NOTES

THE SCHOOL CHOICE PROVISION OF THE NO CHILD LEFT BEHIND ACT AND ITS CONFLICT WITH DESEGREGATION ORDERS

I. INTRODUCTION

The No Child Left Behind Act ("NCLBA" or the "Act"), enacted in 2002, provides that students who attend schools identified as needing improvement may transfer to other public schools within the same school district.[1] This provision, known as the school choice provision, is in conflict with the desegregation orders that remain in place in many Southern and some Northern school districts because students transferring out of their current schools may upset the racial balance mandated by court desegregation orders.[2] The United States Department of Education has responded to the concerns of these school districts by instructing them to follow the school choice provision of the NCLBA at the expense of desegregation plans.[3] The Department of Education further recommends that school districts petition courts to amend or lift the desegregation orders.[4] In fact, because the desegregation of public schools represents the Supreme Court's enforcement of the United States constitution, court- or state-ordered desegregation plans must preempt the school choice provision of the NCLBA.[5] The primacy of desegregation is further supported by sound educational and public policy arguments.

This paper examines the NCLBA's school choice provision and its conflict with

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[1] No Child Left Behind Act, 20 U.S.C. §§ 6301 et seq., Pub. L. No. 107-110, 115 Stat. 1425 (2003).

[2] Jen Sansbury, *Desegregation Complicates School Transfer Law*, ATLANTA JOURNAL-CONSTITUTION, Sept. 6, 2002, at 3C.

[3] 34 C.F.R. § 200.44(c) (2002); *see also* Mari Leonard, *Ga. School District Told to Comply With New Law,* BOSTON GLOBE, Sept. 5, 2002, at A2.

[4] 34 C.F.R. § 200.44(c) (2002).

[5] *See* Brown v. Board of Education, 347 U.S. 483 (1954) ("Brown I"); U.S. CONST. amend. XIV § 1.

school districts' court-ordered desegregation. Section II describes the NCLBA and gives a brief summary of the history of school desegregation and recent resegregation in the United States. This background information will show how the NCLBA and court-ordered desegregation come into conflict. Section III describes why the Constitution requires that court mandated desegregation orders preempt the school choice provision of the NCLBA. Section IV explains the public policy and educational arguments that support why desegregation should preempt the school choice provision. Finally, Section V suggests alternatives to the NCLBA's school choice provision that would comply with constitutional requirements and educational efficacy.

II. BACKGROUND: THE NCLBA AND SCHOOL SEGREGATION IN THE UNITED STATES

The No Child Left Behind Act

The No Child Left Behind Act aims to give the federal government a larger roll in public education, which has traditionally been the province of the states.[6] The declared purpose of the Act is to ensure that "all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and State academic assessments."[7] The Act sets out specific tactics and means for achieving these goals, focusing on four areas: (1) accountability for results, (2) increased flexibility and control, (3) expanded options for parents, and (4) an emphasis on teaching methods proven to work.[8] While states retain control over the curriculum and assessment methods used by their schools, the federal government holds the states accountable for student performance.[9]

Under the NCLBA, states must assess the progress of their schools annually to ensure that each school makes adequate yearly progress as defined in the state's "challenging academic standards," which must be determined ahead of time by the state.[10] Currently, the standards are based on student performance in math and reading (or language arts).[11] The Act requires the addition of science performance

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[6] Introduction: No Child Left Behind *in* NO CHILD LEFT BEHIND *available at* http://www.nclb.gov/next/overview/index.html (visited Mar. 6, 2003); *See, e.g.* Barbier v. Connolly, 113 U.S. 27, 31-32 (1885) (education is among the states' traditional "police powers").

[7] 20 USC § 6301 (2003).

[8] *Id.*; Introduction: No Child Left Behind *in* NO CHILD LEFT BEHIND *available at* http://www.ed.gov/nclb/landing.jhtml (United States Department of Education website) (visited November 14, 2003).

[9] 20 USC § 6311 (2003).

[10] *Id.* § 6311(b)(2).

[11] *Id.*

for the 2005-2006 academic year.[12] The state also chooses the assessment methods used to determine whether schools make adequate yearly progress.[13]

If a school fails to make adequate yearly progress for two consecutive years, the district must identify the school as one needing improvement.[14] Once a school is identified for improvement, it must develop a plan within three months of the identification.[15] The NCLBA establishes guidelines for this plan and provides a timeline for the school to meet each goal.[16] The Act provides for consequences whenever the school misses a deadline.[17] Students who attend a school identified for improvement may elect to transfer to another school within the district that is succeeding.[18] If a student chooses to attend a different school, the school district must subsidize the student's transportation up to a certain level.[19] All states must make school choice available to students beginning with the 2002-2003 academic year[20] unless state law prohibits school choice.[21]

School Desegregation and Resegregation in the United States

Desegregation

Prior to 1954, segregation was considered constitutional in the United States. In *Plessy v. Ferguson*, the United States Supreme Court held that separate accommodations for different races were permissible so long as the accommodations were equal in quantity and quality.[22] While the facts of *Plessy* did not focus on the segregation of public schools, states depended on the decision to

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[12] NO CHILD LEFT BEHIND ACT: TIMETABLE AND FREQUENTLY ASKED QUESTIONS, 2 (National School Boards Association, 2002) [hereinafter TIMETABLE].

[13] 20 USC § 6316(a)(1)(A) (2003).

[14] *Id.* § 6316(b)(1)(A).

[15] *Id.* § 6316(b)(3); *See also* Letter from Rod Paige, United States Secretary of Education, to educators (July 24, 2002) (at http://www.ed.gov/News/Letters/020724.html).

[16] 20 USC § 6316.

[17] *Id.* § 6316(b)(7). Consequences include, *inter alia*, the replacement of any school staff identified as responsible for the failure, restructuring of the school as a charter school, and the takeover of the school by a private educational company or the state government.

[18] *Id.* § 1116(b)(1)(E). Under this provision, students may transfer to another public school within the district, a magnet school, or a charter school, and to a school within another district if such agreement is made between the districts. Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice, in* SCHOOL CHOICE AND SOCIAL CONTROVERSY 23 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

[19] 20 USC § 6316(b)(9). Schools are required to dedicate up to five percent of allocated federal funding to the transportation of students to other schools. If there are insufficient funds to provide transportation for all students wishing to transfer, priority is given to the lowest-performing, lowest-income students.

[20] TIMETABLE, *supra* note 15, at 2.

[21] 20 USC § 6316(b)(1)(E).

[22] 163 U.S. 537 (1896).

maintain segregation in education.[23] In *Plessy* the Court deemed segregation constitutional because it did not imply that one race was inferior.[24]

In 1954, the Supreme Court's landmark decision of *Brown v. Board of Education* ("*Brown I*") overruled *Plessy*. [25] In *Brown I*, the Court unanimously held that school segregation was, by law, unconstitutional.[26] Legal segregation in schools, the Court held, violated the Equal Protection Clause because separate schools, even with equal facilities and resources, were inherently unequal due to the detrimental psychological effect of segregation on black children.[27] A year later, in what is known as *"Brown II,"* the Court considered the implementation of school desegregation by ordering desegregation "with all deliberate speed" and granting United States District Courts the power to oversee state and local school districts' plans for ending segregation.[28]

Cooper v. Aaron further dealt with the issue of how school systems should desegregate themselves. [29] In *Cooper*, the Supreme Court held that school systems must comply with the holdings of the two *Brown* decisions immediately.[30] The Court further held that violence and civil disorder were not valid reasons for the Little Rock, Arkansas, public schools to postpone desegregation and ordered that the Little Rock school district abide by the holding of *Brown* and desegregate its school immediately.[31]

The Civil Rights Act of 1964 ("Civil Rights Act") provided the federal government with greater powers to enforce civil rights.[32] Title VI of the Civil

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[23] *Id. Plessy* involved a challenge to a Louisiana law that required all railroads to provide separate car accommodations for whites and African Americans. *See* JEFFREY A. RAFFEL, *Plessy v. Ferguson, in* HISTORICAL DICTIONARY OF SCHOOL SEGREGATION AND DESEGREGATION 198-99 (1998). *See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 559 (1997).

[24] Plessy, 163 U.S. at 551-552.

[25] 347 U.S. 483 (1954) ("Brown I"). *Brown I* consolidated four separate school desegregation cases where Black students were denied admission to White schools because of laws requiring or allowing segregation. *See generally* JEFFREY A. RAFFEL, *Brown v. Board of Education (Brown I), in* HISTORICAL DICTIONARY OF SCHOOL SEGREGATION AND DESEGREGATION 31-35 (1998).

[26] 347 U.S. 483 (1954).

[27] *Id.*

[28] 349 U.S. 294 (1955) ("Brown II"). The remedies for desegregation described in *Brown II* have been criticized as being imprecise and ineffective, because the decision allowed too much time for desegregation to be implemented, provided no clear guidelines, and focused too much on process rather than the moral basis for the *Brown I* decision. *Brown II* did not desegregate the South quickly. The enactment of the Civil Rights Act of 1964 finally triggered greater desegregation. *See* JEFFREY A. RAFFEL, *Brown v. Board of Education (Brown II), in* HISTORICAL DICTIONARY OF SCHOOL SEGREGATION AND DESEGREGATION 35-36 (1998).

[29] 358 U.S. 1 (1958).

[30] *Id.* at 5.

[31] *Id.*

[32] Civil Rights Act of 1964, 42 U.S.C. §§ 2000 et seq. (2002).

Rights Act gave the government the power to withhold crucial federal funds from schools that failed to integrate.[33] Title VI also provided the United States Attorney General the authority to intervene in desegregation suits.[34] The Civil Rights Act created the Office for Civil Rights ("OCR"), within the Department of Health, Education, and Welfare ("HEW"),[35] to enforce the Civil Rights Act.[36] The OCR gave schools time to comply with its regulations but could initiate an administrative hearing or refer a violating school to the Department of Justice for court proceedings if that school did not comply within a reasonable time.[37]

In addition to the Civil Rights Act, the Supreme Court continued to issue decisions regarding the implementation of school desegregation. In *Goss v. Board of Education*, the Court held that a school district could not enact a school transfer program that allowed a student to transfer to a school at which her race comprised the majority because such transfers would impede the re-zoning plan intended to desegregate the school system.[38] In *Green v. County School,* the Court held that the county's freedom of choice plan for desegregation was not sufficient and ordered the school district to take affirmative actions to integrate the school system.[39] Justice Brennan's *Green* opinion provides that the schools must desegregate "root and branch" by ensuring desegregation not only in the student bodies but in the facilities, faculties, extracurricular activities, and transportation as well (the "*Green* factors").[40]

Resegregation

Recent studies have shown that American public schools are becoming segregated again.[41] Virtually all schools studied show a decline in the level of

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[33] *Id.* § 2000d.

[34] *Id.*

[35] On May 5, 1980, HEW divided into the new cabinet the Department of Education and the Department of Health and Human Services. OCR continues to operate within the Department of Education.

[36] Civil Rights Act of 1964 § 2000d.

[37] *Id.*

[38] 373 U.S. 683 (1963).

[39] 391 U.S. 430 (1968).

[40] *Id.* The student body, facilities, extracurricular activities, and transportation became know as the "*Green* factors". JEFFREY A. RAFFEL, *Green v. County School Board of New Kent, in* HISTORICAL DICTIONARY OF SCHOOL SEGREGATION AND DESEGREGATION 113-114 (1998).

[41] *See, e.g.,* Erica Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts,* THE CIVIL RIGHTS PROJECT HARVARD UNIVERSITY, 4 (2002). In this study, researchers at Harvard's Civil Rights Project collected data from the 2000-2001 academic year from 239 school districts nationwide with enrollments greater than 25,000 students. The study compares the data they found from 2000-2001 to data regarding minority exposure to white students over time and when voluntary or court ordered desegregation plans were in place in these school districts.

interracial exposure among students between 1986 and 2001.[42] While the school-aged population in the United States has grown increasingly diverse, white students today are more likely to attend a segregated school than they were a generation ago.[43] African-American and Latino students are becoming more racially segregated from white students, especially in those districts where desegregation orders were once in place but have now been lifted.[44]

Changing demographics and residential patterns are responsible for much of the resegregation of United States schools. The Latino population in the United States has grown significantly in the last thirty years but in many school districts, white students' exposure to Latinos has not increased. [45] This is because white families have moved out of cities to the suburbs while minority families and their school-aged children remain in urban school districts.[46] As a result of this "white flight," school districts that have rejected city-suburban desegregation plans have the least interracial exposure.[47] Although desegregation plans cannot change where people live, they can help to maintain more racially balanced, equal schools. However, the Supreme Court's recent and continued refusal to help maintain or institute desegregation plans suggests, however, that schools will continue to become more racially segregated.[48]

Recent Supreme Court decisions suggest that the federal courts will no longer mandate and enforce such strict desegregation plans. In *Board of Education of Oklahoma v. Dowell,* the Court held that the Oklahoma City School System could return to a neighborhood zoning plan and dissolve its desegregation decree because it had reached a unitary status according to the *Green* factors.[49] The Court held that even if a school system is likely to resegregate itself once a decree is lifted, the court should dissolve the decree if the school district reaches unitary status.[50] Chief Justice Rehnquist noted that the Court had always intended court-ordered desegregation plans to be temporary.[51]

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[42] *Id.* at 5.

[43] *Id.* at 4.

[44] *Id.*

[45] Erica Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*, THE CIVIL RIGHTS PROJECT HARVARD UNIVERSITY, 4, 12 (2002).

[46] *Id.*

[47] *Id.*

[48] *Id.* While the Court has clearly moved away from implementing and maintaining court ordered desegregation plans, it has recognized that promoting diversity in schools may be a compelling interest in admissions programs. *See, e.g.* Grutter v. Bollinger, 2003 U.S. LEXIS 4800; Regents of Univ. of Cal. v. Bakke, 438 U.S. 1 (1971).

[49] 498 U.S. 237 (1991). Unitary status is the term used to refer to a school district that no longer requires court supervision of desegregation. A school meets unitary status when a court determines that it adequately meets the "*Green* factors'" standards established in the court desegregation order.

[50] *Id.* at 246.

[51] *Id.* at 248.

In *Freeman v. Pitts*, the Court stepped further away from enforcing the desegregation of schools.[52] *Freeman* held that courts could relinquish control of a school district in stages as the district complied with the individual *Green* factors.[53] Under this holding, a District Court determining whether to lift the decree in whole or in part should examine whether the school has met the *Green* factors dictated by the original court order, whether control is necessary to ensure that the school district reach compliance in other areas, and whether the school district has made a good-faith effort in its actions.[54] The Court also advised District Courts not to desegregate schools for desegregation's sake, suggesting instead that if a school has corrected the original constitutional violation leading to the racial imbalance, court supervision need not continue.[55]

The Supreme Court further removed the role of the federal courts and government in ensuring the desegregation of schools in *Missouri v. Jenkins*.[56] In *Jenkins*, the Court held that the fact that many white people had left the city to live in the suburbs did not justify the inter-district remedy of magnet schools because the problem was intra-district.[57] This essentially allowed the school system to maintain segregated schools because of the demographics of the city.[58] The decision also held that school districts do not need to show any correction to the harms caused by residential segregation for the court to lift supervision and declare the district unitary[59] because desegregation orders were intended to be time-limited and could not simply continue indefinitely until their goals were met.[60]

In all, the Supreme Court's tendency in recent years has been to move away from its approach during the Civil Rights Movement. The Court is no longer dedicated to using its power to ensure that school districts are following the holdings of *Brown v. Board of Education I* and *II*.

Conflict Between the NCLBA and Desegregation Orders

The enactment of NCLBA put school districts throughout the country on notice that they must enforce the school choice provision of the Act during the 2002-2003 academic year. The experience of the Richmond County, Georgia, school district is instructive: Prior to the start of the academic school year, the school system challenged the school choice provision in court. The school district argued that it should not have to comply with the provision because of its existing desegregation order, which mandates racial balance within the schools, and a United States District Court ordered a one-year delay in the implementation of the school choice

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[52] 503 U.S. 467 (1992).
[53] *Id.* at 489.
[54] *Id.* at 491.
[55] *Id.* at 494.
[56] 515 U.S. 70 (1995).
[57] *Id.* at 85.
[58] *Id.*
[59] *Id.*
[60] *Jenkins*, 515 U.S. at 89 (1995).

provision.[61] In response to the District Court's decision, the United States Department of Education told Richmond County, in a letter from Undersecretary of Education Eugene W. Hickok, that the schools were not exempt and that the school district must allow its students to transfer out of failing schools.[62] The Department of Education instructed the school district to petition the District Court to amend or lift its desegregation order while abiding by the school choice provision of the NCLBA and underscored the Undersecretary's letter by promulgating a corresponding federal regulation.[63] The regulation states that school districts may not use desegregation orders to avoid or exempt themselves from the school choice provision of the NCLBA.

In essence, the school choice provision of the NCLBA gives legal and financial support to parents who wish to transfer their children from one school to another. In practice, this has the same effect on the racial composition of student bodies that *de jure* segregation had before the *Brown* decisions.[64]

III. COURT-ORDERED DESEGREGATION PLANS SHOULD PREEMPT THE NCLBA'S SCHOOL CHOICE PROVISION: THE CONSTITUTIONAL ARGUMENT

Because the NCLBA applies equally to all public school students in the United States, and public school students are not part of a judicially identified suspect class, the language of the Act alone is probably not unconstitutional.[65] While the Act may distinguish among students based upon their relative wealth (since schools must allocate available funding to the neediest students first when there is not enough funding for all students[66]), wealth is not a characteristic that triggers heightened scrutiny under the Fourteenth Amendment.[67] Under this standard, a court will likely find the school choice provision of the NCLBA constitutional on its face. If a student brought an equal protection challenge against the provision on its face, proponents of the Act could produce a rational, non-discriminatory

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[61] *See* Ashlee Griggs, *Schools Respond to Criticism Feds Accuse County of Hiding Behind Desegregation*, AUGUSTA CHRON., Sept. 7, 2002, at A1; Mari Leonard, *Ga. School District Told to Comply With New Law,* BOSTON GLOBE, Sept. 5, 2002, at A2. The decision of the District Court, granting the school district's motion for a one-year stay in the implementation of the NCLBA, was unpublished.

[62] Griggs, *supra* note 25, at A1; Leonard, *supra* note 25, at A2.

[63] 34 C.F.R. § 200.44(c).

[64] *See generally* Maureen Downey, *Black Schools White Schools; With Court-ordered Busing Fading and Races Choosing to Live Separately, Classrooms Are Heading Back to Where They Started*, ATLANTA J.-CONST., June 22, 2003, at E1.

[65] *See, e.g.* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985); Personnel Administrator v. Feeney, 442 U.S. 256, 271-272 (1979) (where the people affected by a challenged law do not belong to a class that has historically been discriminated against, courts will apply the lowest level of scrutiny when determining whether the law is constitutional).

[66] *See, e.g.* 20 USC § 6316(b)(9) (2003).

[67] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (holding that wealth does not warrant heightened scrutiny).

justification that would allow a court to defer to the legislature and find the provision constitutional.[68]

The Court in *San Antonio Independent School District v. Rodriguez*[69] held that education is not a fundamental right protected by the Constitution.[70] Nothing in the Constitution requires a state provide children with education.[71] As such, if a state mandates the education of its children either in its constitution or by statute, the state need only provide the students with the basic education described in the constitution or statute.[72] The Constitution does not require states to ensure that schools receive the same funding per pupil or that students get the same education.[73] The inequitable outcomes due to the limited transportation funding for the school choice provision are not unconstitutional because education is not a fundamental right protected by the equal protection clause of the Constitution.[74]

While courts will likely not find the school choice provision of the NCLBA unconstitutional on its face, they should find the provision unconstitutional as applied to schools with court-ordered desegregation plans. This is because desegregation orders are not based merely upon the whims or social predilections of the judges who issue them, but upon the Fourteenth Amendment of the United States Constitution.[75] By blocking the enforcement of the Fourteenth Amendment, the NCLBA essentially seeks to modify the enforcement of an Amendment to the Constitution by a mere act of Congress.

In *Brown I*, The Supreme Court held that where public schools are segregated by race, the Equal Protection Clause of the Fourteenth Amendment is violated.[76] The Constitution does not, however, require that students attend schools at a certain level of performance, nor does it require that public schools improve from year to year.[77] In *Rodriguez*, the Court held that if a state chooses to provide a public education to its children, that education must provide its students with the opportunity to acquire basic skills.[78] As such, The NCLBA's goal of improving schools and students' academic achievements is not a constitutional mandate.[79]

Taken together, the impact of the school choice provision, the corresponding federal regulations, and the Department of Education's instructions to educators create a rule requiring individual school districts to abandon court-ordered

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[68] *See* Personnel Administrator v. Feeney, 442 U.S. 256, 274 (1979) (purposeful discrimination without a legitimate, non-discriminatory purpose must be shown for a violation of the Fourteenth Amendment to be found).

[69] 411 U.S. 1 (1973).

[70] *Id.* at 30.

[71] *Id.*

[72] *Id.* at 37.

[73] *Id.* at 54.

[74] *Id.* at 30.

[75] *Brown II*, 349 U.S. 294 (1955)

[76] *Brown I*, 347 U.S. at 483.

[77] *Rodriguez*, 411 U.S. at 30.

[78] *Id.* at 37.

[79] *See* 20 U.S.C. § 6301; *Rodriguez*, 411 U.S. at 37.

desegregation whenever it comes into conflict with school choice.[80] This rule exceeds Congress's constitutional power because, as the Supreme Court has clearly stated, "Congress may not legislatively supersede [Supreme Court] decisions interpreting and applying the Constitution."[81]

In *Dickerson v. United States*, the Supreme Court stated definitively that Congress could not overrule one of the Court's decisions on a constitutional matter.[82] The only question in that case was whether the decision that Congress sought to reverse through legislation was a rule of constitutional interpretation or merely an evidentiary rule under the Court's supervisory power over federal courts.[83] Similarly, the argument could be made in defense of the NCLBA that the school choice provision, while it runs counter to court desegregation orders, is in keeping with the Fourteenth Amendment itself. If school segregation had been entirely eradicated since *Brown II*, this argument would be correct. In fact, as noted above, school segregation is worse now than it was twenty years ago, and with increased school segregation has come an increase in the quality gap between predominantly white schools and predominantly minority schools.[84] If anything, by adding federal funding and approval to the existing trend toward greater school segregation through private action (residential segregation), the school choice provision of the NCLBA may create a distinctive Equal Protection violation where none would have existed otherwise.

IV. COURT-ORDERED DESEGREGATION PLANS SHOULD PREEMPT THE NCLBA'S SCHOOL CHOICE PROVISION: THE EDUCATIONAL AND PUBLIC POLICY ARGUMENTS

The School Choice Provision is Financially and Logistically Burdensome

The school choice provision of the NCLBA enables any student at a school identified as needing improvement to transfer to a successful school.[85] On its face, this provision appears to help students at failing schools by giving their parents greater control over their children's education. Unfortunately, the provision is difficult and ineffective in practice.

If every student took the opportunity to transfer from a school identified as needing improvement, successful schools within the district would quickly be faced with massive overcrowding.[86] Currently, the school choice provision corresponding regulations allow all students to transfer from schools identified as needing improvement and school districts cannot use capacity issues as a

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[80] *See* text accompanying note 62, *supra.*

[81] Dickerson v. United States, 530 U.S. 428, 437 (2000).

[82] *Id.*

[83] *Id.*

[84] *See* text accompanying note 64, *supra.*

[85] 20 U.S.C. § 6316(E).

[86] DEPARTMENT OF EDUCATION, *supra* note 31, at 12.

justification for preventing transfers.[87] School districts also may not use class size limits set by the district or state law to prevent transfers.[88] Furthermore, health and safety concerns that may arise out of increased student populations at the successful schools within a district are not valid reasons for preventing transfers.[89]

In essence, the school choice provision and its accompanying regulations suggest that schools must allow students to transfer from failing schools regardless of the transfer's impact on the successful schools.[90] At the same time, the Act makes comparatively few provisions for improving the failing schools. Taken as a whole, the Act seems to make the naïve assumption that successful schools will be successful regardless of how many students they have in the student body and in each class. Even if school choice did help some students academically, the provision is short-sighted and likely to cause the overtaxed succeeding schools to decline in quality and perhaps be identified as needing improvement in years to come. These outcomes outweigh the potential for a few students to improve as a result of school choice.

The potential for overburdening schools with fluctuating attendance under the plan is exacerbated by the NCLBA's provisions for failing schools that improve their performance. The school choice provision allows students to transfer from their home school only until that school begins to make adequate yearly progress.[91] Students may no longer transfer once it meets adequate yearly progress.[92] Students who choose to transfer are able to continue at the succeeding school until they complete the highest grade at the succeeding school, at which point they must return to their home school.[93] When this happens, the school is likely to be unprepared for the consequent jump in enrollment, which may, in turn put the school below its required performance the following year.

The school choice provision of the NCLBA is also impractical because it disregards its financial impact on the schools identified as needing improvement.[94] If students transfer from a school identified as needing improvement, the money allocated to that school per pupil may go to the succeeding school.[95] Schools

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[87] No Child Left Behind § 6316(E); 34 C.F.R. § 200.44; DEPARTMENT OF EDUCATION, *supra* note 31.

[88] DEPARTMENT OF EDUCATION, *supra* note 31, at 12.

[89] *Id.* at 12-13.

[90] *Id.*

[91] 34 C.F.R. § 200.44(g); DEPARTMENT OF EDUCATION, *supra* note 31, at 6. For example, if a student transferred to a succeeding school that ran through grade four when that student was in second grade and the original school ran through grade six, the student would have to return to the original school after completing grade four if the original school were able to meet adequate yearly performance requirements.

[92] 20 U.S.C. § 6316.

[93] 34 C.F.R. § 200.44(g); DEPARTMENT OF EDUCATION, *supra* note 31, at 6.

[94] *See generally* 20 U.S.C. § 1116.

[95] *Id.*; DEPARTMENT OF EDUCATION, *supra* note 31, at 16-17. The funding for students transferring under the NCLBA should be handled in the same way any other school transfer would be funded. DEPARTMENT OF EDUCATION, *supra* note 23, at 16. The federal Title I

identified as needing improvement or in the corrective stage of school improvement are thus deprived of the financial support necessary to realize positive changes.[96] In this way, the school choice provision serves to compound the problems of failing schools.

Another way in which the school choice provision hurts failing schools is by requiring them to subsidize the transportation of transfer students to successful schools. This subsidy reduces the funds available for improving the failing schools.[97] The identified schools are more likely to reach adequate yearly progress sooner if they use the money for supplemental educational services and other resources rather than for providing transportation to successful schools.

The NCLBA's impact on Massachusetts illustrates the school choice provision's impracticability. Currently in Massachusetts, students' performances on the MCAS (the Massachusetts Comprehensive Assessment System)[98] test have identified 194 schools as needing improvement.[99] It is expected that by 2004 when the NCLBA requires states to break down test results by subgroups, up to fifty percent of the state's 1,900 public schools will need improvement.[100] It is easy to see how allowing the students in half of the public schools in a state to transfer to the other half of the schools would be impracticable – it has the potential to double the occupancy of the state's successful schools. Such an outcome would upset the accomplishments of successful schools and is unlikely to have a significant impact on the transferring students' performance.[101]

School Choice Has Not Been Shown to Improve Educational Outcomes

There is little empirical evidence that school choice improves academic

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money related to a student who chooses to transfer should either stay at the school from which the student transferred or go to the receiving school depending on whether the school district generally allocates its Tile I money by enrollment at a school or by eligibility. DEPARTMENT OF EDUCATION, *supra* note 31, at 17.

[96] *See generally* 20 U.S.C. § 6316; *Education Funding Priorities: Before the Budget Comm. U.S. Senate* (Feb. 26, 2002) (statement by Bob Chase, President, National Education Association) *available at* http://www.nea.org/lac/testimon/edfunding.html.

[97] 20 USC § 6316(b)(9). *See also* note 19, *supra*.

[98] The MCAS is a standardized achievement test given to all Massachusetts public school students. Students must pass the test to graduate high school. *See* <http://www.doe.mass.edu/mcas/about1.html> (visited November 14, 2003).

[99] Michele Kurtz, *Law Could Label Half Massachusetts Schools Deficient,* BOSTON GLOBE, Jan. 13, 2003, at A1.

[100] *Id.* States across the country are anticipating thirty to eighty percent of their schools will be identified as needing improvement in 2004 when test results are broken down by subgroup.

[101] *See generally* Dan D. Goldhaber, *School Choice: An Examination of the Empirical Evidence of Achievement, Parental Decision Making, and Equity,* 28 EDUC. RESEARCHER 16 (Dec. 1999); Henry M. Levin, *Educational Vouchers: Effectiveness, Choice, and Costs,* 17 J. POL'Y ANALYSIS & MGMT. 373 (1998); Patrick J. McEwan, *The Potential Impact of Large-Scale Voucher Programs*, 70 REV. EDUC. RES. 103 (Summer 2000).

performance.[102] What little research exists mostly focuses on student performance with private school voucher programs rather than with public school choice.[103] Studies on public magnet school programs have shown limited improvement by students attending magnet schools.[104] While students may improve on some tests, their overall scores do not improve significantly.[105] A 1992 study of a limited public school choice program in California showed a decrease in students' California Achievement Test scores.[106] The results of this study are significant because these same test scores are used to determine whether a school is successful or in need of improvement under the NCLBA. Currently, there is no strong evidence that suggests that students in public school choice programs perform better than they did when attending their neighborhood schools.[107]

Proponents of school choice and voucher programs argue that choice and competition between schools will make schools more efficient and, thus, better.[108] This argument assumes that schools achieve success in the same way that businesses do, without taking into account the impact of student transfers.[109] School choice leads to a high rate of student turnover, which can be disruptive to both the transferring students and their peers at the receiving school.[110] Furthermore, there is no proof that competition among schools improves students' performance.[111] In all, school choice may give parents a feeling of control, but it does so while imposing more educational costs than benefits.

School Choice Is Inequitable

While there is little research on students' performance with school choice or voucher programs, research has identified the types of students who choose to transfer when school choice programs are in place.[112] School choice and voucher programs have a "skimming effect" on public schools because not all parents take

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[102] Goldhaber, *supra* note 101, at 16; Levin, *supra* note 101, at 373; McEwan, *supra* note 101, at 103.

[103] Goldhaber, *supra* note 101, at 16; Levin, *supra* note 101, at 373; McEwan, *supra* note 101, at 103. School voucher programs are programs in which public school districts provide students with vouchers that can be used to pay for part or all of the student's tuition at a private school.

[104] Jeffrey R. Henig, *School Choice Outcomes, in* SCHOOL CHOICE AND SOCIAL CONTROVERSY 68, 93-94 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

[105] *Id.*

[106] Goldhaber, *supra* note 101, at 18.

[107] Goldhaber, *supra* note 101, at 18.

[108] *School Choice as Education Reform: What Do We Know?*, CLEARINGHOUSE ON URB. EDUC. DIG. (ERIC Clearinghouse on Urban Education, New York, N.Y.), Aug. 2001, at 1.

[109] *Id.*

[110] KEVIN B. SMITH & KENNETH J. MEIER, THE CASE AGAINST SCHOOL CHOICE 11 (1995).

[111] Goldhaber, *supra* note 58, at 18.

[112] Levin, *supra* note 101, at 379; McEwan, *supra* note 101, at 131.

advantage of the programs.[113] Studies have found that the mothers of students who transfer under school choice programs have a higher socio-economic status ("SES") and level of education than the average parent in the school district.[114] In other countries where school choice programs are in place, this "skimming effect" has led to increased segregation: In Scotland, segregation by SES has increased with school choice, and in New Zealand, ethnic minorities have become increasingly concentrated in under-performing schools.[115]

Because parents with higher education and income levels are more likely to take advantage of the school choice provision, schools identified as needing improvement end up populated almost exclusively by children whose parents are not as involved in their children's education.[116] Since parental involvement is the leading indicator of students' success,[117] the school choice provision will make it more difficult for the failing schools to make adequate yearly progress. Failing schools, already financially strained because of the money being spent on transportation for school choice and because of the decrease in student enrollment, will be further challenged as their student bodies are made up increasingly of those students most likely to perform poorly.

Benefits of Integrated Schools

The benefits to students attending integrated schools are greater than simply being exposed to children from different backgrounds.[118] A recent study looked at the benefits of school integration to public high school seniors at the Cambridge Rindge and Latin School in Cambridge, Massachusetts.[119] These seniors overwhelmingly felt that their experience at the highly integrated high school would prepare them to function as adults in a diverse community, understand people with different racial and ethnic backgrounds and different points of view, and work in job settings with people different than themselves.[120]

Since Rindge and Latin is Cambridge's only public high school, the researchers could not compare the results of the study with another school in the district. However, they did compare the results with other, less integrated schools

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[113] Levin, *supra* note 101, at 379; McEwan, *supra* note 101, at 131.

[114] McEwan, *supra* note 101, at 131. These studies only look at the students' mothers' socio-economic status without considering fathers in any way.

[115] *Id.*

[116] *Id.*

[117] McEwan, *supra* note 101, at 126.

[118] *See generally The Impact of Racial and Ethnic Diversity in Educational Outcomes: Cambridge, MA School District*, THE CIVIL RIGHTS PROJECT HARVARD UNIVERSITY (Cambridge, M.A.) Jan. 2002.

[119] *Id.*

[120] *Id.* at 12. *See also* Downey, *supra* note 64 ("White people who grow up in racially isolated schools, however excellent, are increasingly going to be out of step in the world in which they are going to live," quoting Jack Boger, the deputy director of the University of North Carolina Center for Civil Rights).

throughout the country.[121] This comparison shows that high school students in Cambridge have a more positive educational experience due to the highly integrated student body.[122]

Students at integrated public schools are also more likely to have better teachers because white teachers tend to leave highly segregated schools.[123] Students don't need white teachers to be successful, but because there is a shortage of qualified minority teachers in many areas, segregated schools end up drawing their teachers from a smaller pool qualified candidates and suffer a higher rate of teacher turnover than predominantly white or integrated public schools.[124]

The Department of Education's push to favor the NCLBA's school choice provision over school desegregation is bad educational and public policy. The school choice provision is impractical, ineffective, and inequitable, while students attending integrated schools derive real benefits.

V. ALTERNATIVES TO THE NCLBA'S SCHOOL CHOICE PROVISION

Because the school choice provision of the NCLBA may unconstitutionally upset desegregation orders, failing schools should use other provisions of the Act when striving to meet adequate yearly progress requirements. Schools identified as needing improvement should be required to provide supplemental educational services to their students rather than allowing students to transfer out. Currently, parents of children at schools identified as needing improvement for at least two years may choose either to transfer their children to a succeeding school (available the first year after being identified) or to request that their children receive supplemental education such as tutoring and other academic enrichment services beyond those provided during the academic day.[125] Instead, schools should provide supplemental educational services to all students attending failing schools. An identified school is more likely to make adequate yearly progress if the students receive individualized services while the school is implementing its improvement plan. The money allocated to the failing school will be better used if the school spends its money on tutoring its students rather than paying for transportation to another school which may be overcrowded as a result of the school choice provision.

VI. CONCLUSION

Desegregation plans must preempt the school choice provision of the NCLBA

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[121] *Id.*

[122] *Id.* at 2. Comfort with members of other races, increased understanding of diverse perspectives, and desire to interact with people from different backgrounds led to this positive educational experience.

[123] *See* Chad Roedemeier, *White Flight of Teachers Resegregating South*, BOSTON GLOBE, Jan. 13, 2003, at A2.

[124] *Id.*

[125] 20 U.S.C. § 6316; TIMETABLE, *supra* note 15, at 5.

for both legal and public policy reasons. School segregation is unconstitutional and the school choice provision of the NCLBA is unconstitutional insofar as it facilitates segregation and defies court-ordered desegregation plans. The school choice provision of the NCLBA is also highly impractical. There is no proof that school choice is effective in improving educational outcomes, and it is inequitable in its results. School integration, by contrast is of proven value to students. Rather than funding a school choice program that will upset desegregation plans and financially hurt already struggling schools, the NCLBA and the Department of Education should provide supplemental educational services to students attending failing schools.

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