65. Federal Anti-Discrimination Laws, EDUC. NORTHWEST, <http://educationnorthwest.org/equity-program/federal-law> (last visited Sept. 27, 2013) (noting that Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in schools receiving federal financial assistance; Title IX of the Education Amendments of 1972 prohibits discrimination against employees and students on the basis of sex in schools receiving federal financial assistance; § 504 of the Rehabilitation Act of 1973 protects the rights of individuals with disabilities in programs and activities that receive Federal financial assistance from the U.S. Department of Education).

66. See Elementary and Secondary Education Act (ESEA), Pub. L. No. 89-10, § 201, 79 Stat. 27, 27 (1965), available at <http://uscode.house.gov/statutes/1965/1965-089-0010.pdf> (“In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute to meeting the special educational needs of educationally deprived children.”); see also Jonathan C. Augustine & Craig M. Freeman, *Grading the Graders and Reforming the Reform: An Analysis of the State of Public Education Ten Years After No Child Left Behind*, 57 LOY. L. REV. 237, 247 (2011) (“The Elementary and Secondary Education Act (ESEA) of 1965 was part of President Lyndon B. Johnson’s ‘Great Society’ known as the ‘War on Poverty.’”).

67. Holley-Walker, *supra* note 47, at 429.

68. See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 200, 203, 212-14 (1973) (reiterating that only a showing of intentional segregation (*i.e.*, *de jure* segregation) places an “affirmative duty [on schools] ‘to effectuate a transition to a racially nondiscriminatory school system’”) (quoting *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955)).

that there is no fundamental right to education under the United States Constitution and that socioeconomic status is not a protected class.⁶⁹ Thus, the Constitution does not require that schools located in poorer areas and wealthier areas receive equal funding.⁷⁰

Additionally, in *Milliken v. Bradley*, the Supreme Court effectively eliminated inter-district remedies such as busing between cities and surrounding suburbs to integrate city schools absent intentional segregation—that is, where state officials had contributed to racial separation by drawing or redrawing school district lines or by abusing state housing or zoning laws to perpetuate racial segregation.⁷¹ In other words, remedies for *de jure*⁷² segregation were limited to the particular school district that caused the segregation.⁷³ No matter how great the *de facto* segregation, courts were barred from meddling with the racial composition of schools on that basis alone.⁷⁴ In effect, *Rodriguez* and *Milliken* prevented many urban schools from integrating across districts while offering them no guarantee of funding comparable to what would be available under the ESEA.⁷⁵

69. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

70. *Id.* at 33-40. In *Rodriguez*, school children challenged on equal protection grounds the constitutionality of reliance by Texas school-financing system on local property taxation. *Id.* at 4-6. The Court upheld the Texas plan, stating that “at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.” *Id.* at 24. Thus, in “absence of any evidence that the financing system discriminates against any definable category of ‘poor’ people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms.” *Id.* at 25.

71. *See Milliken v. Bradley*, 418 U.S. 717, 755-56 (1974).

72. *De jure* segregation refers to intentional actions by the state to enforce racial segregation. Michelle L. Wells, *Race-Conscious Student Assignment Plans After Parents Involved: Bringing State Action Principles to Bear on the De Jure/De Facto Distinction*, 112 PENN. ST. L. REV. 1023, 1029 (2008). Jim Crow Laws of the southern states, which endured until the 1960s, are examples of *de jure* segregation. *Id.* at 1038. By contrast, *de facto* racial segregation refers to segregation attributable to causes other than intentional government activity. *Id.* at 1025.

73. *Milliken*, 418 U.S. at 744-45 (“[I]t must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district . . . [W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.”).

74. *See id.*

75. *See Milliken*, 418 U.S. at 752 (1974) (holding that school systems are not responsible for desegregating across district lines absent a showing that they deliberately engaged in segregating policies); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54-55 (1973) (holding that the state system of financing schools based on property taxes did not violate the constitution and states are not

2013] **Diversity in Federal Education Funding** 637

The decisions encouraged “white flight” to the suburbs, creating racial concentrations that would produce, in part, the current demographics of public schools in cities across the United States.⁷⁶ Blacks who lived in areas where population movements resulted in high racial isolation were left without a remedy.⁷⁷ Not surprisingly, “[t]his approach offered most districts a basis for terminating their desegregation efforts and the rest an excuse for failing to desegregate in the first instance.”⁷⁸ As a result, courts rescinded their desegregation orders and retreated from school supervision.⁷⁹ Nonetheless, “school integration reach[ed] its all-time high” in 1988, with almost 45% of black students in the United States attending majority-white schools.⁸⁰

C. SCHOOLS RESEGREGATE AS THE SUPREME COURT RELENTS

For many education scholars, a series of Supreme Court decisions in the early 1990s announced the end of the federal government’s penchant for integration.⁸¹ The Court, led by conservative Chief Justice Rehnquist, handed down multiple opinions in which it essentially abandoned its constitutional duty, recognized in *Brown*, to enforce racial desegregation by reducing “the circumstances, means, and duration of desegregation remedies.”⁸²

1. DILUTION OF JUDICIAL REMEDIES

In *Board of Education of Oklahoma City v. Dowell*, the Court made it easier for school systems to comply with their desegregation obligations by emphasizing that court orders are not intended “to operate in perpetuity.”⁸³ The Court ruled that

required to subsidize poorer school districts).

76. Epperson, *supra* note 35, at 183-84 (discussing how *Milliken* and *Rodriguez* signaled the gradual return to local control and affected metropolitan demographics).

77. See Langhorne, *supra* note 44, at 19.

78. Black, *supra* note 10, at 584.

79. Langhorne, *supra* note 44, at 19.

80. *Brown v. Board: Timeline of School Integration in the U.S.*, TEACHING TOLERANCE, Spring 2004, available at <http://www.tolerance.org/magazine/number-25-spring-2004/feature/brown-v-board-timeline-school-integration-us>.

81. See Holley-Walker, *supra* note 47, at 430 (pinpointing the Court’s use of “unitary status” as an indicator of its shifting opinion regarding the cause of racial inequity in school districts).

82. Epperson, *supra* note 35, at 184-85. See generally *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991).

83. *Dowell*, 498 U.S. at 248.

desegregation orders should end once a school achieves “unitary status,”⁸⁴ which freed school systems from any continuing obligations to end segregation. The Court also held that school districts meeting the “*Green* factors” for unitary status are only required to comply with desegregation decrees “in good faith” such that “the vestiges of past discrimination had been eliminated to the extent practicable.”⁸⁵

Shortly thereafter, the Court held in *Freeman v. Pitts* that the “*Green* factors” did not have to be met simultaneously for a school to be declared unitary.⁸⁶ Rather, courts could order incremental or partial withdrawal of judicial supervision and control as to the areas of compliance and retain supervision over areas not yet achieved.⁸⁷ Consequently, desegregation decrees became fragmented to the point of dissolution.⁸⁸

In 1995, *Missouri v. Jenkins* presaged the Court’s intent to bring the era of court-enforced school desegregation to a close.⁸⁹ The Supreme Court relieved states and local school districts from paying for remedial programs by overturning a district court ruling requiring the State of Missouri to fund salary increases and other remedial measures.⁹⁰ More notably, the Court began to require lower courts to trace specific educational shortcomings to

84. Bd. of Educ. v. Dowell, 498 U.S. 237, 248-250 (1991).

85. *Id.* at 249-50.

86. *Freeman v. Pitts*, 503 U.S. 467, 490-92, 496-97 (1992).

87. *Id.* at 490-91.

88. Epperson, *supra* note 35, at 185-86 (“[T]he Court reiterated in *Pitts* that ‘[r]eturning schools to [local control] at the earliest practicable date is essential to restore their true accountability in our governmental system.’ To that end, the Court held that once a district complied with a portion of a desegregation order, a federal court should cease to monitor that portion and remain involved only as to those aspects of the plan that have yet to be achieved. This allowed for the piecemeal dismantling of desegregation orders across the South. The Court had failed to view the ramifications of segregated schools holistically. The Court thus reinterpreted the six factors that it had devised in *Green v. County School Board* to show school districts the areas in which they should focus desegregative efforts; instead, these factors became the markers by which a district could make a piecemeal argument as to the ‘unitariness’ of one particular area.”).

89. *Missouri v. Jenkins*, 515 U.S. 70 (1995).

90. *Id.* at 100. The Supreme Court held that salary increases for teachers ordered as part of a desegregation remedy exceeded the authority of the Court. *Id.* The Court reasoned that the initiative sought to increase the “desegregation attractiveness” of the school district to attract non-minority students to the district. *Id.* at 92. However, because the lower courts ruled that the only violation was *within* the district and that there was no interdistrict violation, the remedy exceeded the scope of the violation, rendering it impermissible. *Id.* at 92, 100.

2013] **Diversity in Federal Education Funding** 639

de jure segregation, without which, they could return school districts to local control and thus perpetuate the cycle of discrimination.⁹¹

The *Dowell*, *Freeman*, and *Jenkins* decisions contributed to the steady resegregation of school districts across the country and the unraveling of integrative successes brought in the wake of *Brown*.⁹² America's public schools are more segregated today than they were prior to *Brown*.⁹³ Surprisingly, white students are the most segregated group of all, generally attending schools where roughly 80% of the student body is white.⁹⁴ While the nation's largest urban public school systems are overwhelmingly nonwhite, they educate one-sixth of its African-American students and one-quarter of its Latino students, making them more integrated than white schools.⁹⁵ The South remains the most racially integrated region of the country for both blacks and whites⁹⁶; however, poverty runs deep in Southern public schools regardless of race.⁹⁷ Because Latinos tend to be segregated by

91. Epperson, *supra* note 35, at 186-87 ("This very form of local control allowed segregation to flourish in the era before *Brown*, and has done so again in the decade since these decisions.").

92. *Dowell*, *Freeman*, and *Jenkins* reflected the Rehnquist Court's desire to stymie desegregation efforts, which it accomplished via "unitary status," the tool that would allow school districts to jettison federal oversight. See Le, *supra* note 33, at 732. Following these cases, more and more schools have been able to achieve unitary status. See Holley-Walker, *supra* note 47, at 430. These cases also foreshadowed the Court's growing distaste for even voluntary desegregation plans. See Epperson, *supra* note 35, at 187.

93. Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1184-85 (2000) (noting that the percentage of African-American students in majority white schools peaked in the early 1980s, but by 1997, the levels had dropped to the levels of the 1960s); see also Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, CIV. RTS. PROJECT 4 (2003) [hereinafter Frankenberg et al., *A Multiracial Society*], <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/a-multiracial-society-with-segregated-schools-are-we-losing-the-dream/frankenbergmultiracial-society-losing-the-dream.pdf> ("At the beginning of the twenty-first century, American public schools are now twelve years into the process of continuous resegregation. The desegregation of black students, which increased continuously from the 1950s to the late 1980s, has now receded to levels not seen in three decades.").

94. Holley-Walker, *supra* note 47, at 431.

95. Frankenberg et al., *A Multiracial Society*, *supra* note 93, at 5.

96. *Id.* at 5-6.

97. The Anniston Star Editorial Board, *Editorial: Divided by class, not race—The resegregation of Southern public schools*, ANNISTON STAR (Oct. 21, 2013), available at http://annistonstar.com/view/full_story/23894345/article-Editorial—Divided-by-

multiple categories, including race, poverty, and linguistics, they are considered the most segregated minority group.⁹⁸

After *Jenkins*, more than ten years passed before the Court decided another K–12 desegregation case.⁹⁹ During this time though, numerous circuit court opinions began to reveal pervasive judicial skepticism surrounding the use of race as a factor in governmental decision-making.¹⁰⁰

2. INTRODUCTION OF VOLUNTARY MEASURES

Disillusioned by the one-dimensional remedy advanced after *Brown* and the subsequent lack of progress, some school districts took matters into their own hands by adopting voluntary desegregation plans.¹⁰¹ School districts operating under voluntary measures work to further diversity not out of legal obligation, but of their own accord, as a core part of their educational mission. Voluntary desegregation plans are generated by local legislative action and usually involve some level of school choice.¹⁰² Students may choose among schools, but the ideal of increasing integration within certain schools, districts, or metropolitan regions guides their choices.¹⁰³ For example, some districts enact student transfer provisions whereby students are allowed to transfer from their neighborhood

class—not-race—The-re-segregation-of-Southern-public-schools?instance=home_ opinion (discussing the interplay between race, poverty, and public education in the South, and Alabama’s proposed Alabama Accountability Act, which has the potential to remove more middle-class students from public schools, thereby compounding the already high poverty levels in the region).

98. The Anniston Star Editorial Board, *supra* note 97, at 4.

99. Siegel-Hawley & Frankenberg, *supra* note 11, at 331.

100. *Id.* For cases illustrating courts’ refusal to allow schools to use race-conscious methods for student body selection, see generally *Wessman v. Gittens*, 160 F.3d 790, 808-09 (1st Cir. 1998); *Tuttle v. Arlington Cnty. Sch. Bd.*, 195 F.3d 698, 707-08 (4th Cir. 1999); *Montgomery Cnty. Pub. Sch. v. Eisenberg*, 197 F.3d 123, 134 (4th Cir. 1999).

101. Epperson, *supra* note 35, at 193 (“In Massachusetts, South Carolina, Kentucky, and California, advocates have successfully defended policies in which school districts have voluntarily considered the racial diversity of student bodies in determining where to build new schools, how to draw attendance zone lines, and how to fashion student transfer policies.”); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (involving the extent to which a school district not under a court order to remedy past discrimination can voluntarily use racial classifications to attempt to achieve diversity).

102. James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 OHIO ST. L.J. 327, 327 (2006).

103. *Id.*

2013] **Diversity in Federal Education Funding** 641

school to another if doing so would further integration.¹⁰⁴ Other districts consider race when admitting students to magnet or specialized schools.¹⁰⁵ Still others authorize monitoring of district facilities and resources to ensure equitable distribution of resources.¹⁰⁶ The method has allowed for circumvention of some, but not all, of the Supreme Court's limitations on court-ordered plans.¹⁰⁷

At the beginning of the twenty-first century, lower courts upheld school districts' voluntary integration programs and found compelling interests therein.¹⁰⁸ However, with the retirement of Justice O'Connor and the appointment of Justice Alito, the fate of voluntary integration plans became unclear.¹⁰⁹ In 2006, the Court held that absent a court order, race-conscious student assignment plans aimed at increasing integration or reducing racial isolation voluntarily adopted by districts are subject to strict scrutiny.¹¹⁰ This, in effect, made it difficult for any voluntary plan to survive.¹¹¹ In that opinion, the plurality found

104. Ryan, *supra* note 102, at 327-28.

105. *Id.* at 328.

106. *See, e.g., Voluntary Integration Plan: 2010*, SAN JOSE UNIFIED SCH. DIST. 1, 5-6 (2010), http://www.sjUSD.org/pdf/districtinformation/Voluntary_Integration_Plan.pdf.

107. Epperson, *supra* note 35, at 193.

108. *See, e.g., McFarland v. Jefferson Cnty. Pub. Sch.*, 330 F. Supp. 2d 834, 858 (W.D. Ky. 2004); *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 400 (D. Mass. 2003); *see also Siegel-Hawley & Frankenberg, supra* note 11, at 331.

109. *See* David Stout, *Alito Is Sworn In as Justice After 58-42 Vote to Confirm Him*, N.Y. TIMES (Jan. 31, 2006), http://www.nytimes.com/2006/01/31/politics/politicsspecial1/31end-alito.html?_r=0 ("Legal scholars have described his jurisprudence as cautious, respectful of precedent—and solidly conservative. In contrast, the justice he will succeed, Sandra Day O'Connor, who is retiring, came to be widely regarded as a swing justice between the tribunal's liberal and conservative wings.").

110. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788-90 (2007) (Kennedy, J., concurring). Justice Kennedy gave the fifth vote, thus controlling the scope of the Court's holding. To survive the strict scrutiny analysis, the school must have a "compelling interest" for using race-conscious methods, i.e., eliminating the negative effects of racial isolation or achieving the educational benefits of diversity, and must "narrowly-tailor" its plan to achieve those ends. *See id.* at 720-21.

111. Derek W. Black, *Voluntary Desegregation, Resegregation, and the Hope for Equal Educational Opportunity*, 38 A. B. A.: HUM. RTS., Fall 2011, available at http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol38_2011/fall2011/voluntary_desegregation_resegregation_and_the_hope_for_equal_educational_opportunity.html ("The Court, however, applied a stringent narrow tailoring analysis, which left many to wonder whether any voluntary desegregation

that voluntary school integration strategies did not serve any compelling government interests.¹¹² However, Justice Kennedy, as the deciding vote, asserted in his concurring opinion that such voluntary policies serve two compelling interests: avoiding racial isolation and pursuing integrated schooling.¹¹³ In the space of fifty years, the Court had shifted from mandating school districts to employ comprehensive desegregation remedies to opposing even voluntarily adopted, small-scale measures to achieve integration.¹¹⁴

III. A CRITICAL LOOK AT INTEGRATED EDUCATION, CHARTER SCHOOLS, AND CURRENT FEDERAL EDUCATION POLICY

This Section explores current education policy involving integration through the lens of the charter school movement. Subsection A discusses the documented benefits of integrated education and the hardships faced by students who remain in high-poverty, racially-isolated schools. Subsection B provides a basic history of the charter school movement, focusing on defining characteristics of the schools and their treatment thus far by the federal government. Subsection C recognizes that charter schools, as they currently exist, are not the panacea for racial inequality that many had anticipated, as several recent studies have documented higher levels of racial and socioeconomic isolation in charters than in other public schools. This Section also contends that current federal education programs, while well-intentioned, have not done enough to incentivize charter schools to integrate.

plan might realistically meet the standard.”).

112. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730-32 (2007).

113. *Id.* at 797-98. The government is not permitted to classify every student on the basis of race and then assign them to particular schools based on that classification. *Id.* at 788-89. According to Justice Kennedy, “[c]rude measures of this sort threaten to reduce children to racial chits valued and traded according to one school’s supply and another’s demand.” *Id.* at 798. However, the majority and Justice Kennedy seem to agree that “it is permissible to consider the racial makeup of schools and to adopt general policies to encourage diversity . . . one aspect of which is its racial composition” in higher education. *Id.* at 788, 722. Kennedy lists means that are race conscious but do not lead to differential treatment based solely on that classification: strategic site selection of new schools; drawing attendance zones keeping in mind neighborhood demographics; recruiting students and faculty by targeting diverse qualities; and allocating resources for special programs. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007).

114. Siegel-Hawley & Frankenberg, *supra* note 11, at 332.

A. THE BENEFITS OF RACIALLY AND SOCIOECONOMICALLY INTEGRATED SCHOOLING

A substantial body of social science research reveals the educational benefits of racial and socioeconomic diversity in K–12 schools and has generally been accepted as valid by the courts.¹¹⁵ Numerous studies have shown that all students, not merely at-risk¹¹⁶ students, benefit from school integration academically, socially, and civically.¹¹⁷ In the *Parents Involved* case alone, hundreds of scholars spanning across several disciplines submitted amicus briefs maintaining that allowing students to regularly interact with students from various racial and socioeconomic backgrounds promotes “improved cross-racial understanding and the reduction of racial prejudice; positive effects on student achievement; a stronger sense of civic engagement and willingness to live and work in diverse settings; and better preparation for higher education and employment.”¹¹⁸

115. See Epperson, *supra* note 35, at 197. The Supreme Court has recognized that K-12 schools are “pivotal to ‘sustaining our political and cultural heritage.’” *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (quoting *Plyer v. Doe*, 457 U.S. 202, 221 (1982)); see *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007) (“[O]ur strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all.”). Currently, five Supreme Court Justices recognize that school districts have compelling interests in achieving diversity and avoiding racial isolation and support the adoption of “general policies to encourage a diverse student body.” *Parents Involved*, 551 U.S. at 788.

116. “At-risk” students are those students who have been labeled as being statistically more likely to fail academically than other students. See generally Catherine Lynn Worley, *At-Risk Students and Academic Achievement: The Relationship Between Certain Selected Factors and Academic Success* (May 31, 2007) (unpublished Ph. D. dissertation, Virginia Polytechnic and State University), available at <http://scholar.lib.vt.edu/theses/available/etd-06132007-132141/unrestricted/DissPDFone.pdf> (examining the relationship between at-risk students and academic achievement). States differ in defining “at-risk;” however, the U.S. Bureau of the Census lists the following criteria for labeling “at-risk” students: low socioeconomic status; low English language ability; living in a single-parent home; changing schools at non-traditional times; below-average grades in middle school; being held back in school through grade retention; having older siblings who left high school before completion; negative peer pressure. Robert Kominski et al., *At-Risk Conditions of U.S. School-Age Children*, (U.S. Census Bureau, Working Paper Series No. 52, 2001), available at <http://www.census.gov/population/www/documentation/twps0052/twps0052.html>.

117. Epperson, *supra* note 35, at 199; see, e.g., Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531 (1994) (evaluating twenty-one studies and concluding that African-American students can obtain long term benefits as a result of desegregation policies).

118. Brief of the American Educational Research Association as Amicus Curiae in

Thus far, no study has put forth any evidence suggesting that integrated schooling poses harm to any group.¹¹⁹ While teachers, curricula, and pedagogy are clearly indispensable elements of the equal educational opportunity equation, the social organization of schools and classrooms “makes a critical difference for K–12 achievement across the curriculum.”¹²⁰

Regularly interacting with students from different backgrounds fosters tolerance and prepares children to function effectively in our increasingly global society.¹²¹ Sociologists Amy Stuart Wells and Robert Crain have found that children who attend racially isolated schools and live in similar environments are at risk of developing stereotypes about other races.¹²² The Civil Rights Project has discovered through its own studies that racially integrated schools encourage “cross-racial understanding in ways that are not possible in segregated school environments.”¹²³ For example, students in integrated schools are more likely to create friendships with individuals from other races and are more willing to live and work in integrated settings

Support of Respondents at 5-6, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2925967, at *5-6; *see also* Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 8-11, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2927079, at *8-11 (discussing that racially integrated schools improve “life opportunities” particularly for nonwhite students due to higher graduation rates networking opportunities, whereas schools with higher percentages of minorities “have fewer educational resources, such as larger class sizes, inadequate facilities, and lower per-pupil spending”).

119. Robert A. Garda, Jr., *The White Interest in School Integration*, 63 FLA. L. REV. 599, 621-22 (2011) (“The only consensus seems to be that white students’ academic achievement and test scores are certainly not harmed by racial integration.”); *see* Derek W. Black, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 943-47 (2002) (discussing research finding that racial diversity has “several benefits” for “[b]oth minority and non-minority students”).

120. Roslyn Arlin Mickelson, *Research Brief No. 5: School Integration and K-12 Educational Outcomes: A Synthesis of Social Science Evidence*, NAT’L COALITION ON SCH. DIVERSITY (2010), <http://www.school-diversity.org/pdf/DiversityResearchBriefNo5.pdf>.

121. Epperson, *supra* note 35, at 199.

122. Wells & Crain, *supra* note 117, at 534.

123. Adai Tefera et al., *Integrating Suburban Schools: How to Benefit from Growing Diversity and Avoid Segregation*, CIV. RTS. PROJECT 63 (2011), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/integrating-suburban-schools-how-to-benefit-from-growing-diversity-and-avoid-segregation/tefera-suburban-manual-2011.pdf>.

2013] **Diversity in Federal Education Funding** 645

than those in segregated schools.¹²⁴ Additionally, metropolitan areas with fully integrated schools have experienced a decline in residential segregation.¹²⁵

Further, racial and economic integration at the K–12 level has been linked to considerable academic improvements, particularly for minority students.¹²⁶ Many “studies over the past twenty years have demonstrated that integrated education leads . . . to [academic] achievement gains in math and reading for African American and Latino children” and increases the likelihood that underrepresented minority youth will attend college.¹²⁷ According to The National Coalition on School Diversity, integration increases the prospect of college attendance in valuable ways:

The educational expectations and performance of students who attend integrated schools surpasses those of students from segregated settings. Students who attend integrated schools perform better on tests in math, science, language, social studies; they take higher-level math and science courses, and they hold higher educational aspirations than their otherwise comparable peers who attend racially isolated minority schools. Racially integrated schools have lower levels of violence and social disorder than segregated settings. They are more likely to have stable staffs composed of highly qualified teachers—the single most important resource for academic achievement, and to have better school climates (academically oriented peers, lower drop out rates, more parents with higher expectations) than racially isolated

124. Tefera et al., *supra* note 123, at 36.

125. *Id.* at 63.

126. See Susan Eaton, *Research Brief No. 1: School Racial and Economic Composition & Math and Science Achievement*, NAT'L COALITION ON SCH. DIVERSITY (2010), <http://www.school-diversity.org/pdf/DiversityResearchBriefNo1.pdf> (“A study of math test scores over more than 30 years found that ‘increases in school segregation correspond to significant increases in the black-white and Latino-white test score gaps.’”); see also *National Coalition on School Diversity: Reaffirming the Role of School Integration in K-12 Education Policy*, NAT'L COALITION ON SCH. DIVERSITY, www.school-diversity.org (last visited Sept. 28, 2013) (providing the remaining “Research Briefs”).

127. See Philip Tegeler, Roslyn Arlin Mickelson, & Martha Bottia, *Research Brief No. 4: What we know about school integration, college attendance, and the reduction of poverty*, NAT'L COALITION ON SCH. DIVERSITY (2010), <http://www.school-diversity.org/pdf/DiversityResearchBriefNo4.pdf>.

schools.¹²⁸

Because students are heavily influenced by their peers, it behooves students to have classmates who are academically engaged and college driven.¹²⁹ “Peers in middle-income schools are more likely to do homework, attend class regularly, and graduate”—all of which positively influence classmate behavior, decrease behavior disorders, and promote learning.¹³⁰ “In addition, when low-income students graduate and search for jobs, those in economically mixed schools have access to valuable networks that facilitate employment.”¹³¹

Although the bulk of research has focused less directly on ways in which non-minority (i.e. “white”) students benefit from diverse school settings, findings indicate that white students benefit too, obtaining “far better learning outcomes” along with “social and psychological advantages.”¹³² In general, exposure to diverse perspectives enhances critical thinking and problem-solving skills by demanding that students be flexible in the way they navigate problems.¹³³ Through cooperation and robust discussion, students are able to generate high-quality solutions to impending problems.¹³⁴ In math and science, diverse schools are

128. Tegeler, Mickelson, & Bottia, *supra* note 127.

129. See KAHLBERG & POTTER, *supra* note 25, at 9.

130. *Id.* at 9-10.

131. *Id.* at 9. One study from Princeton University found that, “even after controlling for individual ability and family home environment, attending a middle-class school reduced the chances of adult poverty by more than two-thirds (4 percent versus 14 percent).” Richard D. Kahlenberg, *Turnaround Schools That Work: Moving Beyond Separate but Equal*, THE CENTURY FOUND. 16-17, available at <http://tcf.org/assets/downloads/tcf-turnaround.pdf> (last visited Sept. 28, 2013) (referring to the findings found in CLAUDE S. FISHER ET AL., *INEQUALITY BY DESIGN: CRACKING THE BELL CURVE MYTH* 84 (1996)).

132. See Genevieve Siegel-Hawley, *Research Brief No. 8: How Non-Minority Students Also Benefit from Racially Diverse Schools*, NAT’L COALITION ON SCH. DIVERSITY 1-2 (2012), <http://www.school-diversity.org/pdf/DiversityResearchBriefNo8.pdf> (providing that benefits to white students include the following: more robust classroom discussion; heightened critical thinking skills; variety of perspectives leading to higher-quality solutions; increased preparation for global workplace; and reduced prejudice); see also Garda, Jr., *supra* note 119, at 622-23 (positing that multiracial schools can “help[] children develop cross-cultural competence” needed to overcome peoples’ unconscious biases, which is potentially more valuable to whites than any academic benefits).

133. Siegel-Hawley, *supra* note 132, at 1-2.

134. *Id.* at 2 (discussing that surveys of white high school students in racially diverse schools reported that classroom discussions impacted their understanding of varying points of view and helped prepare them for work in diverse environments).

2013] **Diversity in Federal Education Funding** 647

“linked to higher test scores for white students.”¹³⁵ In fact, one study documented that math outcomes were higher at every grade level for all students who attended racially and economically diverse schools.¹³⁶ Finally, white students in diverse high schools are more likely to engage in civic and political involvement as well as gain a concrete understanding of complex social injustices.¹³⁷ Thus, the preponderance of research confirms that school diversity carries long-term social, academic, and civic benefits for all children that can span generations.

B. AN OVERVIEW OF THE CHARTER SCHOOL MOVEMENT

This Section briefly explains the charter school model, focusing on some of its defining characteristics. Additionally, this Section examines federal involvement in charter schools thus far.

Historically, students attending public schools were required to attend the school within their neighborhood or district, “regardless of the school’s quality” or ability to account for a particular student’s needs.¹³⁸ “Until recently, only parents with sufficient financial means had [a] choice because they could afford to move” into areas of high-performing public schools or elect to send their children to private schools.¹³⁹ “School choice” encompasses a variety of different policy concepts, including the creation of magnet schools,¹⁴⁰ charter schools, and the issuance of

135. Siegel-Hawley, *supra* note 132, at 2.

136. *Id.*

137. *Id.* at 4.

138. Langhorne, *supra* note 44, at 21.

139. *Id.*

140. Magnet schools are tuition-free public schools of choice operated by school districts that are generally designed around a theme, such as Science, Technology, and Engineering, Fine Arts and Humanities, or Foreign Language Immersion. *What are Magnet Schools?*, MAGNET SCH. OF AM., <http://www.magnet.edu/about/what-are-magnet-schools> (last visited Sept. 29, 2013). “Most magnet schools do not have entrance criteria” or the neighborhood admission requirements of traditional public schools. *Id.* Most magnet schools enroll using a computer-based blind lottery system. *Id.* However, “gifted and talented” “magnet schools may utilize student assessment data and teacher or parent recommendations for admission.” *Id.* Like traditional public schools, magnet schools serve English learners and special education students. *Id.* Because magnet schools’ only eligibility requirement is interest in the school theme, magnet schools attract a wide array of students. *What are Magnet Schools?*, MAGNET SCH. OF AM., <http://www.magnet.edu/about/what-are-magnet-schools> (last visited Sept. 29, 2013). “As a result, magnet schools are typically diverse with students from various socioeconomic and cultural backgrounds.” *Id.*; See *Find Schools & After-Care: School Choices for Parents*, U.S. DEPT OF EDUC., <http://www2.ed.gov/parents/schools/choice/definitions.html> (last

school vouchers, all of which allow children to attend schools other than those in their particular neighborhoods.¹⁴¹ Charter schools are unique in that they are “designed to increase public confidence in public schools and, thereby, to combat the presumption that a good education can only be attained in private or parochial schools, or in a select few suburban schools in the nation’s wealthiest districts.”¹⁴²

First proposed by Professor Ray Budde,¹⁴³ charter schools have exploded with popularity as new alternatives to the traditional public school system.¹⁴⁴ Minnesota passed the first charter legislation in 1991, with California following closely behind.¹⁴⁵ “Since the first charter school was established in 1992, the charter movement has grown to include over 4,900 charter schools . . . educating 1.6 million children,”¹⁴⁶ and charter school numbers are rapidly increasing across several U.S. cities.¹⁴⁷ For example, charter schools now educate over a third of public school students in the District of Columbia.¹⁴⁸ New Orleans currently leads the nation with more than 70% of its public school students attending charter schools.¹⁴⁹ According to the National Alliance for Public Charter Schools, charter schools are “raising the bar of

modified Jan. 14, 2009).

141. Holley-Walker, *supra* note 47, at 446.

142. Brown-Nagin, *supra* note 9, at 764.

143. See Ted Kolderie, Ray Budde and the origins of the ‘Charter Concept,’ EDUC. EVOLVING 1 (June 2005), <http://www.educationevolving.org/pdf/Ray-Budde-Origins-Of-Chartering.pdf> (explaining that Budde’s proposal was actually for a restructuring of school districts, where “teachers would receive educational charters directly from the school board” and would be held responsible for instruction and school management); Paul E. Peterson, *No, Al Shanker Did Not Invent the Charter School*, EDUC. NEXT (July 21, 2010), <http://educationnext.org/no-al-shanker-did-not-invent-the-charter-school/> (noting that while Al Shanker, a labor union organizer and proponent of education reform, initially endorsed Roy Budde’s charter school concept in its early stages, he now vehemently disagrees with their current structure partially because they are exempt from collective bargaining requirements).

144. See Kahlenberg, *Charter Schools that Work*, *supra* note 20, at 1; MICHELLE CROFT ET AL., CHARTER SCHOOLS: A REPORT ON RETHINKING THE FEDERAL ROLE IN EDUCATION, BROOKINGS INST. (2010), available at <http://www.brookings.edu/research/reports/2010/12/16-charter-schools>.

145. Siegel-Hawley & Erica Frankenberg, *supra* note 11, at 338.

146. CROFT ET AL., *supra* note 144. Despite their growing number, charter schools still only educate a little over six percent of the nation’s public school children. See *The Public Charter Schools Dashboard: Total Number of Schools*, *supra* note 12.

147. CROFT ET AL., *supra* note 144.

148. *Id.*

149. See Rich, *supra* note 30.

2013] **Diversity in Federal Education Funding** 649

what's possible – and what should be expected – in public education.”¹⁵⁰ Part of the impetus for the charter school movement has been the perceived need for greater diversity, innovation, and responsiveness in the public school curriculum, qualities purportedly lacking in conventional public schools.¹⁵¹ But what, exactly, makes a school a “charter” school?

1. DEFINING CHARACTERISTICS

Charter schools are publicly funded elementary or secondary schools that have been freed from some of the rules, regulations, and statutes that apply to other public schools, in exchange for some type of accountability for producing certain results set forth in each school's charter.¹⁵² Like public schools, charter schools are generally non-sectarian, non-religious schools, but they differ in that they operate as one-school public school districts (i.e. they are self-governing).¹⁵³ Also like public schools, charter schools are not allowed to charge tuition.¹⁵⁴

States permit charter schools to exist by passing charter-enabling legislation and, in this legislation, they designate who can serve as charter authorizers.¹⁵⁵ “Depending on the state charter school law, authorizers can be local school boards, state boards of education, state universities, state departments of education, or separate independent entities created by law that have as their sole duty sponsoring and overseeing charter schools in the state.”¹⁵⁶ Once a state passes charter-enabling legislation,

150. *Why Charter Schools?*, NAT'L ALLIANCE FOR PUB. CHARTER SCH., <http://www.publiccharters.org/About-Charter-Schools/Why-Charter-Schools003F.aspx> (last visited Sept. 29, 2013).

151. See Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 156 (1995) (“Almost everyone agrees that our schools are failing.”).

152. *Understanding Charter Schools*, NAT'L CHARTER SCH. RES. CENTER, <http://www.charterschoolcenter.org/priority-area/understanding-charter-schools> (last visited Sept. 29, 2013).

153. *Id.*

154. See *What's a Charter School?*, PENN. COALITION OF PUB. CHARTER SCH., <http://pacharters.org/home/why-charters/> (last visited Sept. 29, 2013); *Why Charter Schools?*, *supra* note 150.

155. See *Just the FAQs—Charter Schools*, CENTER FOR EDUC. REFORM, <http://www.edreform.com/2012/03/just-the-faqs-charter-schools/> (last visited Sept. 29, 2013) (providing that forty-two states have charter laws and Alabama, Kentucky, Montana, Nebraska, North Dakota, South Dakota, Vermont, and West Virginia do not).

156. *Id.*

virtually anyone can submit an application to charter authorizers to operate a school.¹⁵⁷ Every charter school is required by law to have an autonomous board of directors that is ultimately responsible for governance, fiscal oversight, strategic planning, and compliance with federal and state law.¹⁵⁸

Charter schools are different from traditional public schools in several ways, namely, with respect to deregulation, accountability, and admission policies. Unlike conventional public schools, charter schools are “deregulated,” meaning that they are granted freedom in how they choose to innovate, experiment, manage operations, “respond . . . to their customers,” govern themselves, enroll, and educate their students.¹⁵⁹ Charter-enabling legislation exempts charter schools from some—but not all—of the regulations and restrictions usually imposed upon public schools under state law.¹⁶⁰ For example, they may be freed from routine statutes regulating budgets, scheduling, teacher-student ratios, curriculum, collective bargaining agreements, and teacher certification requirements.¹⁶¹

157. *Just the FAQs—Charter Schools*, *supra* note 155.

158. Governing Boards, NAT'L CHARTER SCH. RES. CENTER, <http://www.charterschoolcenter.org/priority-area/governing-boards> (last visited Oct. 1, 2013); *Creating and Sustaining High-Quality Charter School Governing Boards*, NAT'L RES. CENTER ON CHARTER SCH. FIN. & GOVERNANCE 4, 7-12 (2008), available at <http://www.usc.edu/dept/education/cegov/focus/charter-schools/publications/policy/Creating%20and%20Sustaining%20High-Quality%20Charter%20School%20Governin.pdf> (noting that states are currently using three policy options to help charter schools compose high-quality governing boards: (1) require boards to include specific types of people, including parents or teachers; (2) create pools of potential board members; and (3) have authorizers appoint or approve board members).

159. Brown-Nagin, *supra* note 9, at 764-65; Stephen D. Sugarman, *Charter School Funding Issues*, 10 EDUC. POL'Y ANALYSIS ARCHIVES 1, 10 (2002), available at <http://www.law.berkeley.edu/files/CharterSchoolFunding.pdf>. However, charter schools retain their “public” nature because they are publicly financed. Brown-Nagin, *supra* note 9, at 765.

160. Brown-Nagin, *supra* note 9, at 764-65. Note, however, that charter schools are not exempt from laws pertaining to civil rights, student health and safety, special education, and student assessment. *See, e.g.*, LA. REV. STAT. ANN. § 17:3996(C) (2012) (noting that charter schools “shall comply with state and federal laws and regulations otherwise applicable to public schools” regarding “civil rights and individuals with disabilities”); *see also* Louann A. Bierlein, *The Charter School Movement*, in *NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION* 44 (Diane Ravitch & Joseph P. Viteritti eds., 1999).

161. Brown-Nagin, *supra* note 9, at 765. *See, e.g.*, LA. REV. STAT. ANN. § 17:3996(A) (exempting charter schools from “all rules and regulations of the state board and those of any local school board that are applicable to public schools and to public school officers and employees”).

2013] **Diversity in Federal Education Funding** 651

Deregulation permits a wide variety of entities to establish charter schools, including universities, corporations, non-profit and for-profit organizations, parents, teachers, and community organizers.¹⁶² As such, many community members who would otherwise remain uninvolved in the educational process are given the opportunity to contribute to school development. Such inclusive decision-making allows charter schools to become forums for the unique needs of their communities because of their unique ability to be governed essentially by ordinary community members. Deregulation also grants autonomy so that charter schools are “free to innovate, to become laboratories for school reform.”¹⁶³ Freedom from standard bureaucratic oversight increases opportunities for teachers to teach subjects as they see fit, which often includes use of experimental pedagogy in the classroom.¹⁶⁴

In some ways, in contrast to the freedom in operation, charter schools are actually more accountable to parents and students than are conventional public schools.¹⁶⁵ Because they are governed by the parents, teachers, and administrators that make up the local school community, charters are in theory

162. Bierlein, *supra* note 160, at 40-46; *see also* To Open an NYS Charter School, CHARTER SCH. INST.: ST. U. N.Y., <http://www.newyorkcharters.org/openOverview.htm> (last visited Oct. 1, 2013) (“In New York State, teachers, parents, school administrators, and community residents . . . can submit an application to establish a charter school. These eligible applicants may file the application in conjunction with a college, university, museum, educational institution, or . . . not-for-profit corporation.”); *Charter Starter Program*, ILL. NETWORK CHARTER SCH., http://incschools.org/start_a_charter/charter_starter_program (last visited Oct. 1, 2013) (noting that educators, community leaders, and individuals with “a vision for improving public education” have succeeded in opening charter schools in Illinois).

163. BRYAN C. HASSEL, *THE CHARTER SCHOOL CHALLENGE: AVOIDING THE PITFALLS, FULFILLING THE PROMISE* 128 (1999) (discussing the potential of charters as engines of system wide reform); Molly O’Brien, *Free at Last? Charter Schools and the “Deregulated” Curriculum*, 34 AKRON L. REV. 137, 139 (2000).

164. O’Brien, *supra* note 163, at 155 & n.111 (citing Bierlein, *supra* note 160, at 55-56 as “expressing that teachers attribute increased professional satisfaction in charter schools” to more freedom, flexibility, and decision-making power).

165. *See* Bryan C. Hassel & Paul A. Herdman, *Charter School Accountability: A Guide to Issues and Options for Charter Authorizers*, ANNIE E. CASEY FOUND. 2 (2000), available at <http://www.aecf.org/upload/publicationfiles/guide%20to%20charter%20authorizers.pdf>. Indeed, this is by design. Charter School FAQ, PBS: CLOSING THE ACHIEVEMENT GAP, <http://www.pbs.org/closingtheachievementgap/faq.html> (last visited Oct. 1, 2013) (“In most cases, charter schools operate under a clear agreement between the state and the school: increased autonomy in exchange for increased accountability.”).

directly responsible to the communities they serve.¹⁶⁶ In addition, when applying for charter status, applicants must include measurable goals for student academic achievement as well as detailed descriptions of the methods used to accomplish those goals.¹⁶⁷ States require schools to demonstrate their agreed-upon student outcomes through empirical data, and failure to meet such outcomes can result in revocation of the board's charter.¹⁶⁸

As schools of choice, charters are “held to the highest level of accountability—consumer demand.”¹⁶⁹ When traditional public schools fail, the education system pours more money into them, but when charter schools fail, they close.¹⁷⁰ Binding charters by the standards they set for themselves creates accountability. In short, the threat of charter revocation functions as an incentive to operate schools that meet stated goals and provide services responsive to student needs.¹⁷¹

Yet another difference, unlike other public schools, charter school administrators have substantial discretion in selecting their own admission standards and are allowed to admit students from all over the state.¹⁷² Nevertheless, charter schools are required to comply with federal law prohibiting discrimination on the basis of race, color, religion, national origin, language spoken, intellectual or athletic ability, measures of achievement or aptitude, or disability status.¹⁷³ Many charter schools employ open enrollment admission policies, permitting district residents

166. See O'Brien, *supra* note 163, 154-55.

167. See, e.g., FLA. STAT. ANN. § 1002.33(7)(a)(4) (West 2013).

168. See, e.g., LA. REV. STAT. ANN. § 17:3992(A), (C) (2012).

169. Charter School FAQ, *supra* note 165; see also *Charter Schools 101: The Most Frequently Asked Questions*, NAT'L ALLIANCE FOR PUB. CHARTER SCH., <http://www.publiccharters.org/About-Charter-Schools/Frequently-Asked-Questions.aspx> (last visited Oct. 1, 2013) (explaining that charter schools are “judged on how well they meet student achievement goals established by their charter” and how well they manage the fiscal and operational responsibilities entrusted to them).

170. Brian Perry, *Charter schools a stone's throw away*, NESHOPA DEMOCRAT (Jan. 14, 2009, 6:00 PM), <http://neshobademocrat.com/main.asp?SectionID=7&SubSectionID=302&ArticleID=18130> (referring to a statement made by Forest Thigpen, the president of the Mississippi Center for Public Policy).

171. Hassel & Herdman, *supra* note 165, at 2.

172. Brown-Nagin, *supra* note 9, 767.

173. See, e.g., D.C. CODE § 38-1802.06(a) (2007); N.J. STAT. ANN. § 18A:36A-7 (West 1996).

2013] **Diversity in Federal Education Funding** 653

and non-residents to attend,¹⁷⁴ and admission slots are generally filled on a first-come, first-served basis or by some type of lottery when schools have reached maximum capacity.¹⁷⁵ Although some state enabling laws allow schools to impose minimum academic standards for admission, the requirements are minimal in comparison to those often imposed on other “choice” options like magnet schools.¹⁷⁶

2. FEDERAL INVOLVEMENT

“Every presidential administration . . . has made charter schools part of federal education policy” since the 1990s.¹⁷⁷ However, prior to 2009, federal involvement in charter schools was minimal.¹⁷⁸ Although President Clinton supported charter schools as a reform tool in his “Call to Action for American Education in the 21st Century,” he opted not to meddle in state politics and espoused the drafting of moderate charter laws.¹⁷⁹ While President George W. Bush instituted No Child Left Behind (NCLB) in 2001—which reauthorized the Elementary and Secondary Education Act (ESEA) of 1965, including Title I—¹⁸⁰ during the 2008–2009 school year, the federal government still contributed only \$1.40 per charter school student.¹⁸¹

174. See D.C. CODE § 38-1802.06(a). Note, however, that charter schools may limit enrollment to specific grade levels. *Id.* § 38-1802.06(b).

175. Compare D.C. CODE § 38-1802.06(c) (admitting students using a random selection process, with preference given to applicants who are siblings of a student already attending the school), with ARK. CODE ANN. § 6-23-306(6)(A)(ii) (West 2011) (allowing schools to utilize a weighted lottery “when necessary to comply with Title VI of the Civil Rights Act of 1964, Title IX of the federal Education Amendments of 1972, the equal protection clause of the Fourteenth Amendment to the United States Constitution, a court order, or a federal or state law requiring desegregation”).

176. Brown-Nagin, *supra* note 9, at 769 (discussing that almost 25% of magnet schools at the elementary level and almost 60% at the secondary level require admissions tests).

177. Holley-Walker, *supra* note 47, at 449.

178. CROFT ET AL., *supra* note 144 (noting that before the ARRA in 2009, \$200 million was appropriated annually through the ESEA for charter grants, although it failed to have any real impact on charter schools).

179. Siegel-Hawley & Frankenberg, *supra* note 11, at 340-41; see also *President Clinton and Charter Schools: A History Lesson*, CENTER FOR EDUC. REFORM (June 21, 2011, 11:07 AM), <http://www.edreform.com/edspresso-shots/president-clinton-and-charter-schools-a-history-lesson/>.

180. EXECUTIVE SUMMARY: THE NO CHILD LEFT BEHIND ACT OF 2001, U.S. DEP’T OF EDUC. (2002), available at <http://www2.ed.gov/nclb/overview/intro/execsumm.pdf> [hereinafter EXECUTIVE SUMMARY: NCLB]. The reauthorization included Title I, the leading federal aid program for disadvantaged students. *Id.*

181. CROFT ET AL., *supra* note 144 (citing JENNIFER SABLE & CHRISTOPHER

NCLB supports standards and test-based education reform based on the idea that setting high standards and measurable goals can improve learning outcomes for students.¹⁸² NCLB ties the receipt of federal funds to schools' documented successes and failures, so that funding is contingent upon schools reaching the standards set forth in the plan.¹⁸³ If schools repeatedly fail to meet "Adequate Yearly Progress" targets, certain steps are taken to turn around school performance and improve student test scores.¹⁸⁴ Under NCLB, one of the turnaround options is transforming the school into a charter.¹⁸⁵

In 2011, President Obama announced that his administration would grant waivers from some of the more stringent NCLB requirements to states that agree to adopt specific education policies.¹⁸⁶ As of August 2013, the administration has granted NCLB waivers to forty-one states and D.C.¹⁸⁷ Although NCLB is technically still in effect, the waivers have cast doubt on the program's current relevance.¹⁸⁸

PLOTS, U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STAT., DOCUMENTATION TO THE NCES COMMON CORE OF DATA PUBLIC ELEMENTARY/SECONDARY SCHOOL UNIVERSITY SURVEY: SCHOOL YEAR 2008-09 (NCES 2010-350 rev) (2010), *available at* <http://nces.ed.gov/ccd/pdf/psu081bgen.pdf>.

182. *See* EXECUTIVE SUMMARY: NCLB, *supra* note 180. To receive funding, NCLB requires states to create their own academic standards and to administer statewide standardized tests in basic subjects every year at selected grade levels. *Id.* Schools that receive Title I funds under ESEA must make "Adequate Yearly Progress" in test scores. *See id.*

183. *Id.*

184. *Id.*

185. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 943 (2004). Turnaround options include (1) chartering the failing schools, (2) replacement of the staff that is tied to the failure, (3) contracting with an outside school to operate the school, (4) entering into a contract with a private company, (5) turning the school over to the state, and (5) other means of restructuring that make "fundamental reforms." *Id.*; 20 U.S.C.A. § 6316(b)(8)(A), (B)(i)-(iv) (2002).

186. Alyson Klein, *Obama Administration Sets Rules For NCLB Waivers*, EDUC. WK. (Sept. 22, 2011, 5:34 PM), http://blogs.edweek.org/edweek/campaign-k-12/2011/09/obama_administration_sets_rule.html ("In exchange for this flexibility, the administration will require states to adopt college- and career-ready standards, focus on 15 percent of their most-troubled schools, and create guidelines for teacher evaluations based in part on student performance.").

187. Press Release, U.S. Dep't Educ., Obama Administration Approves NCLB Flexibility Request for Pennsylvania (Aug. 20, 2013), *available at* <http://www.ed.gov/news/press-releases/obama-administration-approves-nclb-flexibility-request-pennsylvania>.

188. *See* Motoko Rich, 'No Child' Law Whittled Down by White House, N.Y. TIMES,

2013] **Diversity in Federal Education Funding** 655

While the federal interest in the charter school movement has recently increased dramatically, the federal interest in integration therein has remained more modest. Until recently, language promoting “diversity” was completely absent from the DOE’s funding projects and programs. In 2010, however, the DOE definitively identified school diversity as a “priority goal” for its competitive funding programs.¹⁸⁹ The DOE’s “Supplemental Priorities for Discretionary Grant Programs” authorizes the DOE to focus federal assistance on supporting the areas defined to be in greatest need of educational help.¹⁹⁰ It also permits the Department to use one or more of these priorities in any appropriate discretionary grant competition.¹⁹¹ The 2010 notice listed sixteen new funding priorities to be applied to certain discretionary grant programs beginning in 2011, one of which was Priority 11.¹⁹² “Priority 11: Promoting Diversity,” prefers “[p]rojects that are designed to promote student diversity, including racial and ethnic diversity, or avoid racial isolation.”¹⁹³ This Priority is also applicable to the Charter Schools Program, one of the most substantial federal funding opportunities available to charter schools.¹⁹⁴

a. The Charter School Program

The Public Charter Schools Program (CSP) was authorized in 1994 under Title X, Part C of the Elementary and Secondary Education Act of 1965 (ESEA).¹⁹⁵ The purpose of the Program is

July 6, 2012, *available at* 2012 WLNR 14091184.

189. Supplemental Priorities for Discretionary Grant Programs, 75 Fed. Reg. 78,486, 78,500 (Dec. 15, 2010), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2010-12-15/pdf/2010-31189.pdf>.

190. *Id.* at 78,486.

191. *Id.*

192. *Id.* at 78,486-506.

193. *Id.* at 78,508.

194. See Final Priorities, Requirements, and Selection Criteria; Charter Schools Program (CSP) Grants for Replication and Expansion of High-Quality Charter Schools, 76 Fed. Reg. 40,898, 40,898-99, 40,900 (July 12, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-07-12/pdf/2011-17491.pdf>. *But see Issue Brief 4: Federal Support for School Integration: A Status Report*, NAT’L COALITION ON SCH. DIVERSITY 3-4 (June 2012), <http://www.school-diversity.org/pdf/DiversityIssueBriefNo4.pdf> (discussing that the Department of Education has “declined to include diversity as a competitive or invitational priority” in relation to the Race to the Top program but has allowed for applicants of the program to “apply for additional funding (up to \$2 million) for ‘strategies for increasing diversity across schools and LEAs and within schools and classrooms’”).

195. CHARTER SCHOOLS PROGRAM: TITLE V, PART B OF THE ESEA:

to “expand the number of high-quality charter schools available to students across the Nation by providing [f]ederal financial assistance for charter school planning, program design, and initial implementation; and to evaluate the effects of charter schools, including their effects on students (in particular, on student academic achievement), staff, and parents.”¹⁹⁶ Initially, Congress allocated \$6 million in start-up funding to charter schools.¹⁹⁷ By 2001, CSP disbursement had grown to \$190 million.¹⁹⁸ In 2012 alone, CSP issued over \$140 million in grants to states including new and existing awards.¹⁹⁹

Current non-regulatory guidelines for CSP encourage charter schools to concentrate on recruiting disadvantaged groups of students who “might otherwise have limited opportunities to participate in the charter school’s programs.”²⁰⁰ The guidelines require charter schools to admit students via blind lottery if more students apply than can be accommodated to qualify for CSP funds.²⁰¹ However, weighted lotteries (lotteries that give preference to a particular set of students over another) are permitted only when necessary to comply with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, § 504 of the Rehabilitation Act of 1973, the equal protection clause of the Constitution, or applicable state law.²⁰² The guidelines forbid separate lottery pools for boys and girls and weighted lotteries favoring one gender over another—even where schools are simply attempting to achieve a reasonable gender balance.²⁰³ In effect, schools that want to use preferences and weighted lotteries to assemble a student body that looks a certain way must forego federal monies under the program unless the preference falls into one of the limited exceptions pertaining to

NONREGULATORY GUIDANCE, U.S. DEP’T EDUC. 5 (April 2011) [hereinafter CSP: PROGRAM GUIDANCE], available at <http://www2.ed.gov/programs/charter/nonregulatory-guidance.doc>.

196. CSP: PROGRAM GUIDANCE, *supra* note 195, at 7.

197. Suhrid S. Gajendragadkar, Note, *The Constitutionality of Racial Balancing in Charter Schools*, 106 COLUM. L. REV. 144, 149 (2006).

198. *Id.*

199. See *Charter Schools Program State Educational Agencies (SEA) Grant: Funding Status*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/programs/charter/funding.html> (last modified Jan. 29, 2013).

200. CSP: PROGRAM GUIDANCE, *supra* note 195, at 18.

201. *Id.* at 17-18.

202. *Id.* at 17.

203. *Id.* at 18.

2013] **Diversity in Federal Education Funding** 657

anti-discrimination laws.²⁰⁴

b. Race to the Top

By placing charter schools at the center of its policy agenda, the Obama administration catapulted the movement to the forefront of education reform. Upon his election, President Barack Obama appointed Arne Duncan, an ardent charter supporter, as the Secretary of Education.²⁰⁵ The administration launched the innovative Race to the Top Fund, which authorized up to \$400 million in federal funding for the program, which is available to charters.²⁰⁶ In 2010, the administration issued its long-term plan in a proposal that included extensive support for charter school expansion.²⁰⁷

The Obama administration's penchant for charter schools has manifested itself through competitive grant programs that give special advantages and considerations to states that enact pro-charter legislation.²⁰⁸ In 2009, President Obama signed into

204. Nora Kern et al., *A Mission to Serve: How Public Charter Schools Are Designed to Meet the Diverse Demands of Our Communities*, NAT'L ALLIANCE FOR PUB. CHARTER SCH. 2 (2012), available at http://www.publiccharters.org/data/files/Publication_docs/NAPCS_DiverseModelBrief_5_16_12_20120511T164623.pdf.

205. Arne Duncan: U.S. Secretary of Education – Biography, U.S. DEPT OF EDUC., <http://www2.ed.gov/news/staff/bios/duncan.html> (last modified Nov. 19, 2012); *National Conference Highlights Federal Grants to Charter Schools*, U.S. DEPT OF EDUC. (Aug. 2, 2013, 10:50 AM), <http://www.ed.gov/oii-news/national-conference-highlights-federal-grants-charter-schools>.

206. See Mary Ann Zehr, *Backers of Magnet Schools Question Charter Push*, EDUC. WK., Feb. 24, 2010, available at http://www.edweek.org/ew/articles/2010/02/24/22magnets_ep.h29.html?tkn=UYLF9OZw9oE1EIVg5hqoCT6IVwH2jR2GrVdi&print=1 ("The [2011] budget also calls for spending \$400 million for 'promoting effective charter schools,' an increase of \$81 million, or more than 20 percent, over charters' current funding.").

207. See U.S. Dep't of Educ., *A Blueprint Reform: The Reauthorization of the Elementary and Secondary Education Act* 37-38 (2010), available at <http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf>. The Blueprint focuses on five core areas: (1) implementation of college and career ready standards, (2) teacher and principal effectiveness, (3) equity and opportunity for all students, (4) rewarding excellence, and (5) promoting innovation. *Id.* at 3-6. Chartering was featured as one of the options for turning around those schools achieving in the bottom 5% in the state. *Id.* at 10, 12.

208. See Sarah Butrymowicz, *From the convention: what does a pro-charter president look like?*, HECHINGERED (Sept. 5, 2012), http://hechingered.org/content/from-the-convention-what-does-a-pro-charter-president-look-like_5538/; Valerie Strauss, *How Obama helped Georgia charter measure win*, WASH. POST (Nov. 8, 2012, 2:00 PM), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2012/11/08/how-obama-helped-georgia-charter-measure-win/>.

law the American Recovery and Reinvestment Act (ARRA), the historic “stimulus” legislation designed to “stimulate the economy, support job creation, and invest in critical sectors, including education.”²⁰⁹ The ARRA authorized and earmarked \$4.35 billion for the Race to the Top Fund, “a competitive grant program designed to encourage and reward States creating the conditions for education innovation and reform by implementing ambitious plans in four core areas: enhancing standards and assessments, improving the collection and use of data, increasing teacher effectiveness and achieving equity in teacher distribution, and turning around struggling schools.”²¹⁰ The purpose of the awards was to identify the best practices in education that have demonstrated concrete success and could be shared and implemented on a large scale.²¹¹

Charter schools gathered significant support, as reflected in the decision-making process for the awards themselves. Under the RTF, states are required to meet certain charter-supporting prerequisites to be considered for an award, including “lifting caps on the number of charter schools [that can operate in the state]; establishing authorizing practices that hold charter schools accountable for student achievement; ensuring equitable per student funding; and providing facilities assistance.”²¹²

C. THE REALITY OF CHARTER SCHOOLS

Recent studies negate the assumption that minorities are underrepresented in charter schools. In fact, the DOE found that charter schools either have racial compositions analogous to state averages or have “higher proportion[s] of students of color” than traditional public schools.²¹³ In a recent report, the UCLA Civil

209. U.S. DEPT OF EDUC., NOTICE OF PROPOSED REQUIREMENTS 5 (2011), available at <http://www2.ed.gov/programs/racetothetop/interim-notice-proposed-requirements.pdf>.

210. *Id.*

211. *See id.*

212. *Id.*; see also Press Release from John White, Press Sec., U.S. Dep’t of Educ., States Open to Charters Start Fast in ‘Race to Top’ (June 8, 2009), available at <http://www2.ed.gov/news/pressreleases/2009/06/06082009a.html> (statement of Secretary Arne Duncan) (“States that do not have public charter laws or put artificial caps on the growth of charter schools will jeopardize their applications under the Race to the Top Fund.”).

213. Brown-Nagin, *supra* note 9, at 769; Elise Balboni & Ann Margaret Galiatsos, *Why Charter Schools?*, COMMUNITY DEV.: INVESTMENTS, Spring 2001, at 4, 5 available at <http://www.occ.gov/static/community-affairs/community-developments->

2013] **Diversity in Federal Education Funding** 659

Rights Project concluded that “charter schools are more racially isolated than traditional public schools in virtually every state and large metropolitan area in the nation.”²¹⁴ The study found that charter schools serve a higher percentage of African-American students, 70% of whom attend “intensely segregated schools.”²¹⁵ Another “study of 552 charter schools in 317 school districts in twenty-six states found that ‘charter schools are more likely to be found on one end of the poverty continuum or the other.’”²¹⁶ Additionally, the study documented that “only 35% of charter schools, compared to 72% of their home school districts, had socioeconomically diverse enrollments (i.e., enrollments in which 20% to 80% percent of students qualified for free or reduced-price lunch).”²¹⁷ In other words, when reviewing “school and district-level data, charter schools are more extreme in terms of racial and social class isolation and segregation than the districts in which they are located.”²¹⁸

Theoretically, the lax admission policies imposed on charters and the flexibility enjoyed by charter schools could be utilized to combat pockets of high poverty and racial isolation, but that is not currently the reality. Despite their potential tools for success, evidence indicates that charters, as implemented, are not

investments/spring11/CD_Investments_Charter_Spring_2011.pdf (stating that charter schools disproportionately serve a higher percentage of minority and low-income students because they are generally located in urban cities with high minority populations); Yongmei Ni, *Who Participates in Charter Schools in Michigan?*, EDUCATION POLY CENTER MICH. ST. U. (2007), available at <http://education.msu.edu/epc/forms/Policy-and-research-Reports/PR29-CS-Participation-in-Mich-FIN.pdf> (finding that 54% of charter school students in Michigan are African-American, which is three times more than the percentage of African-American students in traditional public schools).

214. ERICA FRANKENBERG, GENEVIEVE SIEGEL-HAWLEY, & JIA WANG, CIV. RTS. PROJECT, CHOICE WITHOUT EQUITY: CHARTER SCHOOLS SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 4 (Jan. 2010), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenber-choices-without-equity-2010.pdf>.

215. *Id.* at 4, 38.

216. See Amy Stuart Wells et al., *Charter Schools and Racial and Social Class Segregation: Yet Another Sorting Machine?*, in A NATION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY 169, 191 (Richard D. Kahlenberg ed., 2000), available at <http://old.tcf.org/publications/pdfs/pb352/chpt6.pdf> (referring to a study set forth in Carol Ascher et al., *Charter School Access: A Preliminary Analysis of Charter School Legislation and Charter School Students* (1999)); Goodwin Liu & William L. Taylor, *School Choice to Achieve School Desegregation*, 74 FORDHAM L. REV. 791, 801 (2005).

217. Liu & Taylor, *supra* note 216, at 801-02.

218. *Id.* (quoting Wells et al., *supra* note 216, at 202).

effectively reducing racial and socioeconomic isolation for several reasons.²¹⁹ First, most charter schools are located in urban school districts, and virtually all of them enroll students from within their own districts.²²⁰ Locating schools in the center of concentrated poverty serves their stated purpose of targeting students in most need.²²¹ Yet the “at-risk” students targeted are disproportionately urban, poor, and minority.²²² Similarly, some states provide “favorable treatment” to schools serving over 75% at-risk or minority students.²²³ Second, state charter laws neither require nor encourage racial or socioeconomic diversity in charter schools.²²⁴ In states that require charter schools to reflect the demographics of their school districts, monitoring, enforcement, and compliance have been questionable.²²⁵ Third, research indicates that admission policies among many schools have the tendency to produce homogeneous student bodies.²²⁶ Finally, integration has not been a fundamental goal of charter schools thus far,²²⁷ causing some school districts reluctance in accepting more federal money for their creation.²²⁸

Charter schools are more likely than conventional public

219. Liu & Taylor, *supra* note 216, at 801-02.

220. Liu & Taylor, *supra* note 216, at 802.

221. See Black, *supra* note 10, at 602. KIPP (Knowledge is Power Program) charter schools emphasize providing a quality education to low-income and minority students by locating in high poverty areas. See *School-by-school reform: KIPP*, PBS: MAKING SCH. WORK (Sept. 2005), <http://www.pbs.org/makingschoolswork/sbs/kipp/>.

222. Liu & Taylor, *supra* note 216, at 802-03.

223. *Id.* at 803.

224. *Id.* at 802 (noting that nineteen state charter laws do not mention diversity at all).

225. *Id.*

226. See *supra* Section III(B)(1).

227. Siegel-Hawley & Frankenberg, *supra* note 11, at 323 (“Charter schools were not developed with specific goals for mitigating ongoing patterns of public school segregation, though some voices in the movement suggested that their ability to transcend school boundary lines might encourage diversity.”); see also Holley-Walker, *supra* note 47, at 456 (“In the accountability movement, racial integration is not a goal One of the underlying premises of the accountability movement is that the state will educate children where they are, meaning that children in poor, racially isolated schools will be provided a successful standards-based education—even in the face of significant social science evidence to the contrary.”).

228. Adai Tefera, Genevieve Siegel-Hawley, & Erica Frankenberg, *School integration efforts three years after Parents Involved*, CIV. RTS. PROJECT (June 28, 2010), <http://civilrightsproject.ucla.edu/legal-developments/court-decisions/school-integration-efforts-three-years-after-parents-involved/teferea-school-integration-three-years-after.pdf>.

2013] **Diversity in Federal Education Funding** 661

schools to be high-poverty or racially isolated.²²⁹ Overall, charter schools enroll a larger percentage of black students than non-charter public schools, a smaller percentage of whites, and comparable levels of Latinos and Asians.²³⁰ Troubling trends exist at the school and district-levels: “89% of black charter school students attend schools with more than [half] minority enrollment, and 70% attend charter schools with 90 to 100% minority enrollment.”²³¹ “More than half of charter school students attend schools that are majority poor,” and 28% attend schools with “extremely high poverty levels,” where over 75% of students are eligible for free or reduced lunch.²³² In fact, some argue that charter schools are more comparable to urban public schools than to suburban or rural public schools because they exhibit similarly high levels of student poverty and racial isolation.²³³

Further, most charter schools are performing at levels similar to or worse than traditional public schools in urban settings.²³⁴ “While the ‘no excuses’ model of making high-poverty schools work succeeds in rare cases, the vast majority of high-poverty public schools in this country fail to produce high achievement.”²³⁵ The existing data reaffirms what the country has at times chosen to ignore since *Brown*: that separate schools for poor children are ineffective models for nationwide reform and charter schools are no exception.

D. CURRENT FEDERAL PROGRAMS REVEAL QUESTIONABLE COMMITMENT TO “PROMOTING DIVERSITY” IN CHARTER SCHOOLS

As Section III(A), *supra*, indicates, the federal role in education—and in charter schools particularly—has been on a rapid and steady rise. However, policymakers have failed to

229. FRANKENBERG, SIEGEL-HAWLEY, & WANG, *supra* note 214, at 4.

230. Liu & Taylor, *supra* note 216, at 801 (charters enroll on average thirty-three percent black students, while non-charter public schools enroll seventeen percent).

231. *Id.*

232. Kahlenberg, *Charter Schools that Work*, *supra* note 20, at 11.

233. See KAHLBERG & POTTER, *supra* note 25, at 2.

234. Black, *supra* note 10, at 602; see also Kahlenberg, *Charter Schools that Work*, *supra* note 20, at 4 (“Upon close examination, claims of widespread charter school success do not hold up to scrutiny, and, indeed, the general performance of charter schools nationally has been largely disappointing.”).

235. Kahlenberg, *Charter Schools that Work*, *supra* note 20, at 11.

prioritize diversity as an interest worthy of careful consideration. Nearly absent from current policies applicable to charter schools is language affirmatively promoting diversity as a legitimate end. Where diversity language does exist, it is discretionary and is valued much less than most other priorities.²³⁶ Although the current administration has acknowledged the importance of closing low-performing charter schools, it has yet to directly address the patterns of racial and socioeconomic isolation within them.²³⁷ By prioritizing at-risk, high-needs schools in awarding competitive federal funding and failing to expand the definition of diversity beyond race and ethnicity, competitive federal grant programs like RTF and CSP do not adequately incentivize charters to integrate. Rather, these programs create perverse incentives for charter schools to continue operating racially and socioeconomically isolated schools, despite the multitude of social science research highlighting the consequences of doing so.

However, “this support for school integration is not yet reflected in the requirements and point systems of many key competitive grant programs, where it might make the most difference.”²³⁸ There are a number of charter school funding competitions available to state education agencies, individual charter schools, and charter management organizations. Each competition permits a small number of points in the competitive rating system for schools that promotes student diversity, but the priorities do not seem to provide a meaningful incentive for applicants to promote diverse charter schools.²³⁹ In general, these competitions allocate significantly more points for serving “educationally disadvantaged” students, including students from

236. See Applications for New Awards: Charter Schools Program (CSP) Grants to Non-State Educational Agency (Non-SEA) Eligible Applicants, 77 Fed. Reg. 22,298 (Apr. 13, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-04-13/pdf/2012-8980.pdf> (noting that according to the notice, non-SEA applicants can receive up to six program points for improving achievement and high-school graduation rates and up to five points for supporting military families, but applicants are only awarded up to two points for promoting diversity or improving productivity in schools).

237. Siegel-Hawley & Frankenberg, *supra* note 11, at 340.

238. *Issue Brief 4: Federal Support for School Integration: A Status Report*, *supra* note 194, at 1.

239. *Id.* at 2. See also *Federal Education Policy Should Promote Diversity*, CIV. RTS. PROJECT 3-4 (Apr. 21, 2011), <http://civilrightsproject.ucla.edu/legal-developments/policy-papers/informing-the-debate-bringing-civil-rights-research-to-bear-on-the-reauthorization-of-the-esea/crp-diversity-brief-2011.pdf> (discussing charter schools' potential for increasing integration but the need for Congress to provide “extra incentives”).

2013] **Diversity in Federal Education Funding** 663

low-income families, English language learners, children with disabilities, migratory children, and neglected or delinquent children, than for schools focused on promoting diversity.²⁴⁰

For example, in the Charter Schools Program, the DOE issues up to five points above the 100-point base maximum for schools that “promote student diversity, including racial and ethnic diversity, or avoid racial isolation.”²⁴¹ However, charter schools can obtain up to twenty base points for “assisting educationally disadvantaged and other students in meeting State academic content standards and State student academic achievement standards.”²⁴² For charter schools in states that do not yet have charter school State Education Agency (SEA) grants, the DOE reduces the points available for diversity to two.²⁴³ The trend is more pronounced for non-profit charter management organizations that have already opened one or more successful charter schools and want to open new ones. In this case, the DOE provides up to four points for “promot[ing] student diversity, including racial and ethnic diversity, or avoid[ing] racial isolation.”²⁴⁴ However, applicants in this case can gain fifteen points for closing historic achievement gaps among specified groups or for demonstrating the school has not increased achievement gaps between those groups; another fifteen points for achieving results for educationally disadvantaged students above the state average; and an additional ten points for generally assisting educationally disadvantaged students.²⁴⁵ While allocating more priority points to schools serving at-risk, disadvantaged students does not by itself instigate racial and

240. *Issue Brief 4: Federal Support for School Integration: A Status Report*, *supra* note 194, at 2.

241. *Id.*; *see also* Applications for New Awards: Charter Schools Program (CSP) Grants to Non-State Educational Agency (Non-SEA) Eligible Applicants, 77 Fed. Reg. 22,298, 22,299 (Apr. 13, 2012), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-04-13/pdf/2012-8980.pdf>.

242. *Issue Brief 4: Federal Support for School Integration: A Status Report*, *supra* note 194, at 2.

243. *Id.* at 3; *see also* Final Priorities, Requirements, and Selection Criteria, 76 Fed. Reg. 40,898 (July 12, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-07-12/pdf/2011-17491.pdf>.

244. *Issue Brief 4: Federal Support for School Integration: A Status Report*, *supra* note 194, at 3. *See also* Applications for New Awards: Charter Schools Program (CSP) Grants for Replication and Expansion, 77 Fed. Reg. 13,304 (Mar. 6, 2012), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-03-06/pdf/2012-5427.pdf>.

245. *Issue Brief 4: Federal Support for School Integration: A Status Report*, *supra* note 194, at 3.

economic segregation, the policy as written creates the perverse incentive to establish more and more charter schools specifically for at-risk students, which in all likelihood will further concentrate poverty and racial isolation in schools.

Additionally, the Charter School Program limits the definition of diversity to race and national origin only.²⁴⁶ Several commentators recommended that the Department expand the definition of diversity in Priority 11 to include factors such as gender, socioeconomic status, sexual orientation, gifted, disability, and English language learner status.²⁴⁷ However, the Department declined the requests, stating that the primary intent of the priority is racial diversity.²⁴⁸ While not every funding priority need cater to every disadvantaged group, failing to include socioeconomic status in a priority aimed at educational equality for racial minorities overlooks the intersection of these two factors.

President Obama's Race to the Top Fund further encourages districts to concentrate students in high-minority, low-achieving schools by omitting diversity from funding consideration altogether. The RTF program, which is not charter specific but has awarded substantial funding to charter school friendly states, distributes funds to states who implement reforms in four core areas, one of which is turning around our lowest-achieving schools.²⁴⁹ The original regulation regarding "Notice of proposed priorities, requirements, definitions, and selection criteria" in 2009 mentions "increasing the supply of high-quality charter schools" as one of the preferred ways for turning around struggling schools.²⁵⁰ However, the Notice does not include diversity as an element of high-quality charter schools.²⁵¹ In fact, the 2009 Notice does not reference diversity or voluntary

246. See Final Priorities, Requirements, and Selection Criteria, 76 Fed. Reg. 40,898, 40, 898-99 (July 12, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-07-12/pdf/2011-17491.pdf>.

247. Supplemental Priorities for Discretionary Grant Programs, 75 Fed. Reg. 78,486, 78,500 (Dec. 15, 2010), available at <http://www.gpo.gov/fdsys/pkg/FR-2010-12-15/pdf/2010-31189.pdf>.

248. *Id.*

249. RTF EXECUTIVE SUMMARY, *supra* note 27, at 2, 11.

250. Race to the Top Fund Notice of Proposed Requirements, 74 Fed. Reg. 37,804, 37,809 (July 29, 2009), available at <http://www2.ed.gov/legislation/FedRegister/proprule/2009-3/072909d.pdf>.

251. See *id.* at 37,804 (listing the areas for education reform but not including diversity).

2013] **Diversity in Federal Education Funding** 665

integration at all.²⁵² Although many commentators suggested adding provisions to incentivize voluntary integration, the DOE rejected their proposals and declined to amend the priorities.²⁵³ Of the three phases of the RTF, none have included positive language to prioritize school integration or have even alluded to its importance in awarding competitive funding.²⁵⁴ The self-proclaimed purpose of the RTF is to invest in “innovative strategies that are most likely to lead to improved results for students, long-term gains in school and school system capacity, and increased productivity and effectiveness.”²⁵⁵ Yet under the current plan, states can win funding without taking any affirmative steps to reduce racial and socioeconomic isolation in schools.

For instance, of the six priorities considered by the DOE in the RTF, Priority 6: “School-Level Conditions for Reform, Innovation, and Learning,” supports schools that provide comprehensive services to high-needs students, remove obstacles to student achievement, and implement strategies to engage families in student education.²⁵⁶ While the priority aims to

252. *Issue Brief 4: Federal Support for School Integration: A Status Report*, *supra* note 194, at 3.

253. Race to the Top Fund, 74 Fed. Reg. 59,688, 59,703 (Nov. 18, 2009), available at <http://www.gpo.gov/fdsys/pkg/FR-2009-11-18/pdf/E9-27426.pdf>; *Issue Brief 4: Federal Support for School Integration: A Status Report*, *supra* note 194, at 3.

254. *Issue Brief 4: Federal Support for School Integration: A Status Report*, *supra* note 194, at 3 (referring to 74 Fed. Reg. 59,836 (Nov. 18, 2009), 75 Fed. Reg. 19,496 (Apr. 14, 2010), 76 Fed. Reg. 70,980 (Nov. 16, 2011)).

255. RTF EXECUTIVE SUMMARY, *supra* note 27, at 2.

256. *Id.* at 5.

Priority 6: Invitational Priority—School-Level Conditions for Reform, Innovation, and Learning.

The Secretary is particularly interested in applications in which the State’s participating LEAs (as defined in this notice) seek to create the conditions for reform and innovation as well as the conditions for learning by providing schools with flexibility and autonomy in such areas as—

- (i) Selecting staff;
- (ii) Implementing new structures and formats for the school day or year that result in increased learning time (as defined in this notice);
- (iii) Controlling the school’s budget;
- (iv) Awarding credit to students based on student performance instead of instructional time;
- (v) Providing comprehensive services to high-need students (as defined in this notice) (e.g., by mentors and other caring adults; through local partnerships with community-based organizations, nonprofit organizations, and other providers);
- (vi) Creating school climates and cultures that remove obstacles to, and actively support, student engagement and achievement; and
- (vii) Implementing strategies to effectively engage families and communities in supporting the academic success of their students.

inspire new ways to reach high-needs students, it fails to consider school integration as a potential factor in accomplishing this end.²⁵⁷

The selection criteria similarly lack reference to diversity. “Turning around the lowest-achieving schools” is a criterion for which up to fifty points can be awarded on a 500-point scale, split between intervening in the lowest achieving schools and turning around such schools using certain intervention models like charter schools.²⁵⁸ Again, the DOE fixates on at-risk students and schools without giving any nod to school integration as a tool for improvement.

Thus, although the DOE has added “Priority 11: Promoting Diversity” to its laundry list of goals, RTF and the other federal grant programs best-positioned to actually encourage diversity have not yet incorporated it into their objectives. This is problematic for two reasons.

First, diverse learning environments provide the best chances of success for all students, as discussed in Section II(A). Research has established that diverse education not only bridges achievement gaps and corresponds with career readiness, but also combats the systemic prejudices that *Brown* sought to break down.²⁵⁹ Federal support for stable, integrated schools is a sound

Id.

257. See RTF EXECUTIVE SUMMARY, *supra* note 27.

258. RTF EXECUTIVE SUMMARY, *supra* note 27, at 10.

Selection Criteria: E. Turning Around the Lowest-Achieving Schools (50 points)

State Reform Conditions Criteria

(E)(1) Intervening in the lowest-achieving schools and LEAs (10 points)

The extent to which the State has the legal, statutory, or regulatory authority to intervene directly in the State’s persistently lowest-achieving schools (as defined in this notice) and in LEAs that are in improvement or corrective action status.

Reform Plan Criteria

(E)(2) Turning around the lowest-achieving schools (40 points)

The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to—

(i) Identify the persistently lowest-achieving schools (as defined in this notice) and, at its discretion, any non-Title I eligible secondary schools that would be considered persistently lowest-achieving schools (as defined in this notice) if they were eligible to receive Title I funds; and (5 points)

(ii) Support its LEAs in turning around these schools by implementing one of the four school intervention models (as described in Appendix C): turnaround model, restart model, school closure, or transformation model (provided that an LEA with more than nine persistently lowest-achieving schools may not use the transformation model for more than 50 percent of its schools). (35 points)

Id.

259. See *supra* Section II(A).

2013] **Diversity in Federal Education Funding** 667

investment for the nation's educational future. Encouraging the development of such schools could improve the social and economic successes of communities and, in turn, save valuable resources necessarily spent solely on the educationally disadvantaged.

Second, the Supreme Court's recent recognition of pursuing integrated education and "avoiding racial isolation"²⁶⁰ as compelling interests should prompt the DOE to reevaluate its current focus on turning around failing schools and incorporate the parallel interest of fostering integrated schools. By minimizing and, in the case of RTF, completely omitting diversity from consideration throughout key competitive funding opportunities, the DOE has missed the opportunity to promote greater inclusion and equity in education. As such, additional measures are needed to prevent public schools and charter schools, in particular, from perpetuating racial and economic segregation.

IV. MAKING DIVERSITY A REAL PRIORITY

History has demonstrated that strong, proactive federal initiatives achieve triumphs in school integration, whereas inactivity on the part of the federal government leads to retrenchment from the progress achieved.²⁶¹ If the DOE follows the Supreme Court's direction and treats school integration and reduction of racial isolation as compelling government interests, schools could begin to experience some reversal of the resegregation trends of the past few decades. The DOE's "Priority 11" is an important step in that direction, but language promoting school integration will need to be laced into education programs across the board to make a real impact. Today, new education reform movements may offer potential solutions to some of the barriers to integration currently faced by traditional public schools. Charter schools understandably generate mixed reactions because of their heightened level of autonomy and potential for exacerbating school segregation. However, charter schools can readily become effective tools of integration should federal education programs comprehensively incentivize such measures.

260. *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).

261. *See supra* Section II(A-C).

Competitive grant programs can be a powerful spur to education reform. In 2010, over thirty states changed their education policies in hopes of winning part of the \$4.35 billion in grant money made available through Obama's Race to the Top Fund.²⁶² Without the promise of federal help, it is doubtful that states would have undertaken reform on this scale. The following recommendations urge Congress to marry support for charter school expansion with stronger incentives to improve educational equity for all students.

The DOE should consider adding a new competitive funding priority in the RTF to incentivize districts seeking RTF funds and other discretionary grants to implement diversity measures. At a minimum, the DOE should persuade all charter schools receiving federal funds to take basic, affirmative steps to promote racial and economic integration. The new priority would take into account integration-promoting measures and explicitly disincentivize concentrating high-needs students into the same schools. Specifically, the RTF should be amended to include "promoting diversity" as a competitive funding priority. By labeling this as a competitive rather than an absolute priority, schools are awarded points for adopting integrationist policies but are not barred from receiving funds if they are unable to acquire all of the allotted points, which makes compliance less arduous but still worthwhile. This measure would align the RTF with the DOE's "Priority 11: Promoting Diversity" and with the Supreme Court's recent pronouncement of school diversity as a compelling government interest. This recommendation could potentially serve as a model for other competitive funding programs in the future. The proposed addition is as follows:

Competitive Preference Priority 7: Promoting Diversity:

The Secretary is particularly interested in applications that include programs, projects, or policies designed to promote school diversity or reduce racial isolation, including: diversity of race, ethnicity, socioeconomic status, disability status, and ELL status. Applicants are invited to discuss how the proposed policy would help bring together students from different

262. See The Associated Press, States Change Laws in Hopes of Race to Top Edge, EDUC. WK. (Jan. 20, 2010), <http://www.edweek.org/ew/articles/2010/01/20/19rtt-sidebar.h29.html>; RTF EXECUTIVE SUMMARY, *supra* note 27, at 2.

2013] **Diversity in Federal Education Funding** 669

backgrounds, including students from different racial, ethnic, and economic backgrounds, to attain the benefits that flow from a diverse student body or how the proposed policy would reduce racial isolation. The purpose of this priority is to focus on the racial, ethnic, and economic diversity of students in order to promote understanding, break down stereotypes, and prepare students for an increasingly diverse workforce and society. Priority 7 considers factors including, but not limited to:

(i) the availability of cross-district transfers to permit low-income students to move from high poverty schools to lower poverty schools, with funding following students to their new schools;

(ii) the extent to which school assignment zones are drawn or schools are located to encompass a mix of demographic characteristics;

(iii) the degree to which racial minority and socioeconomically disadvantaged students enroll and succeed in all classes, particularly in advanced curriculums, to facilitate diversity in classrooms.

(iv) the consistent implementation of a fair discipline process that reduces the disparate impact on racial minorities.

Under the new priority, schools could submit plans in accordance with the joint guidance issued by the Department of Education and the Department of Justice entitled, “Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools” to ensure compliance with federal laws concerning voluntary integration.²⁶³ To offset the perverse incentive that the fund currently creates, the DOE should allocate fifty points to Priority 7, the same number of points given for “turning around the lowest-achieving

263. See generally Letter from U.S. Dep’t of Educ. & U.S. Dep’t of Justice on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools, Office for Civil Rights, available at <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html> (last modified Jan. 3, 2012) (discussing how “elementary and secondary schools can voluntarily consider race to further compelling interests in achieving diversity and avoiding racial isolation” to be “consistent with existing law”).

schools.”²⁶⁴ By apportioning points for racially and economically-integrated schools comparable to the priority now given to schools with concentrations of at-risk or low-income students, schools may be more inclined to seriously consider ways to serve educationally disadvantaged students that do not involve concentrating them in high-needs schools.

The RTF is the program providing the most federal funding to charter schools today, and thus, this new priority would encourage states to reevaluate their current preoccupation with operating high-needs schools. Because charter schools are not constrained by many of the admission requirements burdening traditional public schools, the factors considered in the proposed priority are more easily implemented in charter schools. For example, charter schools’ authority to enroll students from anywhere in the state is crucial for breaking up poverty concentrations by allowing recruitment of diverse, out-of-district students in otherwise homogeneous, highly urban neighborhoods. Since charter schools already have this authority, the first and second factors speak mainly to traditional public school districts that do not have school choice options in place. They encourage states to draw attendance zones in ways that draw students from different backgrounds and to permit school choice through out-of-district transfers. At the same time, these factors encourage charter schools to strategically locate to serve both areas of concentrated poverty and students in more affluent and diverse areas.

Granting students the option to transfer from high poverty schools to more diverse ones with funds following the student may create a market for higher performing schools and break up poverty concentrations by driving low performing schools to close. Next, drawing school assignment zones to promote diversity could help to combat neighborhood segregation. The third factor²⁶⁵ recognizes the importance of maintaining diversity within classrooms and encourages all public schools to structure classrooms in ways that promote inclusion. This factor particularly takes into consideration programs that improve

264. See RTF EXECUTIVE SUMMARY, *supra* note 27, at 2.

265. The third factor in Priority 7, “the degree to which racial minority and socioeconomically disadvantaged students enroll and succeed in all classes, particularly in advanced curriculums, to facilitate diversity in classrooms” urges schools to challenge disadvantaged students by encouraging them to participate in more advanced placement classes and to develop programs catering to this objective.

2013] **Diversity in Federal Education Funding** 671

minority and disadvantaged student involvement in advanced placement curriculum.

Finally, the fourth factor²⁶⁶ rewards schools for adopting disciplinary mechanisms that do not result in disproportionate enforcement for minority or educationally disadvantaged students. Awarding points for these collective factors at a rate comparable to the points provided for serving at-risk, high-poverty populations would signal the DOE's commitment to actively pursuing "Priority 11: Promoting Diversity" in the RTF and other competitive funding grants in a concrete way.

V. CONCLUSION

Segregated schooling is not a problem with a single solution. Its historical grounding and complexities require devotion that permeates all levels of government and society. While the DOE's "Priority 11" is an important step in the right direction, it is just that—a first step. Because charter schools are increasing in number each year while also being implicated in the trend of resegregation, finding ways to improve their functioning is likely a more worthwhile undertaking than reviling their existence *en masse*. As history seems to keep reminding us, separate but equal education never worked, and the current state of American public schools reaffirms that it will not work now. Although the charter school model is not one that inherently concentrates poverty, its current single-mindedness in catering primarily to the "at-risk" has inadvertently done just that. For charter schools to make sustainable educational gains, they must be willing to abandon their current model and reprioritize. Demanding that the federal government entertain a more inclusive definition of diversity across the board in education programs like the RTF and CSP could awaken charter schools to this reality and provide the muscle it needs to reverse some of the resegregation trends that American schools have experienced over the past two decades.

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266. The fourth factor in Priority 7, "the consistent implementation of a fair discipline process that reduces the disparate impact on racial minorities," apprises schools of the school-house to jail-house reality and rewards those schools who commit creating impartial disciplinary policies.