

WHEN THE FREE-MARKET VISITS PUBLIC SCHOOLS: ANSWERING THE ROLL CALL FOR DISADVANTAGED STUDENTS

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INTRODUCTION

The perceived failing health of public education in the United States has given rise to pleas for improvement. The performance of American elementary and secondary students has declined rapidly over the last thirty years.¹ The deterioration in American education disproportionately has occurred in the inner-city.² This means that particularly the poor and the minority are lacking the quality of education that will allow them to improve their performance and to compete globally. The ability of this nation to prepare its citizens to compete globally is particularly important in light of the pervasive feeling afoot that the United States is losing, and perhaps has already lost its foremost position in the world economy.³ Furthermore, that improvement in education must address the concerns of the minority and the poor is no longer disputed as necessary for the economic well-being of this country. The fabric of US society is changing. Minority enrollment in the United States is rising, as is the proportion of the less advantaged youngsters.⁴

* I thank Professor Martha Minow for supervising my writing of this piece and for engaging me in thoughtful discussion about ways to improve the quality of education from minorities and the poor. And thanks also to Rahsaana Towns, the Managing Editor, and the other Staff Editors for all the hours spent editing and improving my work.

1. Schools in the United States have done poorly by most academic yardsticks. Leaving aside momentarily the question as to whether standardized exams are a valid measurement of academic success, for the record, Scholastic Aptitude Test ("SAT") scores have declined steadily over the past thirty years. Combined math and verbal results have fallen from an average of 978 in 1963 to 902 in 1993. Because a broader cross section of students is now taking the SATs, this comparison alone may not be entirely fair. But perhaps more telling is the fact that even with a larger test pool, the absolute number of outstanding scores has dropped. The number of students scoring above 600 on the verbal SAT in 1988 was thirty percent lower than in 1972. In urban school systems, the picture is worse. James A. Peysner, *School Choice: When, Not If*, 35 B.C. L. REV. 619, 626 (1994).

2. Amy J. Schmitz, *Providing an Escape for Inner-City Children: Creating a Federal Remedy for Educational Ills of Poor Urban Schools*, 78 MINN. L. REV. 1639, 1641-47 (1994).

3. JOSEPH MURPHY, *SCHOOL-BASED MANAGEMENT AS SCHOOL REFORM: TAKING STOCK* at 69 (1995). While a clear relationship between educational achievement measured by specific tests and international productivity comparisons has not been established, the underlying assumption of most of the current policy talk about educational reform suggests that schools are to blame for the perceived lack of competitiveness of the U.S. economy. *Id.* at 70.

4. It is projected that by the year 2000, nearly half of all school-aged children will be non-white. Moreover, the percentage of children living in poverty in the United States has more than doubled than that of other major industrialized nations. Thirty percent of children in metropolitan areas live in poverty; that will increase by a third by the year 2000. For minorities, the statistics are worse. The 1990 Census Bureau report found that more than 40 percent of Hispanic children live in poverty as compared with just 13 percent of non-Hispanic whites. If the current

Whether warranted or not, blame for the failing economy and decline in the educational performance of students has been placed on schools.⁵ Schools are held responsible, for instance, for not providing an adequate or relevant education, for drawing teachers and administrators from the bottom of the intellectual barrel and then for poorly training their roles, for providing poor instruction using poor materials, and for lacking leadership and vision.⁶ By drawing parallels to corporate America,⁷ school reformers have sometimes attributed these ills to market-based flaws of the existing structure, namely that schools function as monopolies and within heavily centralized structures of governance.

Public schools function as monopolies for the simple fact that they traditionally have lacked competition other than from private institutions. For those parents who cannot afford to send their kids to private schools, they are often restricted to enroll their children in the designated school of the district in which they live. Under this system, with a few exceptions, parents would have to move out of their neighborhoods in order to send their kids to a different and “better” school. The choice to follow the better schools often is limited to individuals who have the economic feasibility to move into more expensive neighborhoods since the better schools are often in the most unaffordable neighborhoods.⁸ As a result, public schools traditionally have not have to worry about losing their students and their allocated per-pupil funding to other schools. Proponents of market-based reform of public schools argue that this lack of competition among schools creates a disincentive for improvement and leads to inefficiency and waste.

Furthermore, some critics of the existing district governance of schools — which provides central office officials with great authority and grants only limited discretion to administrators, teachers, and others, at school sites — argue that this heavy regulatory overlay impedes effective accountability.⁹ In other words, the layers of rules which govern the process provide endless excuses for school personnel when student performance is low.¹⁰ More importantly, those who are making the rules are so detached from the local needs of students that their standardized methodologies and

trends continue, a study by Tufts University concluded, by the year 2010, more than half of all black and Latino children will be poor. *Id.* at 72 - 77.

5. An alternative explanation for the decline in the performance of students is that the increase in number of youngsters in this country affected by poverty, unemployment, crime, drug addiction, and malnutrition is increasing and with it the need for a variety of more intensive and extended services from schools. It is not that the quality of services rendered at schools has declined and produced the ills of education, but rather that the increased needs of children have overburdened the schools. *See id.* at 74.

6. *Id.* at 70 - 71.

7. Corporate America has faced a series of problems not unlike those confronting schools — diminished product quality, low employee morale, and unhappy consumers. *Id.* at 84.

8. Part of the explanation for better schools being in the richer neighborhoods is that public school funding primarily comes from local property taxes. Hence, the richer the neighborhood, the larger the amount of taxes levied. Although no studies have been able to establish a clear link between school spending and increased student performance, the huge disparate funding allocation that results among poor and rich school districts lead to notable differences in the type or resources (including buildings and textbooks) and the quality of educators (rich districts simply pay more to their teachers) that rich districts are able to provide. *See infra* note 59 and accompanying text.

9. MURPHY, *supra* note 3, at ix.

10. *Id.*

rules, when applied evenly to all students, may prove ineffective.¹¹ Lastly, this system of decentralized decision-making may often lead to boredom, frustration, and eventually to the decreased morale of educators and principals.¹²

Not surprisingly, many of the school reform laws and policies in place today are aimed at "demonopolizing" our education system and at decentralizing our schools. The goal of "demonopolizing" has been implemented through school-choice programs, whose aim is, generally, to increase the mobility of students to other schools, including public schools within the same ["intradistrict"] or different ["interdistrict"] districts, private schools [through vouchers] or charter schools.¹³ Advocates of school choice generally believe that the only avenue to true educational reform in a capitalistic, individualistic society like the United States is through a traditional competitive market theory.¹⁴ Broadly speaking, proponents of school choice make at least three types of claims that will result from increased competition. First, they argue that school choice is simply a more efficient way of delivering education. Breaking the monopoly and forcing schools to compete in the marketplace not only will better match student needs to parental desires with educational resources, but will produce a better education at lower costs.¹⁵ Second, they argue school choice grants more liberty and autonomy to parents. Greater control given to parents over their children's education needs is desirable because the existing complex bureaucratic factors overly encumber public schools and impede their ability to respond to changing educational needs.¹⁶ Conversely, increased parental control over student assignments should give schools an incentive to become more responsive to their students' needs. Lastly, they argue that school choice enables children of low-income and minority families to achieve educational equity and opportunities previously denied them because of their economic status. The rationale is that under the current system, students are forced to stay in neighborhood schools and must deal with a poor academic instruction, a disproportionate track, and the stigma of being less capable learners.¹⁷ In contrast, school choice programs aim

11. *Id.*

12. *Id.*

13. For this paper, school choice includes intradistrict, interdistrict, vouchers and charter schools. For a definition of these terms, see *supra* notes 42 - 60 and accompanying text.

14. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 85-107 (1962); MYRON LIBERMAN, *PRIVATIZATION and Educational Choice* 236 (1989).

15. *Id.*

16. Proponents of school choice strongly blame the present system of delivering education in grades K-12 as primarily responsible for the deterioration in the academic performance of American students. The argument is that public schools exist as monopolies that waste social resources. They point to data showing that whereas between 1960 and 1984, student enrollment grew by nine percent, the number of "other" school staff (i.e. central office administrators, bus drivers, counselors and janitors) grew by 500%. Furthermore, the number of school districts has imploded. In 1960 there were over 40,000 school districts in the United States; by 1981 that number had fallen to just under 16,000. The net result is an increasingly centralized system with a growing dependence on a heavily staffed school bureaucracy. Jonathan B. Cleveland, *School Choice: American Elementary and Secondary Education Enter the "Adapt or Die" Environment of a Competitive Marketplace*, 29 J. MARSHALL L. REV. 75 (1995); see also, Peyser, *supra* note 1. at 619.

17. Philip T. K. Daniel, *A Comprehensive Analysis of Educational Choice: Can the Polemic of Legal Problems Be Overcome*, 43 DEPAUL L. REV. 1, 30 (1993). But see *supra* Part I (discuss-

to be especially inclusive of those children who have been the most marginalized or have suffered the most detrimental effects of the “inefficiency” of the current system.¹⁸ In this way, school choice gives poor parents some of the options that more affluent parents have always had.¹⁹

Proponents of school choice also purport to remedy, namely through charter schools, the fatal organizational defects of public education — too much central control in the hands of a few.²⁰ The belief is that education is most effective in settings in which schools are highly autonomous and school principals and teachers have the maximum amount of discretion and independence.²¹ Whereas charter schools are a more recent phenomena,²² efforts to decentralize the public schools have been in force since the 1970’s through models implemented in the existing public schools known as school-based or site-based management.²³ Like proponents of charter schools, advocates of school-based management assert that education can only be rendered more effective if the central office mode of proscription is disrupted and true responsibility is placed close to the point where instruction actually occurs — in the hands of principals, teachers, and parents.²⁴ By empowering those most directly working with students, proponents of decentralization believe that accountability will be enhanced, that students

ing the potential of school choice programs to increase inequities in public education for disadvantaged children).

18. Proponents of school choice also believe that such plans advance social policy, usually racial balance and equality of educational opportunity or may recognize the diversity which exists among children’s learning styles and teacher’s teaching styles, and therefore, believe that, if each individual student is to achieve his or her maximum academic potential, different options, must be available for parents, students, and teachers. Angela G. Smith, *Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity*. 74 NEB. L. REV. 255, 257 (1995). Many opponents of school choice programs, however, fear that school choice will actually conflict with desegregation efforts and actually result in increasingly segregated schools. See *infra* notes Part I, Section C (discussion how school choice programs may lead to the increased fragmentation of public schools across racial lines and social class differences).

19. Chester E. Finn, Jr., *Why We Need Choice*, in CHOICE IN EDUCATION: POTENTIAL AND PROBLEMS 3, 5-7 (William Lowe & Herbert J. Walberg, 1990). School choice programs, in varying degrees, seek to provide more families, particularly low-income ones, with greater access to more educational opportunities. For example, increasing low-income families’ access to the private school market is the centerpiece of the major voucher programs. Therefore, only families whose household income qualifies them for federal reduced lunch programs are eligible to participate. See TERRY M. MOE ed., PRIVATE VOUCHERS (1995). But see *supra* note 132 (discussing that vouchers to private schools only provide part of the total cost of tuition to attend private schools, making it impossible for low-income families to make use of the voucher).

20. JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA’S SCHOOLS 217 (1990).

21. The idea is a blueprint of the movement in corporate America of pushing decision making down to the level of the organization in closest contact with the consumer, by reorienting their management philosophy from control to empowerment, by establishing scrupulous reputations for attention to quality, and by changing their views of workers — from property of the company to partners in the corporate undertaking. MURPHY, *supra* note 3, at 84.

22. The first charter school, City Academy in St. Paul, Minnesota, opened in September of 1992. See UNITED STATES GENERAL ACCOUNTING OFFICE; REPORT TO CONGRESSIONAL HEARING. CHARTER SCHOOLS: NEW MODEL FOR PUBLIC SCHOOLS PROVIDES OPPORTUNITIES AND CHALLENGES (Jan. 1995) at 32. [Heretofore, REPORT TO CONGRESSIONAL HEARING].

23. The first time that school-based management appeared as a complete idea was in a New York state education reform report, issued by the Fleischmann Commission in 1973. MURPHY, *supra* note 3, at viii. For a more detailed description of school-based management, see *infra* notes and accompanying text.

24. *Id.* at ix.

and parents will become more responsive, and that schools will become more efficient (spend less money).²⁵

Because of the recent implementation of most school-choice programs, little empirical evidence exists to support or question many of the claims of school improvement that proponents of school-choice policies have made. More studies and data have been gathered with regards to site-based management but the results as to their effectiveness still have too many variables and are not entirely conclusive.²⁶ Even without clear evidence, dissenting voices have expressed vehement opposition or clear trepidation about the adoption of capitalist market values by publicly financed educational institutions. This is true particularly when these models emphasize private individualism in the form of choice. Those who vehemently oppose it do so mostly based on ideological differences about what the purpose of public school institutions in America should be. Viewing the strength of public educational institutions to be when these serve as places which bond "individuals to common purpose for the nation, and which require toleration and the compromise of conviction,"²⁷ opponents of school-choice fear that a more individualistic, laissez-faire conception of education will result in the "collective loss of common purpose, civic virtue, and fundamental values, leading to 'moral thoughtlessness.'"²⁸ This latter assertion holds true because a model based on choice has the potential of encouraging individuals to act "in accordance with their own personal, ethnic, or religious preferences to isolate themselves through the school of their choice" and to seek personal advantage.²⁹ In the context of decentralization, the same can be true when localized thinking may lead individuals to provincialism — the narrow viewpoint that the norm and values of your region, town, or neighborhood represent the essence of human achievement.³⁰

In addition to concerns over losing the public school's positive commitment to unity and democracy, opponents of market-based remedies in the schools fear that greater inequities will result as these models may tend to ignore or inadequately address the needs of those who need educational improvement the most.³¹ In the case of school choice, not addressing the needs of the less fortunate, namely the economically disadvantaged and/or

25. *Id.* at ix - x.

26. *See infra* notes 265 - 278 and accompanying text.

27. Mary Jane Guy, *The American Common Schools: An Institution at Risk*, 21 J. L. & EDUC. 569, 570 (1992). The American public schools as an instrument of unity and solidarity vital to a positive commitment to democracy was envisioned by policy makers during the formative years of the American Republic. This model was based on at least three essential "republican" beliefs: That education was vital to the republic, that proper education consisted of the general diffusion of knowledge, and that virtue and civic responsibility were essential. More specifically, the public schools as envisioned by Jefferson, Benjamin Franklin, Benjamin Rush, and Horace Mann would: (1) be free without burden on poor children or class; (2) be accessible to all (not just the poor) and serve all classes, (3) be supported by public taxation; (4) be operated and governed as public, secular entity, free from special interest or sectarian controversy; (5) be part of a system that existed uniformly throughout the state. *Id.* at 580 - 81

28. *Id.* (citing H. Arendt, *Thinking and Moral Considerations* 38 SOC. RES. 417 -46 (1971)).

29. *Id.* at 572. For example, open enrollment and vouchers provide the fiscal feasibility for individuals to separate themselves from the group. *Id.*

30. MURPHY, *supra* note 3, at 150 - 151.

31. *Id.* at 574.

members of ethnic minorities, results in great part in that, whereas it holds out that the greatest good of the greatest number should be the goal of education, it does so even if those who may not be in the greatest number are left out altogether.³² A true free market for education, like any other market, requires a threat of failure; otherwise, competition will not push schools to improve the quality of their educational services. Consequently, though school choice reforms may stimulate innovation and improve the average of quality schools, they risk creating pockets of failure — public schools in economically depressed areas that retain the most disadvantaged students, that have difficulty attracting qualified teachers, that lack adequate funding, and that serve a body of uninvolved and/or uninformed parents and guardians. In addition, the system is created to reward those individuals who are better able to assert a choice to control the education of their children. For reasons explored in this paper, these individuals tend to be the more well-off economically or the better educated.³³

The possibility of decentralizing efforts creating greater disequalizing effects than those currently in place in the districts in charge of educating the most disadvantaged students³⁴ exists if self-managing schools impose much lower expectations on the student's capacity for intellectual development and hard work when developing curricula for poorer schools.³⁵ In addition, deregulation may ultimately result in absolving the central authority of much of the responsibility for the welfare of minorities. In other words, since the political responsibility will fall in the hands of local communities, the state may more easily shirk its social responsibility for providing an equitable quality of education for all.³⁶

This entire debate about deregulating schools and of increasing individual choice in how parents choose to educate their children is taking place within a context of increased national attention to the concerns of education. This national effort, known as "standards-based reform" or "systemic reform," focuses on creating a national support for the idea of changing education through the establishment of high standards in academic content and occupational skills and then basing reform of the entire education system on these standards.³⁷ This requires accepting that the

32. *Id.* at 572.

33. See *infra* notes 60-146 and accompanying text.

34. Those schools which have the greatest number of disadvantaged students and which often need increased attention and accelerated education, are the ones with the least resources. For a discussion of the funding inequities that exist in our schools, see *infra* notes 70 - 86 and accompanying text.

35. See MURPHY, *supra* note 3, at 150.

36. See *id.* Education clauses in state constitutions place the responsibility of establishing and maintaining systems of free public schools on the state. The language of these provisions vary considerably among states with most requiring adequate systems and some requiring uniform systems of education. In Colorado, for example, the General Assembly is responsible, under the state constitution, to establish and maintain a "thorough and uniform system of free public schools. As interpreted by the state's highest court, this responsibility requires the legislature to ensure, through state action, thorough and uniform educational opportunities. . .in each school district. Comment, Peter J. Perla. *The Colorado Charter Schools Act and the Potential for Unconstitutional Applications Under Article IX, Section 15 of the State Constitution.* 67 U. COLO. L. REV. 171, 172 (1996).

37. NATIONAL ISSUES IN EDUCATION: GOALS 2000 AND SCHOOL-TO-WORK, JOHN F. JENNINGS, ed., at vii - viii (1995).

200-year-old ideal of local control of education must be changed; instead the nation and the states must seek broad consensus on what students should know and be able to do and that this agreement on what should be learned ought to be the “guiding star” of public schools.³⁸ In fact, there has been a measure of national agreement on this issue across political lines and the public/private sector.³⁹ The evidence of this consensus culminated in the creation of the Goals 2000 Act which was submitted to Congress by President Clinton.

This paper analyzes the potential for school choice and for decentralizing efforts, if left unregulated, to increase inequities in our schools and to result in the further fragmentation of students based on race and economic status. It proposes ways that the state or the federal government, especially when remedies in the courts are unavailable, can create mechanisms which may minimize the undesirable effects of the market on schools and evaluates whether the implementation of these proposals, even when these conflict with the free-market ideals, are viable and do achieve the desired improvements in education. It concludes that although major policy changes to the existing institution of public education — which would alter the allocation of resources and the distribution of students among schools leading to a more equitable funding system and a more integrated student body — would create a fairer playing field and minimize the unequitable effects of competition and decentralization on disadvantaged students, their implementation is highly unlikely in a political climate that is increasingly more fiscally conservative and less willing to share. Even so, school choice and decentralization programs will continue to operate in this country for at least until there exists credible documented studies demonstrating their failure. The difficulty and slowness of gathering this kind of empirical evidence means that school choice programs will be around for a long time. In the meantime, this paper proposes some minor yet more viable changes in the implementation policies of market-based principles in education which will mitigate some of the damage.

Part I describes what is meant by school choice and school-based management in the United States and discusses the scope of implementation of such programs in this country. Section A argues that a pure market model of competition may be unconstitutional since there is a strong likelihood that it will create pockets of failure among the schools with the fewest resources when these are unable to compete on an uneven playing field.⁴⁰ It recognizes, however, that declaring these systems unconstitutional may prove impossible in some states and that furthermore, from what we have learned about school finance litigation, the process of doing so may prove too costly and too lengthy to be effective. Instead, it argues that state legis-

38. *Id.* at viii.

39. All the major education organizations, all the major business groups, the nation's governors, the current Democratic President, and the former Republican president have all advocated this concept. Previously, there had only been consensus that the federal government have a role in dealing with the special needs of children; in fact, most governors did not endorse the idea of expanding the influence of the federal government in education. *Id.* at ix.

40. Since these schools must still educate those students who are left behind, they may end up violating the state requirements to provide an adequate or uniform system of education. See *infra* notes 70 - 86 and accompanying text.

latures should “step in” and “rescue” these schools with increased funding and technical assistance so long as these remain in operation. Section B argues that increased choice and decentralization, if left strictly to the market, are most likely to benefit those students already with the greater personal and financial resources simply because they will have greater access (i.e. information) to the benefit. Again, proposals about the kinds of policies and regulations that the state or the federal government should require to guarantee that market remedies are more inclusive of the disadvantaged are discussed and evaluated. Section C examines how unrestricted parental choice about where to send their children to school runs counter to benevolent policies of racial integration. Because racial segregation will result from private choice, it is likely to be considered *de facto*. Hence, judicial remedies to prevent the resegregation of schools through choice will not be available; state legislatures will have to create specific restrictions on choice if they result in racial imbalance or will have to create market-based policies which are likely to promote greater integration. Section D summarizes all the inequities of unregulated school choice programs and evaluates the viability of the proposed changes to school choice programs.

Part II presents the rationale behind the decentralization of public education in the United States. Section A describes the two movements of decentralization — site-based management and charter schools — and analyses some of the available studies on the effectiveness of each movement in granting autonomy to schools and resulting in innovative school reform. Section B addresses the concern of decentralized schools resulting in the lowering of academic standards for disadvantaged students and in provincialism and discusses as a remedy the application of national curriculum and assessment standards to such programs. Section C analyses the implications of fiscal inequities and problems with the distribution of resources to disadvantaged students created by the most decentralized management systems of schools and concludes that the state and/or federal government will need to intervene with increased funding or regulations. Section D compares site-based management schools to charter schools and argues that whereas charter schools have an easier time in gaining autonomy and implementing innovations, their potential to hurt the educational opportunities of disadvantaged students is greater. This section offers specific proposals to improve charter school legislation to minimize their potential for harm.

PART I

WHAT IS SCHOOL CHOICE IN THE UNITED STATES?

School choice is one of the most visible public school reform movement in the present era.⁴¹ Additionally, in some form, school choice is on

41. Presidents Reagan and Bush both publicly espoused one or another of the reforms of the school choice movement. See Ronald Reagan, *Statement to the White House Conference on Choice in Education*, January 10, 1989, reprinted in NANCY PAUL, *IMPROVING SCHOOLS AND EMPOWERING PARENTS: CHOICE IN AMERICAN EDUCATION—A REPORT BASED ON THE WHITE HOUSE WORKSHOP ON CHOICE IN EDUCATION* 29 (1989); George Bush, *Statement to the White House Conference on Choice in Education*, January 10, 1989, reprinted in *id.* at 31. President Clinton has also followed this lead.

the agenda of public school reformers in virtually every state in the union.⁴² Yet, school choice policies vary considerably.⁴³ For instance, school choice policies vary in geographical scope. At least seven states permit students to choose schools anywhere throughout the state ("interdistrict choice"),⁴⁴ and at least nine other states allow public school choice within some districts ("intradistrict choice").⁴⁵ Geographically-based proposals differ as to how much discretion schools have in selecting or rejecting applicants, where the number of otherwise eligible applicants exceeds the available capacity of any particular school, how much tuition they may charge, how much of that tuition is paid by public funds, and out of whose budget those public funds come.

Second, school choice programs also vary according to whether the state provides funding for students who attend public or private schools. This would mean replacing the existing system of publicly financed schools with a system of vouchers issued to parents of all school-age children or supplementing the existing system of publicly financed schools with a system of vouchers issued to some limited class of parents, typically parents of school-age children located in urban areas.⁴⁶ Parents may use these vouchers in their discretion at schools operated by public or by private entities.⁴⁷ These voucher proposals envision various degrees of public regulation of such schools, ranging from detailed regulations regarding educational standards, program offerings and admission criteria, to no public regulation at all.⁴⁸

Third, some policies extend student choices to nontraditional alternatives, such as charter schools.⁴⁹ In addition to offering yet another choice to parents, charter schools, publicly-sponsored, autonomous schools, are an attempt to re-establish local control over the curriculum, including the selection of teachers and principals, and the overall management of the operations of a public school. All charter schools must be approved by some

42. CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, *SCHOOL CHOICE* 99-112 (1992). [Hereafter CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING].

43. See Michael Johaneck, *Private Citizenship and School Choice*, 6 EDUC. POL'Y 139, 139-40 (1992).

44. Interdistrict public school choice policies have been adopted in such states as Arkansas, Iowa, Massachusetts, Minnesota, Nebraska, and Ohio. DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* at 226 (1995).

45. See CENTER FOR EDUCATION REFORM, *SCHOOL REFORM IN THE UNITED STATES: STATE BY SUMMARY 3* (1995) (on file with the Harvard Law School Library). The National Education Association supports choice plans at the local level. But most school choice proponents do not think intradistrict school choice policies go far enough to break the monopoly structure of public schools. Under this scheme, each school would offer the same curriculum developed by the school board. But because all the schools would basically offer the same curriculum developed by the school, most parents would likely select a school based on proximity, resulting in a student landscape nearly identical to the present system. See Cleveland, *see supra* note 16, at 96.

46. Most choice polities are publicly funded and restrict educational options to specific sets and sub-sets of families and public schools.

47. School choice programs confined to public schools do not generally evoke the degree of controversy that private school choice or voucher programs do. John F. Witte, *Public Subsidies for Private Schools: What We Know and How to Proceed*, 6 EDUC. POL'Y 206 (1992).

48. Stephen Eisdorfer *Public School Choice and Racial Integration*, 24 WETON HALL L. REV. 937 (1993).

49. SEYMORE FLIEGEL & JAMES MACGUIRE, *MIRACLE IN EAST HARLEM: THE FIGHT FOR CHOICE IN PUBLIC EDUCATION* 16 (1993); *see also* Peyser, *supra* note 1, at 619.

public institution⁵⁰ and vary considerably in their autonomy. While some operate as legally independent entities,⁵¹ others operate with no greater autonomy than many traditional public schools.⁵² Charter schools receive state funding and thus do not require tuition. This funding, however, varies according to the extent to which the funding amounts are negotiable⁵³ and according to how funds flow to the schools.⁵⁴

At least twenty-one states have already implemented programs described as school choice. Thirteen have done so in the last decade.⁵⁵ Likewise, twenty-seven states have adopted the charter school movement in one form or another.⁵⁶ Presently, there are three major educational voucher programs nationwide which operate in Indianapolis, Milwaukee, and San Antonio.⁵⁷ Moreover, scores of school districts have introduced choice programs as well.⁵⁸ Most existing school choice statutes apply only to public schools, but at least one state (Wisconsin) has adopted an experimental voucher program for private schools.⁵⁹

50. For example, the Colorado Charter Schools Act, COLO. REV. STAT. § 22-30.5-101 to 114 (1995), authorizes teachers, parents, and other concerned individuals to contract with the local board of education to establish publicly-funded schools operating largely free from district policies and state regulations; however, a charter school is nonetheless part of the school district in which it is located. As such, charter schools must be approved by local boards of education. However, the general assembly has been authorized by the state board of education to review and overturn the decisions of the local school district. And in fact, On July 18, 1994, the Colorado Board of Education unanimously voted to overturn a decision by the Denver School County School District No. 1. Perla, *supra* note 36, at 171.

51. At least five states, Arizona, California, Massachusetts, Michigan and Minnesota, authorize legally independent charter schools. REPORT TO CONGRESSIONAL HEARING, *supra* note 22, at 2.

52. Factors that influence charter schools' autonomy include their legal status and how they are approved, funded, and gain exemptions from rules. Some state laws exempt charter schools from most state education rules; that is charter schools receive a blanket exemption. Other states require charter school to request exemption from specific rules; these exemptions are subject to district or state approval or both. Legally independent charter schools are not subject to district rules unless agreed to as part of negotiations leading to charter approval. In contrast, charter schools that are legally part of a district are subject to district rules unless waivers are negotiated. *Id.* at 13.

53. Charter school's autonomy could be limited when funding amounts are subject to negotiation with the school district that approves the charter. Districts may seek to control over some funds as a condition of approval. *Id.* at 11.

54. In some states, funding for charter schools is set by the state and is not subject to negotiation. These funds flow directly from the state to the charter school. *Id.*

55. CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, *supra* note 42.

56. Marjorie Lambert, *School Voucher Idea Heads to Front Burner*, FT. LAUDERDALE SENTINEL, Feb. 5, 1995 at 1A.

57. Private funds support all but one, Milwaukee, of the nation's major educational voucher programs. Because these voucher programs do not receive public dollars, they side-step difficult Establishment Clause and regulatory issues. However, this may change as more states, cities, and school districts experiment more aggressively with voucher programs. For example, Milwaukee's Parental Choice Program, launched in 1990, initially only included qualified secular private schools. WIS. STAT. ANN. §§ 119.01-.84 (West 1991 & 1995). Recently, however, it was modified to include qualified religious schools. Not surprisingly, the programs has attracted litigation since its inception. See, e.g., Witte, *supra* note??, at 212.

58. CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, *supra* note ???. In 1995 alone, eight states considered establishing, or expanding, voucher programs. See Nina Shokraii, *School Choice Picks Up Steam*, WASH. TIMES, Jan. 17, 1995, at A17.

59. ARMOR, *supra* note 44, at 226. None of the other voucher initiatives for religious private schools have survived the ballot box; they have been defeated soundly in Oregon in 1991 and in

SECTION A: THE INCREASING INEQUITIES IN SCHOOL FUNDING
THROUGH CHOICE: EQUALIZING THE PLAYING FIELD.

School choice programs may result in significant loss of funding to poorer public schools and lead these schools to deteriorate to the point of inadequacy. Although funding alone does not result in better educational quality, it does have a significant effect upon quality.⁶⁰ First, a school is likely to decline in quality if it loses a disproportionate share of funding relative to the number of students that it loses to other schools. In a school choice system such a disproportionate loss may occur because under most public school choice plans, state funding follows each student to the new 'receiving' school that he or she chooses. If the choice is to attend a charter school or a different public school in the same or in a different district, the sending district becomes indirectly responsible for paying full tuition to the receiving district.⁶¹ This tuition charge equals the average per-pupil expenditure in the receiving district.⁶² Because students typically leave poorer districts, which are forced to compete in an uneven playing field, to attend more affluent districts,⁶³ the sending district generally pays more to the receiving districts than the sending district would have received had the child remained in the home district.⁶⁴ The truth is the market theory of school choice is in direct competition with the idea of educational equity. Market competition necessarily dictates that one "product" will be better than another; that each market competitor will strive to make his "product" better than the others on the market.⁶⁵ By definition, then, some schools will deteriorate and eventually close if they fail to improve.⁶⁶

The problem with simply allowing schools to deteriorate is that those students who never left will have to bear the burden. For reasons discussed in Section B below, those left behind will most likely to be the most disad-

California in 1993. *Id.* Ohio, however, plans to include religious schools in its program. Cleveland, *supra* note 16, at 151.

60. Ronald F. Ferguson, *Paying For Public Education: New Evidence on How and Why Money matters*, 28 HARV. J. ON LEGIS. 465 (1991).

61. When a child chooses to attend a private school, the amount of the voucher may not amount to the full tuition cost of attending the private school. Even though the sending school may be required to lose the funding for its students who choose private education, that amount is not in proportion to the tuition cost of the school. Not surprisingly, choice regimes that include private schools generally do not contemplate paying full cost, but instead offer vouchers that only pay a small percentage of tuition. *See infra* note 134 (discussing the little value of partial vouchers to low-income families).

62. See e.g., 1991 MASS. ACTS CH. 138 s 304 (ordering the state to deduct any tuition owed the receiving district by the sending district from aid the state would otherwise pay the sending district).

63. The Carnegie Foundation study on school choice concluded that statewide interdistrict choice programs "tend to widen the gap between rich and poor districts." THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, *supra* note 42, at 25. For example, the year after Massachusetts implemented its interdistrict choice plan, 135 students transferred from the public school in the nearly bankrupt city of Brockton to the school in Avon, a suburb that spent twice as much per high school pupil. This skimming cost Brockton almost one million dollars in state aid. *Id.* at 26 - 27.

64. Jim Hilton, Note, *Local Autonomy, Educational Equity, and Choice: A Criticism of A Proposal to Reform America's Educational System*, 72 B. U. L. REV. 973, 977 (1992).

65. Smith, *supra* note 18, at 279. .

66. Helen Hershkoff et al. *School Choice and the Lessons of Choctaw County*. 10 YALE L. & POL'Y REV. 1 (1992).

vantaged and the racial minorities.⁶⁷ Interestingly enough, Anthony Alvarado, community superintendent of District 4 in the 1970's — a district which has been credited with inventing school choice and implementing it to turn widespread educational failure into an education miracle — though still a promoter and facilitator of diverse school choice, remains skeptical that choice itself is a “magic bullet for poor schools.”⁶⁸ Alvarado rejects precisely the free market theory that school choice will drive out bad schools because, he asserts “when one school dies, it is the kids who are dying.”⁶⁹

One remedy available to the students who will have to attend the schools in danger of failing is to have the state courts declare such schools unconstitutional. For almost a decade now, inequities in public schools produced by the funding disparities among various districts⁷⁰ have been challenged either under state equal protection clauses⁷¹ or under state education clauses. Under an equal protection analysis, a few courts have actually found that students living in poor schools districts constitute a suspect class and that whenever a system burdens this suspect class with disproportionate funding as compared to other districts, it must do so only to further a compelling state interest.⁷² In the majority of states in which students in poor districts have not been declared to constitute a suspect class, local funding systems which rely heavily on local property taxes have been justified, under a rational standard, as in being in furtherance of local control of education.⁷³ In the case of school choice, which results in actually taking away a portion of the local funding from the local school,⁷⁴ the question would turn on whether the goals of school choice, increasing parental choice and improving the quality of education through competition, constitute either a compelling or a rational state interest. If the rationale of local

67. See *infra* notes 102 - 146 and accompanying text.

68. Carol L. Ziegler et al. *School Vouchers: Are Urban Students Surrendering Rights For Choice?*, 19 FHORDAM URB. L. J. 813, 818 (1992).

69. *Id.* Another school superintendent, commenting on the Massachusetts school choice program, noted that money his district sent to a receiving district went to add a Lacrosse team at the receiving district while his school simultaneously was eliminating foreign language classes. Massachusetts State Senator Arthur Chase, TESTIMONY BEFORE THE JOINT COMMITTEE ON EDUCATION (Nov. 12, 1991).

70. With funds leaving districts to other schools, the funding disparities among schools can very well become greater.

71. A similar challenge under the federal Equal Protection Clause was rejected in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

72. See e.g., *Serrano v. Priest*, 557 P.2d 929 (CA. S. Ct. 1976) (finding that the state's method of funding public education violated the state's equal protection clause).

73. What the courts were emphasizing was that local control is very much tied to the local raising of revenue — local taxation for local expenditures. Most state courts which accepted this connection recognized a legitimate need for local governments to keep control over educational content, educational spending and municipal spending priorities (i.e. whether to spend more on police or schools). See e.g., *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1022 - 23 (Colo. 1982); *Thompson v. Engelking*, 537 P.2d 635, 645 (Idaho 1975); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 788 (Md. 1983); *Board of Educ. v. Nyquist*, 439 N.E.2d 359, 366-67 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1138 - 39 (1983); *Board of Educ. v. Walter*, 390 N.E.2d 813, 819 - 20 (Ohio 1979), *cert. denied*, 444 U.S. 1015 (1980); *Kukor v. Grover*, 436 N.W.2d 568, 580 (Wis. 1989).

74. The flow of funds outside some schools into private schools or schools outside the district actually diminishes the tie between local funding and local control which has been used to justify school funding systems based on local property taxes. Hilton, *supra* note 64, at 973.

control of education did not constitute a compelling state interest,⁷⁵ it is highly unlikely that parental choice and claims of improving the quality of education without substantial proof of its effectiveness would. On the other hand, a rational standard would be much easier to satisfy, particularly in light of the pressing need to improve the quality of education in our schools. Since only a few states apply the compelling state interest test, most states would uphold the constitutionality of school choice policies under state equal protection analysis.

Other states, even some which have rejected challenges under equal protection clauses,⁷⁶ have overturned public school financing systems when these have failed to provide all students with the minimum education required under state constitutions.⁷⁷ State education clauses directly address states' educational duties,⁷⁸ and have offered the strongest theoretical basis for seeking court-imposed education reform. The success of challenges under state education clauses often turns on the language of the clause itself.⁷⁹ State education clauses vary in what they require of states, from simply a general duty to provide some level of free education to the strongest commitment to education. Those requiring the highest commitment — Montana, Louisiana, New Mexico, and North Carolina — use the word "equality" in defining the state's obligation. The inclusion of this term, however, has only been determinative in one of the four states in declaring its current system of public financing unconstitutional.⁸⁰ Other states require that state constitutions provide a uniform public school system, but in some states the requirement for uniformity has only been applied to such things as instruction and standards and only a few have applied it to financing.⁸¹ A third set of states require that the school system be efficient —

75. Serrano, 557 P.2d at 951. The court found that as structured, the public school funding system actually frustrated the objective of providing individual cities and towns with control over their educational systems because although rich districts could afford to provide the quality of education they chose, the poorer districts did not enjoy the same options and were limited in their control to the amount of money they could raise in education. *Id.*

76. See e.g., *Robinson v. Cahill*, 303 A.2d 273 (N.J., 1972), *cert. denied*, 414 U.S. 976 (1973).

77. *Id.*

78. Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814-16 (1985).

79. Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 308 (1991).

80. *Id.* at 320. Despite the strong language of these constitutions, Montana is actually the only state that declared that the state must fund schools in an equitable manner. *Helena Elementary School Dist. No. 1 v. State*, 236 Mont. 44, 52-55, 769 P.2d 684, 689-90 (1989), *modified*, 236 Mont. 60, 784 P.2d 412 (1990).

81. See e.g., FLA. CONST. art. IX, s1; COLO. CONST. art. IX, s2; ARIZ. CONST. art. 11, s1; IDAHO CONST. art. IX, s1; MINN. CONST. art. XIII, s1; NEV. CONST. art. 11, s2; OREGON CONST. art. VIII s3; WIS. CONST. art. X, s3; N.D. CONST. art. VIII, s2; S.D. CONST. art. VIII, s1.

The Wisconsin court applied a uniformity requirement to such items such as teacher certification standards, minimum number of school days, and standard school curriculum. *Kukor v. Grover*, 148 Wis. 2d at 492, 436 N.W.2d at 577 (1989). Similarly, the Washington court held that a general and uniform school system simply required standardized education and instruction opportunities, but not funding. *Northshore School Dist. No. 47 v. Kinnear*, 84 Wash. 2d 685, 729, 530 P.2d 178, 202 (1975); California also used the term uniform in terms of a prescribed course of study and educational progression from grade to grade. *Serrano I*, 5 Cal. 3d at 596, 487 P.2d at 1249, 96 Cal. Rptr. at 609. In addition, Arizona found that the uniformity requirement was met if the school system included uniform course requirements, textbooks, and teacher qualifications. *Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973).

language which places some obligation on the state but does not demand equality.⁸² Even so, some courts, like Texas and Kentucky, have found that efficient does mean equality.⁸³ Others, like Ohio, have found that only an absolute deprivation of education would constitute a violation of an efficiency requirement⁸⁴ In fact, nearly half of all state constitutions require states to provide an education system, but do not provide a basis for finding a constitutional obligation to attain equality;⁸⁵ challenges to funding systems under these clauses are particularly difficult and litigants may want to pursue an equal protection claim instead.⁸⁶

The illustrations above demonstrate how outcomes to litigation challenging inequitable public school funding systems which under state education clauses depend not only on the language of the constitution but on the interpretation of this language by the courts. To the extent that school choice is seen by the courts as responsible for increasing the gap of disparity in public funds among districts, challenges to such a system will more than likely mirror those already attained in the public funding debate. More importantly, this wave of litigation has changed the focus of finance equity litigation from per-pupil expenditure to the broader concept of meeting student's educational needs. This, in turn, has shifted attention in such cases from mechanical funding formulae to the product of education. This is best illustrated in the New Jersey Supreme Court decision which concluded that the state legislature has shirked its constitutional obligation by failing to meet the needs of students in poor urban districts, even though New Jersey ranked second in per capita educational expenditures in the nation.⁸⁷ This result indicates that the question is not simply how much is spent but how it is spent in with what effects.⁸⁸ This kind of focus may become very relevant in the school choice debate and its effect on funding. Proponents of school choice may still want to argue that under school choice, funding has actually been restructured to afford students in poor districts greater and better educational opportunities,⁸⁹ and that the effect on the schools which suffer the greatest loss of students and funding will force these schools to compete and improve their services. And even if these schools are unable to compete and are forced to shut down, those children who remain will then have opportunities to go to better schools in

In contrast, the Kentucky court found that an efficient system required equality, using equality interchangeably with uniformity. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211 (Ky. 1989). In Texas, the terms were also used interchangeably to mean "exactly the same distribution of funds." *Edgewood Indep. School Dist. v. Kirby*, 777 S.W. 2d 391, 396 (Tex. 1989).

The North Carolina court, however, rejected altogether that uniformity could mean equality. *Britt v. North Carolina State Bd. of Educ.*, 86 N.C. App. 282, 289, 357 S.E. 2d 432, 436 (1987), *cert. denied*. 320 N.C. 790, 361 S.E.2d 71 (1987).

82. McUsic, *supra* note 79, at 324.

83. *Edgewood*, 777 S.W.2d at 397; *Rose*, 790 S.W.2d at 211.

84. *Board of Educ. v. Walter*, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979), *cert denied*, 444 U.S. 1015 (1980).

85. McUsic, *supra* note 79, at 325.

86. *Id.*

87. See *Abbott v. Burke*, 119 N.J. 287, 302 n4, 575 A.2d 359, 366 n4 (1990).

88. William E. Sparkman, *School Finance Litigation: A New Wave of Reform*. 14 HARV. J.L. & PUB. POL'Y 517, 543 (1991).

89. Those children who transfer to other schools are, in effect, receiving increased funding and greater choices.

other districts or attend charter or private schools. It is very possible, then, that the question of "effect" will turn on the length of time that students will have to remain in the affected schools. The speculative nature of this question and the implications of such an approach may result in significant harm to a great number of students. In states that do not recognize that unequal school funding is unconstitutional under state education clauses, the prospects for the disadvantaged students are even worse. State courts are likely to conclude that so long as children are still being provided some opportunity for education, either in public schools, charter schools or in the form of vouchers, then the fact that the disparity in funding among public schools has increased still does not raise a constitutional concern.

Furthermore, waiting to hear from state courts on how state legislatures should respond to the loss of funding suffered by some schools under a school choice system amounts to the states, once again, "shirking" their responsibility to public education. In addition, litigation is lengthy and expensive, resulting in the diversion of education funds to lawyers. Furthermore, victory in the courts does not automatically lead to substantive changes in the legislative scheme⁹⁰ and may require further litigation.⁹¹ At least in the states in which courts have already declared that state legislatures should be providing schools with more equitable funding, the obligation to respond to this mandate in the context of school choice should not be ignored. Ideally, all state legislatures should respond. But how?

One proposal that has been suggested in interdistrict school choice programs is for wealthier districts to bear a larger part of the burden of educating nonresident students who transfer into those districts.⁹² In other words, the sending district only has to lose the funding it would have received had the student stayed in the district. To the extent that this funding is lower than what it costs in the receiving district to educate one student, then the receiving district would have to make up the difference. This proposal presents a series of challenges and questions. First, since most states are still operating on a local property-based system of funding education, this would mean that the receiving district will probably have to raise its local taxes to compensate for the difference in educating the transferring student. This would not be too popular with the residents of the receiving district. Why is it fair that *they* be "singled out" to bear this additional burden, and for the simple fact that *they* are already paying more in local taxes to have an effective school system? And unless the receiving district

90. For example, California solved its funding disparities by spending less on overall education. Alexandra Natapoff, 1993: *The Year of Living Dangerously: State Courts Expand the Right to Education*, 92 EDUC. L. REP. 755, 765, n. 35 (1994).

91. For example, once the state legislature had attempted to correct its educational finance system, the Texas Supreme Court, in the 1991 decision of the Edgewood Independent School District v. Kirby, 804 S.W.2d 491, 495-96, held that the remedy was inadequate and ordered legislators to try again. Because of this recently, the courts have been more willing to take control of the implementation of the financing of education. For example, in the 1989 decision of Rose v. Council for Better Education, Inc., 790 S.W.2d 186, 213, Kentucky's highest court invalidated not only the finance system but every statute relating to the public schools, and then ordered the state legislatures to design a new system. William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation; The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 603 (1994).

92. Note, *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Equity*, 109 HARV. L. REV. 2002 (1996).

can limit the number of students who can come in from poorer districts, how big of a burden will this impose on the district? And what if the school is given discretion regarding which students to accept? This would mean that school choice, in effect, would only work among the schools that already receive comparable funding of students. In this case, school choice would do very little to benefit the most disadvantaged students.

Two solutions to the above challenges is to have the state subsidize the difference it would cost the receiving district to educate the transferring student, or to restrict the number of students who are able to transfer.⁹³ One possible challenge to both these proposals is that they might interfere with the purpose of creating an economic incentive for districts who are losing students to competition to improve the quality of their education programs when faced with the threat of failure. With government subsidies providing the receiving district the difference in cost to educate the transferring student, or even with the receiving school districts bearing this cost, the sending district would only end up losing the per-pupil money it would have received for the transferring student. One question still remaining is whether the per-pupil funding alone that the receiving school would lose provides a sufficient threat of failure to force or create incentives the school to improve its education program. A similar question would also have to be posed regarding student transfer restrictions. At what number of transfers should restrictions apply so that the economic incentive for improvement still remains?

One interesting way that Massachusetts tried to answer the need to find a balance between retaining enough competition to spark improvement while at the same time not abandoning the districts which are losing the most funds was to allow cities and towns to apply to receive up to 50% of the funds lost due to the school choice program during 1991-92.⁹⁴ This did not mean that the state would take over the cost of the program, or that a school district would receive these funds automatically. In fact, to be eligible, the school district had to demonstrate how it intended to keep students within its schools in the future.⁹⁵ The Massachusetts proposal at least was an attempt at a compromise between improvement through competition and not abandoning the students who must remain in the failing schools. A better solution would be, however, to even out the race. If schools are expected to compete with each other, then they at least should be given a fair chance to do so. At minimum, all schools should receive equal levels of funding. However, most states are still raising much of its money through a percentage tax, with the rate set by the local residents, on the value of the real property in the district. States which have attempted to move away from this system have used three distinct methods of cor-

93. For instance, Wisconsin's voucher plans allows voucher aid for no more than 1.5% of each school district's students. WIS. STAT. s119.23(2)(b)(1) (1993-1994). Similarly, the program does not permit more than 65% of students in any private school to be a voucher recipient. *Id.* at s119.23(2)(b)(2). These limits mean that, at most, about 7000 Milwaukee students could use vouchers to attend private schools.

94. 1991 MASS. ACTS CH. 493, s2, item 6066-1010.

95. School choice programs already limit the number of students who may transfer to other public or private schools.

recting the disparities.⁹⁶ In the first method, the state gives flat rate grants of a certain amount per pupil or per teacher to a given district, regardless of its ability to raise funds through the local tax base.⁹⁷ This flat rate grant, however, does not go far enough to even the playing field since rich and poor districts alike receive the same grant. The second reform is to enact a foundation program which guarantees that the state will provide funds up to a certain level for any district that is unable to raise that level of money through taxes.⁹⁸ This method comes closest to creating an even field but still does not go far enough, especially since the existing disparities between the available funds to rich as compared to poor districts is so wide that whatever contribution the state makes will probably be insignificant.⁹⁹ Lastly, and probably most effectively, the states may enact a power equalization plan whereby the state guarantees the same amount of money per pupil to all districts that tax themselves at the same rates.¹⁰⁰ Unless states are willing to adopt this third method or one that achieves similar results, then the principle of competition in the uneven playing field of the public school systems does not have a place. At minimum, states should provide additional funding to poorer districts which are unable to compete yet remain responsible to educating a number of disadvantaged students.

SECTION B: INCREASING THE OPPORTUNITIES FOR THE MOST DISADVANTAGED.

In addition to widening the gap of funding disparities among rich and poor school districts, school choice programs as currently implemented have the potential of primarily assisting those with enhanced access to information, technical assistance, and professional influence.¹⁰¹ These "information-rich" individuals would disproportionately include the wealthy, majority and highly-educated parents.¹⁰² Unless information systems in

96. Thro, *supra* note 91, at 597, n2.

97. *Id.*

98. *Id.*

99. Virtually every fiscal equity case to date has revealed a deplorable pattern of fiscal inequity. the record in Rodriguez, for example, showed that Edgewood, the poorest of the San Antonio school districts, had an annual per capita expenditure that was only a 60% of that of Alamo Heights, a nearby affluent district, even though Edgewood was taxing itself at a 24 percent higher tax rate. Moreover, this pattern of inequity has persisted throughout the years. In another striking example, New York city's 1990-91 average per capital expenditure was \$7,494, while the comparable expenditure in suburban Great Neck was \$16,625. Michael A. Rebell, *Fiscal Equity in Education: Deconstructing the Reigning Myths and Facing Reality*, 21 N.Y. U. REV. L. & SOC. CHANGE 691, 694 - 95 (1995).

100. Thro, *supra* note 91, at 597.

101. Michael A. Olivas, *Information Access Inequities: A Fatal Flaw in Educational Voucher Plans*, 101 J. OF L. & EDUC. 441, 446 - 48 (1981) (arguing that the method of information dissemination is a crucial consideration, especially in the educational market, in which products cannot be easily compared for unless all the populations have equal access to information, including an equal ability to decipher the data, it cannot be said that the choice of operating in the marketplace is the "free choice" which forms the fundamental premise of the voucher programs).

102. Research results from several social service programs give insight into the inadequacies of information delivery systems for the poor and disadvantaged. For example, Olivas points out that even food stamp programs, with simple eligibility criteria requiring no exercise of choice among services on the part of clients, have demonstrated under-participation by extremely poor families and that this is attributable to low rates to poorly designed information delivery systems. *Id.* at 448 - 49. Similar social service entitlement programs, including welfare, housing subsidies, and benefits for the elderly, suggest that the poorest potential clients have low access to basic

school choice plans incorporate equitable and comprehensive dissemination programs, the benefits of school choice will be in-egalitarian in their effect.

Proponents of the free-market model of school choice have faith that the "Economics of Information" (EOI) will ensure that a market of information concerning product attributes will emerge.¹⁰³ Therefore, they dismiss the concern of the ability of the poor or of the minority to effectively choose a school after evaluating the available information as patronizing and yet another example of the paternalism.¹⁰⁴ However, concerns about information gaps are real. Poor minority populations, particularly bilingual populations, utilize different sources of information than do majority populations. Therefore, information delivery systems in school choice programs, even those that have out-reach and advertising components, may miss the mark.¹⁰⁵ The poor do develop alternative information delivery systems within their communities; these include the ethnic press, bilingual advertising, minority radio programming, church-related channels, and information received informally through friends and families.¹⁰⁶ These channels are highly oral and frequently in non-English languages making it difficult, if not impossible, for school-choice and voucher programs to guarantee the achievement of comprehensive information dissemination for their complex programs.¹⁰⁷ In addition, school-choice and voucher programs deliberately create a dynamic mix of choices so that parents may have the widest possible range of schools from which to choose. Therefore, instead of increasing efficiency of low-income families participating in the program, a complex voucher system would more likely decrease the participation of these families as oral and informal communication networks would be inadequate to convey the complicated data on school characteristics or parental prerogatives to organize and establish new schools. While parents from all racial and socioeconomic backgrounds confront obstacles to making informed decisions about educational options, social science research shows that low-income and less educated families know little about program options, have limited access to information about those options,

information concerning eligibility for programs or to assistance in securing application forms and in documenting their financial need. When these findings are combined with the data on the literacy and educational levels in minority or disadvantaged populations, it is clear that information access will disproportionately and detrimentally affect those already under-education. *Id.* See also OLIVAS, *THE DILEMMA OF ACCESS*, (1979); BROWN, HILL, ROSEN & OLIVAS, *THE CONDITIONS OF EDUCATION FOR HISPANIC AMERICANS*, (1980); MORRIS, *ELUSIVE EQUALITY: THE STATUS OF BLACK AMERICANS IN HIGHER EDUCATION*, (1979).

103. Cleveland, *supra* note 16, at 133. (proposing that schools will advertise their curriculum, test scores, college placement and specialized programs; that typically, third parties provide independent evaluations of academic programs; and that moreover schools will develop reputations, both good and bad, which will assist parents in making their choice). Cleveland points to the East Harlem, New York example. According to leaders of the charter school initiative in East Harlem, when poor parents learned about the charter school, they fought hard to educate themselves and their children as to their options and how to realize them within a choice system. *Id.*

104. *Id.* at 133 - 34.

105. Olivas, *supra* note 101, at 448.

106. *Id.* at 449.

107. *Id.*

and are not as likely to make good decisions about school placement for their children if unaided.¹⁰⁸

Programs could be designed that address the communication needs of minority and disadvantaged communities. This task, however, will be difficult and expensive¹⁰⁹ because of the very complex nature of the information which needs to be available.¹¹⁰ The available channels to the disadvantaged, which do not enjoy the advantages of technology, will require that the message be extraordinarily efficient and effective. Effective dissemination to the disadvantaged will further require that the content of the information provided take into account the skills of those populations in evaluating these descriptors. The information will need to be available in the various languages and will require that it be explained in lay-terms and in the language of the recipient. The dissemination of this information will also demand intensive outreach efforts in the less traditional channels (i.e. ethnic radio stations, newspapers, community workshops, and churches).

School choice programs have responded to meet the challenge so that parents with less education, less experience with bureaucracy, who may be intimidated by schools, or who may have language problems will know how to select the school for their child. In Cambridge Massachusetts, for example, a Parent Information Center provides parents with sufficient information to make informed choices.¹¹¹ Similarly, the White Plains, New York district opened a Parent Information Center and implemented an aggressive outreach program to help all parents understand the rules and procedures of the choice program.¹¹²

A further related difficulty concerning choice among low-income minority parents is that their choices, even when guided by good and comprehensive sources of information, still will be based in the context of their own experiences. Hence, the information distributed will need to address and be sensitive to these differences. For example, studies have shown that blue-collar parents tend to emphasize obedience to authority in their choice of schools, while white-collar families tend to emphasize critical and independent thinking.¹¹³ This might perpetuate the desire of parents to keep their students in highly structured schools stressing discipline and basic skills rather than in more innovative schools like charter schools.¹¹⁴ In

108. Richard W. Campbell & Lawrence R. Hepburn, *Educational Choice: Is It Really a "Panacea" for What Ails American Schools?*, 2 KAN. J.L. & PUB. POL'Y 61 (1992).

109. Olivas, *supra* note 101, at 450 - 51.

110. Voucher proposals, for instance, would require the communication of complex information: at minimum, information on costs (over and above voucher amount); transportation; racial composition; teacher quality; curriculum; school history; entrance requirements; adequacy of facilities; location; school environment; and many more qualitative and quantitative criteria (i.e. . racial and multi-cultural acceptance, availability of bilingual programs, etc.). *Id.* at 451.

111. Valerie E. Lee, *Educational Choice: The Stratifying Effects of Selecting Schools and Courses*, 7 EDUC. POL. 125, 139 (1993).

112. Saul M. Yanofsky & Laurette, Young, *A Successful Parents' Choice Program*, PHI DELTA KAPPAN, Feb. 1992, at 474, 477.

113. Henry M. Levin, *The Theory of Choice Applied to Education*, in WILLIAM H. CLUNE ET AL., eds., CHOICE AND CONTROL IN AMERICAN EDUCATION 247 (1990).

114. Not all charter schools employ innovative methods of teaching. In fact, some schools, recognizing that blue-collar workers prefer to send their children to highly structure schools which stress basic skills and discipline, have designed their schools to meet those needs with the

addition, minority parents may be reluctant to send their children to schools where they would become the racial minority in fear that their kids may face increased racial animosity. The information provided to parents, therefore, should include information specifically addressing such fears and similar concerns.

So long as the "information-gap" problem is not addressed effectively, another real danger of school choice programs may result if a disproportionate number to the school's "best" students transfer to other school. The problem of the best students leaving is not only a consequence of the information-gap problem but also of the unregulated admissions practices of the receiving schools.¹¹⁵ The parents will have a right to apply to any school of their choice, but in the majority of school-choice programs, it ultimately will be the schools making the decision to admit; these admissions committees can be expected to rely heavily on grades and test scores.¹¹⁶ This problem can be seen even in schools such as East Harlem in New York City, which has often been used to exemplify the success of school choice. East Harlem school instituted one of the first school choice programs in the country,¹¹⁷ and over the past twenty years has raised itself from its students scoring last on proficiency tests to a level approximating the city-wide average.¹¹⁸ The change, however, may not have helped those students most in need; instead, it put them in a position of competing for the good schools in East Harlem under the rubric of choice.¹¹⁹ Choice be-

specific purpose of attracting these blue-collar parents to their schools. The problem with charter schools designing their programs to target the needs of a specific social class groups is that they do nothing to address the persistent problem of the stratification of students by social class and race in our public schools. See *infra* notes 152 - 165 and accompanying text (discussion the contribution of private choice in school choice programs to the increased segregation of schools). Part of the aim of charter schools should be to further the efforts of integration. See *infra* notes 220 - 227 and accompanying text (discussing the benefits of integrated education on disadvantaged students); see also *infra* notes 142 - 144 (discussing the debilitating effects on the education of low-income status students resulting from the stratification of students by income in public schools). As such, they should be required, as should all public schools participating in school choice, to aim to educate a diversity of students, coming from different social economic levels and ethnic backgrounds, in their classrooms.

115. It may be possible to regulate the admissions practices of receiving schools under Title VI if these result in disparate impact against protected classes. Title VI prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal funds. 42 U.S.C. §2000d (1988). For a more detailed discussion of how schools, particularly those which rely heavily on standardized exams, may be subject to Title VI penalties, see Stuart Biegle, *School Choice Policy and Title VI: Maximizing Equal Access for K-12 Students in a Substantially Deregulated Educational Environment*. 46 HASTINGS L.J. 1533, 1566 - 1578 (1995).

116. *Id.* at 1566. It is important to point out, however, that the earliest data on charter schools, the most deregulated schools under the schools choice program, indicates that whereas some charter schools tend to "skim" students who come from low-income families, have below-average test scores, and qualify for special education, it is not true that charter schools select only the most able, privileged students or that they exclude those who have been traditionally underserved. Skimming is the term used when there is a prevailing tendency for a school to select out students who are most at risk — in particular, racial/ethnic or language minorities from low-income families who are potential dropouts are failing school, or who qualify for special education. RONALD G. CORWIN, ed., *FREEDOM AND INNOVATION IN CALIFORNIA'S CHARTER SCHOOLS* (1995).

117. CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, *supra* note 42.

118. David L. Kirp, *What School Choice Really Means*, ATLANTIC MONTHLY, Nov. 1992, at 120.

119. Daniel, *supra* note 17, at 33.

came a gate-keeper for school administrators since they used choice to select and admit the most academically gifted of the students.¹²⁰ Choice in East Harlem was analogous to the criteria used by the more selective institution of education; this resulted in the good students attending the better schools.¹²¹

The problem with this arrangement is that the loss of good students may both reduce the quality of teaching¹²² by making it more difficult to retain qualified instructors and the motivation of the remaining students to compete with other, less talented peers.¹²³ The result may be that many young people will have to attend for an indeterminate period of time, decaying schools staffed with unhappy, often burnt-out teachers; these students will be grouped together with a disproportionate number of students who also have been unsuccessful in their academic pursuits.¹²⁴ The stigma of failure resulting from inappropriate educational settings has proven to be long lasting.¹²⁵

One way of addressing this "brain-drain" problem is perhaps by instituting restrictions over student placement to prevent that only the "best" students leave the schools in their districts. Although most public school choice policies require public schools to use random lotteries to determine which nonresident students will be allowed to transfer into each school, states permit nontraditional public schools, including magnet schools, 'alternative' schools, and charter schools, to use selective criteria in deciding which students to admit.¹²⁶ It is highly unlikely that the selective criteria voluntarily will draw students with the greatest academic deficiencies, behavioral problems or other special needs, particularly since it is these students who will demand greater resources and require greater expense. Instead the receiving district should be required to accept at least one child with special needs¹²⁷ for every "best" child that comes into the district.

120. *Id.*

121. *Id.*

122. See JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 52 (1991) (finding that many teachers make little effort to instruct students who are unmotivated and who perform poorly).

123. See JAMES S. COLEMAN, ET AL., *EQUALITY OF EDUCATIONAL OPPORTUNITY* 22 (1966) (concluding that "a pupil's achievement is strongly related to the educational backgrounds and aspirations of the other students in the school").

124. Jonathan Kozol has documented the realities that already exist in these urban educational settings today. KOZOL, *supra* note 122, at 61-63.

125. See *infra* notes 142 - 144 and accompanying text.

126. For example, in East Harlem's District 4, 'alternative' schools can 'screen applicants on the bias of test scores, interviews, and teacher comments.' Lieberman, *supra* note 14, at 60.

127. Students with special needs or at-risk students refer to those who are unlikely to succeed in school because their home experiences and resources are largely incompatible with the expectations embodied in conventional school practices. Such students are more heavily concentrated among minority groups, immigrants, single-parent families, and the poor. More than one-third of all students in the public schools meet the at-risk criteria; this proportion is rising rapidly because of high birth rates among these populations and large immigrations from third world countries. See HENRY M. LEVIN, *BUILDING SCHOOL CAPACITY FOR EFFECTIVE TEACHER EMPOWERMENT: APPLICATIONS TO ELEMENTARY SCHOOLS WITH AT-RISK STUDENTS* at 2 (1991). State-wide guidelines should be developed by an independent body to guide schools in determining whether a student has special needs and should take into accounts such things as low grade point average and poor performance on standardized exams, and language deficiency. Race should also be taken into account, not as a special need, but as a means to further integration efforts. For further discussion about how race should be treated in school choice plans, see *infra* notes 145 - 227

Because children with special needs are often more expensive to educate, this requirement might create disincentives for schools to admit any student from outside the district. Therefore, the child with special needs should travel with his portion of any additional money that the sending school may already receive to educate children with special needs on top of what other students are usually allocated.¹²⁸

Finally, school choice programs often do not take into account the inability of low-income families to take advantage of these new educational opportunities for their children due to lack of resources.¹²⁹ Particularly school choice programs, with a focus on achievement and not equity, exemplify this problem. The District 4J in Eugene, Oregon, for example, was not intended as a program to address any inequities. This District Director of Secondary Education, Jerry Colonna, has explained that, “[u]nlike some of the nation’s biggest cities, we didn’t start our choice programs to desegregate schools or to fix any deficiencies. We simply added more options to very sound neighborhood schools.”¹³⁰ But because the district has not made any commitment to equity by providing such things as transportation,¹³¹ the district admits that not all of its students have access to the choice program, causing less affluent families to be left behind.¹³² Many residents of large urban metropolitan areas will be placed at a severe disadvantage by parental choice education, especially those who cannot pay for their own transportation and students of color who live in the inner city.¹³³

Key legal and policy arguments may be available to students to challenge choice programs that do not include reasonable transportation costs

and accompanying text. The definition of students with special needs to be considered by schools participating in schools choice program has not included children with learning disabilities, who can come from both lower, middle, and upper income backgrounds, because their needs are sometimes better met by schools specializing in the education of students with learning disabilities.

128. This money will come in great part from federal programs designed to supplement the funding of public schools for “at-risk” students. Among others, these funds include: Title I (now known as Chapter I) of the Elementary and Secondary Education Act of 1965 (“ESEA”), 20 U.S.C. ss 2701 - 2976 (1988); Bilingual Education Act (Title III of ESEA), 20 U.S.C. s 880b (1988); and the National School Lunch Act, 42 U.S.C. § 1751, 1769(a) (1989).

129. See Amy S. Wells, *The Sociology of School Choice: Why Some Win and Others Lose in the Educational Marketplace*, in *SCHOOL CHOICE: EDITH RASELL & RICHARD ROTHSTEIN, eds., EXAMINING THE EVIDENCE* (1993).

130. Bulletin, School District 4J, Eugene, Or., *4J Inside Line: An In-Depth Look Inside School District 4J 1* (1993).

131. Most school choice plans, including the prototypical enabling statutes for charter schools, fail to provide mandatory funding for transportation. For example, with the exception of Massachusetts, which has created charter schools under a wide-ranging reform act that includes desegregation components, charter school legislation typically includes no provisions for transportation. See AMY STUART WELLS, *TIME TO CHOOSE: AMERICA AT THE CROSSROADS OF SCHOOL CHOICE POLICY 62-95* (1992).

132. *Id.* The same is true of choice regimes that include private schools, for example, but do not contemplate paying the full cost of attending the school but only offer to pay a small percentage. Even when vouchers to attend private schools have addressed the potential of the wealthy benefiting most by limiting the awards to disadvantaged families (For example, in order to participate in the Milwaukee Parental Choice Program, the family’s income must be at least 175% below the federal poverty line. WIS. STAT. ANN. § 119.23 (WEST 1989 - 90)), partial vouchers would be of little use to parents unable to make up the difference between the value of the voucher and the cost of private school tuition from their own resources. Hershkoff et al., *supra* note 66, at 18.

133. Biegle, *supra* note 115, at 1556.

for families living below the poverty line. This is true also of private schools participating in a publicly-funded voucher program, which would most likely be subject to increased regulation.¹³⁴ As recipients of federal funds, private schools might have to comply with federal laws such as Title VI of the Civil Rights Act of 1964.¹³⁵ This statute applies to "recipients" of federal funds.¹³⁶ The enabling regulations define recipients to include those schools that receive federal financial assistance directly or through another recipient, such as a state education agency.¹³⁷ Title VI prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal funds.¹³⁸ Using an argument of disparate impact under Title VI, plaintiffs could challenge choice programs that do not provide transportation costs to families living below the poverty line if a disproportionate number of students in a protected class are impacted adversely.¹³⁹ Although few title VI cases have been filed in the education context, because disparate impact jurisprudence has been strengthened by the Civil Rights Act of 1991, students of color who are denied equal access in a new school choice system may find that the current Title VI discriminatory effects framework will provide them with a substantial advantage in federal court.¹⁴⁰

Regardless of the outcome of litigation, states still should pay particular attention to the needs of low-income families if they are serious about educational reform being inclusive of disadvantaged students. Less discriminatory school choice systems can be achieved if the government pays reasonable transportation costs for low-income families. Professors John Coons and Stephen Sugarman, for example, have suggested that the government pay reasonable transportation costs for the poorest twenty percent of persons with school-age children. Unlike most existing school choice programs, professors Coons and Sugarman's school choice system demands that "[t]he provisions of any system of educational choice must tilt toward

134. ARMOR, *supra* note 44, at 227 n6.

135. 42 U.S.C. s 2000(e)(2) (1988).

136. *Id.*

137. *See, e.g.*, 34 C.F.R. ss 100.13(I), 104.3(f) (1992). School choice proponents might be willing to speculate that Title VI controls public school choice programs and charter schools, but they are likely to contend that private decisions by parents in a deregulated private sector fall outside the requirements of the statute. Precisely because of the ambiguity of the statute, it is still unclear whether private schools participating in a federally funded program voucher would be subject to these regulations. However, there is a strong likelihood that they will in light of the rationale that the Supreme Court has taken to expose private schools which are recipients of federal scholarship funds, even though channeled directly to the students, to regulatory coverage under Title IX. *See Grove City College v. Bell*, 465 U.S. 555 (1984). Also, the Civil Rights Restoration Act — 20 U.S.C. § 1687(2) (1988) — allows the federal government to require an assurance of non-discrimination for an entire entity, even where only a discrete program within the entity receives federal funds.

138. 42 U.S.C. § 2000d (1988).

139. For a detailed discussion of how a lack of transportation challenge could be brought under a Title VI suit, *see Biegle, supra* note 115, at 155-1566.

140. *Id.* at 1566. This process may, however, prove quite difficult, if not impossible, in light of the lack of empirical evidence regarding the effects of school choice programs on protected classes, particularly as to the long-term effects of such programs (i.e. that school choice will lead to the overall improvement of education even if it results temporarily in pockets of failure).

the poor to ensure that they have both the opportunity to escape from schools that ill-serve them and fair access to schools they prefer."¹⁴¹

The dangers of school choice leading to a new stratification of schools based on ability, income, and family background can have debilitating effects on the education of low-status students. Curriculum and instruction are frequently inappropriate for low-status students and instructional services are delivered less effectively in low-status schools than in mixed or middle-status schools, since the concentration of learning and behavioral problems in low-status schools makes teaching and learning problems particularly difficult.¹⁴² Low socioeconomic status can be stigmatizing for students, leading to low performance and unequal life chances.¹⁴³ Such stigmatization leads not only to low self-esteem, but also initiates a self-fulfilling prophecy of failure for those students.¹⁴⁴

SECTION C: PRIVATE CHOICE AND THE INCREASED FRAGMENTATION OF SOCIETY. MERGING SCHOOL CHOICE AND INTEGRATION PLANS.

The nation's current quest for better schools also appears to be clouding over desegregation efforts. In stark contrast to earlier activity, much of the current school desegregation activity focuses on when to cease judicial oversight.¹⁴⁵ In fact, courts are continuing to find new limits to desegregation remedies' breath, scope and contours.¹⁴⁶ This is happening at a time when a recently published report of a study of American public education reveals that racial segregation in our schools has reached the highest levels since 1968,¹⁴⁷ the year that the Court decided *Green v. New Kent County School Board*.¹⁴⁸ The Harvard Project on School Desegregation reports that 4.6 million of the nation's 6.9 million African American and 3.7 million of the 5 million Hispanic public school students attended predominantly minority schools in the 1991-92 academic year.¹⁴⁹ At about the same time

141. JOHN E. COONS & STEPHEN D. SUGARMAN, *SCHOLARSHIPS FOR CHILDREN* (1992).

142. DANIEL W. LEVINE & ROBERT J. HAVINGHURST, *SOCIETY & EDUCATION* 274, 303 (7th ed. 1989).

143. Rodman b. Webb, *Schooling & Society* 371 - 89 (1981).

144. *Id.* at 374 - 78, 387.

145. Michael Heise, *Assessing the Efficacy of School Desegregation*. 46 *SYRACUSE L. REV.* 1093, 1096 (1996) (citing *Freeman v. Pitts*, 112 S. Ct. 1430, 1443 - 46 (1992) (permitting withdrawal of judicial supervision over desegregation plan before full compliance has been achieved); *Board of Educ. v. Dowell*, 498 U.S. 237, 249 - 50 (1991) (emphasizing that judicial supervision over school desegregation was intended to be temporary)).

146. In *Missouri v. Jenkins*, 115 S. Ct. 2038, 2055 (1995), for example, the Court reversed a lower court's requirement that the state of Missouri continue to fund educational programs in Kansas city under a school desegregation order because of stubborn and undesirable gaps between minority and non-minority student achievement levels. Noting that numerous external factors beyond the school board's control influence minority achievement, the Court held that factors that do not stem from school segregation should not guide judicial remedies.

147. William Celis 3d, *Study Finds Rising Concentration of Black and Hispanic Students*, N.Y. TIMES, Dec. 14, 1993, at A1.

148. 391 U.S. 430 (1968) (establishing the standards under which schools could fulfill their desegregation obligations and attain unitary status).

149. GARY ORFIELD, *THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968*, at 5 (1993). ("Predominantly minority" is defined in the report as comprising more than 50% African American, Latino, Native American or Asian students).

that the Court began providing school districts with more concrete guidance on how to end judicially supervised desegregation activities and achieve unitary status,¹⁵⁰ an old educational policy idea — school choice — re-emerged.¹⁵¹ Although the school choice movement has no direct relationship to the desegregation movement, it has definite implication for desegregation policy.

Because school choice and desegregation policies involve the distribution of students among schools, these policies necessarily interact but their approach to student assignment are dissimilar if not antithetical. Whereas the desegregation movement combats racial isolation and inadequate resources through achieving racial balance, the school choice movement seeks to improve educational quality through maximizing school choice at all levels and without constraints: within a public school system, between different public school systems, and between both public and private schools. Maximizing racial balance means restricting choices, increase segregation and maximizing choices that aid integration (i.e. through such programs as magnet schools). On the other hand, the kind of private choice that is involved in school choice generally means maximizing choices that increase segregation.¹⁵² Because the emphasis is on lack of constraints, these policies could lead to increase in school segregation.¹⁵³

Public school choice has the potential to foster or perpetuate racial segregation in the schools in several different ways. First, parents of white students are extremely reluctant to have their children attend schools with substantially minority enrollment or located in minority neighborhoods, regardless of any other characteristic of the school.¹⁵⁴ School choice would exacerbate this problem if white families in urban areas with substantial minority populations have the option of choosing to enroll in suburban schools that are almost entirely white.¹⁵⁵ Second, more affluent and educated families do not make choices on the basis of distinctive educational characteristics of the various schools, but on other considerations, such as

150. See e.g., *Freeman v. Pitts*, 503 U.S. 467 (1992); *Board of Educ. v. Dowell*, 498 U.S. 237 (1991).

151. Modern school choice proposals are really about forty years old and popularly attributed to Milton Friedman. See FRIEDMAN, *supra* note 15, at 85-107; MILTON FRIEDMAN, *THE ROLE OF GOVERNMENT IN EDUCATION*, In ROBERT A. SOLO ed., *ECONOMICS AND THE PUBLIC INTEREST* 123 - 44 (1955).

152. ARMOR, *supra* note 44, at 212. This is true since the external societal influences and actual physical and social separation, internal constraints related to the continuing effects of racial separation persists. That is, as was true in 1968 when preferences and choices were skewed by established institutions, established patterns of behavior, established information, and an established psychology, that were rooted in discrimination, blacks and other minorities today still tend to choose "black schools" and whites tend to choose "white" schools. Paul Gerwitz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 749 (1986).

153. See Susan Chira, *Research Questions the Effectiveness of Most School-Choice Programs*, N.Y. TIMES, Oct. 26, 1992, at A1 (citing a Carnegie Foundation report that choice programs do not necessarily improve student performance, require additional money and may cause segregation among students).

154. CHRISTINE H. ROSSELL, *THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS OR FORCED BUSING* 23, at 115 (1990).

155. MYRON LIEBERMAN, *PUBLIC SCHOOL CHOICE: CURRENT ISSUES/ FUTURE PROSPECTS* 35 - 38 (1990).

location.¹⁵⁶ Therefore, in communities where income and education are correlated with race, these children are disproportionately white; a public school choice plan might thus permit parents to selectively enroll in schools that are predominantly white rather than schools that are racially balanced or predominantly minority. Similarly, minority families, including those that are less affluent, may not choose aggressively schools that are predominantly white. Sometimes this is a result of ideological choice¹⁵⁷, but more often, it has to do with lack of information about those schools and fears that their children will be unwelcome or unable to compete.¹⁵⁸ In fact, the most comprehensive study of the impact of school choice plans on racial segregation concludes that school choice plans that do not include both racial controls on transfers and selective location of especially desirable "magnet schools" in minority neighborhoods are likely to increase the degree of racial segregation.¹⁵⁹

The contention that segregation will occur from school choice programs has historical backing that stems from the "Freedom of Choice" programs of the 1960's launched soon after judicial desegregation efforts began in earnest and were designed specifically to thwart public school desegregation.¹⁶⁰ Shortly after *Brown*, some southern states attempted to use school choice policies as a vehicle to enable white families to circumvent school desegregation efforts.¹⁶¹ In 1968, the Supreme court in *Green v. New Kent County*,¹⁶² forged an indelible bond between school choice and desegregation.¹⁶³ *Green* involved a two-school district in Virginia, which, after years of state-enforced segregation, adopted in 1965 a "freedom of choice" student assignment plan.¹⁶⁴ The plan did little to desegre-

156. CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, *SCHOOL CHOICE* 12 - 16 (1992). Analyzed a different way, more affluent families make the choices on where to live, oftentimes, depending on the quality of schools in the community.

157. Wells, *supra* note 129, at 39.

158. Wells, *supra* note 129 (case study of minority families participating in the school choice program in St. Louis); Barbara Strobert, *Factors Influencing Parental Choice in Selection of a Magnet School in the Montclair, New Jersey, Public Schools* 97 - 103 (unpublished dissertation, Columbia Teachers College, Umi Order No. 9121214, 1991).

159. ROSSEL, *supra* note 154, at 197 - 200; see also Michael Alves & Paul L. Pryde Jr., *Comments and General Discussion*, in EDITH RASELL & RICHARD ROTHSTEIN, eds., *SCHOOL CHOICE: EXAMINING THE EVIDENCE* 135, 135 - 37 (1993). The data on school transfer from Minneapolis under Minnesota's statewide school choice programs are especially striking. In 1988 - 89, 47% of the students in Minneapolis were minority, but only 19% of the applicants for transfer to suburban schools outside the city were minority. Most of the white applicants were located in neighborhoods near the suburban border whose schools were predominantly minority.

160. Heise, *supra* note 145, at 1108.

161. Philip T.K. Diamond, *A Comprehensive Analysis of Educational Choice: Can the Polemic of Legal Problems be Overcome?*, 43 DePaul L. Rev. 1 (1993). In Louisiana, for example, a district court overturned a voucher statute designed to help fund white flight from newly desegregated schools. *Hall v. St. Helena Parish Sch. Dist.*, 197 F.Supp. 649, 651 (E.D. La. 1961), *aff'd per curiam*, 368 U.S. 515 (1962). A subsequent Louisiana statute adopted a different approach for the same end by creating a statute focusing on parent's rights to influence their children's education. Louisiana Financial Assistance Commission, Act 147 of 1962 (LSA-R.S. 17:2951-:2959). The court, noting Louisiana's growing history of resistance to school desegregation, struck down the statute, declaring that its intent and effect were to maintain segregation. *Poindexter v. Louisiana Fin. Assistance Comm'n*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968). See Heise *supra* note 145, at 1109.

162. 391 U.S. 430 (1968).

163. See *supra* note [Heise], at 1109.

164. 391 U.S. 430, 433 (1968).

gate the schools and the Supreme Court invalidated it and required the school board to develop an alternative plan that promised to truly desegregate the school system.¹⁶⁵

Recognizing the fact that school choice policies will result in racial imbalance and that such effects may be litigated under constitutional and civil rights laws,¹⁶⁶ most existing choice statutes discourage or prohibit school choice policies that adversely affect the racial balance of schools which are subject to court-ordered desegregation or which have adopted a voluntary plan of integration.¹⁶⁷ The statutory language of a few states is mandatory, while in the majority it is simply permissive. In general, open enrollment statutes have designated local school board policy requirements for the open enrollment procedures, including considerations of racial balance.¹⁶⁸ Minnesota's plan, for example, outlines detailed procedures and mandates that a district which has a desegregation plan approved by the state board of education must accept or reject each individual application in a manner that will enable compliance with its desegregation plan.¹⁶⁹ On the other hand, most statutory language grants the school district more discretion. For example, Colorado states that a district may deny a student permission to enroll in an alternative school within the district if "[a] desegregation plan is in effect for the school district, and such denial is necessary in order to enable compliance with such desegregation plan."¹⁷⁰ Similarly, the Iowa section, allows but does not require denials or preferences for transfer applications which adversely or positively affect desegregation efforts, both in court-ordered and voluntary desegregation plans.¹⁷¹ The Ohio statute simply states that procedures for admission shall include "[p]rocedures to ensure that an appropriate racial balance is maintained in the district

165. 391 U.S. 430, 442 (1968).

166. Some proponents of school choice, however, argue that school choice offers a realistic mechanism to desegregate education on a broader scale. The argument is that since blacks and other minorities constitute a disproportionate segment of the poor, they will benefit disproportionately from a scheme that enables them to bypass the public school system that created, and continues to foster segregation. See Cleveland, *supra* note 16, at 141.

167. Some school choice programs created by court order or consent decrees place racial composition limits on the freedom of students to choose among public schools. For instance, intradistrict choice in Cambridge, Massachusetts, must conform to very strict requirements of specific minority-to-white ratios. See ABIGAIL THERNSTROM, *SCHOOL CHOICE IN MASSACHUSETTS* 76-77 (1991), at 12 - 16. Although Cambridge was not under court order to desegregate, the interracial composition of the community, contrasted to the segregated character of the schools, probably would have led to a court challenge. Instead, the schools district entered into a consent decree to resolve the segregative conditions on its own. Cambridge, Massachusetts developed the "controlled choice" model to help effectuate desegregation. Under the plan, the assignment of students under the plan gives parents and students the opportunity to list their first, second, and third choices of schools in the district. After assignments are made, taking preference and racial balance into consideration, over half of the students receive their first choice of schools and over ninety percent receive one of their choices. CHRISSIE BAMBER ET. AL., *NATIONAL COMMITTEE FOR CITIZENS IN EDUCATION, PUBLIC SCHOOL CHOICE: AN EQUAL CHANCE FOR ALL?* 23 (1990).

168. See, e.g., COLO. REV. STAT. s 22 - 36 - 101 (Cum. Supp. 1994); OHIO REV. CODE ANN. s 3313.97 (Baldwin 1994); UTAH CODE ANN. s 53A - 2 - 213 (1994); WASH. REV. CODE s 28A.225.270 (Supp. 1995).

169. MINN. STAT. s 120.062(5)(k)(1993 & Cum. Supp. 1995).

170. COLO. REV. STAT. s 22-36-101(3)(d0 (Cum. Supp. 1994).

171. IOWA CODE s 282.18(4) (Supp. 1994).

schools” but allows the district to determine those procedures.¹⁷² Similarly, the Washington statute creates no specific language relating to integration or racial balance, requiring only that districts establish their own policy standards on how the intradistrict enrollment options will be implemented and adopting the necessary rules for the expressed purpose of improving racial balance within and among school districts.¹⁷³

As the examples above exemplify, efforts by legislatures to preserve the integration of schools in school choice policies has happened mostly in school districts which already have desegregation plans in place, whether these have been ordered by the federal court or have been adopted voluntarily by the school board or the board of education. Part of the rationale for limiting transfer restrictions only to schools in which desegregation plans are in place is that by restricting the transfer of students in all schools based on how these transfers will affect the racial composition of the school, the legislature would, in effect, be defeating the real purpose of school choice policies — to increase parental school choice. In addition, such restrictions, proponents of school choice argue, may raise constitutional problems under the Equal Protection Clause of the Fourteenth Amendment by allowing or disallowing choice specifically tied to race.¹⁷⁴

There are at least two methods of transfer restrictions districts have adopted to foster racial integration in the context of school choice policies. A “racial balance” control seeks to keep the racial makeup of each of the schools in the district approximately equal to the racial makeup of the district as a whole.¹⁷⁵ Thus, in a district where the student enrollment is sixty percent minority, whites might be prohibited from enrolling in programs that are more than seventy percent minority.¹⁷⁶ The second method, an “anti-tipping,” control seeks to keep whites from fleeing the district.¹⁷⁷ If, for example, a school official determines that the tipping point is forty percent minority in a district where enrollment is sixty percent minority, they might prohibit minority students from enrolling in schools that are more than forty percent minority, even though this guarantees that some other schools in the district must have minority enrollment in excess of the dis-

172. OHIO REV. CODE ANN. § 3313.97(B)(2)(c) (Baldwin 1994).

173. WASH. REV. CODE § 28A.225.250 - 28A.225.270 (Supp. 1995).

174. Claims that racially conscious school assignment policies are unconstitutional arise in at least three settings. Racially conscious assignment policies that are intended to foster or perpetuate racial segregation, which are the essence of de jure segregation, clearly are unconstitutional. *Brown v. Board of Educ.*, 347 U.S. 483 (1954). Racially conscious assignment policies which are designed to remedy de jure segregation clearly are permissive, until the effects of de jure segregation are fully eliminated. *Swann v. Charlotte-Mecklenburg Bd of Educ.*, 402 U.S. 1, 28 (1971). Even where racial segregation in the schools is not the result of past or present de jure segregation, state or local officials may still argue that racial integration is desirable and may include it as the educational mission of the school. Proponents of school choice would argue, however, that in the latter case, controls designed to achieve racial integration entail discrimination on the basis of race against both white students and minority students and that “anti-tipping” controls especially disadvantage minority students by disproportionately denying them the opportunity to attend their preferred choice of school. Michael Heise, *An Empirical and Constitutional Analysis of Racial Ceilings and Public Schools*, 24 SETON HALL L. REV. 921 (1993). *But see infra* notes 184 - 192 and accompanying text.

175. Eisdorfer, *supra* note 48, at 945.

176. *See*, for example, model policy recommended in TIMOTHY W. YOUNG & EVANS CLINCHY, CHOICE IN PUBLIC EDUCATION 147 - 52.

177. Eisdorfer, *supra* note 48, at 945.

trict-wide average.¹⁷⁸ Anti-tipping controls do limit disproportionately the opportunities of minority students to enroll in white schools.¹⁷⁹ Whether racial balance controls disproportionately limit the choices of either whites or minorities is less certain.¹⁸⁰ It appears to depend on such factors as the racial makeup of the schools district, the extent to which the various schools have space available, and the degree of residential segregation.¹⁸¹

These and similar kinds of race-conscious student assignment policies to remedy de facto segregation, whether adopted voluntarily by local school districts or imposed by state education departments, have litigated in a variety of cases, almost exclusively at the state level;¹⁸² Generally, state courts have upheld the constitutionality of such plans.¹⁸³ School authorities traditionally are charged with board power to formulate and implement educational policy, including ones designed to prepare students to live in a pluralistic society through school integration.¹⁸⁴ Even in the most recent decision of the Court, *Board of Regents v. Bakke*,¹⁸⁵ which struck down race conscious admission criteria in the context of higher education, the Court observed that the university admission policy was fundamentally different from a racially conscious public school assignment plan because it denies the applicant a place in the program altogether, while the pupil assignment plan merely changes the location at which the pupil receives a comparable public school education.¹⁸⁶ In fact, A Los Angeles organization, *Bustop, Inc.*, sought on several occasion to put before the U.S. Supreme Court the claim that a racially conscious pupil assignment plan imposed by the California state courts in the Los Angeles school district to

178. *Id.*

179. See *Johnson v. Board of Educ.*, 604 F.2d 504, 510 - 13 (7th Cir. 1979) (describing the effect on transfers by minority students under "anti-tipping" controls). See also, *Heise, supra* note 174, at 921.

180. *Eisdorfer, supra* note 48, at 945.

181. *Id.*

182. The United States Supreme court dismissed appeals from two of these state court decision, *Citizens for Better Educ.* 484 U.S. 804 (1987); *School Comm.*, 389 U.S. 572 (1968), for "lack of a substantial federal question." Also, although the Court has never addressed the subject in a plenary opinion, it has, in dictum, state that school authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of black to white students, reflecting the proportion for the district as a whole. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). To do this as an education policy is within the broad discretionary power of school authorities, absent a finding of constitutional violation. *Id.*

183. See e.g., *Offerman v. Nitkowski*, 378 F.2d 22 (2d Cir. 1967); *Crawford v. Board of Educ.*, 551 P.2d 28 (Cal. 1976); *Tometz v. Board of Educ.*, 237 N.E.2d 498 (Ill. 1968); *School Comm. v. Board of Educ.*, 227 N.E.2d 729 (Mass. 1967), *appeal dismissed*, 389 U.S. 572 (1968); *Board of Educ. of Englewood Cliffs v. Board of Educ. of Englewood*, 257 N.J. Super. 413, 608 A.2d 914 (App. Div. 1992), *aff'd mem.*, 132 N.J. . 327, 625 A.2d 483, *cert. denied*, 382 U.S. 905 (1965); *Pennsylvania State Human Rights Comm'n v. Chester Sch. Dist.*, 233 A.2d 290 (Penn. 1967); *Citizens for Better Educ. v. Goose Creek Consol. Indep. Sch. Dist.*, 719 S.W.2d 350 (Texas Ct. App. 1986), *appeal dismissed*, 484 U.S. 804 (1987); *Citizens Against Mandatory Busing v. Palmason*, 495 P.2d 657 (Wash. 1972).

184. *Board of Education v. Swann*, 402 U.S. 43, 45 (1971) (observing that school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements).

185. 438 U.S. 265 (1978).

186. *Id.* at 200, n39.

eliminate de facto segregation that was racially discriminatory. The organization sought a stay of the state court remedial order in 1978, but Justice Rhenquist denied the stay with the following explanation:

[T]his is not the traditional argument of a local school board contending that it has been required by court order to implement a pupil assignment plan which was not justified by the Fourteenth Amendment to the United States Constitution. The argument is indeed novel, and suggests that each citizen of a State who is either a parent or a schoolchild has a "federal right" to be "free from racial quotas and to be free from extensive pupil transportation that destroys fundamental rights to liberty and privacy." While I have the gravest doubts that the Supreme Court of California was required by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was permitted by that Constitution to take such action.

Bustop, Inc. v. Board of Educ., 439 U.S. 1380, 1382-83 (1978).¹⁸⁷

Moreover, in *Washington v. Seattle School District No.1*,¹⁸⁸ the Court struck down a state voter initiative that removed from school districts the power to implement voluntarily school desegregation to remedy racial imbalance. The proponents of the initiative did not argue that the type of school desegregation plans barred by the initiative violated the federal Constitution, and the Court did not address this issue.¹⁸⁹ However, the Court expressed that even though desegregation plans may be controversial, "in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process."¹⁹⁰

The fact that school districts are not prohibited constitutionally from instituting policies to foster integration in the context of de facto segregated schools does not mean that they are constitutionally mandated to do so.¹⁹¹ And the truth is that many state policies and many of the school choice proposals make no mention of racial impacts.¹⁹² If school choice policies do result in increased segregation of public schools, would it be possible to infer segregative intent from school choice policies and challenge them under existing desegregation laws?¹⁹³ The challenger would have to prove that the school choice policy has, as its main goal, the intent

187. Justice Powell denied a second stay application relying on the same reasons given by Justice Rehnquist. 439 U.S. 1384 (1978). The case came back to the Court four years later under the caption *Crawford v. Board of Education*, 458 U.S. 527 (1982), as a challenge to a subsequent California constitutional amendment barring the state courts from ordering busing or mandatory pupil assignments to achieve racial balance. The Court found it unnecessary to reach *Bustop's* constitutional claim, upholding the constitutional amendment on the other grounds. *Id.* at 535 n.11.

188. 458 U.S. 457 (1982).

189. *Id.* at 472 n. 15.

190. *Id.* at 472-74.

191. See *supra* notes 185 - 187 and accompanying text.

192. ARMOR, *supra* note 44, at 227.

193. For historical reasons, even public school choice proposals trigger fears and suspicions that one of the intended effects of schools choice is to terminate efforts to desegregate schools in the north and west and resegregate schools in the south. The same fears, for example, also were present in the Reagan administration initiative to replace mandatory student assignment with "voluntary choice" plans which involved the creation of "magnet schools" in minority neighborhoods to desegregate. Paul Gerwitz, *Choice in Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, at 770 - 71 (1986).

to resegment schools. More importantly, the challenger will have to establish that there is a state actor responsible for that segregative intent. Given the current Supreme Court doctrine on school segregation, proving that school choice policies are discriminatory and have no legitimate educational value probably would be difficult, particularly if a significant number of minority students take advantage of a choice program.¹⁹⁴ In addition, if resegregation occurs from school choice, it would have resulted because of the parent's choice to send their children to different schools.¹⁹⁵ Arguably, this constitutes private action, rather than state action.¹⁹⁶

Policies such as educational choice which are not only race-neutral on their face, but also race-neutral in terms of intent, may nonetheless violate the Equal Protection Clause, but only when these are implemented without any restrictions in schools under court order to desegregate. In *United States v. Fordice*,¹⁹⁷ for example, the Court, in an opinion joined by eight of the nine Justices, addressed the issue of formerly de jure segregated higher education institutions under affirmative duty to desegregate adopting race neutral policies that have nonetheless resulted in continued segregation. The Court rejected the Fifth Circuit Court of Appeals' holding that by simply adopting race-neutral policies, the school had met its affirmative obligation to disassemble the prior dual system.¹⁹⁸ Language in the opinion can be read as supporting the notion that the adoption of policies such as educational choice, even if considered race-neutral, may nonetheless violate the Equal Protection Clause.¹⁹⁹ This is only the case, however, in institutions that are still under federal mandate to desegregate and have not attained unitary status. *Fordice* is, by its terms, only applicable to previously dual systems. Similarly, the order in *Green* mandating the school to abandon the "freedom of choice" plan resulted in the context of a school district under court order to desegregate.²⁰⁰ In contrast, school systems not subject to desegregation orders or who have achieved "unitary sta-

194. The decisions of *Board of Oklahoma City v. Dowell*, 498 U.S. 237 (1991), and *Freeman v. Pitts*, 503 U.S. 467 (1992), have been pessimistically interpreted as providing an excuse for school systems that have attempted but not succeeded in desegregating their schools and ammunition for those who would have the schools stop trying. In both opinions, the Court remanded the cases for findings in accord with the Court's determination that a segregated school system's partial compliance with a desegregation order could trigger the partial dissolution of the order, even if the schools have not attained racial balance or have become resegmented through "private decision making and economics" such as residential patterns. *Dowell*, 498 U.S. at 243 (1991); see also *Freeman*, 503 U.S. at 482.

195.

196. *Freeman v. Pitts*, 503 U.S. 467 (1992) (denying an equal protection claim when resegregation of a school district resulted from private choices, rather than state action).

197. 505 U.S. 717 (1992).

198. *Id.* at 2736.

199. Justice White writing for the majority indicated:

[W]e do not disagree with the Court of Appeals observation that a state university system is quite different in very relevant respects from primary and secondary schools. Unlike attendance at the lower level schools, a student's decision to seek higher education has been a matter of choice.

We do not agree with the Court of Appeals or the District Court, however, that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system. That college attendance is by choice and not by assignment does not mean that race-neutral admissions policies cures the constitutional violation of a dual system. *Id.* at 2736 - 37.

200. See *supra* notes 160 - 165 and accompanying text.

tus”²⁰¹ have considerably more latitude in designing school choice programs. Since a violation of the Fourteenth Amendment for school systems depends on both the purpose of a policy as well as its effects, then if the school can show that the principal purpose of the school choice policy is to enhance education, rather than to cause segregation, its consequences for racial balance might well be ignored by the courts.²⁰² Particularly in light of the *Dowell*²⁰³ and *Pitts*²⁰⁴ decisions, there is no remedy at law de facto for segregated schools. In such cases, it is up to state legislatures or school districts specifically to prioritize the issues of choice and integration of schools and must place the goal of desegregation first in order to preserve the integration of the schools.²⁰⁵ This language of intent to a continued

201. Board of Educ. of Oklahoma City v. Dowell, 498 U.S. 237 (1991) (holding that further judicial and desegregation orders cannot proceed against schools that have attained unitary status unless the proposal has the actual intent to discriminate according to race).

202. ARMOR, *supra* note 44, at 14.

203. 498 U.S. 237 (1991).

204. 503 U.S. 467 (1992).

205. The Nebraska state legislature's attempt to link school choice policies to the preservation of the integration efforts of the Omaha School District illustrates why desegregation efforts must be a priority in school choice statutes. The Omaha School District was ordered by the Eighth Circuit Court of Appeals to desegregate in 1975. *United States v. School Dist. of Omaha*, 521 F.2d 530, 537, 546, *cert. denied*, 423 U.S. 946 (1975). The Omaha School District implemented its plan to desegregate, based on voluntary participation of students in exercising social choice options, consisting in various magnet schools that had higher minority populations and the reassignment and transportation of students. Office of Public Information, Omaha Public Schools, *The Plan, Desegregation of the Omaha Public Schools 14*. The plan proved very successful and in the fall of 1984, the United States District Court granted the Omaha School District unitary status. *United States v. School Dist. of Omaha*, No. Cv. 73-)-320, slip op. at 2 (D.Neb. Sept. 17, 1984).

In January 1989, Senator Dennis Baak introduced an interdistrict open enrollment bill into the Nebraska legislature. During the floor debate, an amendment to the bill concerning the bill's potentially harmful effects on Omaha's desegregation plan was introduced and passed. Floor Debate, LB 183, 91st Leg., 1st Sess. 2228, 2246 (Mar. 15, 1989). The amendment generally gave first priority for enrollment to option students whose request for enrollment would aid the racial integration of the option school district and the resident school district. Racial integration would be aided if a student transferred to an option schools district in which his or her race would be a smaller percentage of the total student enrollment of the option school district than it is of the student's resident schools district. *Id.* The Omaha School District, the only district in the state with a desegregation plan, voted November 19, 1990 to participate in the open enrollment plan during the 1991 - 92 academic year but would not allow non-black students to transfer out of the District but would allow non-black students to transfer in if space (capacity) was available. Black students, on the other hand, would not be allowed to transfer into the District but would be allowed to transfer out of the District if their OPS schools attendance had a higher-than-average (28%) black enrollment. Joint Ex. 17 at 1, Enrollment Option Appeals Involving Douglass County Sch. Dist. No.1, Cases No. 91-01 to 91-13, 91-19 to 91-21, 91-27 (Neb. Bd. of Ed., Sept. 9, 1991) (Omaha School Board minutes) (Dec. 3, 1990) Late in 1990, numerous "non-black" students applied to the Omaha School District for permission to transfer out of the district but were denied. Several of the students and their parents petitioned the Nebraska Department of Education for a reconsideration of the district's denial. *Id.* at 1. The hearing Officer for the Department of Education Addressed six issues, four of which were jurisdictional. The other two issues analyzed the open enrollment legislation: the constitutionality of section 79-3407 and of the Omaha School Board's standards for participating in the open enrollment program and whether those standards complied with the substantive requirements of the open enrollment legislation as a whole. *Id.* at 15.

The petitioners argued that section 19-3407 violated the Equal Protection Clause of the Fourteenth Amendment because it created a classification based solely upon race; they also argued that the standards were unconstitutionally overbroad and vague. *Id.* at 44 - 47. The hearing officer, however, agreed with the school district and held that section 79-3407 and that district standards were "justified by a legitimate state purpose . . . fostering integration in their school system." *Id.* at 60. The hearing officer also did not find that the standards were overbroad nor

commitment to desegregation must clarify the priority of the goals.²⁰⁶

The following is a list of factors that school choice plans must have in order to achieve and continue desegregation. At minimum, depending on the scope of the school choice plan, all schools, including charter schools, should be required to participate. In interdistrict school choice plans, this is not always the case²⁰⁷ and the danger is that the "better off" schools will be the least likely to participate. A requirement to participate means that all schools will be required to admit all those students who apply to their

vague. *Id.* at 68. However, the petitioners also argued that the standards should only address the continued integration of the Omaha School District but not improperly impose upon racial integration in potential option districts. The hearing officer agreed and found that the standards failed to consider each student's application for transfer out of the Omaha School District on any basis other than race, failing to consider the impact of each transfer on its desegregation plan. *Id.* at 79. Furthermore, the hearing officer determined that the standards, when actually applied to the seventeen petitioners, would have little or no impact on racial balance in the Omaha public schools. *Id.*

In its Final Order, the Nebraska Board of Education adopted and incorporated the hearing officer's finding of fact and conclusions of law and directed the Omaha School District to approve all seventeen petitioner's requests for transfer of their children to those chosen option districts. *Kingston v. Douglass County Sch. Dist. No. 1*, Case no. 91-01, slip op. at 2 (Neb. Bd. of Ed. Sept. 11, 1991) (Final Order). In response, the Omaha School Board created new standards allowing both "black" and "non-black" students to transfer out of the district, and both "black" and "non-black" students to transfer into the district. See Hearing Officer's Finding of Fact, Conclusions of Law, and Recommendation at 41 - 43, Enrollment Option Appeals for the Sch. Year 1993 - 94 Involving Douglas County Sch. Dist. 001, Cases No. 93 - 03, 93 - 05 to 93 - 07 (Neb. Bd. of Ed., Sept. 8, 1993). However, the number of such transfers was limited by specific quotas which mirrored the racial composition of the school district. *Id.* As such, the district still maintained an absolute prohibition on transfer of students in the Omaha school district who were needed in their home school to maintain the current racial balance. Therefore, some students, by virtue of their residence in Omaha, would be allowed to take advantage of the choice program, while others would not.

In 1993, the Omaha district's denial of choice applications again was challenged by parents and students. This time the hearing officer ruled that the district's new standards did not comply with statutory intent because the absolute prohibition for some students undermined the legislature's specific language that all parents and students in Nebraska should have a choice. Hearing Officer's Finding of Fact, Conclusion of Law, and Recommendation at 61, Enrollment Option Appeals for the Sch. Year 1993 - 1994 Involving Douglas County Sch. Dist. 001, Cases No. 93 - 03, 93 - 05 to 93 - 07 (Neb. Bd. of Ed., Sept. 8, 1993). Once again the Nebraska Board of Education adopted the finding of fact and conclusions of law of the hearing officer and ruled that the students could opt out of the Omaha district.

The state legislature responded to the Nebraska's Board of Education's decision with an amendment in January of 1994 to the school choice legislation. During her introduction of the bill, Senator Jessie Rasmussen stated that the new legislation would "make it clear that the state recognizes that desegregation and integration are critically important issues and that when there is a conflict between the school option and the desegregation plan that it is the desegregation plan that will be the prevailing interest." Floor Debate, LB 930, 96th Leg., 1st Sess. 8975 (Feb. 11, 1994). The Nebraska Unicameral amended the statute. Under this new statute, any district that has a desegregation plan adopted by the school board or the board of education or has been ordered by the federal court may adopt standards for acceptance and rejection of applications for transfer into or out of such district which are designed to make desegregation easier. These standards would prohibit transfer which, if granted, would increase the racial percentage in the school district's total enrollment of the minority group for whom the desegregation plan was ordered or adopted. NEB. REV. STAT. § 79 - 3407 (Reissue 1994).

206. Smith, *supra* note 18, at 165

207. Under the Massachusetts statute effectuating public school choice, for example, districts are not required to participate. As a result, the program has limited participation and is woefully inadequate. Less than twenty percent of the state's districts have elected to participate in the program. *Id.*

schools²⁰⁸ unless the school can show that it does not have the capacity to accept those students, for instance, if the density of students is significantly adversely affecting the quality of education offered at the school.²⁰⁹ Once given the choice, all students should be allowed to transfer without permission from their home districts unless such transfers upset racial balance.²¹⁰ This needs to be true regardless of whether the home school or district is under any mandatory or voluntary plan to desegregate. School choice plans should give parents the opportunity to choose among more than one school in the district (in an intradistrict plan) or in the state (in a interdistrict plan) to make it easier to take into account both preference and racial balance when deciding what choice to allow. In the case of school vouchers for private schools, the voucher should, at minimum, be sufficient to cover the full cost of private schools for those students who come from low-income families.²¹¹ In addition, parents should be well informed of all their choices, particularly parents with less education and less experience with bureaucracy.²¹² Likewise, transportation or cost reimbursement for already existing transportation must be provided if the choice program is to function equitably.²¹³

It is important to recognize if the appropriate factors as considered above are implemented in school choice programs, these may be quite effective in desegregating schools. Segregation in the schools continues in this country primarily because of a combination of two factors: the segregation of neighborhoods through housing patterns and the Supreme Court's refusal to require desegregation efforts across district lines and into predominantly white suburbs.²¹⁴ In fact, the traditional practice of assigning students to neighborhood schools always has resulted in racially segregated school systems because urban residential segregation always has been prevalent. Mandatory desegregation through busing has only had limited success in the United States because residential patterns continually

208. Admission policies will have to ensure that the most at-risk students also are included. See *supra* notes 115 - 129 and accompanying text.

209. This may include such issues as overcrowding due to insufficient space if the cost of building new space would be greater than the benefit to the new students.

210. This is the way it is done in the Minnesota interdistrict plan. Smith, *supra* note 18, at 166.

211. See *supra* note 133 and accompanying text.

212. See *supra* note 100 - 115 and accompanying text. The Massachusetts state-wide program also has no mechanism for informing parents of choices. As a result, few minority and low-income parents have been able to take advantage of school-choice programs. Smith, *supra* note 18, at 165.

213. See *infra* notes 130 - 141 and accompanying text. Unfortunately, the Massachusetts state-wide interdistrict program does not have a mechanism in place either for transportation to students to other districts. Not surprisingly, under this plan only six percent of the students who participated in the Massachusetts plan were minority students, compared with twenty percent in the Massachusetts state public school population as a whole. Smith, *supra* note 18, at 165.

214. *Id.* at 181. In *Milliken v. Bradley*, 418 U.S. 717 (1974), the Court overturned the Sixth Circuit affirmation of the district court's desegregation plan, which included the fifty-three suburban school districts surrounding the inner-city in Detroit. Although the Sixth Circuit recognized that without the inclusion of the white suburban districts most schools within Detroit's inner city would remain predominantly black, the Supreme Court held that the plaintiff must prove that the "racially discriminatory acts of the state or local schools districts, or of a single school districts have been the substantial cause of interdistrict segregation" before an interdistrict remedy will be mandated. *Id.* at 735, 745.

remain segregated.²¹⁵ Due to this residential segregation, proponents of school choice can turn around and argue that it is counter-intuitive for advocates for the current system of education to point to school choice as harmful to integration efforts when the current dimensions of public school districts are largely determined by political and neighborhood boundaries which mirror the segregated housing patterns.²¹⁶ While suburbs are frequently white enclaves, cities are racial and ethnic polyglots.²¹⁷ As a result, suburban schools are largely white and urban schools are decidedly not.²¹⁸ Compounding the problem is the fact that people with means, regardless of color, can always escape the public system by sending their children to private or sectarian schools, while the poor have not choice but to stay behind.²¹⁹ These claims by proponents of school choice, however, will only have merit if the appropriate steps are taken to ensure that the most disadvantaged are included. Leaving it entirely to the forces of the market is simply paying lip service to unrealistic promises.

Finally, since the aim of school choice is to improve the overall education offered in this country to American children, any discussion of how freedom of choice interfere with desegregation efforts become relevant only if racial mixing is necessary for the quality of education. The decision in *Brown* confirmed that the stigma of inferiority resulting from the separation of the races was an expected (if not an intended) product of the second class citizenship accorded African Americans.²²⁰ But the divided question today is whether that same stigma continues forty years later.²²¹

Proponents of school choice programs argue that problems of low-self esteem associated with stigma, to the extent that they persist, should be addressed through increased emphasis on ethnic and cultural pride.²²² Therefore, to the extent that freedom-of-choice give all parents, including minority parents more autonomy, the argument is that more control over the education of their children would provide more say in how resources are deployed in ways that are unique and particularized to the needs of their children's education and self-esteem.²²³

On the other hand, even if racial mixing is not a precondition to a quality education, advocates of continued attempts at integrating schools point to other social, political, economic, and educational reasons.²²⁴ First,

215. *Id.*

216. Peyser, *supra* note 1, at 619.

217. *Id.*

218. *Id.*

219. *Id.*

220. See Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits*, 42 EMORY L. J. 791, 805-09 (1993); Kimberle W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1377-78 (1988).

221. Maryland V. Yarbrough, *Still Separate and Still Unequal. Symposium: Brown. v. Board of Education After Forty Years: Confronting the Promise.* 36 WM. & MARY L. REV. 685 (1995).

222. Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L. J. 1285, 1286-87 (1992).

223. See Patricia Wen, *Boston Schools Approach a new Era Assignment Plan Seen as a Key Step*, BOSTON GLOBE, Dec. 26, 1988, at C1.

224. See Scott J. Davidson, et al., *The Riffing of Brown: De-Integrating Public School Faculties*, 17 HARV. C.R.-C.L. L. REV. 443, 500-02 (1982); James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463 (1990).

because ethnic and social minorities will compose the majority of the American work-force in the next century, the future of the U.S. in world leadership really depends on a work-force and citizenry that is reflective of and cognizant of diverse cultures that comprise the country.²²⁵ That public schools are one of the best viable means of achieving this recognition and acceptance of diverse cultural attributes derives from the fact that public education is the most common ground on which citizens of this country meet.²²⁶ Second, the simple theory some have labeled the "green follows white" recognizes that even in those instances where resources are found to be or are stipulated to be equal, when whites and minorities have been educated separately, educational outcomes have invariably been unequal.²²⁷ Even with the growing evidence that suggests that socio-economic class rather than race causes the difference in educational achievement; to the extent that so many more minority students than non-minority students are poor, minority students suffer disproportionately. Therefore, mixing socio-economic classes invariably means mixing races.

SECTION D: A SUMMARY.

Undeniably, the search for and implementation of programs that will lead to educational improvement is both desirable and necessary. The potential inequities resulting from school choice programs should, therefore, not overshadow completely their benefits. If such programs do show that they can lead to increased innovation, increased parental involvement, and improved education, they should be implemented more widespread. On the other hand, this country can no longer afford to aim for improvements that will continue to leave out the most disenfranchised and for the most disadvantaged students in our country. Particularly, with all the talk of welfare reform and self-sufficiency, this country cannot keep asking the poor to pick themselves up without first trying to share with them the resources that will give them the skills to breach the gaps in knowledge, pay,

225. David G. Carter & James P. Sandler, *Access, Choice, Quality, and Integration*, 23 *EDUC. & URBAN SOC'Y* 175, 183 (1991).

226. Yarbrough, *supra* note 221, at 692. A parallel argument can be made regarding the effect that vouchers for private schools have on creating a greater number of American children receiving a less uniform education. For example, the Wisconsin Constitution provides that "the legislature shall provide by law for the establishment of district schools which shall be as nearly uniform as possible." *DAVIS v. GROVER*, 480 N.W.2d 460, 472 (1992) (citing article X, section 3 of the Wisconsin Constitution). Therefore, in *Davis v. Grover*, the Intervenor, various school administration organizations and the NAACP, argued that participating private schools became district schools by accepting public money. Accordingly, these private schools, by offering a different "character of instruction" from the public schools in the district, allegedly violated the Uniformity Clause. The court determined, however, that participating private schools do not constitute district schools, reasoning that the Uniformity Clause requires the legislature to provide the opportunity for children to receive a free uniform basic education, but does not require the legislature to ensure that all children must receive a uniform education.

227. The 1966 Coleman Report, and the 1972 Mosteller and Moynihan reexamination of that report concluded that rather than the level of resources, classroom colleagues were a major determinant of the achievement of minority group children. When comparing the influence of fellow students with the influence of school facilities and the influence of staff, the Coleman Report concluded that "attributes of other students account for far more variation in the achievement of minority group children" than the other factors. *JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATION OPPORTUNITY* (1966). See also, *FREDERICK MOSTELLER & DANIEL P. MOYNIHAN, eds., ON EQUALITY OF OPPORTUNITY* (1972).

and wealth which in the United States only keep getting increasingly bigger. Steps must specifically be taken to ensure that school choice programs will not only include the poor, the disabled, and the minorities but that they will be implemented mostly for their benefit.

Part I of this paper has discussed some of the problem areas in school choice as presently implemented in the United States that are likely to either lead disadvantaged students to further inequalities or leave them out of the benefits altogether. Part I has also offered some proposals to make school choice programs more inclusive of the disadvantaged or to keep them from creating further inequities in the way educational resources are distributed. Some of these proposals are more plausible than others, whereas others are highly unlikely. For example, it is unlikely that school choice will be implemented in an even-playing field, with all schools receiving the same level of funding statewide and having similar resources.²²⁸ But it still may be possible, as has been done already, to try to mitigate the damage to schools that are losing significant resources to competition but which are still responsible for educating a number of disadvantaged students by providing those schools with a percentage of the funds they have lost.²²⁹ Still, these mitigating funds are unlikely to last forever since the schools is interested in determining whether these schools ultimately will continue to operate or are doomed to fail.²³⁰ At least, if schools do fail, the state should not allow them to run in horrible conditions for long and should provide immediately the children who remain behind with various accessible alternatives to attend other schools. Accessibility will depend on such things as full-vouchers to low-income students who wish to attend private schools and free transportation to low-income children who wish to attend schools outside the district.²³¹ In addition, information has to be presented in a way that most low-income families can comprehend and widely distributed via the non-traditional channels of communication most likely to reach low-income families.²³² Though it will take time, it may also be possible to have legislatures make it mandatory for all schools in the state to participate in school choice,²³³ but it seems less likely that these schools will be prohibited from adopting high-standards admission criteria, so long as the criteria in place is non-discriminatory.²³⁴ Lastly, restrictions on students choices based on race, even with the purpose of aiding integration, are likely to be unpopular.²³⁵ Rather, the statutory language of school choice policies simply will encourage districts to take into

228. *See supra* note 96 - 100 and accompanying text.

229. *See supra* note 94 - 95 and accompanying text.

230. The sooner the state stops subsidizing the failure of the schools to compete, the faster the state will determine the failure or success of the school.

231. *See supra* notes 131 - 142 and accompanying text.

232. *See supra* notes 103 - 116 and accompanying text. The challenge to get the state to provide these additional resources will vary according to their costs. The greater the demand and the higher the cost, the more likely that state legislatures will fail to provide these resources and the more dangerous school choice programs will become to the disadvantaged.

233. *See supra* notes 209 - 211 and accompanying text.

234. *See supra* notes 115 - 130 and accompanying text. Not allowing schools to determine academic criteria for the type of students it wishes to enroll nor to limit the number of students from outside the district it wishes to enroll would be considered highly intrusive.

235. *See supra* notes 168 - 175 and accompanying text.

account the aims of integration but will not interfere with the local affairs of the schools. The impact of such language is likely bring little change to minimal impact that most integration policies have had in more than four decades post *Brown*.

The popularity of school choice programs is currently strong in the United States, and it may take a long time before a real assessment of its failure or success will be available. Hopefully, the foresight of educators and of policymakers will result in at least some measures adopted to ensure that the disadvantaged are included seriously in the success of the program.

PART II: DECENTRALIZATION

A second major criticism of the current system of education in our public schools is the increasing centralization of the decision-making authority. At the beginning of the twentieth century, schooling was a local affair. During the Progressive Era, however, a reform movement expanded the government's role in providing lower-level education and consolidated authority over individual schools.²³⁶ Reformers replaced the decentralized system with centralized governing institutions staffed by "impartial education experts" who were devoted to the public interest.²³⁷ Centralization reduced the number of school districts from 100,000 in 1945 to 16,000 today.²³⁸

Critics of the current organizational structure of public schools argue that centralization diminishes the control of parents and students over the distant political body. As professionals at the district, state and federal level took control of the public school system, parents and students correspondingly lost influence over the education that local schools provided.²³⁹ In such a system, the decision-maker does not have to confront personally or assess the impact of the thousands of decisions necessary to operate a school system.²⁴⁰ Moreover, critics of centralization argue that such a system leads to an expansive bureaucracy which functions very much like monopolies in which agency costs are exorbitant and resources are wasted. Critics cite as illustrative of this expansive democracy the fact that while student enrollment increased only by nine percent between 1960 and 1984, school administrative staff increased 500%.²⁴¹

Other criticisms of centralized schools is that teachers must work within a highly detailed framework in which they have little input — for instance, the size of classes, the length of class periods, curriculum materi-

236. Chubb & Moe *supra* note 20, at 3.

237. *Id.* at 4.

238. Cleveland, *supra* note 16, at 86.

239. MILTON FRIEDMAN & ROSE D. FRIEDMAN, *FREE TO CHOOSE* 151 at 155 (1980). For instance, most major policy decisions regarding curriculum, course content and textbooks are made at the state level. *Id.*

240. FLIEGEL & MACGUIRE, *supra* note 49, at 26. Because of the lack of accountability, critics of public schools argue that the policies trickling down from the top are both ineffective and inefficient. For example, the creation of a uniform curriculum and institutional setting, critics argue, is inappropriately servicing the diverse talents, interests, desires and needs of children. *Id.*

241. Peyser, *supra* note 1, at 622.

als,²⁴² student assignments, student attendance and discipline policies, and evaluation of student achievement.²⁴³ These restrictions on teacher involvement, critics argue, have negative consequences for school effectiveness generally, and particularly for at-risk students. This is true because uniform policies ignore the enormous variety of student needs and characteristics found among schools.²⁴⁴ Secondly, school-based educators cannot take the responsibility for educational outcomes when they have little say in the educational decisions affecting schooling.²⁴⁵ Thirdly, not allowing school-based educators and administrators input results in the underutilization of talent in the schools, since there is little opportunity to influence the organization, curriculum, or broad instructional strategies.²⁴⁶

There is, however, a different side of the story about decentralized education. According to this version, "local control of the schools resulted in schools that were grossly unequal in resources, reproduced the 'dull parochial and attenuated totalitarianism' of village life, repressed the discretion and expertise of professional educators, and stirred petty politics."²⁴⁷ Because of this, some have predicted that decentralization could result in disqualifying effects, especially against the most disadvantaged students.²⁴⁸ One fear is that localized curriculum planning will result in the predictable tendency of designing schools in affluent areas that will be culturally rich and cognitively demanding, and for schools in poor areas with curricula which impose much lower expectations on the student's capacity for intellectual development and hard work.²⁴⁹ A second concern is that radical decentralization can be a major threat to the welfare of many of those who benefit from government services — the allocation of political responsibility to local communities will tend to absolve the central authority of much of the responsibility for the welfare of minorities.²⁵⁰ A third concern is the potential rise of provincialism — "the narrow viewpoint that the norm and values of your own region, town, or neighborhood represent the essence of human achievement."²⁵¹ Based on lessons, from previous attempts to deregulate schools, the fear is that these schools may provide access to power for groups that see the schools as a forum for enacting narrow, ethnic or

242. Indeed, a major principle of curriculum design that is used by publishers who sell curriculum and materials to schools is to make the curriculum "teacher-proof" so that teachers can not alter the educational process from the pre-designed format. Levin, *supra* note 115, at 6.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. JANE HANNAWAY, Ed, DECENTRALIZATION AND SCHOOL IMPROVEMENT: CAN WE FULFILL THE PROMISE? at 3 (1993).

248. Particularly thoughtful analyses of the potentially disqualifying effects of decentralization have been produced by Watt (1989), S.B. Lawson (1991), and Mirel (1990). *Id.*

249. MURPHY, *supra* note 3, at 150. (reporting Watt's (1989) study of the implementation of decentralization or school-based management in schools in Australia which demonstrates an increasing inequality of provisions of favorable conditions of learning between rich and poor schools).

250. *Id.* (citing S.B. Lawson (1991) who concludes that decentralization will lead the state to arrogantly shirk its social responsibility for providing an equitable quality education for all).

251. MURPHY, *supra* note 3, at 151.

racial agendas which will separate children from one another in a new form of self-imposed segregation.²⁵²

Still, supporting the critics of centralized management of schools is decades of organizational research which has revealed that organizational performance improves when power is shifted down to lower levels of the organization.²⁵³ John Chubb and Terry Moe concluded in their 1990 study of public schools that high levels of autonomy from external authority tend to be associated with high levels of organizational effectiveness.²⁵⁴ Specifically, principals in schools that produce the highest achievement scores gains experience substantially lower interference from superintendents and central office administrators, particularly in areas of curriculum content, instructional methods and autonomy to hire and fire teachers.²⁵⁵ This being the case, increasing efforts have been made at all levels of government to return more local control over education to schools.

SECTION A: TWO METHODS OF DECENTRALIZATION

In an effort to decentralize, at least two methods have been implemented — school-based management and charter schools.²⁵⁶ For those who believe that schools need to change in order to deliver what society needs in the 21st century, but are reluctant to overthrow the entire existing means for governing and managing schools, school-based management is a sensible approach. School-based management schools are those in which significant authority has been devolved from the district office to the school campus. This initiative to increase the authority of the local schools has come more often from the schools themselves.²⁵⁷ To transfer authority, most school-based management schools establish site councils, though their composition, role and leadership vary.²⁵⁸ Most councils have administrative, teacher, parent and classified employee representatives who are elected from their respective constituents.²⁵⁹ In addition, in schools that are most active in school restructuring, subcommittees are sometimes formed to disperse power further; these subcommittees engage more of the faculty and parents.²⁶⁰

The first time that school-based management appears as a complete idea was in New York state education reform report, issued by the Fleisch-

252. *Id.*

253. PRISCILLA WOHLSTETTER, ASSESSMENT OF SCHOOL-BASED MANAGEMENT at 32 (1996).

254. CHUBB & MOE, *supra* note 20, at 150 - 52. Chubb and Moe analyzed more than 20,000 students in a nationwide sample of 500 schools. *Id.* at 9. Their analysis of school organization divided those schools in the top quartile of a distribution of achievement gain scores are classified as "effectively organized" and those in the bottom quartile as "ineffectively organized." *Id.* at 143.

255. *Id.* at 150 - 52.

256. For a definition of charter schools, *see supra* notes 49 - 54 and accompanying text.

257. WOHLSTETTER, *supra* note 56, at 40.

258. In some schools, as in San Diego, schools districts dictate the structure of the council while in others, such in Prince William County, the decision is left up to the school itself with the principal having the ultimate responsibility of ensure that all parties have an opportunity to participate. Other schools, as in Jefferson County, the guidelines for establishing a council are set up collaboratively by the district and teacher association. Those schools which do not set up councils usually leave it up to the principal to devise informal ways to seeking teacher and parent input. *Id.* at 56.

259. *Id.*

260. *Id.*

mann Commission in 1973,²⁶¹ at the time the idea was not embraced widely. However, as early as 1989, fourteen states had fostered the development of student-based management projects and by 1991, thousands of districts across the country were experimenting with it in some form or another.²⁶² By 1992, in New York alone, school-based management, initiated by Chancellor Joseph Fernandez, was functioning in at least 200 of the city's public schools.²⁶³

One real problem of school-based management is that it has not been implemented uniformly. Past research has shown that school-based management is everywhere and nowhere. It is everywhere because school systems all over the country are involved in school-based management because the extent of decision-making responsibility devoted to the school is limited.²⁶⁴ At the most basic level, there is a lack of clarity about the meaning of school-based management.²⁶⁵ Also, what has been found is that for school-based management to work, the people at the school site must have "real" authority over budget,²⁶⁶ personnel²⁶⁷ and curriculum.²⁶⁸

261. MURPHY, *Supra* note 3, at viii.

262. *Id.* at 5 - 6. For example, in Kentucky, House Bill 940, which was passed in 1990, mandated with a few minor exception that all schools in the state employ a school-based management model of governance by July 1, 1996, as part of the Kentucky Education Reform Act (KERA). By the end of 1991-92 academic year, 420 of the 1350 schools in Kentucky had established school-based councils. Act 366 of the Hawaii State legislature, signed into law in 1989, was a major initiative designed to facilitate improved student performance in the public schools system. In Oregon, legislation was passed in 1991 to establish site-based decision-making committees in all public schools in the state by 1995. Related events also unfolded in Texas, Washington, Tennessee, South Carolina, and other states. *Id.*

At the district level, General Assemblies also made similar efforts to move decision-making authority to the school level, especially in urban areas such as Dade county, Chicago, Los Angeles, and Rochester. For example, in Detroit, as part of its empowerment plan, districts gave schools 92% of the district's per-pupil spending and allowed schools to run their own affairs. Similar reforms are occurring in Dallas, Cincinnati, Los Angeles, White Plains (NY), and hundreds of other districts. In South Carolina alone, at least 50% of the school districts have implemented some reforms of school-based management. *Id.*

National data on school-based management programs show that somewhere from a fifth to two-thirds of the districts reported having schools involved in reform efforts. Fifty—three% of secondary schools had school-based reform programs, compared with 56 percent of elementary schools and 57% of intermediate schools. The majority of school-based reform were relatively new. Nationally, only 15% of the districts reported having their current programs in place before 1988- 89. More than half of the programs were initiated between 1989 and 1991. PATRICK SHIELDS, ET AL., *IMPROVING SCHOOLS FROM THE BOTTOM UP: FROM EFFECTIVE SCHOOLS TO RESTRUCTURING. FINAL REPORT* at vii (1995). With this national data, it is important to keep in mind that it only provides a limited picture of school-based reform activity because of the wide variation in change efforts across districts and schools. In some schools, reform simply translates to little more than changes in teachers' routines and meeting times; in others, reform does involve more fundamental reorganization. *Id.*

263. Ziegler et al., *supra* note 68, at 829.

264. WOHLSTETTER, *supra* note 256, at 35 (citing studies from Clune & White, 1988; Malen & Ogawa, 1988; Ogawa & Dranz, 1990 and Wohlstetter & Buffet, 1992).

265. MURPHY, *supra* note 3, at 7.

266. Typically, resources are allocated by norms, which give local schools little flexibility of resource use at the school building or site. Under these circumstances, principals have only two budgetary functions: they maintain records for a small amount of restricted money given them by the district, and they learn and use persuasive techniques in obtaining additional 'spending money' that a district administrator controlled to use for a local school project. *Id.* at 50.

267. In traditional schools, districts hire personnel. In the least aggressive model of decentralization, the allocation of teaching positions is determined at the district level. In the most advanced cases of decentralization, authority for the employment of the principal is held by

Otherwise, the amount of authority that districts can push downward to the school level will be minimal if school systems are ensnared in an ever-expanding web of regulations and prescriptions.²⁶⁹ The most far-reaching of deregulation involves promoting school-based management by pulling back the entire regulatory framework.²⁷⁰ Under this model, schools are provided or are asked to provide goals and are held accountable for results.²⁷¹ In turn, they are given considerable discretion in selecting the processes, strategies, and activities they will use to reach objectives. Despite the fact that real control is a requisite of successful school-based management programs, the evidence on whether such programs have been successful in devolving decision-making influence to the school level in the areas of real importance — budget, personnel, and curriculum — is mixed, and there is decidedly pessimistic flavor to the data.²⁷² At least in some locales, stake-

members of the local school community, members of the local school community exercise nearly full control over who will fill these slots — that is, although the central office maintains a pool of qualified applicants, teachers are not longer sent to the school from the district office. Teachers and administrators select candidates to interview, make the final choice, and pass their selection back to the district. Under more nearly comprehensive models of local control, the allocation of professional positions is not predetermined. Although schools are still free to select personnel, they also have the option of using funds budgeted for teachers for other purposes. For example, in Dade County and Santa Fe, teachers are parents in the process established to select new principals. In Chicago, local school councils are empowered to make final decisions about who will be hired to administer the school. *Id.* at 52 - 53.

268. WOHLSTETTER, *supra* note 256, at 3. Autonomy at the school site in the area of curriculum means that board and central office establish an outline of educational objectives and leave the schools free to meet those objectives in any way they see fit. Within a broad framework of goals, objectives, and expected outcomes, the method of producing is left in the hands of the building staff. School-based curriculum allows the local communities to determine which instructional materials shall be provided. The more expansive the decentralization, the greater are the opportunities to select a specific pedagogical approach, including the assignment and grouping of students to customize staff development to meet the school's unique needs. MURPHY, *supra* note 3, at 53.

269. MURPHY, *supra* note 3, at 37. This conclusion was based on studies performed by the Center on Educational Governance at the University of Southern California in Los Angeles which have looked at schools and school districts in the United States, Canada and Australia to find out what makes school-based management work and on a current study which visited 40 schools in 13 school districts in the United States and Canada — Edmonton, Canada; Jefferson County, Kentucky; Prince William County, Virginia; and San Diego, California — and interviewed more than 400 people, from school board members, superintendents and associate superintendents in district offices to principals, teachers, parents and students who have been operating under school-based management systems for at least four years or longer. WOHLSTETTER, *supra* note 256, at 3. [Heretofore this study will be referred as ASSESSMENT OF SCHOOL-BASED MANAGEMENT STUDY.]

270. MURPHY, *supra* note 3, at 37. Under school-based management, for example, the school site is responsible for budgeting. In the first step of the school-based management budgeting process, the central office allocates lump sums to the individual schools. The larger the school grant or discretionary lump sum annual budget, the greater the amount of decentralization. North Carolina's 1989 School Improvement and Accountability Act is a good example of state-wide deregulation. Under this Act, school districts volunteer to participate and those that do receive money for instructional materials, supplies and equipment, textbooks, testing support and driver education in a lump sum, to be spent as each wishes. Other examples include: Dade County, school-based management sites have decision making authority over 70% - 90% of the budget. The district office in Edmonton allocates 80% of the total budget to schools. Under Detroit's School Empowerment Plan, school based management sites control 92% of the budget. *Id.* at 49 - 50.

271. For example, under the North Carolina 1989 School Improvement and Accountability Act, schools are accountability for achieving at least 75% of their goals. *Id.* at 49.

272. *Id.* at 137.

holders are exercising this kind of influence.²⁷³ These findings, on the other hand, are countered by a more pessimistic backdrop about the vigor of decentralization.²⁷⁴ Reviews of the literature on school-based management suggests that the authority of schools at the local level is either vaguely specified or high circumscribed and seldom does it really mean control over the core elements of organization.²⁷⁵

Perhaps due to the failure of most public school systems to transfer real authority to the schools themselves, charter schools were conceived. Proponents of charter schools argue, however, that school-based management only purports to give public school principals, teachers and parents new power to manage their own affairs at each individual school because the political dynamics of public education have ensured that the levels of power over such critical items as budgets and personnel remain with central school authorities and teachers unions.²⁷⁶ The kinds of changes that must occur within the existing organizational structures of public schools to decentralize are significant and likely to run into vehement opposition.²⁷⁷

Charter schools, however, also face a similar kind of opposition from the existing status quo.²⁷⁸ For instance, state teacher unions tremendously

273. *Id.* at 138. For example, a 1993 study by David of Kentucky schools concluded that councils are meeting and making important decisions. In a 1991 study of Oregon's 2020 schools, Goldman reached a similar result with teachers making decisions about supplies budgets, distribution of special education funding, implementation of computer labs and so on. *Id.* at 139.

274. *Id.*

275. A 1993 study by Wohlstetter and Mohrman found that the extent of decision-making responsibility transferred to site teachers and administrators is limited. Similarly, in 1993, Tyack found that teachers exert very little influence even with increased involvement. Four other recent studies reached similar results. Malem and Ogawa's (1988) study in Salt Lake City underscored the difficulty in altering the principal, teacher and parent influence relationships in public schools. Lindquist and Mauriel (1989) also found that site councils do not make substantive decisions. Deresh (1990) concluded of Cincinnati schools, that traditional patterns of control remained unchanged. Finally, Malen and her colleagues (1989) concluded that school councils operate more as ancillary advisors than as major policy makers or primary policy actors at both the school and district level. *Id.* at 139-40.

276. The recent experience of Boston, which has already implemented school-based management, appears to bear out this conclusion. According to a recent study by the Pioneer Institute, Boston's mandated programs and collective bargaining agreements leave individual school-based management schools with discretion over less than five percent of their annual budgets. Peysner, *supra* note 1, at 630.

277. School-based management districts are undergoing at least three types of structural change. In some cases, most smaller field units, sub-districts, community school districts, or pilot districts. For example, in the late 1980s the superintendent of Milwaukee decentralized the school bureaucracy by dividing the district into six service delivery areas. In Cincinnati, the district's 80 schools were reorganized into nine mini-districts. A second type of structural change has been the reduction in size of central office staff, often accompanied by the elimination of entire layers of the central hierarchy. For example, in the ABC Unified District in California, the goal was to reduce the number of management levels between the superintendent and the principals to one. Over a five year period, 22 district management and secretarial positions were eliminated. The first year of the Chicago Reform Act (1988-1989) saw a 205 reduction in central office staff, from 300 positions to 2660. By 1992, the Chicago Board of Education was forced to reduce staff in its administrative units by 840 positions. Third, employees who previously occupied middle-management roles at the district are sometimes reassigned to support activities in individual schools, but in some case, the money used to fund these positions is simply freed up to support new initiatives at the site level. MURPHY, *supra* note 3, at 39.

278. Tom Triplett, *Choice Through Charter Schools*, in RICHARD M. BOSSONE AND IRWIN H. POLISHOOK eds., PROCEEDINGS: THE FOURTEENTH CONFERENCE OF THE UNIVERSITY/URBAN SCHOOLS NATIONAL TASK FORCE: SCHOOL CHOICE 21 (1992).

oppose the creation charter school programs.²⁷⁹ Legislatures respond to the pressures from these unions and have limited the number of charters permitted.²⁸⁰ Moreover, in some states before chartering a school, parents and other interested parties must receive approval from their local school board.²⁸¹ Predictably, in such cases, school boards fail to authorize charters because permitting charters would create competition for students which would, in turn, lead to a loss of public funds from the district to the charter schools.²⁸² Necessitating approval from the school district also often results in schools having little control over budgeting or personnel, although this varies.²⁸³ Furthermore, charter school's autonomy from state and district rules varies considerably across states with some states granting blanket exemptions while others granting only rule-by-rule exemptions which are subject to district or state approval.²⁸⁴ Even so, at minimum, most charter schools enjoy considerably more autonomy than most schools operating under school-based management programs.²⁸⁵

SECTION B: NATIONAL STANDARDS FOR EDUCATION AND DECENTRALIZATION: RESPONDING TO EQUITY CONCERNS

Even with all the present problems and opposition to the decentralization of education, it is clear that efforts to localize education continue to be made and that more deregulated charter schools will spring up and that school-based management will continue to operate with at least some of the schools keeping substantial control over significant decisions, including decisions about curriculum. This will happen in conjunction with increased efforts by the national government to create higher national standards of

279. *Id.*

280. *Id.*

281. *Id.* Charter schools under four states' laws — Arizona, Massachusetts, Michigan, and Minnesota — are legally independent from the school districts where they are located; that is the charter schools are legally responsible for their operations. In five states — Colorado, Georgia, Kansas, New Mexico, and Wisconsin — charter schools must be part of a school district that is legally responsible for the school's operations. In one state, California, a charter school's legal status is determined through negotiation with the local board that approves its charter. In one state, Hawaii, the legal status of charter schools remains uncertain and awaits a decision by the State Attorney General. See REPORT TO CONGRESSIONAL HEARING: CHARTER SCHOOLS, *supra* note 22, at 8.

282. Triplet, *supra* note 278; see also *infra* note 367 - 68 and accompanying text.

283. As a condition for approving charters, for example, one district required charter schools' terms of employment — for teacher tenure, salary, and schedule advancement — to be the same as those for other schools in the district. Also, evidence from California indicates that districts were least supportive of charter schools seeking the most independence. See REPORT TO CONGRESSIONAL HEARING: CHARTER SCHOOLS, *supra* note, at 9.

284. Arizona and Minnesota receive the most widespread autonomy having both blanket exemptions from most state rules and district rules which do not apply due to the charter schools' legal independence. California, Wisconsin and Hawaii also receive blanket exemptions from state provisions and may receive rule-by-rule exemptions from the district. Massachusetts receives exemptions from state rules on curriculum and teacher tenure and dismissal, but is subject to rule-by-rule exemptions of any other provision. The rest of the states, including Colorado, Georgia, Kansas, and New Mexico, must request rule-by-rule exemptions. Michigan must adhere to all applicable state laws but is legally independent from the district and must not abide by its rules. *Id.* at 14.

285. With charter schools, however, the concern with inequities resulting from competition must be taken into account. See *infra* Part I. In addition — discuss concerns with funding and with the education of Title I and kids with special needs, etc.

education across the board so that all students, including the most disadvantaged, are meeting at least certain minimum requirements of learning.²⁸⁶ A key question is whether decentralized education, either in the form of school-based management or charter schools, when combined with a push for more national standards and instructional reform, still can produce school improvement. This question also would be responding to the fear that decentralized education will result in culturally rich and advanced instruction for the students with the most resources while shafting the most disadvantaged students with low-standards and poor instruction.²⁸⁷ The ability to combine a national curriculum with decentralized schools may also address the concern that local schools may result in provincialism.²⁸⁸

Some education reformers believe that there should be a national curriculum and "restructured" individual schools where professionals decide how but not what to teach.²⁸⁹ A national curriculum would ensure that students are receiving at least a minimum of common knowledge. Limited studies do provide hope that the having a national curriculum in more decentralized education systems may be combined. At least school-based management programs have been found to have more leverage when adopted in the context of a set of curricular guidelines, developed either at the district, state and/or national level (e.g. National Council of Teachers of Mathematics standards).²⁹⁰ In fact, the absence of a clearly defined set of instructional goals tends to slow down the progress of even the governance changes school-based management is supposed to deliver.²⁹¹ Having national standards would guarantee, for instance, that all schools nationwide teach such things as a foreign language or advanced courses in technologi-

286. When the United State House of Representatives and Senate passed and President Clinton signed Goals 2000 in March 1994, their actions capped nearly five years of effort to reshape the federal role in education with the most significant initiative in three decades. The result of that extensive work are incorporated in seven objectives: (1) to raise the performance for all students in all elementary and secondary schools; (2) to develop specific standards and expectations for higher performance by all students; (3) link academic and occupational skills for job preparation; (4) provide coherence among the separate federal education programs and link them more forcefully with state and local resources, particularly through the use of new waivers; (5) plan expanded use of learning technologies, which are essential for raising student achievement; (6) expand participation of business, community, parent, and government leaders in education policy decision; and (7) benchmark American student results and teaching and learning practices to international quality standards. Gordon M. Ambach, *Goals 2000: A New Partnership for Student Achievement*, in JOHN F. JENNINGS, ed. NATIONAL ISSUES IN EDUCATION: GOALS 2000 AND SCHOOL-TO-WORK (1995).

287. See *infra* notes 252 - 53 and accompanying text.

288. See *infra* notes 254 - 55 and accompanying text.

289. The need for a national language and economic competitiveness of uniform systems of technology and communication, for example, will supersede the individual choice of each school to use a separate language and culture of instruction. AUGUSTINA H. REYES, THE LEGAL IMPLICATIONS OF SITE-BASED BUDGETING, at 7 (1994).

290. WOHLSTETTER, *supra* note 256 at 20. All four districts studied in the ASSESSMENT OF SCHOOL-BASED MANAGEMENT STUDY implemented school-based management in combination with curriculum and instructional reform although there was variation in terms of who was providing the instructional guidance system. In San Diego and Jefferson County, the state provided direction in the areas of curriculum and instructional reform. In Prince William County, the district played the key role. In Edmonton, the district played the predominant role, but the province (state) provided general goals and broad curriculum framework that drove local effort. *Id.* at 35.

291. *Id.* at 55.

cal advancements (i.e. computers) to ensure that students remain competitive in the global market.

The argument for national guidelines is extended further to provide direction not only for curriculum and instruction reform, but also about the form of performance standards and/or assessment systems. The fear among some educators was that more decentralized and/or deregulated education would result in the lowering of standards in classroom teaching aimed at the most disadvantaged students. At the same time, proponents of decentralization argued the opposite — that is, that the loosening of centralized control would result in increased innovations and more effective ways of teaching students according to their needs. This would, in turn, improve performance. Unfortunately, very little empirical evidence exists either with school-based management schools or charter schools with regards to student performance. The criteria of success for school-based management programs, for example, have tended to pertain to process rather than outcomes and unfortunately, the impact on student learning is usually ignored.²⁹² As a result, school-based management has not been accountable for improving student learning.²⁹³ In addition, many of the schools implementing reform were found to have had little effect at the classroom level.²⁹⁴ Teachers still were receiving training, and some had not yet “bought into” all of the reforms touted within their districts.²⁹⁵ Even with reforms well under way, classroom practice was not always directly targeted for change.²⁹⁶ Nationally, it was found that nearly 1 in 5 of the reforms sought to improve neither curriculum nor content. Finally, even among those reforms aimed at changing teaching and learning, some sites did not show that an actual impact was occurring.²⁹⁷ Given this, school-based management studies focusing on student outcomes suggests that the development of characteristics of more effective schools has not occurred.²⁹⁸

Part of the explanation for lack of change in instructional approach, the “how” of the curriculum, is that school-based management schools do implement some innovations, but very few of them are of the variety envisioned by reformers.²⁹⁹ In fact, there seems to be a strong strain of conser-

292. MURPHY, *supra* note 3, at 156.

293. *Id.*

294. SHIELDS, *supra* note 262.

295. *Id.*

296. *Id.*

297. For example, in a comprehensive assessment of the Dade County Public School (DCPS) school-based management experiment, Collins and Hanson (1991) discovered that students in school-based management performed no differently, on the average [on the state Student Assessment Test] than students in other DCPS schools. In Kentucky, recent test scores showed no clear difference between schools that have been deeply involved in reform efforts and others that have made no changes (Harp, 1993). In Chicago, as the reform implementation reached mid-point, it would be fair to say that it has not yet had a significant impact upon student learning (Hess, 1992). MURPHY, *supra* note 3, at 157. .

298. Reviews by Marsh (1992) and Malen and her colleagues (1989) and in studies by Duttweiler and Mutchler (1990) and Rumbaut (1992) have concluded that no evidence from research conducted over the past decade about school-based management measures suggest that they are any more effective in enhancing student achievement than were previous decentralization initiatives. *Id.*

299. *Id.* at 147.

vatism in the ways school personnel plan to take advantage of the new opportunities they have been afforded so that in the majority of schools: the plans simply call for more of the same educational programming.³⁰⁰ Not surprisingly, decentralization has not impacted schools in ways that trigger diversity and, in fact, schools show remarkably similar patterns of conformity to mainstream norms.³⁰¹

Despite the slowness in the actual implementation of change in school-based management programs, the reforms that have been observed do not confirm the fears that decentralized education will lead to the lowering of standards of the instruction given to disadvantaged students. In fact, one of the original goals of the effective school-based management measures was to close the achievement gap between "regular" and "at-risk" students.³⁰² One prevalent theme running through many of the reforms is the belief that all students can learn.³⁰³ Shift in teacher's perceptions did not always affect classroom practice, but when it did, the trend was to adopt approaches to teaching that focus on critical thinking and which involve students in the act of learning through hands-on activities.³⁰⁴ This means that

300. *Id.* (citing studies by Anderson & Dixon (1993), Johnson (1993), and Hess (1992)).

301. *Id.* (citing studies by Hannaway (1992), Rothstein (1990), Collins & Hanson (1991) and Sackney & Dibski (1992) analyzing the conditions that inhibit the traditional school organization and culture from maximizing the potential of the strategy. The problems is that school-based management requires the restructuring of authority and decision-making arrangements in the school and district, arrangements which are extremely difficult to achieve and maintain. The first condition that inhibits school-based management from increasing classroom innovation is limited opportunities for teachers to exercise expertise in issues central to instructional improvement. A major factor in limiting these opportunities is the resistance of school administrators to share their authority. In their research of principals' coping mechanisms, Crowson and Porter-Gehrie (1980) found a tendency of principals to be wary of any reduction of their control over the work environment; they appeared to delegate very little responsibility to their subordinates. Also, another condition that inhibits classroom innovations in school-based management schools is the teachers' lack of experience as innovators. For example, in a workshop in 1989, Robert McClure, Director of the National Education Association's "Mastery in Learning Project," identified the tendencies among faculty involved in their first year of the project tended to accept external mandates as standard operating procedures: they were reluctant to question established instructional "technologies;" and they generally avoided risk-taking in the development of their school improvement plans. Finally, there are a number of hierarchical and/or resource constraints that serve as barriers to increasing teacher's innovation and initiative. Increased authority at the school site is not always accompanied by release from highly restrictive district or state regulatory requirements, and school-based management is frequently implemented without accompanying supportive changes in the professional lives of teachers. Participation in school-based management exacts a toll on teachers in terms of time and resources required to participate, to develop new knowledge and skills, and to see results. This time and resource, for instance, are exacerbated when participation takes the form of additional rather than "in lieu of" of professional activity. HARNESSING THE ENERGY OF PEOPLE at 39 - 43.

302. SHIELDS, ET AL, *supra* note 262

303. *Id.* An example of this new perspective comes from some schools which are implementing Outcome-Based Education (OBE). These reforms involved mastery learning and its underlying belief that every child can achieve mastery-level understanding in the classroom. The process involves teaching, testing, then re-teaching or enriching, and finally, re-testing. Teachers implementing OBE who once believed that certain students would fail to achieve at high levels have reported to changed their expectations and believe that with sufficient help, all students could achieve at higher levels than previously though. In a Kentucky high school, teachers took this high-expectation rhetoric seriously and implemented an afternoon tutoring program targeting the lowest-performing 55 students in the school, all of whom were in jeopardy of failing. The program was a success and all students got back on track and were promoted to the next grade level.

Id.

304. *Id.*

the newer curricula emphasizes process for solving problems, rather than simply getting the right answer.³⁰⁵ More importantly, some schools moved toward less tracking at the school level. Students no longer were placed in classroom on the basis of achievement levels. One result of this trend was the increased mainstreaming of special education students.³⁰⁶

With regards to charter schools, there is also little or no systematic evidence yet available to help determine whether charter school students are learning more — or less — than their regular public school counterparts.³⁰⁷ Evidence does suggest, however, that teachers in charter schools do provide more experimental, thematic, individualized, and cooperative forms of instruction in an attempt to increase the performance of students.³⁰⁸ More importantly, these studies have demonstrated that charter schools are serving the needs of students who have been traditionally under-served by the public school system.³⁰⁹ It is particularly these same schools that are working with at-risk students that also adopt accelerated learning programs designed to breach the gap of their academic performance as compared to regular students.³¹⁰

305. *Id.* For instance, these changes have focused on students' interactions with one another. Cooperative learning and clustering arrangements have affected the settings in which students learn and how they work with one another. *Id.*

306. *Id.* To support the placement of special education and other low-achieving students in regular classrooms, some schools developed creative strategies. For example, one midwestern school was piloting a center within the school to serve students with special needs, about 15% of its student population. A cadre of special education and unassigned regular teachers provided quick-response assessment and observation to students who were struggling in the school program. These same teachers taught cooperatively with regular classroom teachers. The initial goal of the student center was to get past student labels and to expand the cooperative learning and cooperative teaching experiments throughout the school.

307. MARK BUECHLER, CHARTER SCHOOLS: LEGISLATION AND RESULTS AFTER FOUR YEARS. POLICY REPORT PR-813 (1996). This is not unexpected, given the youth of the charter school movement. Only three states have had charter schools in existence for two years or more. This may change, however, over the next few years as a result of \$2.1 million contract the U.S. Department of Education has signed with a consortium of research groups to conduct a comprehensive four-year study of charter schools. *Id.*

308. CORWIN, *supra* note 116. For example, in a study conducted of charter schools in California, a slightly fewer than one half of the teachers reported using more individualized assignments (44%), teaching lessons that combined several traditional subjects like science, math, and history (47%), and lessons that combine several different teaching modalities to address students' different learning styles (45%).

309. See *supra* note 117 and accompanying text. For example, the California law (Senate Bill 1448, Section 47601, 1992) specifically states that charter schools will be established, among other things, to increase learning opportunities for all pupils, with special emphasis on expanded learning experiences for pupils who are identified as academically low achieving. CORWIN, *supra* note 308.

310. For example, the Accelerated School, the only charter school in South-Central Los Angeles, implements an accelerated program for learning modeled after the Accelerated Schools projected based at Stanford University. The school serves 55 students, grades k-5 and emphasizes high expectations for all students and makes learning relevant to the students' lives. This school received impressive results from a standardized math test reflecting an increased 64 percent over the previous year. Also, the Vaughn Elementary School implements a bilingual program which has been successful in accelerating the pace of students becoming proficient in English. Vaughn Elementary was converted to a charter school in July 1993 and serves 1200 students, grades K-6, with all students currently eligible for federal free lunch programs and 75 percent speaking a native language other than English. Before the charter was granted, Vaughn was one of the lowest-achieving schools in the Los Angeles district. After two years of intensive focus on academic restructuring and family involvement, test scores are up dramatically and the school's at-

If, in fact, school-based management and charter schools are implementing measures that will prove successful in increasing the academic performance of students, then why not allow for a national assessment system that will measure that success? One problem is that as teachers and administrators have been putting this new curricula in place, they also have been grappling with, and in some cases, avoiding the role of assessment in providing improved education for students. A major effect of the reforms in schools attempting to improve classroom practice has been the raising of teacher's consciousness about the limits, uses, and impacts of standardized testing which do not allow students to demonstrate their knowledge.³¹¹ Although traditional multiple choice tests make comparisons easy, they do not provide authentic measure of students' abilities to learn across disciplines, think creatively and critically, write well, solve problems and apply what they have learned — precisely the kinds of abilities that school-based management schools and charter schools have been preparing to teach.³¹² Because of these limitations, school-based management sites and charter schools also have raised the issue of the need for the inclusion of performance or alternative assessment methods, yet part of the problem is that the majority of sites have not obtained or implemented these new assessments. An number of sites do have in place some type of alternative student assessment. One of the more common methods in both school-based and charter schools is the use of portfolios and performance assessments.³¹³ However, in state after state, where these types of assessments have been tried, serious questions about their reliability have been raised.³¹⁴ Furthermore, one study on the accountability of charter schools found that although most charter schools intend to use portfolios or performances in some form, their charters reveal little evidence that these schools had a real understanding of these assessment techniques.³¹⁵

tendance is the best in Los Angeles. A LOOK AT CHARTER SCHOOLS. A BACKGROUND PAPER FOR THE U.S. DEPARTMENT OF EDUCATION'S "SATELLITE TOWN MEETING" (1996).

311. SHIELDS, *supra* note 262. Requirements for charter school' accountability systems to the state vary under state laws and sometimes do include standardized exams. For example, in Arizona, charter schools must design a method to measure public progress toward the outcomes adopted by the state board of education. Each school must participate in the essential skills test (a performance-based test) and a standardized, norm-referenced achievement test and must report annually on the results of such testing. Similarly, in Massachusetts, charter schools must meet the same performance standards and testing portfolio requirements set by the board of education for students in other public schools and must report annually on progress made toward achieving goals set forth in the charter. In Michigan, pupil outcomes are assessed using a Michigan education assessment program test or other models as authorized by law or one or more of the following: The California Achievement Test, the Stanford Achievement Test, the Metropolitan Achievement Test, or the Iowa Test of Basic Skills. REPORT TO CONGRESSIONAL HEARING, *supra* note 22, at 16 - 17. However, most state laws — Colorado, California, Georgia, Hawaii, Minnesota, New Mexico — allow schools to develop their own methods of assessing student outcomes, so long as these conform with or exceed statewide performance standards. *Id.*

312. BUECHLER, *supra* note ???.

313. In Kentucky school-based management schools, for instance, the state has instituted an assessment systems that relies more heavily on portfolios and performance events. *Id.*; see also *supra* notes 308 - 309. (discussing the popularity of performance assessment and portfolios among charter schools to measure student assessment).

314. BUECHLER, *supra* note 307.

315. *Id.*

In general, then, both charter schools, as well as school-based management programs, appear to be deficient in precisely the area in which they are supposed to make the greatest difference — accountability of student achievement. And as State Senator Gary Hart, author of the California charter school bill, suggested this deficiency could prove to be the Achilles' hill of the charter school movement.³¹⁶ At minimum, part of the rationale for comparative assessment mechanisms is the practical need for curricula, qualifications and examinations to be reasonably similar across the national or sub-national unit, so as to facilitate mobility,³¹⁷ the exchange of personnel, and the mutual recognition of diplomas across different regions.³¹⁸ But most importantly, there has to be a way of making sure that these schools are held accountable for student achievement. Given that standardized exams must conform to a fictional image of the average student, it may prove difficult, though not impossible, to change their nature. But in the meantime, some charter and school-based management schools have had to do with combining traditional standardized exams with more comprehensive, innovative ways of measuring success assessing a student's progress. For example, the charter school of Guajome Park Academy High School in Vista California, clearly defines its promotion and graduation requirements.³¹⁹ To advance from one division to another, students have to demonstrate progress through the presentation and defense of nine portfolios and pass the California Learning Assessment System (CLAS), among other things. The school also has established a School Performance Index using multiple indicators (SAT, Advanced Placement exams, college placements, and others) to compare its performance to other schools. Similarly, Columbia Park Elementary School in Prince George's County, which runs a school-based management program, established a set of measurable performance standards which included national achievement indicators such as the California Achievement test (CAT) and more personalized Criterion Referenced Tests,³²⁰ combined with a broader range of assessment in the form of essays and projects.³²¹ Other charter and site-based management schools should adopt similar assessment measures.

316. CALIFORNIA STATE SENATOR, CLOSING ADDRESS AT THE CALIFORNIA NETWORK OF EDUCATIONAL CHARTERS CONFERENCE (1995) (stating that if "we [charter schools] cannot demonstrate the outcomes, we're not entitled to the deregulation").

317. Mobility also refers to the ability of students to be admitted into institutions of higher learning. To the extent that portfolios and not grades will be part of students' application package, then there needs to be a way for higher institutions to compare those students with portfolios to those students with grades.

318. HANNAWAY, *supra* note 250, at 59.

319. BUECHLER, *supra* note 307.

320. This Criterion-Referenced Testing program (CRT) measures mastery of local curriculum on a range of content areas. The test is given three times a year and the focus of analysis is in the individual student. Therefore, the CRT reporting formula allows teachers to identify the specific learning needs of the individual student and to reshape their instructional program accordingly. For his aim, CRT's are reported not in the aggregate, but rather as the "percentage of items correct" in specific areas. This desegregation allows teachers to formulate the students' learning plans by targeting individual skills areas. The advent of the CRTs has helped the school move beyond areas of basic skills to teach more advanced skills that are required to process, synthesize and apply knowledge. JOHN A. MURPHY, IMPROVING THE EDUCATION OF AT-RISK STUDENTS. A SYSTEM OF CHECKS AND BALANCES, at 8 (1990).

321. *Id.* at 7 - 8.

SECTION C: THE IMPLICATIONS OF DECENTRALIZATION ON FISCAL EQUITY — ACCOUNTABILITY TO THE DISADVANTAGED. WHO WILL RESPOND?

Educators who are concerned with the potential inequities resulting from decentralization also have suggested that with decentralized public education, the states will shirk their responsibility to provide the necessary resources and oversight to educate disadvantaged children more equitably. This does not mean that the states have been doing a good job of providing equity to students. In the area of public school funding, for example, the reality has been that even with more centralized systems of public education, few states have embraced the responsibility of providing a more equitable public education funding system³²² A large proportion of school funding is still localized and collected from local property taxes even when this system has resulted in huge disparities in funding among districts. On the other hand, it has been this local control — which would become more localized with greater decentralization with the power shifting from municipalities or districts to schools themselves — which has been used by state policymakers to justify using property tax to fund local education. And state courts which have failed to recognize a state constitutional mandate to equalized funding of public education have echoed this rationale.³²³ With increased local control, the justification to legislators and judges alike for local funding of public schools becomes stronger. However, it does not necessarily follow that if control remains more centralized at the district school level, that the courts or state legislators are more likely to order a less localized distribution of funds. At least in court cases, the real question still will be whether the state has a constitutional mandate, either under state equal protection or education clauses, to provide more equitable funding, irrespective of whether the control of education is more or less localized. For state legislators, voting in favor of more equalized distribution of public school funding will remain a highly unpopular proposal with their most powerful constituents irrespective of control. Increased decentralization simply will allow legislators to voice their arguments against redistribution policies more strongly.

Still, with increased deregulation, there remain certain funding concerns, particularly with the fiscal reporting responsibility and accountability of individual schools which will affect the distribution of federal funds and compliance with requirements designed to improve the education of disadvantaged students.³²⁴ One of the advantages of centralized budgeting systems is that the central systems maintain expert knowledge and fiscal

322. See *infra* note 70 - 84 and accompanying text.

323. See *e.g.*, *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1022 -23 (Colo. 1982); *Thompson v. Engelking*, 537 P.2d 635, 645 (Idaho 1975); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 788 (Md. 1983); *Board of Educ. v. Nyquist*, 439 N.E.2d 359, 366-67 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1138-39 (1983); *Board of Educ. v. Walker*, 390 N.E.2d 813, 819-20 (Ohio 1979), *cert. denied*, 444 U.S. 1015 (1980); *Kukor v. Grover*, 436 N.W.2d 568, 580 (Wis. 1989); see also, *Hilton, supra* note 64.

324. See generally REYES, *supra* note 289, at 12.

accountability, including budget revenues, expenditures, and reporting.³²⁵ School districts, for example, are required to participate in the Public Education Information Management System (PEIMS) in order to provide the state with a campus-based accounting of state dollars and state programmatic requirements.³²⁶ Similarly, for purposes of federal program administration, school districts receive allocations of federal programs from their states and are held legally responsible for meeting program requirements.³²⁷

But with site-based fiscal accountability, as with charter schools, would this mean that each school would have to do its own reporting³²⁸ and be legally responsible for meeting state or federal program requirements? Currently, in school-based management programs, as well as in charter schools, that are legally dependent on school districts, school districts are still ultimately responsible for the reporting and for meeting program requirements. And because these schools still are considered part of a traditional school district, they are eligible for programs aimed to provide an equal opportunity for students with special needs by providing additional funding³²⁹ through the district; these schools are not eligible to receive funds directly from the state education agency.³³⁰

But what would happen with full deregulation when schools began to act as legally independent entities as is already the case with some charter schools?³³¹ Could this schools receive funding directly from the state and be held independently legally accountable for meeting program requirements? With regards to Title I funds, for example, of those states that authorize legally independent charter schools, Arizona and Massachusetts have not yet decided on how to treat them; California, Minnesota, and Michigan have decided on contrasting approaches.³³² The California Department of Education, in order to avoid creating a new funding structure, treats all charter schools as regular schools within a district for Title I

325. These offices have expert knowledge in “generally accepted accounting principles,” and the inability to develop, maintain, and file federal and state accounting reports necessary to assure the integrity of fiscal accountability. *Id.*

326. In order to participate in the state’s school finance program, districts must submit an annual report of the amount of tax dollars collected by the district. *Id.*

327. REPORT TO CONGRESSIONAL HEARING, *supra* note 22, at 17.

328. In school districts with multiple campuses, such as the Houston public school districts, which has 237 campuses, school self-reporting to states would lead to an inefficient system and unnecessarily create 237 site-based fiscal accountability experts to replace once central office unit. This kind of system increases the margin of error from one central unit to 237 units, placing the integrity of fiscal accountability at risk of faulty accounting and reporting. REYES, *supra* note 324, at 10.

329. For example, Under Title VI, schools districts have legal obligations to provide instruction in the students’ native language. Under other programs, such as Migrant Education, school districts are required to provide special services to this mobile population. Under the Education of All Handicapped Children Act, educators must work out individualized programs for children with disabilities. *Id.* at 12.

330. See REPORT TO CONGRESSIONAL HEARING, *supra* note 22, at 18.

331. See *supra* note 285.

332. See REPORT TO CONGRESSIONAL HEARING, *supra* note 22, at 19. Part of the problems of allocating funds is that state education agencies must use census data to calculate Title I allocations among school districts — data which does not exist for charter schools. Therefore, state education agencies must use the same measure of low income throughout the state. *Id.* at 18.

funds.³³³ If a charter school is eligible for Title I, then the district must determine the charter school's share the same way it does for other eligible schools.³³⁴ Minnesota school districts have two options: to employ staff directly, which provide services to Title I students at the charter school or to allocate part of the federal funds to charter schools directly.³³⁵ Under either option, the school district remains legally responsible for the charter school's implementation of programs.³³⁶ In contrast, Michigan allocates its Title I funds directly to its charter schools and considers these schools legally responsible for administering their own Title I programs.³³⁷

Regardless of how the most deregulated schools, namely legally independent charter schools, receive their funding for programs aimed at improving the education for the disadvantaged, mechanisms have to be in place for ensuring that these schools cannot simply do away with these requirements. These mechanisms would have to be in place even when charter schools could not afford or would not want to deliver these services. Charter schools not having funds happen when resources come primarily from local sources to which charter schools generally do not have access.³³⁸

Providing a "free appropriate education to disabled children," for example, is a federal requirement which mandates that school receiving public funds provide children with disabilities the necessary special education services.³³⁹ But while the federal government provides some funding for special education, most funding comes from state and local sources. Since charter schools do not levy taxes, that special education depends on local revenues poses particular challenges in funding special education for students attending charter schools.³⁴⁰ In Minnesota, for example, the state education agency first decided that the legal responsibility for meeting federal special education requirements for children in charter schools would depend on whether the district or the parent places the child in the charter school.³⁴¹ If the district where the student lived placed the child in a charter school, then the district remained legally responsible.³⁴² If, however, the parent placed the student in a charter school, then that would be "akin to the child moving away to another district,"³⁴³ and the charter school

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. To ensure that charter schools received a fair share of Title I funding, the state Title I office devised a way to divide a traditional school districts' allocation with a charter school within its boundaries. As of September of 1994, Michigan had used this method in one charter school. The state Title I office, with the consent of the district and the charter school, allocated part of Detroit's Title I allocation to the charter school on the basis of the number of students eligible for free or reduced-price lunch at the school. The state expects to use the same method for other charter schools, although this may be more difficult when students from more than one district attend a charter school. *Id.* at 20.

338. REYES, *supra* note 289, at 12.

339. *Id.* at 20.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Letter of Finding*, MINNESOTA DEPARTMENT OF EDUCATION (Nov. 24, 1993), at 2.

would become legally responsible.³⁴⁴ This has changed. Now, the state education agency of Minnesota allocates state funds directly to charter schools as a partial reimbursement for special education costs. Charter schools, in turn, bill un-reimbursed costs to the districts where the students live. The districts are expected to use revenues from property taxes or federal education funds to fund the un-reimbursed amount.³⁴⁵

Schools in several districts are unhappy with Minnesota's expectation that each school district use local property taxes for un-reimbursed costs for charter schools' special education programs since charter schools are supposed to be legally independent.³⁴⁶ Whereas this argument is particularly valid among school districts who are already functioning with scarce resource and which must now compete with charter schools for funds,³⁴⁷ not providing sufficient sources for charter schools to adequately provide for the education of children with special disadvantages would result in an equal protection violation. So long as charter schools exist, funding for special education in these schools must come from some place, if not from the funds provided to the school district.

Particularly in areas where local taxes — which are used to fund special education — are low, one argument against a system in which the same level of funding to educate children with special education needs is now shared by two different institutions of learning, charter and public schools, is that it might result in further reducing the quality of special education for children at either institution. Often, the extra funding for each student with disabilities that traditional public schools receive is not even enough to match the costs of educating the students, and the district must dip into general operating revenues to pay for special education.³⁴⁸ Sometimes, districts also help control the costs of special education by designating particular public schools as special sites for students with certain types

344. See REPORT TO CONGRESSIONAL HEARING, *supra* note 22, at 20. Minnesota's arrangement to fund special education needs in charter schools resulted in several complaints. For example, one complainant alleged that the district where the student lived failed to implement the student's individualized education plan at the Metro School for the Deaf. The Minnesota Department of Education ruled that the district was in violation and was responsible for ensuring service provision because it had placed the student in the charter school. In another case, the complainant also alleged the district had failed to implement the student's individual education plan at the charter school. In this case, the Minnesota Department of Education ruled that, because the student was placed at the Ceder Riverside Charter School by parental choice, the district of residence was not responsible for providing the student of a free appropriate public education and that the charter school was now responsible. *Id.* at 21.

345. *Id.* As an alternative, the state could allocate the funds designed to educate students with special needs directly to the charter schools. Such a system, however, still would not get around the problem of charter schools competing for resources with other public schools in the district since state allocation of funds to charter schools would result in less funds to those schools districts from which students are leaving to attend charter schools. Still charter schools are also part of the model of school choice reform — reform which competition is supposed to spark.

346. *Id.*

347. See *supra* notes 60 - 86 and accompanying text (discussing how school choice programs drain resources from poor districts).

348. BUECHLER, *supra* note 307. When a student has been identified as disabled, traditionally it has been the district which has had certain obligations to that student specified by federal law. The district must assess the student's needs, develop an individualized education program (IEP), place the student in the least restrictive environment, and provide services appropriate to the student's needs. At minimum, school buildings must be made accessible for students with disabilities. *Id.*

of disabilities or by hiring special education teachers who circulate from school to school.³⁴⁹ These cost-controlling measures are not available to charter schools, especially to those charter schools that are legally autonomous.³⁵⁰ Also, there is generally no mechanism specified in law for these schools to share costs or personnel with other district schools or to draw upon the expertise of district staff members who specialize in special education assessment and funding.³⁵¹ Some charter schools are even unaware of the extent of their responsibilities and, consequently, are unprepared to meet the needs of students with disabilities who enroll.³⁵²

Particularly for charter schools which are already struggling with the need for additional start-up funds,³⁵³ the problem of charter school's unpreparedness with complying its obligations of education children with special education needs could be worse if the number of students with special education needs transferring from a traditional public schools to a charter school in a given academic year is quite small so that the funding they bring with them will be insufficient to cover the necessary costs of the charter school to create a program addressing their needs. No matter how small the number, for each student, the charter school would still need to provide such things an individual study plan, hire trained educators, and provide facilities which meet the regulations for students with disabilities. Similarly, especially if the number of students leaving represent a high proportion of the students with special education needs enrolled in the traditional public school, the loss of funding from the transferring students might result in a significant loss of funding to the special education program at the traditional public school and affect its quality. In such cases, states cannot simply ignore the problem and should provide additional money to individual charter schools or districts to make up for the fiscal inefficiency which may be created by running a dual system of public education.

Finally to prevent charter schools from shirking their responsibility to educate students who are often a heavy drain on resources, all charter schools should be required to accept all students with special education needs,³⁵⁴ including students who are considered to be academically at-

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. Many charter schools face a great deal of additional financial burdens, particularly when starting that traditional public schools do not have to worry about. For example, charter schools must worry about finding a site, making sure this site complies with state and federal regulations, and recruiting students from whom a significant source of their funds will come. For every student, they are able to recruit, charter schools receive the same amount of money per student as other schools in the district. *See e.g.* Donna Harrington-Lueker, *Charter Schools: Another Ho-Hum Reform, or a Genuine Reformation Thumping on Your Schoolhouse Door?*, SCHOOL BOARD JOURNAL (Sept. 1994), at 22. *But see* A LOOK AT CHARTER SCHOOLS: A BACKGROUND PAPER FOR THE U.S. DEPARTMENT OF EDUCATION SATELLITE TOWN MEETING (1996) (discussing how in 1993, President Clinton, to alleviate some of the financial problems of charter schools, proposed a program to provide start-up funds for charter schools around the county. Enacted as part of the re-authorized Elementary and Secondary Education Act, this program is now providing start-up funds to charter schools in 11 states).

354. Just as traditional public schools are required to provide educational services to all students residing in their district, regardless of their needs.

risk,³⁵⁵ so long as they do not teach already a disproportionate number of at-risk students at their school. Although the limited empirical evidence on charter schools suggests that charter schools are not skimming (i.e. avoiding to educate) at-risk students,³⁵⁶ the truth is still that at-risk students are a heavy drain on resources. Therefore, many charter school advocates would prefer to keep the percentage of at-risk students they serve at no more than the approximately the percent of at-risk students in the state's population as a whole.³⁵⁷ So long as every charter school is required to educate at least an equitable share of the percentage of at-risk students in the state's population as a whole, limiting the enrollment of at-risk students in a given school to this national percentage would prove effective to avoid the over-concentration of at-risk students in any given school. The challenge, therefore, is not that some charter schools are put aside to educate a large proportion of at-risk students but that these students be distributed as evenly as possible among all charter schools.

SECTION D: A SUMMARY

The little empirical evidence available regarding decentralization suggest that schools with local control do have the potential to improve education without compromising national curriculum³⁵⁸ and without the lowering

355. BUECHLER, *supra* note 307. Presently, only California and Wyoming grant charter schools the option to select students based academic admission criteria. Several other states expressly forbid charter schools to exclude students based on intellectual ability yet allow them to establish "academic standards" for prospective students. These two positions are difficult to reconcile and officials from some states have said that the issue will have to be worked out on a case-by-case basis. See also *supra* notes ??? and accompanying text (discussing the brain-drain problem in some school districts facing competition from school-choice programs).

356. See *supra* notes 116 - 128 and accompanying text.

357. Harrington-Lueker, *supra* note 353, at 25.

358. The Southwest Regional Laboratory (SWRL) conducted a statewide survey of the 66 California Charter Schools and of 63 charter schools across the United States during the 1994-95 school year. The survey was conducted in three phases. In the first phase, 54 schools, 82% of the schools authorized in California, responded. A second survey to administrator was mailed to these 54 charter schools with thirty-nine, 72%, responding. In addition, surveys were returned by 46 comparison schools that students would have attended had they not enrolled in charter schools. Finally, a short survey was returned by 63 charter schools in eight states with charter school legislation. This number represents 66% of the charter schools that had been authorized by April 1995. CORWIN, *supra* note 116. .

Conductors of the survey warned that some charter schools did not return the questionnaire and that the number of charter schools increased in California at a steady pace during the period covered by the survey which were not included. And although responses to the survey data were robust, the numbers still only represent conjectures closely grounded on the available information. With this in mind, the survey found that 43% of the students enrolled in California's charter schools are members of racial or ethnic minorities. This compares to the 38% nationwide percentage which ranges from a high of 70% in New Mexico to lows of 20% in Wisconsin and 22% in Colorado. Also, on the average, 14% of the charter school students are classified as limited English proficient. In several states, however, this percentage is negligible, while in Arizona, nearly 33% are English language learners, as compared to 19% in California. Using the percentage of students who qualify for free or reduced-price meal as the criterion, one third of the students in the nation's charter schools have low income students. While California's charter schools serve 34% low-income students, Colorado charter schools only serve 20%. Nationally, 16% of the students who attend charter schools qualify for special educational placement. Whereas Minnesota serves 39% of disabled students, California only serves 10%. Students who are one or more years below the national norm on standardized tests comprise 33% of charter school students nationally and also in California. Also, 12% of the students in charter schools, nationally as well as in California, have not been promoted to the next grade at least once. Lastly, 9% of the

of academic standards, particularly for disadvantaged students.³⁵⁹ So the question has not been whether to continue to experiment with local-based management of schools, but rather how local control should be implemented and what has been most successful. Studies looking at both site-based management and charter schools have shown the different levels of decentralized management that schools actually have. Quite a few site-based management schools — either because districts have refused to give them real control, or because participants in the schools have not known how utilize control to create change — have achieved little with regards to local control of authority, classroom innovation and improved outcomes of student performance.³⁶⁰ Across the board, charter schools appear to have

students in the nation's charter schools are current or former dropouts; California enrolls relatively few dropouts (6%). *Id.*

While charter schools are not exclusive, still, when compared to the comparison schools in the survey, they tend to enroll fewer disadvantaged students. Generally, the findings suggest that there are no striking differences between the sample of charter schools and the comparison sample with regards to minority enrollment. In slightly under one half of both samples, most students have minority backgrounds. In about a third, more than 70% are minorities. Comparison schools do enroll more students who are eligible for free or reduced-price meals than charter schools. For example, there is a 16% differential between the number of charters that have predominately low-income student and their counterparts (30% vs. 46%). Corresponding to the under-representation of low-income students in charters, students from privileged families tend to be over-represented in comparison to their counterparts. Schools with a preponderance of students from professional families are found almost twice as often among charter schools as among their nearby comparisons (26% vs. 15%). English language learner students predominate in comparison schools than in charters, but the difference is small (21% vs. 15%). In whether charter schools are targeting above-average students, there is not distinctive difference between charters and their comparison counterpart; in fact, comparison schools tend to outrank charters in the number enrolling more than one in five students with high scores (63% vs. 72%). However, this does not mean that charter schools are made up predominantly of low achievers. In 41% of the comparison schools, the majority of students are below average. For charter schools, the comparative figure is 26% (a 15% difference). Charter schools are, however, serving more students who are failing in school than the comparisons. In one in five charters, more than 20% of the students have been retained in grade, which is more than double the rate of the comparison schools. Similarly, charter schools are serving relatively higher numbers of students with high dropout rates (15% vs. 7%). Finally, there is some support that charter schools are under-serving special education students. One in five students qualifies for special education placement in one fourth of the comparison schools and in 16% of the charter schools (10% difference). *Id.*

A 1996 Policy Report also confirmed that charter schools are not serving an elite population of upper-middle-class white students. In fact, in Massachusetts, 7 of the 12 operating charter schools with data on race/ethnicity of students were more than 45% minority; 5 of those 7 were more than 45% minority. In Michigan, at least 4 of the first 10 charter schools had a higher percentage of both minority students and low-income students than the resident district did; a fifth had a higher percentage of minority students than the resident district but a lower percentage of low-income students; and a sixth had a higher percentage of low-income student but a lower percentage of minority students. BUECHLER, *supra* note 301.

These good results in charter schools are not indicative of the effect that voucher systems in private schools or that intra/interdistrict school choice programs are likely to have on admissions policy. First, charter schools have been specifically designed to target disadvantaged students. The legislation in at least 7 of the 19 states either encourage or requires charter schools to address the needs of at-risk students. *Id.* Second, authorizing bodies of charter schools, particularly local boards, are more likely to sponsor a charter school if it is designed to serve children that the public schools have already conceded they cannot serve. *Id.* Third, charter schools depend on the enrollment of students for funding; especially when these schools do not have high enrollments, their admissions policy may be a lot more lenient than the policies of private or schools in popular districts which are in high demand. As the demand of charter schools goes up, however, it is quite possible that admissions criteria may change.

359. See *supra* notes 286 - 291 and accompanying text.

360. See *supra* notes 242 - 310 and accompanying text.

been more successful in implementing innovation and increased local control³⁶¹ though the experience not entirely unique. An increasing number of site-based management schools have also been successful at attaining significant levels of local control, and have indeed used innovative ways of teaching in the classroom.³⁶² So it is at least quite possible for site-based management schools to be innovative in the classroom and to create better outcome performance of students. It is less clear, however, what it would take to implement similar site-based management programs in other schools across the nation. Although studies have identified the necessary components of successful site-based management programs,³⁶³ the replicability of these models still very much depends on the full cooperation and participation of all stakeholders in the process.

Because of the uncertainty or difficulty of replicating successful site-based management programs, should the focus of reform be to detract decentralization efforts and resources away from site-based management schools and steer them more towards highly autonomous charter schools? This paper does not propose to answer this question but does point to some of the consequences of this choice on the educational equity of disadvantaged students. First, what must be recognized is that charter schools also form part of the school-choice model of competition and do drain resources and students from traditional public schools. An additional problem related to the funding structure of charter schools is that their acquisition of funds through competition with traditional public schools may not be sufficient to ensure that students who are more costly to educate (i.e. special education students) will receive an adequate education.³⁶⁴

361. See *supra* notes 266 - 277 and accompanying text.

362. Methods of innovation which have been implemented at site-based management schools include the Accelerated School Project, designed by Stanford University at various California schools and the Comer School Development Program in Prince George's County. Both programs foster high expectations of student performance, focus on the development of disadvantaged students, and implement alternative assessment mechanisms that better reflect the progress of the individual student. See LEVIN, *supra* note 115 and MURPHY, *supra* note 3; see also *supra* notes 302 - 306 and accompanying text.

363. The Center on Educational Governance at the University of Southern California in Los Angeles has been studying schools and school districts in the United States, Canada and Australia to find out what makes site-based management work. In brief, they found that effective school-based management required that people at the school site must have real authority over budget, personnel and curriculum. The first requirement of successful site-based management programs, then, is the full cooperation of school districts and of unions to grant significant control to the school. School districts play a supportive role in providing technical assistance and expertise. In addition, successful site-based management programs include programs of professional development and training for teachers and other stakeholders in managing and problem-solving, as well as in curriculum and instruction to provide them with the expertise necessary to become more autonomous. Also, in schools where site-based management has worked, school principals have played a key role as facilitators and managers of change, as strong supporters of their staffs, and as people who brought innovation to the school and moved reform agendas forward. WOHLSTETTER, *supra* note 256.

364. See *supra* notes 60 - 68 and accompanying text. This problem is more unique to charter schools participating in school choice programs than it is for other schools in the district participating in school choice programs. This is true because students who transfer from one district into another school in a different school district bring with them the exact level of funding that it costs the receiving district to educate a comparable student in their school. This means that if a student with special education needs moves from a poor district into a wealthy district, the poor district usually is responsible for paying not only what it would have cost to educate the student in their school but also the difference is what it will now cost to educate that student in the new

In both instances, the state or the federal government cannot simply shirk its responsibility and must provide additional funds directly to the public school which is still having to educate the unfortunate students left behind in the competition or to the charter schools with insufficient resources to start an adequate program that accommodates students with special needs.³⁶⁵

Another concern with charter schools is that these may become centers for educating only the brightest students or that they will result in little change or in further damage to the persistent segregation of students by race and class in our public schools. Although studies on student composition of charter schools currently show that charter schools are educating their share of disadvantaged students,³⁶⁶ it is still possible that in a longer period of time, with increased demand of charter schools, as is the case with private school, these schools may become more selective in their admission criteria, absent regulations prohibiting it. Unless all charter schools are specifically ordered to educate at least a proportional share of disadvantaged students as compared to traditional public schools, charter schools may become education center for the brightest kids. As important is that regulations requiring charter schools to educate their proportional share of disadvantaged students apply equally and individually to all charter schools. What this means is that statistics for charter schools should not be based on a median percentage of students from all charter schools. Were this the case, as it is happening now, some charter schools will end up with a disproportionate number of disadvantaged students, while others schools will not. Since this is the way that traditional public schools function currently, this would not represent any real improvement but will simply perpetuate the tendencies of public schools to educate students segregated by social class and racial divisions.

CONCLUSION

Even among those educators that are quite concerned with the fate of low-income and minority students in the face of increasing market-based principals applied to public education, few of them would argue that all school choice programs and all decentralization proposals should be rejected out right. In fact, school choice and decentralization programs have improved the education benefits of quite a few disadvantaged students.³⁶⁷ At least more than a few disadvantaged students have been able to transfer to different districts to receive a higher quality education; some disadvantaged students have been challenged academically, perhaps for the first time in their lives, in more accelerated, innovative and individualized programs of instruction at site-based management schools or at charter

school. Charter schools, however, only receive the amount that it would have cost the sending district to educate the student and not the entire cost that the charter may end up spending to education that student. Especially since funding to educate disadvantaged students, including special education students, is insufficient by itself and charter schools do not have alternative mechanisms to absorb these costs, the quality of education available to those students at charter schools may suffer in quality.

365. See *supra* notes 253 - 354 and accompanying text.

366. See *supra* note 117.

367. BIEGLE, *supra* note 116, at 1579.

schools; and some minority students have assisted the integration of schools through their participation in voluntary transfer programs.

But as much as there have been benefits to disadvantaged students through school choice programs, their potential for great harm is quite real. This paper has expounded on some of these harms: the creation of pockets of failure in the inner-city in schools that are still rendering services to disadvantaged students who were left behind;³⁶⁸ the fear that only the students who come from wealthier, more educated families will take advantage of the new opportunities;³⁶⁹ the concern with children with special needs who are costlier or more difficult to educate will not be admitted into the new schools;³⁷⁰ the expectation that private choice without restrictions may lead to increased fragmentation of students by race and social class;³⁷¹ and the lowering of educational standards and increase of provincialism in schools.³⁷²

In each of these areas, the proposals to avoid or mitigate the harm run against several constraints. First, some of the proposals, like the proposal to equalize school funding state-wide,³⁷³ are simply too politically unpopular. Second, other proposals, like having the state rather than the local school district provide the charter schools with the funds necessary to run a special education program,³⁷⁴ would be too costly for the state and be considered inefficient and duplicative. Third, yet other proposals, like prohibiting charter or schools in districts participating in school choice programs from developing their own admissions criteria,³⁷⁵ run counter to the specific purpose of these programs to get rid of bureaucracy and over-burdening regulations from the state.

That there are barriers to these proposals, however, does not mean that state legislatures have not been open to impose a variety of regulations with the specific purpose of mitigating the harm of school-choice and decentralization programs on the disadvantaged. These include states that provide mitigating money, at least for two years, to districts that lose funds when students leave their schools to attend charter or private schools or schools in other districts. States have been willing to subsidize the failing schools even though doing so runs counter to the principle of competition and forces states to spend more money on competition.³⁷⁶ It also includes states that make integration efforts a priority in school choice statutes, even when these may result in restricting some students from attending the school of their choice.³⁷⁷ And furthermore, it also includes school choice programs which have parent information centers with outreach components.³⁷⁸

368. *See supra* notes 60 - 67 and accompanying text.

369. *See supra* notes 100 - 116 and accompanying text.

370. *See supra* notes 117 - 134 and accompanying text.

371. *See supra* notes 146 - 167 and accompanying text.

372. *See supra* notes 246 - 47 and accompanying text.

373. *See supra* notes 75 - 98 and accompanying text.

374. *See supra* notes 356 - 357 and accompanying text.

375. *See supra* notes 357 - 360 and accompanying text.

376. *See supra* notes 93 - 95 and accompanying text.

377. *See supra* notes 168 - 175 and accompanying text.

378. *See supra* notes 110 - 112 and accompanying text.

Because the majority of students in American schools will soon be comprised of minority and low-income backgrounds,³⁷⁹ similar and additional policies need to be adopted by state legislatures across the states if the improvement of education through school choice program is to be a serious endeavor. At minimum, all student should be given the ability to participate; such things as transportation and full vouchers to private schools should be made available to students who come from low-income backgrounds.³⁸⁰ Second, if not regulate directly, states should at least hold all schools accountable for educating a cross-section of students and for providing good quality instruction. In order to do this, order to do this, each school should be required to educate a minimum number of at-risk students at their schools as well as be asked to provide reliable assessment methods that measure student performance and certain minimum standards.³⁸¹ If, and only if school choice and decentralization programs are accompanied by appropriate statutory protection and serious about being inclusive of disadvantaged students, they may result in making a differences in the lives of America's youth.

379. *See supra* notes 3 - 4 and accompanying text.

380. *See supra* notes 135 - 145 and accompanying text.

381. *See supra* notes 318 - 323 and accompanying text.