1995

Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity

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Angela G. Smith, Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity, 74 Neb. L. Rev. (1995)
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** A version of this Article may also be found at Angela G. Smith, Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity, 24 J.L. & EDUC. 147 (1995).
I. INTRODUCTION

The idea of "choice," broadly definable within the realm of school reform,¹ seems at first glance to be as simple and as all-American as apple pie. That simple ideology, however, has been legislatively translated into numerous and varied reform measures.²

Separate, distinct theories underlie the basic goal of school reform via choice legislation. Advocates of school choice generally fall into three categories.³ Some educators, policymakers, politicians, and parents believe that the only avenue to true educational reform in a capi-

1. "Choice," as a term referring to possibilities in educational reform, has been defined in various ways. Some educators discuss choice strictly in terms of privatization of elementary and secondary schools, Marilyn Y. Yarbrough, School Choice and Racial Balance: Silver Bullet or Poison Dart?, 2 Kan. J.L. & Pub. Pol'y 25, 26 (1992), or define the concept of choice as "empowering parents and students... to choose between private and public schools in a market-like arrangement where schools compete for students," 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, 61 (1992). Others define choice more broadly, concluding that, "[i]n current policy discourse, the term 'choice' refers to education systems in which parents are allowed maximum decisionmaking authority over their children's schooling." Helen Hershkoff & Adam S. Cohen, School Choice and the Lessons of Choctaw County, 10 Yale L. & Pol'y Rev. 1, 1 (1992). Because the term is quite sweeping in its definition, it encompasses numerous types of school reform measures, both public and private.

2. Types of choice include intradistrict open enrollment, which allows a student to transfer to a different school within his or her district; interdistrict open enrollment, which allows a student to transfer to a school outside of his or her district; alternative or "second chance" schools, which allow a student to attend a special, alternative school within the public school system; postsecondary options, which allow a student to enroll in college courses to receive high school credit; charter schools, which allow a student to attend a publicly-sponsored, autonomous school, relatively free from governmental administrative control; scholarship and voucher programs, which allow a student to attend a private or nonresident public school of his or her choice by providing government or private grants to cover part or all of the educational expenses; and tax credits and deductions, which lower the cost of educating a student by providing income tax relief for educational expenditures. Center for Choice in Education, U.S. Department of Education, Issue Brief: Review of State Choice Legislation 6 (1992) [hereinafter Issue Brief]. See also Timothy W. Young & Evans Clinchy, Choice in Public Education (1992) (discussing the concept of school choice and the types of school choice programs available). Although they vary widely in structure, funding, philosophy, and means of support, the basic goal of all of these plans is school reform, i.e., improvement of the education system within the geographic area designated.

talistic, individualistic society like the United States is through a traditional competitive market theory. Others advocate school choice plans to advance social policy, usually racial balance and equality of educational opportunity. Still others advocate school choice because they recognize the diversity which exists among children's learning styles and teachers' 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. Each of these theoretical underpinnings is exemplified by the policy and practices of various school choice plans in place throughout the United States.

One of the most popular school choice reform measures is open enrollment, in which students are allowed to choose to attend a school other than their neighborhood or district school. Because the motivation for such choices may, in some cases, stem from racism, the dangers inherent in this "simple" approach pose a serious threat to school desegregation and integration.

This Article will explain and analyze open enrollment plans, both intradistrict and interdistrict, and their potential harms and benefits. Part II sets the stage by outlining the trials and tribulations of the Omaha, Nebraska, School District in its attempt to balance the goals of integration and open enrollment. Part III overviews open enrollment, summarizing and synthesizing current open enrollment legislation and providing examples of both intradistrict and interdistrict plans which are presently in effect. Part IV analyzes the various theories which have been utilized to justify choice and to provide the legislative motives behind open enrollment statutes, particularly criticizing the market theory. Part IV also analyzes the interdependence of law and education and the problems inherent in that relationship. Part V discusses various aspects of the interplay and potential conflict between open enrollment and desegregation. Part VI provides recommendations for educational and legislative reform in the area of public school choice which will meet the needs of all students and provide not only quality education, but equity, access, and integration as well.

II. A CASE IN POINT: THE OMAHA SCHOOL DISTRICT

In July 1975, due to its segregated nature, the Omaha School District was ordered by the Eighth Circuit Court of Appeals to eliminate

4. Id. at 19-21; Joe Nathan, Introduction to Institute for Teaching and Learning, Public Schools By Choice: Expanding Opportunities for Parents, Students, and Teachers 5 (Joe Nathan ed., 1989).

5. See infra notes 87-123 and accompanying text.
racial discrimination in the Omaha public schools "root and branch."6 The court reviewed the segregative character of faculty assignments, the segregative effect of the district's student transfer policy, the segregative rationale behind the district's use of optional attendance zones, the segregative pattern of school construction, and the deterioration of the nearly all-black high school.7 It then determined that the evidence adequately established intentional segregation.8 Consequently, the court remanded the case to the district court with the command that it take the necessary steps to remedy the discrimination9 and ordered the Omaha school officials to promptly present an acceptable desegregation plan for the district court's consideration.10

In the spring of the following year, the district court approved a modified version of the desegregation plan proposed by the Omaha school board.11 The plan included not only the reassignment and transportation of students,12 but also the creation and development of various magnet programs within the schools that had higher minority populations.13 At the senior high level, the plan was based on voluntary participation of students exercising social choice options.14 The plan worked and worked well.15 In the fall of 1984, the United States District Court found that the plan had operated and continued to operate "with noteworthy success"16 and held the school district to be "desegregated in all aspects of its operation."17 Based on those findings and the district's pledge to continue to provide desegregated education, the court granted the Omaha school district's motion for a declaration of unitary status.18 Accordingly, the Omaha school district continued to implement its desegregation plan.

In January 1989, an interdistrict open enrollment bill was introduced into the Nebraska legislature. The statement of intent provided by Senator Dennis Baack, who introduced the bill, established that the law's purpose was "to increase parental involvement in the education of their children and make public schools more responsive to the

7. Id. at 537-46.
8. Id. at 537.
9. Id. at 546.
10. Id. at 548.
13. Id. at 6-7, 11.
14. Id. at 14.
16. Id.
17. Id. at 4.
18. Id.
concerns and needs of parents and students, thereby improving the quality of education.”

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. The amendment read:

Any option school district shall give 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. For purposes of this section, racial integration is aided if a student transfers to an option school district in which his or her race is a smaller percentage of the total student enrollment of the option school district than it is of the student's resident school district.

In passing the proposed open enrollment legislation with the inclusion of that amendment, the Nebraska legislature acted to implement state-wide, interdistrict choice without interfering with the Omaha public schools' desegregation plan by providing a specific statutory section which partially exempted the Omaha school district from the choice plan.

The Omaha school district is the only district in the state with a desegregation plan. On November 19, 1990, the district voted to participate in the open enrollment plan during the 1991-92 academic year and requested recommendations for an appropriate board policy from its Planning, Community Relations, Research, and Evaluation Committee. In preparing its recommendations, the committee heard testimony from Senator Baack concerning the intent behind LB 183. He emphasized that "the bill was never intended to re-segregate our schools," explaining that "the specific language is in there dealing with the desegregation plan for Omaha and allowing them the flexibility to implement choice with their desegregation plan in mind." Soon thereafter, the Board adopted the committee's recommendations that "[n]on-black students will not be allowed to transfer out of the District, but may transfer in if space (capacity) is available" and that "[b]lack students will not be allowed to transfer into the District but

21. *Id.* at 2245-46 (statement of Senator Chambers).
24. *Id.*
will be allowed to transfer out of the District if their OPS school of attendance has a higher-than-average (28%) black enrollment."

The specific standards for acceptance and rejection of applications for transfer in or out of the Omaha school district read in part:

Enrollment option transfers must facilitate the School District of Omaha's desegregation plan and maintain or improve the integration of the district and the district's schools. Transfer requests facilitate the district's desegregation plan when they meet the following criteria:

1. For students applying to transfer into the School District of Omaha:
   a. The option student's race is a smaller percentage of the student enrollment in the School District of Omaha than it is of his/her resident school district.
   b. The option student's race is a smaller percentage of the student enrollment of the receiving school than it is of the sending school.

2. For students applying to transfer out of the School District of Omaha:
   a. The option student's race is a smaller percentage of the student enrollment of the option (receiving) school district than it is of the School District of Omaha.
   b. The option student's race is a smaller percentage of the student enrollment of the receiving school than it is of the sending school.
   c. The option student's race is a higher percentage of the sending school than it is of the School District of Omaha at large.

Late in 1990, numerous "non-black" students applied to the Omaha school district for permission to transfer out of the district for the 1991-92 school year, but they were denied such permission. Several of the students and their parents petitioned the Nebraska Department of Education for a reconsideration of the district's denial.

The hearing officer for the Department of Education addressed six issues, four of which were jurisdictional issues. The other two issues analyzed the open enrollment legislation and its application. The hearing officer considered the constitutionality of section 79-3407 and of the Omaha school board's standards for participating in the open enrollment program. He also addressed the question of whether those standards complied with the substantive requirements of the open enrollment legislation as a whole.

The petitioners argued that section 79-3407 was unconstitutionally overbroad and vague and that both the statutory section and the board's standards violated the Equal Protection Clause of the Fourteenth Amendment because they created a classification based solely upon race. In response, the school district argued that the statutory

26. Id.
28. Id. at 1.
29. Id. at 15.
30. Id.
31. Id. at 44-47.
section and the district standards were constitutional because "they serve the compelling purpose of avoiding a violation of the Equal Protection Clause of the 14th Amendment and of preserving and posturing integrated education."32

The hearing officer held that section 79-3407 and the district standards were "justified by a legitimate state purpose . . . fostering integration in their school system."33 Although he opined that the standards were not narrowly tailored to accomplish that goal, the hearing officer concluded that they were not unconstitutionally overbroad and, therefore, there was no violation of due process,34 He also agreed with the respondent that the statute and standards were not unconstitutionally vague because their "meaning is plain to individuals of common intelligence."35

In discussing whether the standards adopted by the Omaha public schools complied with the substantive requirements of the entire Nebraska Enrollment Option Program, the hearing officer recognized that section 79-3407 was permissive; it allowed, but did not require, the Omaha School District to adopt standards limiting the number of students who transfer into or out of the school district.36 He stated that "[t]he critical question is whether the Respondent's enrollment option standards are in compliance with the terms of Section 79-3407."37

In addressing this question, the petitioners argued that the standards should only address the continued integration of the Omaha School District, but instead they improperly imposed upon racial integration in potential option districts.38 The hearing officer agreed that section 79-3407 was "silent as to priority that a resident school district may give students transferring out of [the Omaha school district]."39 He concluded:

[The] practical effect of these standards is what is most troublesome. This takes away the "choice in education" which was the intent and purpose of the Legislature in passing the Enrollment Option Program. (citation omitted). Further[,] Section 79-3407 does not give school districts with desegregation plans carte blanche authority to deny every application of students to transfer in and out of the school district. It says such a school district may limit the number of students who transfer into or out of the school district. I find [that the Omaha School District's] standards fail to consider each student's application for transfer out of the [Omaha] school district on any basis other than

32. Id. at 47.
33. Id. at 60.
34. Id. at 65.
35. Id. at 68.
36. Id. at 70.
37. Id. at 75.
38. Id.
39. Id. at 76.
race and fail to consider the impact of each transfer on its desegregation plan.\textsuperscript{40}

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.\textsuperscript{41}

In its Final Order, the Nebraska Board of Education adopted and incorporated by reference the hearing officer’s findings of fact and conclusions of law.\textsuperscript{42} Consequently, the Board directed the Omaha school district to approve all seventeen petitioners’ requests for transfer of their children to their chosen option districts.\textsuperscript{43} Although the petitioners anticipated a federal court appeal by the Omaha school district, no such appeal was made.\textsuperscript{44}

In response, the Omaha school board re-evaluated and reconsidered its standards as written, and adjusted them, presumably to satisfy the requirements of the statute and the order of the Nebraska Board of Education. The new standards allowed both “black” and “non-black” students to transfer out of the district, and both “black” and “non-black” students to transfer into the district.\textsuperscript{45} However, the number of such transfers was limited by specific quotas which mirrored the racial composition of the school district.\textsuperscript{46}

Specifically, for every three black students who transferred out of the district, seven non-black students could transfer out.\textsuperscript{47} The same ratio was applied to transfers into the district, but the two processes were kept separate. For example, if three black students transferred out, seven non-black students’ names were randomly drawn from the pool of applicants and allowed to transfer out as well. For every three black students who transferred into the district, seven non-black students were permitted to transfer in as well. However, if, as a whole, more non-black students transferred in than out, additional non-black students were not selected from the applicant pool to transfer out of the district.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{40} Id. at 79.
\item \textsuperscript{41} Id.
\item \textsuperscript{43} Id. at 4.
\item \textsuperscript{44} Deborah Shanahan, \textit{State Board Backs Appeals, Grants 17 School Transfers, Omaha World-Herald}, Sept. 12, 1991, at 1.
\item \textsuperscript{45} See Hearing Officer’s Findings 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).
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id. at 42.
\item \textsuperscript{48} Interview with Stan Sibley, Government Relations, Omaha Public Schools, (Apr. 1, 1994). Such use of specific quotas may be unconstitutional under Regents of University of California v. Bakke, 438 U.S. 265 (1978), in which the Supreme
An exception to the "seven-three" rule was also created. The district maintained an absolute prohibition on transfers for students in the Omaha school district who were needed in their home school to maintain the current racial balance. For example, black students were not allowed to transfer out of Burke High, a majority white school; non-black students at North High, with its racially balanced student population, were not allowed to leave the district either. Here the argument was not one of racial equity, but a policy problem. Some students, by virtue of their residence in Omaha, would be allowed to take advantage of the choice program, while others would not. "Fairness" was already an issue because Omahans were treated differently than the rest of the state, but the "fairness" issue becomes more obvious to parents when their children are treated differently from other students within the Omaha school district itself.

Because of the policy problems and issues of fairness, in 1993 the Omaha district's denial of choice applications was again challenged by parents and students. This time, the hearing officer ruled that the district's new standards did not comply with the 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.

The hearing officer apparently felt that the standards did not sufficiently take into account the statutory factors listed in section 79-3401. That section allowed parents "when deciding what public school or public school district is best for their children," to consider school and district size, traveling distance, course and extracurricular offerings, quantity and quality of staff, and district performance.

Court held that such use of quotas is unconstitutional because "[p]refering members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." Id. at 307. Based on the Bakke decision, the use of racial quotas in any school system not under court order to desegregate would be problematic and may not withstand a constitutional attack. In a controlled choice plan, for example, students excluded from the magnet school of their choice could challenge such use of racial quotas on the same equal protection grounds asserted by the plaintiff in Bakke. Eileen M. Fava, Desegregation and Parental Choice in Public Schooling: A Legal Analysis of Controlled Choice Student Assignment Plans, 11 B.C. THIRD WORLD L.J. 83, 101-02 (1991).

49. Interview with Stan Sibley, supra note 48.
50. Id.
51. Id.
52. Id. at 62. See also Committee on Education Hearings, LB 930, 96th Leg., 1st Sess. 149, 152 (Jan. 25, 1994)(citing the findings of the hearing officer as evidence of the need to clarify the language in § 79-3401).
Once again the Nebraska Board of Education adopted the findings of fact and conclusions of law of the hearing officer and ruled that the students could opt out of the Omaha district.\textsuperscript{54}

In December of 1993, the Omaha school district again modified its standards in an attempt to rectify the problems articulated by the Board of Education in its decision. The absolute prohibition affecting certain students was lifted.\textsuperscript{55} In addition, under the current standards, the district will consider the net effect of transfers in and out of the district when granting transfer applications.\textsuperscript{56} After all transfers in and out have been confirmed in the spring, the district holds a second random drawing to determine additional non-black students who may transfer out of the district in equal numbers to those who will be transferring in.\textsuperscript{57}

The state legislature also responded to the Nebraska Board of Education's decisions. In January 1994, an amendment to the school choice legislation was proposed "for the purpose of clarifying the intention of the Nebraska legislature regarding the implementation of the school enrollment choice option in relationship to any school district's desegregation plan."\textsuperscript{58}

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."\textsuperscript{59} She further explained that decisions based on the school district's established standards turn on whether "those standards do make desegregation easier to maintain or improve [and not whether the] single movement in or out of the district of an individual will significantly impact desegregation."\textsuperscript{60}

The Nebraska Unicameral thus amended the statute, and the new statutory language states as follows:

Application acceptance and rejection; standards; desegregation plan; racial integration.

(2) A school district that has a desegregation plan adopted by the school board or the board of education or 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 to maintain

\textsuperscript{54} Interview with Stan Sibley, supra note 48.

\textsuperscript{55} OPEN ENROLLMENT STANDARDS COMMITTEE, OMAHA PUBLIC SCHOOLS, STANDARDS FOR ENROLLMENT OPTION PROGRAM FOR THE 1994-95 SCHOOL YEAR (1993).

\textsuperscript{56} Id. at 3.

\textsuperscript{57} Id. at 6.

\textsuperscript{58} Floor Debate, LB 930, 96th Leg., 1st Sess. 8975 (Feb. 11, 1994).

\textsuperscript{59} Id. at 8975-76.

\textsuperscript{60} Id. at 8976.
or improve. Desegregation is made easier to maintain or improve by standards which, considering all requests for transfer into or out of the school district received prior to the school district's application deadline . . . , prohibit transfers 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. . . .

(3) Any option school district shall give 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. . . .

(4) For purposes of this section, racial integration is aided if a student transfers to an option school district in which his or her race is a smaller percentage of the total student enrollment of the option school district than it is of the student's resident school district.61

Subsection two directly addresses the State Department of Education's attempt to place a student's right to choose above the goals of desegregation by allowing a desegregated district to adopt standards for acceptance and rejection of applications different from those set forth for option school districts in section 79-3407(1).62 The statute specifies that, instead, the standards should be "designed to make desegregation easier to maintain or improve."63

The language of section 79-3401, relating to legislative intent, also was modified to reflect a more equal balance between the goals of choice and integration, negating the placement of parental choice in a priority position over and above that of desegregation. The new language states that "the Legislature intends to provide educational options for parents and legal guardians, when deciding what public school or public school district is best for their children, by allowing them to consider [the statutory factors]."64

As a whole, the 1994 amendments to the statute further clarify the legislature's intent to support the Omaha School District in its continuing efforts to desegregate. By amending the statutory sections relating to legislative intent and standards for acceptance, the legislature has specifically prioritized the issues of choice and integration in the Omaha School District, placing the goal of integration first.

III. OPEN ENROLLMENT

While school choice plans have been considered by many state legislatures and local school boards, currently less than one-third of the states have actually enacted public school choice statutes. Numerous individual school boards have also enacted choice plans within their district boundaries. The implementation of both state and local legis-
lation has met with varying success, and opinions on the effectiveness of these plans and on the idea of choice itself remains inconsistent.

A. Open Enrollment Legislation

By the end of 1993, fifteen state legislatures had passed choice legislation. Most of these statutes codify some type of open enrollment requirement: intradistrict, interdistrict, or both.

1. Intradistrict Legislation

In general, intradistrict open enrollment statutes mandate that local school boards allow students to attend any school in the district. Such statutes typically designate local school board policy requirements for the open enrollment procedures, including considerations of space or capacity limits, student preference or priority, and racial balance.

Apparently, the statutory language in some states is mandatory, while in others it is permissive. For example, the Ohio statute specifically requires that "[e]ach policy shall provide . . . [p]rocedures for admitting applicants to alternative schools, including . . . [t]he establishment of district capacity limits by grade level, school building, and education program." Some statutes designate admission procedures which are not allowed, including requirements of academic, athletic, or artistic skills, proficiency in the English language, or a clean disciplinary record.

The statutory language regulating racial balance varies from state to state. Colorado mandates 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." The Ohio statute states that procedures for admission shall include "[p]rocedures to ensure that an appropriate racial balance is maintained in the district schools." While the Washington statute creating an intradistrict program contains no specific language relating to integration or racial balance, requiring only that each district

70. OHIO REV. CODE ANN. § 3313.97(B)(2)(c) (Baldwin 1994).
“establish its own policy establishing standards on how the intradistrict enrollment options will be implemented,”71 the general provision for interdistrict open enrollment provides that the state superintendent of public instruction is authorized to adopt necessary rules “for the expressed purpose of . . . [i]mproving racial balance within and among school districts.”72 Similarly, Utah requires “maintenance of heterogeneous student populations if necessary to avoid violation of constitutional or statutory rights of students”73 for both its intradistrict and interdistrict open enrollment programs.

2. Interdistrict Legislation

Several of the states which have passed interdistrict open enrollment statutes outline the legislative motive for school choice within the language of the statute.74 For example:

[the General Assembly [of Arkansas] . . . finds that . . . [t]here is no ‘right’ school for every student, and permitting students to choose from among different schools with differing assets will increase the likelihood that some marginal students will stay in school and that other, more motivated students will find their full academic potential . . . [It] further finds that giving more options to parents and students with respect to where they attend public school will increase the responsiveness and effectiveness of the state’s schools, since teachers, administrators, and school board members will have added incentive to satisfy the educational needs of the students who reside in the district.75

The Iowa legislature has declared that its goal is “to permit a wide range of educational choices for children enrolled in schools in this state and to maximize the ability to use those choices.”76 Other statutes contain similar language of intent.77

The interdistrict open enrollment statutes follow a general pattern. Generally, they set forth a time frame for implementing the program, a list of procedures and requirements for applications and admissions across district lines, a policy concerning transportation of students and costs of such transportation, a formula for transfer of money from

72. Id. § 28A.225.250.
76. IOWA CODE § 282.18(1) (Supp. 1994).
77. See, e.g., NEB. REV. STAT. § 79-3401 (Reissue 1994).
the sending district to the receiving district, and a stipulation concerning the effects of the plan on desegregation efforts. 78

The desegregation sections vary, indicating the differences among these states in their current desegregation efforts and their commitment to such efforts. Minnesota's plan outlines detailed procedures specifically relating to desegregation district transfers and concludes with the mandate that "[a] district that 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." 79 The Iowa section, allowing denials or preferences for transfer applications which adversely or positively affect desegregation efforts, applies to both court-ordered and voluntary desegregation plans. 80

The Arkansas legislature is not so adamant about facilitating further integration. The Arkansas statute only disallows transfers "where percentage of enrollment for the student's race exceeds that percentage in his [or her] resident district." 81 It also created the exception that, if "the transfer is between two (2) districts within a county, and if the black and white percentages of school enrollment in both the sending and receiving district remain within an acceptable range of the county's overall black and white percentages of school population," 82 then the transfer is allowed.

3. Other Public School Choice Measures

Some of the states that have implemented some form of open enrollment have combined this reform with other measures. The best

82. Id. § 6-18-206(g)(2). The section does specify that, "[i]n any instance where the foregoing provisions would result in a conflict with a desegregation court order or a district's court-approved desegregation plan, the terms of the order or plan shall govern." Id. § 6-18-206(g)(5).

example is Minnesota's school reform package, the most comprehensive program and one which has been developed over the past decade, which also includes statutory enactments allowing postsecondary enrollment options, charter schools, and tax deductions. Other states have combined reform measures to a lesser degree; for example, Iowa's statutory choice plan includes tax credits and deductions.

Numerous individual districts also have embraced choice as a method for achieving their educational goals. These types of open enrollment plans are not allowed or required by state legislation; rather, local school boards decide to provide their students with choices of schools within the district, often times combining choice with a magnet or alternative school program within the district. These intradistrict plans seem to meet with success more consistently than their interdistrict counterparts.

B. Open Enrollment in Action

Successfully implementing complex legislation is never easy, and open enrollment legislation is no exception. While intradistrict plans are logically easier to implement because of their smaller range and more tailored details, some interdistrict plans have also been successful.

84. IOWA CODE §§ 282.12 and 282.2 (Supp. 1988 and 1994). A few states have passed other forms of choice legislation. California has recently enacted a charter school plan. This legislation is intended "to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently from the existing school district structure," as a method of improving learning and increasing learning opportunities, encouraging the use of innovative teaching methods and creating new professional opportunities for teachers, providing expanded choices for parents and students, and holding schools accountable. CAL. EDUC. CODE § 47601 (West 1993). Other states are also showing increasing interest in charter school legislation. Telephone Interview with Dr. Ruth Randall, Associate Dean, University of Nebraska-Lincoln Teachers College (Mar. 29, 1994).

Two states have enacted somewhat unique versions of choice legislation to fulfill some of the needs of their particular constituencies. Choice legislation in Vermont requires tuitioning, a plan under which a town with no established schools pays the tuition for a resident to attend the school of his or her choice. VT. STAT. ANN. tit. 16 §§ 821 to 824 (1989 & Supp. 1994). Wisconsin has enacted a choice statute affecting only the city of Milwaukee, under which the state pays the tuition of any low-income student within the city who chooses to attend any nonsectarian private school in the city. WIS. STAT. § 119.23 (1991 & Supp. 1994).

86. See infra notes 87-109 and accompanying text.
1. Intradistrict Plans

The most effective intradistrict plans have been implemented not in districts within the states that have codified intradistrict options, but rather, within districts that have chosen to implement a choice plan within the boundaries of the district. The policy reasons behind the decision to provide choice may vary, but the overriding concerns appear to be achievement and equity.

a. Cambridge, Massachusetts

Some school systems use "controlled choice" to help effectuate desegregation. An excellent example is the intradistrict, controlled choice plan in Cambridge, Massachusetts, in which students are assigned to their choice of school if space exists and the assignment has a positive effect on racial balance. In the Cambridge plan, the two goals of improved desegregation and more effective education are "inseparable." The plan "expands the concept of neighborhood from a small area to the entire city." 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 eventually led to a court challenge. The school district decided instead to take up resolution of the segregative conditions on its own; thus, the idea and ideal of desegregation was at the forefront in developing the controlled choice plan.

Consequently, two factors necessary for a choice plan to achieve and continue desegregation were included in the plan from the onset. First, 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. Second, a Parent Information Center provides parents with sufficient information to make informed choices. The positions of Citywide Parent Coordinator and Parent Liaison were created to meet the challenge "that parents with less education, less experi-

87. Robert S. Peterkin & Dorothy S. Jones, Schools of Choice in Cambridge, Massachusetts, in Public Schools by Choice: Expanding Opportunities for Parents, Students, and Teachers, supra note 4, at 125, 140.
88. Id. at 127.
89. Id.
91. Id.
ence with bureaucracy, who may be intimidated by schools, or who may have language problems also . . . know how to select the school for their unique child . . . and understand the importance of becoming involved in their child's education."

b. East Harlem, New York

The East Harlem, District No. 4, program, "probably the nation's most well-known and honored public school options program," involves choice primarily at the middle school level. The process of "open zoning" is based on the district's concept that "choice is crucial to maintaining the vitality of educational institutions." The schools are organized around varying themes and philosophies, such as the Academy of Environmental Science, the Colleges for Human Services Junior High School, the Creative Learning Community, the Health and Bio-Medical Center, the Harbor Performing Arts Junior High School, the East Harlem Maritime School, and the Rafael Cordero Bilingual School. The district also offers some "alternative concept schools" for the pre-school and elementary levels, including several K-6 schools organized around a developmental, Montessori philosophy; a Children's Workshop, which "provides a nurturing learning environment for holdover students" in the second, third, and fourth grades; and the Talented and Gifted School for pre-Kindergarten through sixth grade students. Because students and their parents are permitted to choose the schools they prefer to attend, they, like the teachers and administrators who staff the schools, feel a commitment to the learning environment they choose.

Naturally, equal educational opportunity for minorities and low income students was at the forefront in designing the East Harlem program, although desegregation was not feasible because of the high percentage of children of color within the East Harlem district. However, the success of the schools has in recent years attracted white students into the district, perhaps proving the viability of a choice program as a desegregation tool.

93. Peterkin & Jones, supra note 87, at 127.
94. Nathan, supra note 4, at 6.
96. Id. at 3-53.
98. Id. at 12.
99. Id.; Schools of Choice, supra note 95, at 1.
100. See John Merrow, Schools of Choice: More Talk Than Action, in Public Schools by Choice: Expanding Opportunities For Parents, Students, and Teachers, supra note 4, at 121-22.
c. White Plains, New York

The White Plains, New York, Controlled Parents’ Choice Program combines a concern for equity and racial balance with an opportunity for parents to select an elementary school for their child. In 1988, the White Plains Board of Education adopted a racial/ethnic diversity policy which states: “It is the goal of the district to achieve at each elementary school a mix among the ‘Black,’ ‘Hispanic,’ and ‘Other’ students that is within [plus or minus five] percentage points of the district average for each of these groups in each of the grade levels.” The choice program was established in the same year to effectuate the policy and achieve racial and ethnic balance in each of the district’s five elementary schools. It was to be phased in over a six-year period.

Like the schools in East Harlem, the White Plains schools have developed “distinctive emphases, such as partnerships, active learning, global education, communications, and science and technology.” Like Cambridge, the 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 and to combat a common criticism of choice programs that “such programs typically give advantage to families who are informed, aggressive, and well-connected in the community.” The desegregation component of the program has exceeded the board’s policy requirements; for most racial and ethnic categories at most of the grade levels the variance from district-wide averages is less than two percent.

d. Eugene, Oregon

District 4J in Eugene, Oregon, exemplifies the type of choice program which focuses on achievement and not equity. The District Director of Secondary Education, Jerry Colonna, has explained that, “unlike 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.” Colonna recognizes, however, the downsides of this approach. Because the dis-
trict has not made a commitment to equity by providing transportation, the district admits that not all of its students have access to the choice program, causing less affluent families to be "left behind."\textsuperscript{108} The District 4J plan apparently emphasizes the creation and perfection of alternative schools such as the Buena Vista Spanish Immersion School, the Magnet Arts Alternative School, the Patterson Family School, Yujin Gakuen (a Japanese immersion program), and the International High School, over the idea of choice itself.\textsuperscript{109}

2. Interdistrict Plans

In contrast to these intradistrict programs, state-wide interdistrict open enrollment plans have met with widely varying levels of success.

a. Massachusetts

The Massachusetts state-wide interdistrict program has limited participation and is woefully inadequate in several aspects. Although the legislative intent is obscure, some of the legislative history indicates that the intent was probably to improve education by forcing competition.\textsuperscript{110} Not surprisingly, a plan focusing on the market theory places little emphasis on the importance of desegregated schools.

Under the Massachusetts statute effectuating public school choice, districts are not required to participate in the plan, and the state pays tuition costs to districts that enroll nonresident students and deducts these costs from the transferee districts.\textsuperscript{111} Less than twenty percent of the state's districts have elected to participate in the program. No mechanism is in place for informing parents of school choice options, and no provision is made for transportation of students to another district.\textsuperscript{112}

Lack of transportation can contribute extensively to the segregative effects of a school choice program.\textsuperscript{113} "Transportation is the key to providing all students equal access to choices. Without adequate transportation policies, a choice program will neither be fair nor effective for all students."\textsuperscript{114} While transportation was not a major issue in the Cambridge schools because of the district's small size and Boston's elaborate public transportation system,\textsuperscript{115} in larger geographical

\begin{itemize}
\item \textsuperscript{108} Id.
\item \textsuperscript{109} Public Affairs Office, School District 4J, Eugene, Or., Take Your Pick: Choice in Education 1-3.
\item \textsuperscript{110} Fossey, supra note 3, at 1.
\item \textsuperscript{111} Id.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} See Lee, supra note 92, at 130.
\item \textsuperscript{114} Roundtable, supra note 85, at 25.
\item \textsuperscript{115} Christine H. Rosell, The Carrot or the Stick for School Desegregation Policy 197-98 (1990).
\end{itemize}
areas transportation must be provided or its cost reimbursed for the choice program to function equitably.\textsuperscript{116}

Massachusetts' attempt at an interdistrict public school choice plan demonstrates the danger of exacerbating socioeconomic and racial inequities, a danger which is inherent in a program poorly planned and poorly administrated with respect to desegregation concerns. Only six percent of the students who participated in the Massachusetts plan were minority students, compared with twenty percent minority in the state public school population.\textsuperscript{117} "If more suburban districts elect to accept school-choice students in the future and the pattern of low minority participation does not change, school choice could contribute to increasing the racial isolation of the state's urban minority students."\textsuperscript{118}

b. Minnesota

Not all interdistrict plans are so poorly implemented. Minnesota, the first state to make choice broadly available to its school children,\textsuperscript{119} has devised a continually-expanding, innovative plan which has five major components. They are: area learning centers, which provide students with different methods of teaching and learning in order to ensure success; open enrollment, which gives parents the opportunity to select their children's schools; high school graduation incentives, which encourage enrollment in alternative programs to increase graduation statistics; postsecondary enrollment options, which allow eleventh- and twelfth-graders the opportunity to take college courses for high school credit; and outcomes-based charter schools, which offer teachers the opportunity to design and implement their own unique programs.\textsuperscript{120} To facilitate desegregation concerns under the open enrollment portion of the state program, students in large districts (more than one thousand students) are permitted to transfer without permission of their home district unless the transfer upsets racial balance.\textsuperscript{121}

Ruth Randall, who was the Minnesota Commissioner of Education when choice was initially implemented in that state, attributes the success of the program, in part, to the administrators who were responsible for implementation. For example, after the first choice legislation, which allowed post-secondary enrollment options, was passed in late June 1985, the plan to effectuate such options was placed into

\begin{footnotes}
\item[116] Roundtable, supra note 85, at 25-27.
\item[117] Fossey, supra note 3, at 4.
\item[118] Id. at 71.
\item[120] Roundtable, supra note 85, at 44.
\item[121] Bamber et al., supra note 90, at 24.
\end{footnotes}
effect within about six weeks, in time for the upcoming academic year in over fifty post-secondary institutions in Minnesota.\textsuperscript{122} Dr. Randall also emphasizes that the support of the Governor and the press were invaluable in continually expanding the choice legislation package.\textsuperscript{123}

That continual, steady expansion contributes to the success of the state-wide interdistrict plan in Minnesota. The state has provided real choice through charter schools, learning centers, and post-secondary options, not relying on or waiting for "market factors" to provide legitimate options for its students and parents. Other states must take a lesson from Minnesota in order to legislate and implement an effective choice plan.

C. Opinions on Choice

Open enrollment and other aspects of school choice have received mixed support and mixed reviews by almost every interested party on the educational spectrum. Somewhat surprisingly, however, politicians seem to agree on choice, at least at the general level, while educators and parents apparently have differing views on its appeal and effectiveness.

As with all legislation in general, and school reform measures in particular, politics plays a part in change. School choice legislation appears to be rather unique in that it has been heralded by liberals and conservatives, Republicans and Democrats alike.\textsuperscript{124} One commentator has explained that the vagueness of the concept of choice enhances its political appeal because the term can be construed to mean various things.\textsuperscript{125} Conservatives view choice with an eye toward competitiveness in the market system and a capitalistic approach to education. Liberals see choice as a means to social equity. The result is that open enrollment legislation is politically expedient.\textsuperscript{126} The question is whether this quality of public school choice is actually an attribute or a detriment. While expediency in the legislative or administrative process somehow seems inherently desirable, some legislatures, like Massachusetts', have hurriedly pushed through choice legislation without sufficient concern for details and, consequently, almost caused some districts to close due to impending

\textsuperscript{122} Telephone Interview with Ruth Randall, \textit{supra} note 84.
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{See} \textit{Young & Clinchy, supra} note 2, at 2; \textit{Lee, supra} note 92, at 128.
\textsuperscript{126} \textit{Id.}
bankruptcy. Other states have amended their choice legislation soon after its implementation.

In addition to politicians, some educators are also advocating choice as the key to educational reform because of its effectiveness in improving education. Some of the specific benefits listed by administrators who have implemented choice plans include: (1) the stabilization of the school population due to the continuous enrollment of students from mobile families; (2) the re-enrollment of dropouts and continued enrollment of potential dropouts; (3) fewer discipline and truancy problems; (4) better usage of facilities and the space within those facilities; (5) creation and implementation of alternative assessment of students; (6) creation of a sense of mission under each individual school's philosophy which gives parents, students, and teachers a stake in the success of the school and invigorates the faculty as a whole; (7) more parental and community involvement in what is going on at each school; (8) more diversity among schools and their curricula and hence more success in meeting the needs of students' various learning styles; and (9) the advancement of racial integration and more opportunities and support for minority students.

Other educators, however, are not so sure about the benefits of school choice. Critics of choice charge that (1) choice segregates students by race or social class, (2) the factors that stimulate entrepreneurial activity in competitive markets are not present in public education, (3) school choice is unlikely to produce innovative educational options without talented and energetic teachers, (4) participation may be based on convenience or other factors, and (5) choice may insulate districts from change because the most active parents will leave the districts that most need them. Loss of local governmental control and the consolidation of small districts are other concerns.

As for parents' opinions on choice, statistical data indicates a general support for the idea of choice, probably because it is based on the American values of freedom and individualism, as well as that spirit

127. See Fossey, supra note 3, at 37.
128. For example, Nebraska and Minnesota have both amended their open enrollment legislation several times.
129. Roundtable, supra note 85, at 33-35.
130. Young & Clinchy, supra note 2, at 3. A 1989 Survey indicated that fifty-one percent of school board presidents, sixty-eight percent of superintendents, and sixty percent of school principals opposed choice. Id. In contrast, a 1990 survey of Washington (state) superintendents indicated that seventy-one percent supported district-wide choice, but only twenty-one percent supported statewide choice. Id. A 1988 poll of the Minnesota Education Association revealed that sixty percent of its membership supported statewide choice, even though officially the MEA opposed the Minnesota statewide choice legislation. Id.
131. Fossey, supra note 3, at 21-23. See also McGillivray, supra note 125, 117-23 (discussing criticism of open enrollment programs).
of laissez-faire capitalism. A 1987 Gallup poll indicated that seventy-one percent of the national public supported choice. In a more recent survey on choice in the Detroit metropolitan area, seventy-seven percent of local residents surveyed favored intradistrict open enrollment, and sixty-one percent supported interdistrict open enrollment. The research indicates that the impetus behind this opinion is current dissatisfaction with the public school system.

Generally, opinions on choice continually vacillate. They will continue to do so until research and commentary substantiate or disprove the viability and effectiveness of school choice programs.

IV. CHOICE AND EDUCATION

A. Critical Analysis of Choice Theories

Whether people advocate or oppose choice, one fact remains: choice is a popular topic in education and in the legislative arena of many states. Why is choice such a popular idea for so many different people? Because its various underlying theories appeal to a broad range of individuals. The market theory appeals to conservatives and capitalists, while the equity theory appeals to liberals and integrationists; naturally, each is at odds with the other. The achievement theory appeals to parents and teachers. Although the theories differ, the mechanism for results is the same—choice. Predictably, however, the actual results also differ, depending on the theory.

1. Market Theory v. Equity Theory

The market theory of choice is based on the assumption that market pressures will cause individual schools to improve or close; the end result will be a better school system. One concern about this idea revolves around the definition of "improvement." Another question arises about equality of access and opportunity to attend these "improved" schools. Because people of color and of low socioeconomic status have always been disadvantaged in our capitalist economy, those disadvantages will necessarily carry over to a free market system of education.

134. Id. at 124.
135. Id. at 129. The city of Detroit, the school district with by far the largest black population, had the highest level of support for school choice. Seventy percent of the parents in Detroit said they would consider sending their children to a public school in another school district, compared to forty-two percent overall. Id.
136. Id. at 124.
137. Issue Brief, supra note 2, at 1-5. For example, in 1992, in thirty-three states, some variation of choice legislation was introduced or pending; and in at least nineteen states, citizens coalitions had formed to advocate choice. Id. at 4-5.
With respect to "improvement," studies indicate that schools may be trying to "improve" by meeting the needs of parents rather than students in order to attract "business." Research shows that, in some public school choice jurisdictions, parents make choices based on non-academic reasons.\textsuperscript{138} For example, some parents choose for convenience rather than for the quality of education; they may choose a particular school because it has before- and after-school care or a full-day Kindergarten program, or because it is located closer to or on their way to work.\textsuperscript{139} In a true market theory system, schools may begin providing more parent services rather than educational improvements to attract students and the money that follows them. Perhaps these schools could offer a breakfast and dinner program, shuttle service to after-school piano lessons or soccer practice, or summer "school" day care programs. The possibilities are endless; for example, in Great Britain's choice program, one school offered parents a discount on shower units to entice them into enrolling their children in that school.\textsuperscript{140}

Some advocates of school choice believe the reasons for choosing should be irrelevant in a true choice plan. In Minnesota, a parent's reason for transfer is not considered because the choice is for the parent and should not be affected by the value judgments of the state.\textsuperscript{141} In Nebraska, the application form formerly included a portion requiring the parent to state the reason for the student's application to transfer to another district, but the legislature amended the statute and deleted that requirement.\textsuperscript{142} Part of the impetus behind this change was the realization that parents are not always truthful about why they might be moving their child to another district.\textsuperscript{143}

Unfortunately, as they have so frequently in the past, as demonstrated by "white flight" to the suburbs and the creation of "segregation academies" in the South during the late 1960s and early 1970s, in response to desegregation mandates some parents may choose a particular school or district for racially motivated reasons.\textsuperscript{144} In the case of the "segregation academies," consumers were demanding segre-

\begin{itemize}
  \item \textsuperscript{138} Fossey, \textit{supra} note 3, at 73.
  \item \textsuperscript{139} \textit{Id.} Fossey notes that, although "[t]he Carnegie Foundation has argued that school choice is probably not an effective school reform tool, because many students participate in open enrollment, not to find better school programs, but simply as a matter of convenience," \textit{id.} at 3, his research indicates that, in Massachusetts, the pattern of open enrollment choices suggested rational decision making based on considerations of socioeconomic status and student performance in the receiving schools, and not on convenience-based decisions. \textit{Id.} at 3, 86.
  \item \textsuperscript{140} Hershkoff & Cohen, \textit{supra} note 1, at 27.
  \item \textsuperscript{141} Telephone Interview with Ruth Randall, \textit{supra} note 84.
  \item \textsuperscript{142} See \textit{Legislative History, LB 270, 93d Leg., 1st Sess.} (Mar. 25, 1991).
  \item \textsuperscript{143} Interview with Stan Sibley, \textit{supra} note 48.
  \item \textsuperscript{144} Hershkoff & Cohen, \textit{supra} note 1, at 2, 27.
\end{itemize}
gated education, and private schools flourished in response to that demand, regardless of their quality. Currently, under the market theory, the possibility exists that schools will covertly cater to the desires of racist parents and entice white students away from inner-city districts, creating or enhancing segregation on the district-wide level.

In addition to being at odds with integration, the market theory is in direct contradiction 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. By definition, under the market theory, some schools will deteriorate and eventually close if they fail to improve. Unfortunately, the students who attend those schools which are in the process of deterioration are receiving a less-than-equal education during the time in which the market “naturally” works and takes it toll.

Even after the “weeding out” process is complete, the schools will not provide equal educational experiences; some schools will inevitably be better, others will continue to compete. Unfortunately, not all parents are on equal footing to know exactly how to evaluate the schools to determine which one is better. “Since educational objectives are ambiguous, outcomes multidimensional and difficult to evaluate, and knowledge about the factors that contribute to learning uncertain, it is very hard even for professionals and informed policy-makers to know what ‘quality education’ is and what kinds of schools produce it.”

While parents from all [racial and] socioeconomic backgrounds confront obstacles to making informed decisions about educational options, evidence indicates that low-income and less educated families know little about program options, have limited access to information about those options, and are not as likely to make good decisions about school placement for their children. Social science research shows a strong association between information levels and social class on [the subject of] education.

Critics of the market theory who raise issues of equity, focus their attention on the public nature of education, on education as a “merit good.” “Relying on market-based reforms and their inherent focus on a good’s private benefits will mean that the major social benefits of education will be lost to society.” This criticism presumes as cor-

145. Id. at 27.
146. Id. at 25.
147. Fava, supra note 48, at 85.
148. See Hershkoff & Cohen, supra note 1, at 18.
149. Campbell & Hepburn, supra note 1, at 69.
150. Id. at 70.
151. Id. at 61; Yarbrough, supra note 1, at 26.
152. Campbell & Hepburn, supra note 1, at 71.
rect the underlying assumption that the purpose of education is benefit to society and ignores the equally plausible assumption that the purpose of education is to benefit the individual, which is the basis of the market theory.

These two contradicting presumptions have provided the scaffolding for debates about the nature, character, quality, and effectiveness of education in this country since the country first began to implement a common school system. Why do we educate, for the social good or for individual benefit?

Before the implementation of common schools, the actual responsibility for education rested on parents, and thus the purpose of education was predominantly, if not wholly, for the benefit of the individual child and, perhaps, for the benefit of the family. But educational and political theorists who advocated a common school system, and the education of a large portion of society, did so for public not private reasons: to create a literate, participatory citizenry in the new republic.153

As the common school system took hold nationwide after the Civil War, the purposes of public education reflected the times. Thousands of immigrants were flocking to the United States and many were seen as a threat to the democratic ideals of the Nation. The focus, then, was to assimilate these children into American society. Note, however, that this was not a purely public goal; it served private, individual interests as well, because many of these immigrants wanted their children to be Americanized, to speak English, in order to take advantage of the benefits this country had to offer.154 Because state and individual interests were fairly cohesive during this time, debate about the nature of education was not as rampant as during the following era.

By the end of the 1920s, the term “equality of educational opportunity” came into being in the educational and political worlds. The schools emphasized vocational purposes, universities began to focus on research and service, bureaucracies were implemented in the administration of schools, and the typical educational experience spanned Kindergarten through twelfth grade and beyond. “Equality of educational opportunity” described the variety of programs which were adapting to individual needs.155

New Deal practices changed this definition. “The New Deal modified this nearly exclusive emphasis on curriculum variety and choice by claiming that poverty significantly undermined educational oppor-

153. Patricia A. Graham, Historical Roots of Contemporary Educational Policy in the U.S., Class Lecture (Feb. 21, 1994).
154. Id.
tunity. Federal involvement was based on the implied belief that for equality of educational opportunity to exist, inequalities rooted in class and race had to be attacked.”156

When the schools became the logical focal point for the NAACP's fight for racial equality, access to education, and eventually desegregation, became the new societal goals for the public good.157 Many individuals, especially in the South, heartily disagreed that such integration and equity was for any good whatsoever, and they fought the role of public education as a stepping stone for integration.158 Disagreement about that role continues to this day and is highlighted by the distinct and different approaches to school choice legislation.

What is the role of public education today? Obviously, the schools have attempted to accommodate both the public and the individual. They serve social functions not only by attempting to provide equality of educational opportunity and integrated schooling, but also by providing drug and alcohol education, sex education and birth control devices and information, moral and civic education, some health care, and opportunities for other services such as free or reduced price meals, day care for teenage mothers, and transportation, all for the benefit of the public good, at least in some respects. Schools serve individual needs by providing certain types of education like vocational education or college preparatory courses, by offering individual and family counseling, by sponsoring a variety of extracurricular activities, and by including before- and after-school care for students.

Oddly enough, with all of these responsibilities, schools are still viewed by the public and by politicians as not doing enough. Schools are continually criticized for not meeting the needs of students and their families and for not preparing children to be productive members of society. The movement for reform in the form of public school choice is simply further evidence of people's dissatisfaction with schools' inability to meet all the demands made of them, and, especially, the disagreement about the role of public education.

Still, people and their lawmakers continue to turn to schools to solve all of society's problems and to fulfill their families' and children's individual needs, and they continue to advocate, propose, and implement legislation accordingly. This fact demonstrates that the public apparently does agree on one idea: that schools can provide solutions to all of our problems.

The public school choice debate helps to clarify the overbreadth of this idea. Even though people cannot agree on, or pinpoint the role of, public education, schools should not try to fulfill all possible aspects of

156. Id. at 24.
both roles. Additionally, although they are professional educators, teachers are not necessarily the best people to take responsibility for all aspects of educating society's children, regardless of their socio-economic status or race. Furthermore, schools are not the only route to equal opportunity and equality in society.

Politicians, parents, and the public must recognize that public education cannot, and should not be expected to, solve all of the problems in American society. Admittedly, looking to schools for future improvement is logical; they are the nurturing ground for our nation's youth, the next generation, the future politicians, parents, and public. People tend to give up on solving current problems when they begin to seem omnipresent and overwhelming. Consequently, politicians begin to advocate legislation which will affect the future; parents, who frequently see their children as being able to accomplish what they have been unable to achieve, look to their own children's potential for success in the future; and the public in general views school children as their hope for a better tomorrow. The focus, sometimes unnoticeably, shifts from present to future.

Children are the future, or so the rhetoric goes. Our schools need to educate them early on about matters of importance, before their young minds are prematurely affected by the negative influences of society. Indeed, we educate them early for the most noble reasons: to help the society of the future develop into a better place and to protect the children themselves from all the possible harmful influences that could make them a burden on society, including their own parents.

So politicians, parents, and the public continually heap responsibilities onto the already overburdened public schools. They expect success in answering all of their desires and needs, and they expect public school teachers to perform miracles. But teachers are not miracle workers. They are people who, like everyone else, have a limited amount of energy to expend and limited capacity for facts and knowledge. That energy and capacity needs to be focused on areas of education which are encompassed by a background and an education in teaching. Teachers should be allowed to focus their energies on what they do best, teach a certain subject matter and/or age group. Then, rather than supplying society with a mediocre product, the schools could excel in their area of strength and allow other factions of society to deal with the voluminous challenges and problems that today are allocated, for the most part, to the schools.

This is not to say that schools should not focus on integrative ideals. Desegregation efforts are implemented at the administrative, district-wide level and take little energy or time away from teachers. Furthermore, racial prejudice is a failing which, unlike many others that the schools are assigned to remedy, is passed down from parents, even when they consciously try to avoid revealing their prejudices. If
a generational link is to be broken in the chain of racial prejudice, society cannot rely on parents for that break. Instead, perhaps the schools are the proper institutions for cracking the metal.

But they are not the only possibility, as the public and its lawmakers seem to frequently forget. Policymakers need to explore other alternatives for equity and integration in society and for further weakening the acceptability of racial animus and bigotry. Some other efforts at equality have been implemented in cities throughout the country; for example, Omaha has implemented scattered-site, low-income housing to better integrate its racially and socioeconomically stratified community. Creative new ideas need to be initiated in areas other than education, such as housing and employment.

Furthermore, research relating to the success of equity and integration efforts in public school choice programs is mixed and uncertain. In districts and states where safeguards are not implemented, or where legislators and board members merely pay lip service to desegregative ideals, research indicates that segregation may actually increase, and that students from lower socioeconomic backgrounds are pulled farther away from equitable treatment in the public schools. However, other studies and analyses indicate that some programs, with parameters carefully drawn and safeguards against inequities included, do actually contribute to statistically improved racial mixing in the schools. Several, like Cambridge, have implemented a controlled choice plan, based on equity theory, as an alternative to assigning schools based on race.

However, the efficacy of such controlled choice plans has been questioned. Christine Rossell's research indicates that voluntary plans with incentives produce more desegregation than these mandatory plans. "It is more efficient to try to change the behavior of citizens by restructuring the range of alternatives to choose from and encouraging socially desirable behavior through positive and negative incentives than it is to order the desegregation assignment of specific students to specific schools."

She specifically criticizes the Cambridge plan and challenges the acclaim and accolades it has received. She argues that the Cambridge plan works because the district is so small, and that the same plan would not work on a large scale. Although some controlled choice

160. Fossey, supra note 3, at 71.
161. See Roundtable, supra note 85, at 35.
162. See supra notes 87-93 and accompanying text.
164. Id. at 188.
165. Id. at 198.
advocates presume to resolve the problem by dividing a large district into subdistricts, she argues that such a division limits true parental choice.166 Furthermore, she points out that, unlike many cities in need of desegregation, Cambridge is residentially desegregated to a large extent, and “[i]f every student simply chose the school closest to his or her home, the Cambridge school system would still be one of the most integrated in the country.”167

Other educators advocate both voluntary and controlled choice plans as giving families greater educational opportunity and equity. Intradistrict plans, like ‘controlled’ choice, increase educational opportunities and equity for economically disadvantaged or minority families by allowing them to select from among many or all of a district’s schools. School assignment is not dependent upon neighborhood housing patterns. Interdistrict plans have the potential of giving families even greater educational opportunity and equity by offering minority and low-income students an education heretofore reserved for suburban white and middle-class Americans.168

However, while the potential for greater equity exists, equity is not the equivalent of racial desegregation. Some educators, policymakers, and parents assume that segregated education is workable and can be made fair and offer genuinely equal opportunity, “although no major school district has accomplished this goal.”169 Until the Supreme Court returns to the doctrine of “separate but equal,” such a perspective is not only unrealistic, it is unconstitutional.

A pure market theory ignores ideas of equity, while a pure equity theory does not necessarily take into consideration the goals of desegregation. Neither theory, in and of itself, addresses the goals or fulfills the potential of public education in America, and because the two theories seem diametrically opposed, they are difficult to balance. The achievement theory, in contrast, places education itself at the forefront, while providing an adequate framework for both individual choice and social equity.

2. The Achievement Theory

The public school choice debate has clarified the need for a new approach to educational achievement. Ideas about academic achievement differ greatly, and the debate has magnified those differences. Educators have traditionally presumed that the public school system could not meet all of the needs of all of its students, and when it did attempt to do so, the result was mediocrity. Choice based on an

166. Id.
167. Id. at 197-98.
168. YOUNG & CLINCHY, supra note 2, at 13-14.
achievement theory emphasizes those differences and consequently points to a new direction in educating all students.

Historically, one of the problems with analyzing students' achievement is that educators and parents continue to disagree on how to evaluate achievement, on the value of standardized testing, and on text and classroom bias against minority and female students. Currently, little data exists to substantiate academic improvement of students involved in choice programs; and even if data existed setting forth positive improvement in choice students' standardized test scores and grades, that data would be challenged because of the continuing debate in education circles about the viability of such data.

However, if one does accept the standard assessment indicators of achievement, then the East Harlem choice program is "one of educational choice's greatest examples of achievement." In 1973, East Harlem's scores in reading and math ranked thirty-second out of thirty-two city districts, with only fifteen percent of students at grade level in reading. But public school choice was implemented in the early 1980s, and by 1989 East Harlem had moved up to sixteenth out of thirty-two in test scores, and sixty-four percent read at or above grade level.

Other aspects of achievement are even more difficult to assess, and thus the success of choice plans on aspects of achievement other than academic achievement are even more tenuous. A student's ability to choose a school where he or she can compete in more athletic programs, can be more active in extracurricular activities, can interrelate better with teachers or other students, or can simply feel more comfortable may directly correlate to not only his or her academic success, but also to self-esteem, concentration, motivation, or happiness. These factors are difficult to measure in and of themselves and, consequently, are considerably difficult to attribute to the benefits of open enrollment programs.

Achievement itself is an amorphous concept, defined differently by different groups of people and by different people within those groups.


173. Id. (citing Hood, Miracle on 109th Street, REASON, at 20 (May 1989)).
While one parent may think his child is "achieving" because she excels in math (although she may be reading at grade level or below), another may determine that her child is "achieving" because he has won the state-wide spelling bee. Some teachers put much emphasis on standardized test scores as indicators of their students' "achievement," while others are forbidden by the policies of the school administrator to assign letters grades or any other type of numeric value to the students' "achievement."

Although the term "achievement" itself can be defined, the boundaries which surround the concept of achievement are fluctuating and, indeed, highly personal. Rather than seeing this reality as a burden, choice advocates who focus on achievement can use these personal variances as the basis for implementing choice. Differences in teaching, learning, and parenting styles necessitate differences in school climate, curriculum, and philosophy. While a pure market theory approach merely provides different qualities of the same product (like USDA grades for beef), an achievement approach understands that for parents, teachers, and administrators to have a real choice, the differences must go deeper than the surface quality of the school. Because choice based on achievement recognizes these differing needs (like providing Kosher meat for Jewish people or alternative protein foods for vegetarians), school choice is combined with other measures, charter schools and alternative programs, which vary in philosophy and structure, not just quality.

Only public school choice based on an achievement theory can provide true equality of educational opportunity, by providing each individual student with his or her best opportunity for success, self-esteem, and happiness. Only public school choice based on an achievement theory can provide true equality of opportunity while continuing to support integrative ideals.

B. Law and Education

At one time in the history of humankind, the subjects of law and education were completely separate, independent of each other. Parents, if they chose to do so, took responsibility for educating their children. The term "education" therefore was a broad one, encompassing whatever parents decided was best to teach their children in order to prepare them for life. For some, education focused on literacy; for others, on religion and moral values. Some parents focused on vocational education, teaching their children the skills of their own trades, farming, tailoring, blacksmithing, housekeeping, or perhaps engaging their children as apprentices with another person experienced in skilled labor. For the upper echelon of society, the task of education may have been transferred by the parents to a nanny or tutor, and education may have focused on classical Greek and Latin. But who-
ever the parents or whatever their decision about their own child's program of "study," decisionmaking about education was of a very personal and independent nature, not to be interfered with by the state.

However, in this country, law and education evolved simultaneously and slowly became increasingly intertwined. The association between them became "a fundamental tenet of American society" by the turn of the twentieth century, and "during the course of the twentieth century, schooling [became] dramatically more prominent in the lives of countless Americans."175

Over the past 150 years, government has become increasingly involved in regulating and mandating education, both public and private. State legislatures and local school boards have continually enacted statutes and policies which set school district boundaries, dictate curriculum requirements, and determine the number of mandatory school days per year. Congress, too, has intervened in schooling, legislating on everything from regulations affecting teachers' unions and collective bargaining to Chapter 1 allocations for special education programs. In addition, state and federal courts have become involved in education, most prominently in the area of school desegregation. Simultaneously, education and the schools have consistently (if not increasingly) reflected governmental purposes, teaching citizenship education and civics for example.

However, although the two subjects are currently melded together, probably permanently, they have historically served the purposes of two separate, very different, and probably conflicting constituencies. Law has consistently represented the upper levels of society, the members of high socioeconomic classes. Throughout much of history, law has served as a vehicle of domination over the poor and less fortunate in society, keeping them "in their place," and has frequently reflected and served the economic interests of the ruling class and big business. For example, at the end of the nineteenth century, the Supreme Court's reliance on classical legal theory, in order to constitutionalize contractual law in the form of substantive due process, kept business at a place of high priority and repeatedly and successfully kept labor dispersed and without power.176 Prior to that era, the constitutionalization of slavery also provided substantial financial benefits to the

174. Lazerson, supra note 155, at 50 (citing John Dewey, Democracy and Education (1916)).

175. Id.

wealthy planters and slave traders at the expense of the lowly. Only more recently in our legal history have we seen law act, in some instances, as a protector of the less affluent and weaker members of society.

Education, on the other hand, has always been a symbol of hope and a vehicle to personal and financial independence for members of the middle and lower socioeconomic classes. Education has been viewed by many people in American society, philosophers and commoners alike, as the great equalizer and the key to equal economic opportunity. Beyond compulsory attendance, parents send their children to pre-school to improve their chances of successfully competing with other children in elementary and eventually high school; and they send their children to undergraduate school to help them obtain stable, profitable employment and to live a better life. Parents from lower socioeconomic classes frequently put much faith in the ability of the educational system to break the chain of poverty in their families and their lives.

Law and education are also served by two very different groups of people. Politicians and lawyers determine, enact, argue, and interpret the law. Teachers and administrators design and implement the educational system. The substantial differences between politicians and lawyers on one hand, and teachers and administrators on the other, cannot be minimized or ignored.

Politicians are driven by the political system. They are at times motivated by factors other than educational concerns: they may be running for re-election and therefore evading certain controversial issues, bargaining away their votes for a proposal which they are sponsoring, or repaying a campaign contribution with support of a particular viewpoint. Lawyers, while less political, are also influenced.


by factors unrelated to the advancement of educational goals: lawyers must represent clients and their viewpoints in order to maintain a livelihood, and they may be forced to settle cases, cases that should be litigated, because of time and money restraints. Furthermore, politicians and lawyers are rarely experts in the field of education, nor do they have sufficient background in educational theory, methods, research, or practice to make truly informed decisions about the regulation of schools.

Teachers and administrators, in contrast, are experts in education, but frequently insufficiently understand the intricacies of lawmaking and politics. Reading and adequately understanding the ramifications of a statute or board policy can take expertise beyond that provided in teacher training and graduate education programs. In addition, some teachers experience some difficulty in viewing the world of education outside the walls of their classrooms or schools because they cannot always see the “big picture.”

This is not to say that all politicians are inadequate in matters of education, or that all educators are uninformed about political decisionmaking. But each group, taken as a whole, reflects a different aspect of the educational process. The lawmakers legislate educational matters on the books, in theory, while the educators put those laws and policies into action, into practice.

Much like Roscoe Pound's critique of the law in books versus the law in action, the area of education can be divided into education in theory and education in practice. Pound recognized that, "if we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear." He explained that, "in theory, our judges are tied down rigidly by hard and fast rules. Discretion is reduced to a strictly defined and narrowly limited minimum." But "in practice, flesh and blood will not bow to such a theory . . . men, and not rules, will administer justice."

The law of education is no exception to this idea. Laws, policies, and guidelines govern, sometimes with excruciating details, the administration of schools. But teachers close their doors and teach their students, frequently without much or any knowledge of or allegiance to those specific rules and guidelines.

In some senses, this truth may be advantageous for the students. Because the laws and policies are frequently drafted by people who are not only amateurs in educational theory and practice, but whose

180. Id.
181. Id. at 41.
182. Id.
loyalty to education may be watered down by the myriad legislative topics that cross their desks, perhaps the teachers’ in-class modification of the rules better serve the purposes of education.

Furthermore, teachers have to answer more directly to the constituents of education than do politicians. Rarely do lawmakers get the intensely personal and detailed feedback on their decisionmaking that teachers receive during the process known as parent-teacher conferencing. Politicians are frequently criticized about many matters, and they have to answer for them at the next election, but teachers have to answer to parents, students, and administrators directly, even when they have tenure.

Pound states that “it is the work of lawyers to make the law in action conform to the law in the books, not by futile thunderings against popular lawlessness, nor eloquent exhortations to obedience of the written law, but by making the law in the books such that the law in action can conform to it.” In the field of education, this would require lawmakers and policymakers to become more informed about educational theory and practice, about what is feasible and what is not in terms of a teacher’s time, energy and expertise, and about what types of education work for various types of students. Teachers also need to join this effort, by learning about the applicable regulations and rules and, if necessary, striving to change them to be more feasibly workable and more educationally effective.

One of the problems with public school choice is that teachers and legislators are working against each other. Teachers’ unions have adamantly opposed school choice laws, perhaps because they do not understand the details of how they work, possibly because they do not appreciate such radical legislative intervention into their traditional school systems, probably because they fear schools closing and therefore teachers losing jobs. Legislators have imposed capitalistic theories on educational institutions, not understanding or appreciating the delicacies and intricacies of such institutions and how they differ from a typical market scenario; for example, few business personnel have tenure in their jobs, but many teachers do.

Martin Luther King, Jr., recognized the interdependence of law and education:

Through education we seek to change attitudes; through legislation and court orders we seek to regulate behavior. . . . Through education we seek to break down the spiritual barriers to integration; through legislation and court orders we seek to break down the physical barriers to integration. One method is not a substitute for the other, but a meaningful and necessary supplement.
V. CHOICE AND DESEGREGATION

The law is continually evolving, and what began as the vision of hope for a desegregated society has evolved, through Supreme Court decisionmaking, into an ineffective mandate which has, for the most part, failed to desegregate our nation's 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 the predominantly white suburbs.

Mandatory desegregation and bussing have had limited success in the United States because residential patterns continually change; housing segregation is a basic cause of school segregation. The traditional practice of assigning students to neighborhood schools creates racially segregated school systems because urban residential segregation has been high for as long as significant numbers of blacks have lived in this country's cities.

Furthermore, strong school desegregation actions by the federal courts in the 1970s never resulted in true desegregation because of the segregation among city and suburban districts, which could not be effectively cured after Milliken v. Bradley was handed down by the Supreme Court in 1974. In Milliken, the Supreme Court overturned the Sixth Circuit affirmance of the district court's desegregation plan, which included the fifty-three suburban school districts surrounding the inner-city district 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 school districts, or of a single school district have been a substantial cause of interdistrict segregation" before an interdistrict remedy will be mandated.

Because housing patterns are a major cause of interdistrict segregation, such a burden of proof is substantial. Housing patterns are typically caused by personal choice, which is not state action, or by the actions of governmental housing authorities, which is not the action of

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189. Id. at 733-35, 745, 753.
192. Id.
"state or local school districts." Consequently, few interdistrict desegregation remedies have been mandated by the federal courts, although several have been attempted on a voluntary basis.

A. School Districts Under Court-Ordered Desegregation

Court-mandated desegregation efforts continue in a number of large metropolitan areas. Many of these are school districts most in need of reforms such as public school choice plans. Because a court order is in effect in these districts, the imposition of school choice reform must comply with the directives of desegregation; in a sense, the conflict between desegregation and school reform is easier to resolve within desegregation districts.

David S. Tatel, a civil rights lawyer specializing in education cases, argues that the desegregation movement and the school reform movement should be "mutually reinforcing." The school reform movement should be able to find helpful allies among courts presiding over desegregation cases, and courts should be able to find in the school reform movement the possible answer to today's most perplexing desegregation dilemma: how to end court supervision of school districts without returning to segregated schools.

In a way, Milliken forced the school reform and desegregation movements closer together. Because court-ordered desegregation of many large urban areas was virtually impossible after Milliken, policy makers devoted to the ideal of desegregation were forced to create voluntary alternatives, some of which have become the touchstones of school choice.

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193. Id.
194. For example, St. Louis and Kansas City, Missouri, have both implemented voluntary, interdistrict desegregation plans.
196. See id. at 62.
197. See id. at 61.
198. Id.
199. Id.
200. See id. at 63. "Today's school desegregation plans contain many of the same programs recommended by school reformers... [including] both intra- and interdistrict choice options." Id.
An interesting example is provided by the St. Louis, Missouri, school system. In 1975, in spite of *Milliken*, the Eighth Circuit, in *United States v. Missouri*, affirmed the district court's authority to order an interdistrict remedy: the consolidation of three adjoining school districts.\(^\text{201}\) Five years later, the Eighth Circuit required St. Louis to develop a more comprehensive interdistrict plan, approving the use of bussing among city and suburban districts.\(^\text{202}\) In response, the plaintiffs and school districts reached a settlement agreement, involving a voluntary interdistrict scheme.\(^\text{203}\) The voluntary plan was approved by the Eighth Circuit, mainly because it was already working effectively.\(^\text{204}\)

In St. Louis, ... the voluntary [interdistrict] transfer goal was to encourage 15,000 inner-city black students to suburban districts, with each receiving district reaching a black student population considerably higher (with percentage goals) than [the 1980 populations]. ... City magnet schools were created to attract white suburban students. By 1989, 18,000 city students had transferred to about 100 suburban schools, and 2,000 county students had chosen to attend city magnet schools.\(^\text{205}\)

The greatest source of potential conflict between desegregation orders and school choice, as well as other reform measures, is the constitutional, court-ordered requirements placed upon desegregating school systems. For example, most desegregation orders require that all or a substantial portion of schools within the system meet specified racial guidelines. “This presents a major obstacle to school reform in large, predominantly minority, urban school systems where continuing residential segregation is likely to lead to resegregation of most schools when uncontrolled choice is introduced.”\(^\text{206}\)

Therefore, school districts under court-ordered desegregation plans that implement open enrollment programs should consider the potential resegregative effects of those programs. However, concerns that public school choice may result in segregation and a return to “separate but equal” may not carry much weight in actual litigation.\(^\text{207}\)


\(^{202}\) Adams v. United States, 620 F.2d 1277, 1295-96 (8th Cir. 1980).

\(^{203}\) Liddell v. Missouri, 731 F.2d 1294, 1300-01 (8th Cir.) (en banc), cert. denied, 469 U.S. 816 (1984).

\(^{204}\) See id. at 1301-06.

\(^{205}\) *Roundtable*, supra note 85, at 35. See also D. Bruce La Pierre, *Voluntary Interdistrict School Desegregation in St. Louis: The Special Master's Tale*, 1987 Wis. L. Rev. 971 (analyzing the implementation of the St. Louis voluntary interdistrict student transfer program and its potential as a solution to school desegregation).

\(^{206}\) Tatel, supra note 195, at 64.

\(^{207}\) Yarbrough, supra note 1, at 28.
Apparently, the "[United States] Supreme Court today views Brown as standing for equality of educational opportunity"208 and not as a mandate for integration.209 In the case of Board of Education of Oklahoma City Public Schools v. Dowell,210 plaintiffs contended that the city's 1984 School Reassignment Plan, which went into effect in 1977 after the district was declared unitary, was resegregating the district. "The school board's Student Reassignment Plan involved a return to some predominantly one-race schools, yet the Supreme Court refused to find the plan to be a per se violation of Brown."211

Furthermore, in Freeman v. Pitts,212 the DeKalb County School System in Georgia requested that the district court lift its order to desegregate because shifts in residential patterns had caused desegregation efforts to fail and the system remained highly segregated. The Court, "explicitly hold[ing] that resegregation resulting from private choices does not implicate a violation of the Equal Protection Clause,"213 stated that "[r]acial balance is not to be achieved for its own sake but is to be pursued only when there is a causal link between an imbalance and the constitutional violation."214 Thus, "if one consequence of a school choice plan would be the re-creation of several mostly one-race schools, the [Supreme] Court would presumably find no per se discrimination."215

The Supreme Court's current "color blindness" mentality necessarily "depend[s] on the elimination of the relevance of domination and subordination—in short, ignorance of real world power relations. [A]ll 'content neutral' definitions of race relations attain their neutrality by ignoring past injustices and the unfair advantages that whites as a group have acquired through racial discrimination and subordination."216 The Supreme Court's attitude and approach minimizes the conflict between desegregation and choice by ignoring reality and denying the inherent importance of integration in schools.

B. School Districts Not Under Court Order

Many school districts and states that are considering or have implemented public school choice plans have never been subject to a court-ordered desegregation plan. In addition, several school districts

209. Id. at 488.
211. Egle, supra note 208, at 499.
213. Egle, supra note 208, at 499.
that were once under court order to desegregate have been declared "unitary" and are no longer operating under federal court supervision. Each of these types of systems presents special concerns and issues when considering the interaction of choice and integration.

Districts and states which have never confronted the issue of desegregation should nevertheless consider and implement integrative ideals and policy for two reasons. First, although such districts may be so racially homogenous that they are unable to racially integrate their district, they still should implement integrative policies addressing some of the same problems relating to resegregation concerns because of the inequalities of socioeconomic segregation. Second, although such districts may have never embraced a sufficient African-American population so as to require black-white desegregation efforts, the continual increase in percentages of other minorities in the United States, and the consequent imminence of a totally multicultural, pluralistic society, calls out for continued efforts to racially integrate education in a manner which will sufficiently prepare students to live in that society.

Socioeconomic segregation exists virtually everywhere, whether or not accompanied by racial segregation. Research indicates that public school choice programs may enhance social stratification because "real choices are actually unavailable to a majority of [choice] students,"217 those of low socioeconomic status.

"Management of choice requires careful planning to avoid the twin perils of choice becoming an end in itself, abandoning the goal of integration, and methods implementing choice leading to new stratification of schools, not in terms of race but in terms of ability, income, and family background."218 Such stratification can have debilitating effects on the education of low-status students. Daniel Levine and Robert Havighurst believe that 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, apparently because the concentration of learning and behavioral problems in low-status schools makes teaching and learning problems particularly difficult there."219 They emphasize that their research was derived both from concentrated

218. Orfield, supra note 169, at 249. School choice regimes are likely to segregate students based on socioeconomic status for three main reasons: (1) choice programs, especially voucher programs, are unlikely to sufficiently fund true choice for all students; (2) problems of inadequate access to information and bureaucratic barriers create a greater obstacle for low socioeconomic students and parents; and (3) some open enrollment plans do not provide transportation. Hershkoff & Cohen, supra note 1, at 18-20.
minority poverty populations and from concentrated poverty schools that were predominantly white. Their conclusion is that "socioeconomic status and concentrated poverty, not race and ethnicity, are the key determinants of low achievement in big-city schools." 220

In addition, low socioeconomic status can be stigmatizing for students, leading to low performance and unequal life chances. 221 Such stigmatization leads not only to low self-esteem, but also initiates a self-fulfilling prophecy of failure for those students. 222

Thus, policy makers in racially homogeneous communities cannot ignore the real possibility that choice might be implemented in such a way as to further stratify their community, significantly affecting the educational opportunities available to certain sectors of the population. In such districts, legislatures and school boards should take similar precautions as those needed in racially heterogeneous districts in order to ensure that students from all socioeconomic classes are receiving a truly equal opportunity in their educational experiences.

Such districts should also embrace integrative ideals because of the likelihood that minority populations other than African-American will develop or are developing in significant numbers in their local area. Hispanic, Asian-American, and Native American populations contribute to the pluralistic character of the United States, and education is responding by an increased attention to multicultural curricula and programs. However, schools and districts should also respond by expanding the traditional integrative ideals for the black and white communities to these other minority populations, especially because of the high improbability that the legal system will provide any remedial measures to fight the segregation of minorities, other than African-American, in the school systems.

"Unitary" districts must deal with somewhat different concerns. A unitary school system has been defined as:

one in which all of the students have equal access to the opportunity for education, with the publicity provided educational resources distributed equally, and with the expectation that all students can acquire a community defined level of knowledge and skills consistent with their individual efforts and abilities. It provides a chance to develop fully each individual's potentials, without being restricted by an identification with any racial or ethnic groups. 223

Realistically, few if any school districts have met this definition, especially those which were formerly under court order to desegregate. However, some school districts have been declared unitary by federal

220. Id. at 276-78.
222. Id. at 374-75, 387.
courts, thereby lifting the court supervision of their desegregation plans.²²⁴

Basically, a unitary district is one which is no longer in violation of the Equal Protection Clause of the Fourteenth Amendment. Therefore, a unitary district which is involved in a public school choice plan must recognize and remember its continuing role in the integration of its schools. However, the continuation of its desegregation plan will no doubt impede the ability of parents within the school district to make unmitigated choices. This impediment looms larger when statewide interdistrict open enrollment is implemented by the legislature. The interaction among the Omaha School District, the Nebraska legislature, the State Department of Education, and the District's parents provides a good example of the conflicts and politics that come into play when such a situation arises.

The Omaha school district's continuing battle against parents and the Department of Education evinces the fact that even a unitary district, with the best of intentions to continue integrating its students, may have a high hurdle to overcome when attempting to balance its desegregation plan against an open enrollment plan. Districts with less of a commitment to integration may waiver from integrative goals, especially with the assistance of parents and factions of the state legislature or bureaucracy. For some, the waning importance of desegregation efforts in the schools may shift from ideology to reality, with the help of school choice advocates and open enrollment policies.

VI. RECOMMENDATIONS FOR REFORM

The first step to reform in any policy area is, if necessary, a change of attitudes. In disputed areas, such as the conflict between public school choice and desegregation, usually each faction has an "attitude" and is attempting to change the viewpoint of the other side. This state of affairs makes for interesting debate and journal articles ad nauseum, but it primarily serves to intensify the argument and lessen the likelihood of true compromise.

For the public school choice and desegregation camps to work together, rather than in opposition to each other, each needs to modify its attitude toward the opposing viewpoint. Public school choice advocates need to change their, and the public's, ambivalence toward continuing efforts at school desegregation and integration. Desegregation advocates need to realize that the concept behind school choice could revitalize education.

The public's viewpoint that segregated schools are workable stems from a variety of factors. One of those factors is continued racial prejudice. Although it is currently out of vogue to admit racial animus

²²⁴ For example, Oklahoma City, Oklahoma, and Omaha, Nebraska.
and prejudicial motivations, those motivations continue to exist throughout all factions of society and within all races. In some ways, it is more dangerous that such admissions have become unacceptable in our society; at least, in the past, advocates of racial justice knew who their enemies were. Now, every public figure claims to be a friend to "diversity," but how they vote on policy issues may actually boil down to one thing, racist tendencies.

Evidence abounds that racial prejudice continues in the American culture, and not just within the white race. Obvious examples are the continuation and proud declarations of groups such as the Ku Klux Klan. Less obvious is the racial animus that some minorities feel toward the "oppressive white race" and the unspoken motivations of hundreds of Americans who, on a daily basis, make decisions based on racial reasons. Those decisions may be as large as choosing a school for one's children, choosing to leave a job, or choosing to buy a home in a certain neighborhood, or as small as deciding to ride the other elevator or looking back when someone is walking behind you.

Such evidence of continuing racial prejudice, large and small, builds the case for continuing desegregation efforts in schools. Placing children of different races together has changed the attitudes of the next generation and made them more accepting of other races by realizing both the similarities and differences which exist among people of the same and of different racial and ethnic backgrounds.

Desegregation was initially an access issue: the NAACP wanted access to white schools because their lawyers knew that gaining access to white schools would gain them the quality of education available in white schools. The focus was, in large part, on equality of educational opportunity. But one cannot deny that, even though desegregation has not provided truly equal educational opportunities, it has helped improve the pluralistic nature of the United States and has forced racism into the shadows.

Segregated schools are not only considered workable by the public; some people have in fact advocated such schools in the form of all-black male academies. Many African-American parents and educators believe that such schools "instill within Black children valuable qualities and characteristics that White institutions [are] not providing [and] provide[ ] a sense of belonging, self-worth, spirit, purpose and self-control."

225. Graham, supra note 154. See also KLGER, supra note 158 (analyzing the history of Brown v. Board of Education).
227. Id. (quoting David Hall & George Henderson, Thirty Years After Brown: Looking Ahead, 24 WASHBURN L.J. 227, 234 (1988)).
Others recognize that single-race public academies would mark a return to officially sanctioned, state-enforced segregation. Such segregation "is a particularly virulent expression of political racism. [It] makes a reality of the belief underlying it, that the objects of the discrimination are different—indeed, separated—from humanity, [and it] facilitates more and easier discrimination."228 Single-race schools, therefore, "not only symbolize that there are differences between the races, an obvious and benign observation, but also imply an inferiority and an 'otherness' no amount of role models or self-esteem training can eliminate."229

Notably, choice provides an answer to this debate. Academies which provide for the needs of young, African-American boys can be made available, but open to whites and students of other minorities (and girls) on an equal basis. In all likelihood, such schools will have a high percentage of African-American male students, thereby providing the preferred environment and focusing the curriculum on the appropriate subject matter areas. However, such an environment may also be the best learning environment for certain other students. Through a choice program, the best learning environment for each individual student would be equally available to all students. Furthermore, through a choice program which incorporated such schools as magnet or alternative schools, the choice would be an individual one, not a form of officially sanctioned, state-enforced segregation with its accompanying stigmas.

Similar possibilities, stemming from the choice ideology, are virtually endless, and advocates of desegregation need to realize that the ideology has the potential to revitalize education. Many advocates of desegregation, like the early proponents in the NAACP, continue to see desegregation as an access issue. Their goal is desegregation for the purposes of educational quality and equality, rather than purely for the purpose of improving race relations in society. But there are other ways to accomplish those goals. Choice, combined with a charter or magnet school program and sufficient safeguards against racial, ethnic, socioeconomic, and gender discrimination, can help the educational system realize the goals of quality and equality.

Many advocates of desegregation, especially politicians and lawyers, fail to understand that the problem with the educational system is not simply that it fails to provide for the needs of each student, but


229. Id. See also Drew S. Days III, Brown Blues: Rethinking the Integrative Ideal, 34 Wm. & Mary L. Rev. 53, 60-62 (1992)(discussing proposals to establish public schools and programs exclusively for black students).
that, in its current format, it is unable to provide for the needs of each individual student because of its inherent standardization. Teaching high school from 1982-1985, I acquired first-hand knowledge of the vast differences among students' learning styles, and those differences were not necessarily correlative with their racial, ethnic, or socioeconomic background. In fact, my ninth-grade English students were "tracked," but that ability grouping told me nothing of their learning styles. While a few students learned best from reading, some learned better visually, some aurally, and some through hands-on experience. These learning styles spanned the students in each of the three ability groups. My goal was to teach using each of the several methods each week in hopes of reaching and teaching each student, at least in part, on a consistent and regular basis. If students could be grouped, not by ability, but by learning style, the educational process would be much more effective in dispersing knowledge and teaching problem solving and critical thinking skills to a greater number of students. Choice, combined with a charter or magnet school program and with sufficient safeguards against racial, ethnic, socioeconomic, and gender discrimination, can help the educational system realize those goals.

How does a school system provide those safeguards? The legislation or school board policy behind the implementation of choice programs must be carefully worded to protect against discrimination and to continue the goal of integration. State legislatures can take a lesson from the experience of the Nebraska Unicameral. Current legislation in several states incorporates language of intent focused on widespread choice and educational opportunity. Such language could be read as minimizing the legislative commitment to desegregation efforts. Language of intent should not only include a continued commitment to integration, but also must clarify the priority of the legislative goals. Are they equally important? If so, then say so. If a state includes a unitary district, then the goal of continued integration, and efforts to avoid resegregation, should take priority (at least in that district), and the legislature should say so.

As legislation or board policy is placed into action, and choice programs are implemented, school districts can take a lesson from the successes and the failures of choice programs that are currently in operation throughout the country. In order to avoid racial, ethnic, or socioeconomic segregation or resegregation, school districts must employ tactics which will ensure true choice.

To avoid the inherent advantage of choice for upper- and middle-income families, choice programs must provide adequate information about the choices available and must provide it in a way that is accessible and readable for all members of the community. In order to allow less educated parents to understand and conquer the workings of the educational bureaucracy, choice programs must provide not only
information, but assistance in completing the requisite forms, meeting the appropriate deadlines, and fighting the administration, when necessary. In order to allow non-English speaking parents and students equal opportunity to choose, choice information must be provided in multiple languages. Choice programs must also, if necessary for equitable access to the program, provide transportation for students of low socioeconomic status.

Choice programs which merely “go through the motions” of providing equal opportunities to participate in the choice program will produce programs that are inherently unfair to students of color or of low socioeconomic status. To reach these students and their parents, choice programs must truly enter into the community and communicate with all parents. Parents of low socioeconomic status, those who are less educated or illiterate, and those with low self-esteem will not come forward easily in order to participate.

Usually, choice programs which merely “go through the motions” are those based on the market theory. For choice to really work, its advocates must dump the market theory. Using a market basis for the theoretical underpinnings of a choice plan infects the entire program with inequity and with a false sense of control.

The average person has about as much control over the market as a one-year-old has over his bowels. As Robert L. Hale recognized, the market is not voluntary, it is coercive, and certain societal constructs (such as the public/private distinction) simply obscure that coercion. In this capitalistic society, for consumers to have any market control, they must band together and form large groups to fight corporate forces. In addition, the government must continually intervene to protect them.

Reliance on pure market theory reveals just how naive its advocates are concerning the unequal power relationship between the average (or below average) consumer and the omnipotent big business. It also indicates how unaware market theory advocates are about the nature of education and schools.

A market competition among schools would not provide students with different approaches to education to meet their differing needs; rather, as stated earlier, it would provide students with different qualities of the same product. In fact, individual schools may internally diversify their curriculum and extracurricular activities even more, in order to attract as many “customers” as possible. The need in education is to concentrate efforts to fulfill the educational needs of particular types of students and their individual learning styles, not to

further disperse each school's resources into an ever-increasing multitude of goods and services.

But policymakers, many of whom have a business background, do not understand the nuances of effective education. They need to learn more about schools, not just the schools within their constituencies, but all schools, by interacting with educators and placing more trust in their expertise.

"Choice," in and of itself, is not an educational reform, it is an American value, which is precisely why the idea of choice has received so much support from so many different people. The appeal of choice revolves around control, and choice advocates provide a deluded vision of personal control. But "choice" can work as a part of educational reform, not because it gives the parent control over the educational system, but because it advocates, indeed, it requires, participation by parents in their children's education.

A child's education is a combined effort of the individual and the government. As government control of and intervention into education has continually expanded, parents' roles in their child's education has consequently and inevitably lessened. This ramification is unfortunate, because parental involvement is key to a child's academic success. Choice gives some of that control back to the parent. And like any other endeavor, once the parent has some "ownership" over the schools, once she has "bought into" her child's education, then the student will benefit from the increased attention and effort on the part of the parent.

Educational systems need parents to get involved if the schools are going to effectively educate children. But parental input and choice cannot be the only consideration. Governmental involvement for the benefit of society as a whole historically has, and continues to be, an important aspect of public education in the United States.

The problem with the historical conflict between education for society and education for the individual is that each aspect tries to overpower the other. The debate about the purposes of education, societal or individual, does have a logical answer: both. If each component of education would try to balance with, rather than overpower, the other, the American school system could progress rather than regress or stagnate.

Public school choice and desegregation provide the perfect elements for this balance to occur. Each type of reform epitomizes its particular purpose: parental choice of a school tailored to the child's need is the ultimate expression of individuality, and true societal integration and equal opportunity is the most pressing need of our multicultural, pluralist society.

In fact, these two key elements of education should not only be balanced, they should be focused upon at the exclusion of all the other
myriad responsibilities that have been given to the American educational system. All individual needs, including athletics, extracurricular activities, special assistance, could be addressed by individual charter or magnet schools, to the extent they are needed, or by parents themselves. Other societal concerns could be addressed through other facets of the legislative arena; and perhaps such a shift of responsibility would force federal, state, and local policy makers to attack those concerns, rather than continuing to pass off all the hard questions to other institutions, like schools.

With careful planning, public school choice and desegregation not only balance, they complement each other. Choice can help facilitate desegregation efforts, and desegregation concerns can help ensure real choices for all parents in the United States.

VI. CONCLUSION

The idea of school choice should continue to be explored and expanded throughout most of the country, not based purely on a market theory, but because it will best serve the individual needs of the greatest number of students. It is the most promising innovation for increasing students' achievement and consequently their healthy self-esteem.

However, with the increasing popularity of school choice plans and the focus on competition and individuality, concerns for equality of educational opportunity and racial and socioeconomic integration must remain at the forefront. While all educators agree that continued improvement of the public schools is an important goal, such improvement should only be acceptable in our society if offered on a truly equal basis. And until the doctrine expounded in Brown v. Board of Education231 is reversed or overruled by the United States Supreme Court, truly equal education can only be provided in a desegregated school setting.