

THE “COMPELLING GOVERNMENT INTEREST” IN SCHOOL DIVERSITY: REBUILDING THE CASE FOR AN AFFIRMATIVE GOVERNMENT ROLE

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INTRODUCTION

The strong endorsement of the “compelling government interest” in school integration by five members of the Supreme Court in *Parents Involved in Community Schools*¹ stands in surprising contrast to the Obama Administration’s tepid support for affirmative measures to expand school diversity initiatives. Although the Department of Education formally endorsed the Supreme Court plurality’s position on school integration in a 2011 guidance to local districts,² its funding programs have not followed suit. Since 2009, spending on magnet schools, the only Department of Education funding program that supports school integration, has declined relative to other departmental programs, while funding for charter schools, which are generally even more segregated than regular public schools, has expanded.³

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1. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring); *id.* at 803 (Breyer, J., dissenting).

2. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (Dec. 2011), available at <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf>.

3. NAT’L COAL. ON SCH. DIVERSITY, FEDERAL SUPPORT FOR SCHOOL INTEGRATION—A STATUS REPORT 8–9 (June 2012, updated April 2014), available at www.school-diversity.org/pdf/DiversityIssueBriefNo4.pdf. See also *infra* note 120. A new Department of Education guidance letter on the obligations of charter schools to comply with federal civil rights laws emphasizes the benefits of school diversity and outlines steps charter school operators can take to increase diversity. “Dear Colleague” Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. (May 14, 2014), available at www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf. The language on diversity in the new guidance is not mandatory, however, and the guidance letter does not offer any new funding incentives.

At the same time, the Department's largest competitive grant programs, "Race to the Top" and "Investing in Innovation," have eschewed any mention of school integration as a goal or priority.⁴

The Office for Civil Rights' (OCR) 2012 annual report illustrates the Department of Education's reluctance to affirmatively promote school integration: "The choice as to whether to pursue diversity and reduce racial isolation lies with educational and civic leaders. OCR is ready to help educational leaders who make this choice."⁵ The Department essentially takes the position that it will not intervene to help severely segregated districts except upon request. Yet, the Department generously funds segregated districts and regions, as well as the states that support them, without providing any encouragement or incentive to address these harmful local conditions. This Article will explore the gap between the "compelling government interest" in school integration announced in *Parents Involved* and the Obama Administration's education policies. I will argue that the federal government has both the legal authority and the obligation to take a more proactive stance in promoting racial and economic integration in schools.

A. Parents Involved: *The "Compelling Government Interest" in School Diversity and the Government's Response*

In striking down voluntary school integration plans in Seattle and Louisville, the *Parents Involved* decision significantly narrowed the use of individual racial classifications to achieve voluntary K-12 integration.⁶ Simultaneously, a different majority of the Court announced for the first time that school diversity and reduction of racial isolation are "compelling government interests" that justify the use of non-discriminatory measures to achieve racial integration.⁷ Although the Court had previously opined on the importance

4. NAT'L COAL. ON SCH. DIVERSITY, *supra* note 3, at 3–5. See also *infra* Part III. This Article uses the terms "school diversity," "reduction of racial isolation," and "school integration" interchangeably, though the Court in *Parents Involved* chose the two former terms in its recitation of the importance of integration. See, e.g., *Parents Involved*, 551 U.S. at 783, 797–98. While some potential definitional differences among these three terms exist, they are not germane to this Article.

5. U.S. DEP'T OF EDUC., OFF. FOR CIVIL RIGHTS, TITLE VI ENFORCEMENT HIGHLIGHTS 17–18 (2012), available at <http://www2.ed.gov/documents/press-releases/title-vi-enforcement.pdf>.

6. *Parents Involved*, 551 U.S. at 788–89.

7. The 5-4 opinion of the Court in *Parents Involved* struck down the individualized use of race as a factor in assigning students to schools in non-court ordered integration plans in two school districts (Louisville and Seattle). *Parents Involved*, 551 U.S. at 711. However, a separate 5-4 majority, led by Justice Kennedy's concurring opinion and supported by Justice

of school integration, this was the first time the Court had assessed a state or local government’s efforts to voluntarily promote school diversity in K-12 education in the absence of a desegregation liability finding.⁸

Consistent with the Court’s decision in *Parents Involved*, the Secretary of Education and the Attorney General issued a high-level “guidance” document in December 2011 reinforcing the Supreme Court majority’s view. The joint *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*⁹ summarized the compelling government interest found by the Court and explained that, “[p]roviding students with diverse, inclusive educational opportunities from an early age is crucial to achieving the nation’s educational and civic goals. . . . Racially diverse schools provide incalculable educational and civic benefits by promoting cross-racial understanding, breaking down racial and other stereotypes, and eliminating bias and prejudice.”¹⁰

Regarding the government’s responsibility to reduce racial isolation, the joint K-12 Guidance states:

Conversely, where schools lack a diverse student body or are racially isolated (i.e., are composed overwhelmingly of students of one race), they may fail to provide the full panoply of benefits that K-12 schools can offer. The academic achievement of students at racially isolated schools often lags behind

Breyer’s dissent, affirmed the importance of racial integration as a compelling government interest, and described the use of a variety of race conscious methods for achieving school integration that do not involve discrimination against individual students. These methods include drawing of school boundary lines, school siting, development of integrated magnet schools, use of student socioeconomic status in student assignment, and affirmative marketing and targeted recruitment. *Id.* at 788–89 (Kennedy, J., concurring). Justice Kennedy’s opinion also left open the possibility of individualized use of race in future, narrowly tailored ways, see *Parents Involved*, 551 U.S. at 798, but the case’s general policy message is that future efforts to achieve racial integration should try to avoid individual student assignment based on race. *Id.* at 788–89; see also U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., *supra* note 2. The majority’s endorsement of race-conscious efforts to promote school integration has been left relatively unscathed by related opinions in *Ricci v. New Haven*, 557 U.S. 557 (2009) and *Fisher v. Texas*, 133 S.Ct. 2411 (2013). See Elise C. Boddie, *The Way Forward: Racial Integration After Ricci, a Response to Michelle Adams*, 96 IOWA L. REV. BULL. 100, 108–10 (2011); Joint “Dear Colleague” Letter, U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV.; U.S. DEP’T OF EDUC., OFF. FOR CIVIL RIGHTS (September 27, 2013), www2.ed.gov/about/offices/list/ocr/letters/colleague-201309.html.

8. The Supreme Court’s prior comments on the benefits of K-12 school integration arose in contexts relating to state or school district liability for segregation or the crafting of a remedy for a judicial finding of segregation. See, e.g., *Swann v. Charlotte–Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472–73 (1982) (citing additional cases).

9. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., *supra* note 2.

10. *Id.* at 1.

that of their peers at more diverse schools. Racially isolated schools often have fewer effective teachers, higher teacher turnover rates, less rigorous curricular resources (e.g., college preparatory courses), and inferior facilities and other educational resources. Reducing racial isolation in schools is also important because students who are not exposed to racial diversity in school often lack other opportunities to interact with students from different racial backgrounds.¹¹

These affirmative statements express the Executive Branch's policy judgment,¹² but they are presented without much legal citation apart from *Parents Involved* and *Grutter v. Bollinger*.¹³ Justice Kennedy's key legal conclusion in *Parents Involved* is likewise devoid of citations other than to earlier Court opinions:

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population.¹⁴

Justice Breyer's dissent in *Parents Involved* is a more detailed exploration of the compelling government interest in school integration,

11. *Id.* The Joint Guidance's summary of the harms of segregation is consistent with decades of social science research, most recently summarized in GARY ORFIELD ET AL., E PLURIBUS. . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS 7–8, available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus. . . separation-deepening-double-segregation-for-more-students>:

The consensus of nearly sixty years of social science research on the harms of school segregation is clear: separate remains extremely unequal. Schools of concentrated poverty and segregated minority schools are strongly related to an array of factors that limit educational opportunities and outcomes. These include less experienced and less qualified teachers, high levels of teacher turnover, less successful peer groups and inadequate facilities and learning materials. There is also a mounting body of evidence indicating that desegregated schools are linked to important benefits for all children, including prejudice reduction, heightened civic engagement, more complex thinking and better learning outcomes in general.

See also Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 404–09 (2012) (summarizing research on harms of racial and poverty isolation).

12. Though, as noted in the discussion in Part III, below, the Executive Branch has yet to implement this policy.

13. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., *supra* note 2 (text at notes 8-9, citing *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

14. *Parents Involved*, 551 U.S. at 797–98 (Kennedy, J., concurring).

relying not only on prior court opinions¹⁵ but also on social science literature expounding the benefits of integration.¹⁶

How far does Justice Kennedy’s “moral and ethical obligation” to avoid racial isolation extend? Does the obligation flow primarily from Supreme Court case law, does it derive from an evolving consensus in the social sciences,¹⁷ or does it also have a statutory basis in Title VI and other federal law? In addition to its value as a justification for non-individualized, race-conscious remedial efforts by state and local governments, does the compelling interest identified in *Parents Involved* also suggest an affirmative duty on the part of the federal government? And if so, how far does this affirmative duty extend, and how might it be enforced?

This Article will attempt to answer these questions by exploring the potential legal sources of the federal government’s powers and duties with respect to avoiding racial isolation in the public schools and to the government’s affirmative obligation to promote integration. Part I will explore sources of legal authority for affirmative school diversity policies at the federal executive level. Part II will propose a new, more proactive approach to assessing state and local segregation impacts that the Department of Education could adopt within its existing Title VI authority. Part III will identify non-prescriptive funding incentives that the Department could include in its competitive grant programs to support school diversity. Finally, Part IV will suggest data metrics the Department could include in its data reporting programs to incentivize performance by state governments and local districts. In sum, the federal government has multiple tools at its disposal to advance the promise of *Brown* and *Parents Involved*. Its continuing failure to assert these inherent powers will inexorably result in increasing segregation at the local level.

15. Justice Breyer finds the compelling interest in school integration grounded, in part, on “a well-established legal view of the Fourteenth Amendment . . . as forbidding practices that lead to racial exclusion.” *Id.* at 829 (Breyer, J., dissenting).

16. Citing multiple recent articles and treatises, Justice Breyer identifies three “essential elements” to the interest in school integration: the “historical and remedial element,” the “educational element: an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools,” and the “democratic element: an interest in producing an educational environment that reflects the ‘pluralistic society’ in which our children will live.” *Id.* at 838–40.

17. Lia Epperson has explored some of the ramifications of this approach in *The Promise and Pitfalls Of Empiricism In Educational Equality Jurisprudence*, 48 WAKE FOREST L. REV. 489 (2013).

I. SOURCES OF AUTHORITY FOR AFFIRMATIVE SCHOOL INTEGRATION POLICIES AT THE FEDERAL AGENCY LEVEL

As illustrated by the citations underlying the plurality opinions in *Parents Involved*, the most direct source of legal authority for school integration has come from federal enforcement against school districts engaged in de jure or intentional segregation practices.¹⁸ This historical focus on enforcement is also reflected in the policies of the Department of Education, where school integration efforts are still largely siloed in its civil rights enforcement division. For example, the Department of Education's only mention of school diversity in its proposed Strategic Plan for 2014–2018 is in the section of the plan covering civil rights enforcement.¹⁹

While federal enforcement continues to be important, especially in monitoring longstanding school integration plans in historically segregated southern school districts,²⁰ it has diminishing value as a basis for addressing deepening interdistrict school segregation in the 21st Century.²¹ To promote the government's "compelling interest" in the reduction of racial isolation, the Department of Education must move beyond the limited frame of enforcement and acknowledge that meaningful school integration efforts do not necessarily stop at the school district boundary line.

In this Section, I will suggest that the federal government has at least four potential sources of legal authority to promote school integration on the state and local level, without requiring any

18. School desegregation claims have historically been brought under both the 14th Amendment and Title VI of the Civil Rights Act of 1964. While these cases have most often been brought by schoolchildren and their parents, the federal government has also exerted its authority under Title VI to investigate and bring enforcement claims against state and local governments. See Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725, 764–68 (2010); Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 146 (2008).

19. U.S. DEP'T OF EDUC., DRAFT STRATEGIC PLAN FOR FISCAL YEARS 2014–2018 30–31 (2013), available at www2.ed.gov/about/reports/strat/plan2014-18/draft-strategic-plan.pdf. Comments on the plan from the National Coalition on School Diversity can be accessed at http://www.school-diversity.org/pdf/NCSD_comments_on_ED_strategic_plan_10-4-13.pdf.

20. Indeed, hundreds of old court orders and consent decrees remain in effect around the country and serve as the foundation for ongoing enforcement efforts by the Department of Justice and the Department of Education's Office for Civil Rights. See Le, *supra* note 18; Epperson, *supra* note 18. For a review of extant court orders, see Sean F. Reardon et al., *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL'Y ANALYSIS & MGMT. 876 (2012), and accompanying database at <http://cepa.stanford.edu/data/district-court-order-data>.

21. See, e.g., JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* (2010).

additional legislative authority.²² These sources include Title VI of the Civil Rights Act of 1964; the Elementary and Secondary Education Act; the Department of Education’s founding legislation; and the Convention on the Elimination of All Forms of Racial Discrimination, an international treaty ratified by the Senate in 1994.

A. Title VI

Title VI of the Civil Rights Act of 1964 gave the federal government new power to address segregation at the state and local level.²³ Title VI prohibits recipients of federal funding from discriminating on the basis of race, color, or national origin.²⁴ It is enforceable by private parties or directly by the federal government, both in court and through administrative complaints filed with the appropriate federal funding agency.²⁵ The Title VI Coordinating Regulations²⁶ require each federal department to create regulations barring discrimination by grantees, including an administrative mechanism to investigate and adjudicate complaints.²⁷ Title VI prohibits both intentional discrimination and policies or practices that have a discriminatory impact;²⁸ however, since 2001, private claims of disparate impact under Title VI may no longer be brought in court but must be filed in an administrative complaint through the appropriate agency.²⁹

Although the original context for Title VI was the continuing existence of “de jure” Jim Crow segregation ten years after the 1954

22. It should be noted here that Congress is also fully empowered to pass legislation promoting school integration. For a fuller discussion see Lia Epperson, *Legislating Inclusion*, 6 HARV. L. & POL’Y REV. 91 (2012). However, this Article focuses on the existing powers the Department of Education has been reluctant to fully exercise.

23. See generally CLAY RISEN, *THE BILL OF THE CENTURY* 250–251 (2014).

24. Section 601 of the Act provides that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 742, (*codified at* 42 U.S.C. § 2000d (2006)).

25. See generally U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., TITLE VI LEGAL MANUAL (1998) (amended Jan. 11, 2001), available at http://www.justice.gov/crt/about/cor/coord/vi_manual.php.

26. 28 C.F.R. §§ 42.401–42.415

27. 28 CFR § 42.408(a)

28. See generally *Guardians Assn. v. Civil Serv. Comm’n of N.Y.*, 463 U.S. 582 (1983); *Lau v. Nichols*, 414 U.S. 563 (1974).

29. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001). Importantly, *Sandoval* did not question the validity of the Title VI disparate impact regulations—the decision only addressed the question of an implied right of action to enforce the regulations in court. See U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., TITLE VI LEGAL MANUAL (1998) (amended Jan. 11, 2001), available at http://www.justice.gov/crt/about/cor/coord/vi_manual.php.

Brown decision,³⁰ Title VI expressly reached beyond “de jure” policies in the South. As President Kennedy noted in his June 1963 speech previewing the introduction of Title VI in Congress, “This is not a sectional issue. Difficulties over segregation and discrimination exist in every city, in every State of the Union, producing in many cities a rising tide of discontent that threatens the public safety.”³¹ Indeed, the distinction between “de jure” and “de facto” racial segregation was not as clear in 1964 as it has since become. As Justice Marshall noted in *Guardians Association v. Civil Services Commission of New York City*, “when the agencies first interpreted [Title VI] in 1964, 12 years before *Washington v. Davis*, . . . the Equal Protection standard could easily have been viewed as one of discriminatory impact.”³²

More specifically, amendments in 1970 to Title VI and the Elementary and Secondary Education Amendments made it clear that de facto school segregation was as much of a concern for Title VI enforcement as formal de jure segregation:

It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation.³³

Although Congress cut back on Title VI enforcement in the mid-1970s, these later amendments were limited to restrictions on

30. See generally ROBERT D. LOEY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964 (1990). Although school segregation and educational inequity was a major original focus of Title VI, it was also intended to address segregation in hospitals and other institutions. See David Barton Smith, *Racial and Ethnic Health Disparities and the Unfinished Agenda of the Civil Rights Era*, 24 HEALTH AFFAIRS 317 (2005).

31. President John F. Kennedy, Address on Civil Rights (June 11, 1963), available at <http://millercenter.org/president/speeches/detail/3375>.

32. 63 U.S. 582, 622 (Marshall, J., dissenting) (citations omitted). See also Owen Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965); Prof. Owen Fiss, Presentation at the Annual Judicial Conference Second Judicial Circuit of the United States: The Inappropriateness of the Intent Test in Equal Protection Cases (Sept. 11, 1976), in 74 F.R.D. 219, 276 (1977); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 544 (1977) (“Considerable uncertainty existed prior to *Washington* in regard to whether the principal element of a constitutional claim of racial discrimination was discriminatory purpose or simply discriminatory effect.”).

33. Act of Apr. 18, 1970, Pub. L. No. 91-230, 84 Stat. 121 (codified at 42 U.S.C. § 2000d-6 (2006)); see also *Guardians*, 463 U.S. at 620 (Marshall, J., dissenting) (citing § 2000d-6).

“forced busing” as a remedy to a Title VI violation³⁴—they did not undermine the substantive scope of the statute.

Title IV of the 1964 Civil Rights Act, which created regional Equity Assistance Centers (EACs)³⁵ to assist in the implementation of Title VI, provides further evidence of Title VI’s broad reach and Congress’s expectation that the Department of Education would take an affirmative, proactive role. Funded by the Department of Education, EACs provide services to states, school districts, and schools on desegregation-related issues.³⁶ Consistent with Title VI’s general intent to address discriminatory effects of segregation, regardless of legal origin, most of the Centers were located outside regions with de jure school segregation.

The legislative history of Title VI is replete with references to segregation policies and practices, which are usually subsumed under the term “discrimination” in the Congressional Record.³⁷ It was understood that the new statute would eliminate perennial disputes over segregation in every federal program that came up for reauthorization or annual funding.³⁸

Importantly, Section 102 of Title VI also “authorizes and directs” the Department of Education to advance Title VI’s non-discrimination goals in a manner consistent with the goals of its education

34. See *Le*, *supra* note 18, at 739–42 (discussing the history of the federal commitment to school integration). The Equal Opportunities Act of 1974 is still codified at 17 U.S.C. § 1713, and reads:

No court, department, or agency of the United States shall, pursuant to section 1713 of this title, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student.

35. Pub. L. No. 88-352, §§ 401, 403–04, 406, 78 Stat. 246–48 (codified as amended at 42 U.S.C. §§ 2000c, 2000c-2, 2000c-3, 2000c-5). Originally called “Desegregation Assistance Centers,” under 34 C.F.R. Part 272, the EACs were described generally by the statute as training institutes affiliated with institutions of higher education, to assist in “technical assistance to [applicants] in the preparation, adoption, and implementation of plans for the desegregation of public schools.” 42 U.S.C. §§ 2000c-2, 2000c-3.

36. *Training and Advisory Services Equity Assistance Centers*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/programs/equitycenters/index.html> (last modified Mar. 8, 2013).

37. See generally Mitchell A. Horwich, *Title VI of the 1964 Civil Rights Act and the Closing of a Public Hospital*, 1981 DUKE L.J. 1033 (1981); U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., *supra* note 25.

38. Horwich, *supra* note 37. For example, one Congressman stated that “Title VI enables the Congress to consider the overall issue of racial discrimination separately from the issue of the desirability of particular Federal assistance programs. Its enactment would avoid for the future the occasion for further legislative maneuvers like the so-called Powell amendment.” 110 CONG. REC. 2468 (1964). The “Powell Amendment” was an anti-segregation rider placed separately on each spending bill by Congressman Adam Clayton Powell prior to the enactment of Title VI, forcing repeated votes on the issue.

programs.³⁹ As discussed below,⁴⁰ this provision is not just the basis for adoption of administrative enforcement regulations; it also authorizes and directs the agency to engage in more far-reaching efforts to address the segregated educational conditions that were a catalyst for the original statute.

B. *The Elementary and Secondary Education Act*

The Elementary and Secondary Education Act of 1965 (ESEA)⁴¹ also provides support for the federal government's interest in and its authority to promote school integration. The ESEA, like Title VI, was designed to address unequal educational conditions and funding needs. Title I of the Act provides supplemental funding to schools with substantial numbers of poor children.⁴²

Consistent with the mandate to assist low income children concentrated in poor schools, the ESEA also recognized the importance of school integration, and the original statute directly tied funding to compliance with Title VI desegregation requirements.⁴³

In addition to tying Title I funding to desegregation compliance, the ESEA has also included affirmative support for magnet schools and interdistrict school integration programs.⁴⁴ In the section authorizing the Magnet Schools Assistance Program (MSAP), Congress declared that “[d]esegregation efforts through magnet school programs are a significant part of our Nation’s effort to achieve voluntary desegregation in schools and help to ensure equal educational opportunities for all students” and that “[i]t is in the best interests of the United States” to “ensure that all students have equitable access to a high quality education that will prepare all students to function well in a technologically oriented and a highly competitive economy comprised of people from many different racial and ethnic backgrounds.”⁴⁵ The ESEA also expressly

39. 42 U.S.C. § 2000d-1.

40. See *infra* Part II.

41. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

42. 20 U.S.C. § 6314(a)(1).

43. 42 U.S.C. § 2000d-5. This section, which was added to Title VI by the ESEA Amendments Act in 1966, includes hearing procedures for school districts that have had Title I funding suspended for non-compliance with Title VI. *Id.*

44. See 20 U.S.C. § 7231 (magnet schools); 20 U.S.C. § 7225 (voluntary public school choice); see also 34 C.F.R. §§ 280.1–280.41 (magnet schools).

45. 20 U.S.C. § 7231(a)(4) (2006). In the most recent reauthorization of this section, Congress reiterated that “Magnet schools are a significant part of *the Nation’s effort to achieve voluntary desegregation* in our Nation’s schools.” *Id.* at § 7231(a)(1) (emphasis added).

states that the MSAP’s purpose includes “the elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools with substantial proportions of minority students.”⁴⁶

The 2002 amendments to the ESEA (titled “No Child Left Behind”) included a school transfer option for students in persistently failing schools.⁴⁷ While this provision does not expressly mention school integration, it addresses the severe resource and opportunity disparities that are associated with economic and racial segregation and adopts a classic desegregation remedy: voluntary transfer to a higher-performing school.⁴⁸

More broadly, a central goal of the entire ESEA is alleviating the impacts of school-based poverty concentration. For example, the section of Title I authorizing targeted grants to high poverty schools notes that “[s]tudies have found that the poverty of a child’s family is much more likely to be associated with educational disadvantage if the family lives in an area with large concentrations of poor families.”⁴⁹ Similarly, the ESEA’s “Voluntary Public School Choice” program does not expressly mention racial or economic diversity, but it prioritizes proposals aimed at reducing racial isolation.⁵⁰

C. The Department of Education Organization Act

The Department of Education became an independent, cabinet-level department with the Department of Education Organization Act in October 1979.⁵¹ According to the Act, a key purpose of the

46. 20 U.S.C. § 7231(b)(1) (2006).

47. No Child Left Behind Act of 2001 (NCLB), Pub. L. No. 107-110, § 1116(b)(1)(e), 115 Stat. 1425 (codified at 20 U.S.C. § 6316(b)(1)(E)–(F) (2006)).

48. See William L. Taylor, *Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity*, 81 N.C. L. REV. 1751, 1755–62 (2003). The voluntary transfer provisions of NCLB also recognize that some urban districts may have no schools eligible for transfer and permit transfers across school district lines, though it is unclear how many families have actually taken advantage of this option. 20 U.S.C. § 6316(b)(11).

49. 20 U.S.C. § 6336(a)(7) (2006).

50. 20 U.S.C. § 7225c (2006):

In awarding grants under this subpart, the Secretary shall give priority to an eligible entity— (1) whose program would provide the widest variety of choices to all students in participating schools; (2) whose program would, through various choice options, have the most impact in allowing students in low-performing schools to attend higher-performing schools; and (3) that is a partnership that seeks to implement an interdistrict approach to carrying out a program.

51. Pub. L. 96-88, 93 Stat. 688; see also 20 U.S.C. § 3402 (Congressional declaration of purpose).

Department is “to strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual.”⁵² At the time of the Department’s founding, this commitment to equal educational opportunity was widely understood to encompass school desegregation. The Senate Report accompanying the Bill reflects this focus:

The purpose[s] outlined in the bill highlight the view of the Committee with respect to its intent in establishing the Department: . . .

(2) To continue and strengthen the Federal commitment to ensuring access by every individual to equal educational opportunities. Equal educational opportunity has been and must remain a major education goal of the Federal government. The Federal government has acted to ensure equality of educational opportunity for every American regardless of race, sex, age, ethnic heritage, economic disadvantage, or handicapped condition:

Racial minorities – Through compliance efforts, technical assistance, and financial assistance the Federal government has promoted racial desegregation.⁵³

Similarly, the Federal Interagency Committee on Education for the Committee on Governmental Affairs⁵⁴ described how the Bill’s equal-opportunity education goals were linked to desegregation and promotion of racially integrated school attendance:

To assure equality of educational opportunity for each individual . . . the Federal government has pursued three basic strategies. The first is the compliance effort relating to both

52. 20 U.S.C. § 3402(1).

53. S. REP. NO. 96-49, at 12–13 (1979).

54. The function of this Committee is:

to study and make recommendations for assuring effective coordination of Federal programs, policies, and administrative practices affecting education. The membership includes the Secretary of Education, or his designee, who chairs the Committee, and senior policy making officials from those Federal agencies, commissions, and boards that the President may find appropriate. OMB, the Council of Economic Advisors, the Office of Science and Technology policy and the Domestic Policy Staff designate a staff member to attend the Committee’s meetings. The Secretary recommends member agencies to the President.

Federal Interagency Committee on Education, U.S. DEP’T OF EDUC., www2.ed.gov/about/bdscomm/list/com.html#fice (last modified Nov. 22, 2013).

educational access and employment. Second, technical assistance is provided to school systems and institutions undergoing desegregation. Finally, financial assistance is available under certain programs to ease problems resulting from desegregation and to strengthen historically minority institutions.⁵⁵

Today’s Department of Education appears to recognize that school integration was an integral part of the Department’s founding “equal educational opportunity” mandate, although as discussed below, it has been slow to provide financial support for integration.⁵⁶ Examples of the Department’s acceptance of the integration goal include the 2011 School Diversity Guidance, as well as the Department’s announcement of a 2010 competitive funding priority that permits (but does not require) a preference in discretionary grants programs for “[p]rojects that are designed to promote student diversity, including racial and ethnic diversity, or avoid racial isolation.”⁵⁷ The Department notes that “[t]he intent of this priority. . . is to focus on the racial and ethnic diversity of students in order to promote cross-racial understanding, break down racial stereotypes, and prepare students for an increasingly diverse workforce and society.”⁵⁸

D. The International Convention on the Elimination of All Forms of Racial Discrimination

In 1966, President Johnson signed the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD treaty”);⁵⁹ Congress ratified the treaty in 1994.⁶⁰ The CERD treaty

55. FED. INTERAGENCY COMM. ON EDUC., TOWARD A COMPREHENSIVE FEDERAL EDUCATION POLICY: A PAPER PREPARED BY THE FEDERAL INTERAGENCY COMMITTEE ON EDUCATION, 14–15 (1979).

56. *See infra* Part III.

57. *See* Supplemental Priorities for Discretionary Grant Programs, 75 Fed. Reg. 78486, 78508 (Dec. 15, 2010).

58. *Id.* at 78500.

59. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD], available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

60. For a basic history of the CERD treaty in relation to its affirmative provisions barring de facto segregation, see Michael B. de Leeuw et al., *The Current State of Residential Segregation and Housing Discrimination: The United States’ Obligations Under the International Convention on the Elimination of All Forms of Racial Discrimination*, 13 MICH. J. RACE & L. 337 (2008) and Martha Minow, *Brown v. Board in the World: How the Global Turn Matters For School Reform, Human Rights, and Legal Knowledge*, 50 SAN DIEGO L. REV. 1 (2013).

applies to federal, state, and local governments.⁶¹ The treaty embodies an obligation, both within government programs and in society at large, not only to avoid policies with a discriminatory impact but also to affirmatively take action to address racial disparities in outcomes for people of color.⁶² The CERD treaty expressly commits state parties to “particularly condemn racial segregation” and “undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.”⁶³ The treaty also requires parties to monitor and take affirmative steps to address general societal discrimination and segregation, including the continuing legacy of historical discrimination.⁶⁴

The Geneva-based Committee on the Elimination of Racial Discrimination (the “CERD Committee”) is a “body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its State parties.”⁶⁵ It is located within the Office of the U.N. High Commissioner on Human Rights. State Parties to the Convention are required to submit periodic reports to the CERD Committee, which then reviews treaty compliance and issues findings and recommendations.⁶⁶ The CERD Committee also issues periodic interpretations of the CERD treaty in the form of “General Recommendations.”⁶⁷

In 1995, the CERD Committee issued a General Recommendation emphasizing that the duty to eradicate segregation includes

61. CERD, *supra* note 59, at Art. 2(1)(a), Art. 2(1)(c), Art. 3.

62. “[T]he obligation to eradicate all practices of this nature includes the obligation to eradicate the consequences of such practices undertaken or tolerated by previous Governments in the State or imposed by forces outside the State.” Comm. on the Elimination of Racial Discrimination, General Recommendation XIX on Art. 3 of the Convention: The Prevention, Prohibition, and Eradication of Racial Segregation and Apartheid, 47th Sess., U.N. Doc. A/50/18 (1995).

63. CERD, *supra* note 59, at Art. 2(1)(c).

64. Comm. on the Elimination of Racial Discrimination, General Recommendation XIX on Art. 3 of the Convention: The Prevention, Prohibition, and Eradication of Racial Segregation and Apartheid, 47th Sess., U.N. Doc. A/50/18 (1995), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRCGEN/Rev.6 at 208 (2003), *available at* <http://www1.umn.edu/humanrts/gencomm/genrexix.htm>.

65. *Committee on the Elimination of Racial Discrimination*, OFFICE OF U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/cerd/> (last visited Mar. 25, 2014).

66. CERD, *supra* note 59, at Art. 8, Art. 9.

67. *Id.*

taking affirmative steps to address the impacts of past discrimination and segregation, whether caused by government or private actions.⁶⁸

In its most recent review of U.S. compliance with the treaty,⁶⁹ the CERD Committee specifically expressed concern over the lack of U.S. progress in addressing *de facto* school segregation:

¶ 17: The Committee remains concerned about the persistence of *de facto* racial segregation in public schools. In this regard, the Committee notes with particular concern that the recent U.S. Supreme Court decisions in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) and *Meredith v. Jefferson County Board of Education* (2007) have rolled back the progress made since the U.S. Supreme Court’s landmark decision in *Brown v. Board of Education* (1954), and limited the ability of public school districts to address *de facto* segregation by prohibiting the use of race-conscious measures as a tool to promote integration. (Articles 2 (2), 3 and 5 (e) (v)).⁷⁰

The CERD Committee also urged the United States to “take all appropriate measures—including the enactment of legislation—to restore the possibility for school districts to voluntarily promote school integration. . . .”⁷¹

68. Comm. on the Elimination of Racial Discrimination, General Recommendation XIX on Art. 3 of the Convention: The Prevention, Prohibition, and Eradication of Racial Segregation and Apartheid, 47th Sess., U.N. Doc. A/50/18 (1995):

[W]hile conditions of complete or partial racial segregation may in some countries have been created by governmental policies, a condition of partial segregation may also arise as an unintended by-product of the actions of private persons. In many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race, colour, descent and national or ethnic origin, so that inhabitants can be stigmatized and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds. . . . The Committee therefore affirms that a condition of racial segregation can also arise without any initiative or direct involvement by the public authorities. It invites States parties to monitor all trends which can give rise to racial segregation, to work for the eradication of any negative consequences that ensue, and to describe any such action in their periodic reports.

69. Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination, 72d Sess., U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008).

70. *Id.* An accompanying paragraph criticized the United States’ failure to make progress on housing segregation. *See id.* at ¶ 16.

71. *Id.* at ¶ 17.

In June 2013, the United States submitted its fourth periodic report to the CERD Committee,⁷² and its response to the Committee's critique of U.S. school segregation illustrates the weakness of the Administration's current efforts:

With regard to paragraphs 16 and 17 of the Committee's Concluding Observations, the causes and effects of *de facto* segregation and racial and ethnic disparities in housing and education, as well as in other aspects of American life, are issues of active study and concern. . . .

The United States also actively addresses *de facto* segregation in education—an issue not unrelated to residential segregation. Despite the promise of the *Brown v. Board of Education* decision, far too many students still attend segregated schools with segregated faculties or unequal facilities. . . .

To ensure equal educational opportunities for all children, DOJ and ED enforce laws, such as Titles IV and VI of the Civil Rights Act of 1964 . . .

DOJ/CRT monitors and seeks further relief, as necessary, in approximately 200 school districts that had a history of segregation and remain under court supervision. . . .

The United States also assists school districts in voluntarily ending *de facto* segregation and avoiding racial isolation and in promoting diversity by 1) providing technical assistance . . . and 2) providing financial incentives to school districts for programs like magnet schools . . .⁷³

Unlike Title VI and the ESEA, which authorize but arguably do not require federal support for school integration, the CERD treaty requires affirmative government intervention to address *de facto* school segregation and its resulting harms. Unfortunately, the treaty is not enforceable by private parties against the United

72. See generally PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (June 12, 2013), available at <http://www.state.gov/documents/organization/210817.pdf>.

73. *Id.* at 25–28.

States,⁷⁴ but as the “supreme law of the land”⁷⁵ it provides ample authority for a more forceful federal stance.⁷⁶

The joint 2011 Guidance on K-12 school diversity⁷⁷ acknowledges the federal government’s responsibility to promote school diversity and reduce racial isolation in public schools. And as summarized above, Title VI, the ESEA, the Department of Education Organization Act, and United States treaty commitments all provide ample legal foundation for a more assertive federal role. The next three Sections will introduce several approaches that the Department of Education can use to actively promote school integration using its existing regulatory and funding authority.

II. IMPLEMENTING THE “COMPELLING INTEREST” IN SCHOOL DIVERSITY THROUGH PROACTIVE TITLE VI EQUITY ASSESSMENTS

When Title VI was initially implemented, its regulations established a basic administrative complaint process within each federal agency and generally permitted disparate impact claims pursuant to the regulation-making authority set out in Section 602 of Title VI.⁷⁸ This model was essentially passive: in response to the filing of an individual’s complaint, each agency’s Office of Civil Rights would conduct an investigation, make a probable cause determination, engage in conciliation efforts, and possibly hold a hearing if a settlement could not be reached.⁷⁹

74. See 140 CONG. REC. S7634-02 (daily ed., June 24, 1994) (U.S. Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination), available at <http://www1.umn.edu/humanrts/usdocs/racialres.html>.

75. U.S. CONST., art VI.

76. The government’s treaty obligations to address school segregation also derive from the International Covenant on Civil and Political Rights (Dec. 16, 1966, United Nations General Assembly Resolution 2200A), a separate treaty also ratified by the United States. The government’s failure to address de facto school segregation, and the harms that flow from its inaction, were recently addressed in a “shadow report” submitted to the U.N. Human Rights Committee by the Leadership Conference, PRRAC, and other groups. LEADERSHIP CONFERENCE EDUC. FUND, STILL SEGREGATED: HOW RACE AND POVERTY STYMIE THE RIGHT TO EDUCATION (2013), available at http://civilrightsdocs.info/pdf/reports/Still_Segregated_Education_Fund.pdf.

77. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., *supra* note 2.

78. 42 U.S.C. § 2000d-1.

79. See U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., *supra* note 25. A less formal “compliance review” process also provides agencies a way to assess concerns about local Title VI compliance, in the absence of a formal complaint, but like the formal complaint process, these reviews generally occur after funding has been awarded, and are often triggered by problems identified by local advocates. See *id.*; 28 CFR § 42.407(c).

Until recently, this complaint-driven approach to Title VI was the norm, and the federal government's obligation to affirmatively address disparate impact discrimination and racial disparities under Title VI remained inchoate. But in the last decade, several federal agencies have taken a more proactive approach and have required state and local governments to assess the racial impacts of their policies and practices before adopting them. These federal "equality directives"⁸⁰ place "proactive and affirmative duties on federally funded actors,"⁸¹ including the duty to conduct racial impact analyses and to assess less discriminatory alternatives prior to major planned agency actions.⁸² Title VI regulations and guidance at the Federal Transit Administration, the Environmental Protection Agency, and the Department of Agriculture exemplify this new approach.⁸³

The Department of Education, however, has not yet implemented the full range of its Title VI obligations and powers. The Department's Office of Civil Rights has an active enforcement program to address discrimination allegations but lacks the assessment tools that would assist state governments and local school districts in anticipating and avoiding actions that increase racial isolation and school poverty concentration. The absence of such an equity assessment procedure to review the effects of key decisions on segregation is particularly incongruous in light of the strong emphasis on school desegregation at the heart of Title VI. The Department should make the development of such a regulation or guidance a priority.

80. See Olatunde Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339 (Nov. 2012). See also R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527 (2011).

81. Johnson, *supra* note 80, at 1363.

These directives take a different approach to achieving racial and other forms of inclusion than do the standard public and private enforcement models. Their essential attributes are that (1) they are regulatory in their approach; (2) they are affirmative and not just prohibitory; and (3) they impose a set of pervasive duties for federal-state programs.

Id. at 1366.

82. The Title VI Coordinating Regulations also provide a basis for a more formalized Title VI pre-decision assessment, 28 CFR § 42.407(b) ("Prior to approval of federal financial assistance, the federal agency shall make written determination as to whether the applicant is in compliance with Title VI The basis for such a determination under "the agency's own investigation" provision . . . shall be submission of an assurance of compliance and a review of the data submitted by the applicant. Where a determination cannot be made from this data, the agency shall require the submission of necessary additional information and shall take other steps necessary for making the determination. . .")

83. See *infra* notes 84, 94, 95.

To consider what a proactive Title VI regulation might look like at the Department of Education, this Part will first look at the Federal Transit Administration, where the requirement of a prospective racial equity analysis as a precursor to major state and local action is particularly well-developed. In its 2012 Title VI guidance, the FTA set out equity guidelines that require state and local transit agencies to review racial impacts of siting decisions, service changes including new routes, and other major policy or spending decisions.⁸⁴ These assessments are encompassed in each grantee’s “Title VI Program,” which varies with the size and type of the grantee. For example, large “Fixed Route Transit Providers”⁸⁵ must undertake the following:

- Extensive data reporting on ridership demographics and resident needs in the service area region, and on detailed service indicators by area;
- A Title VI “equity analysis” for the siting of new facilities⁸⁶ and any proposed fare changes,⁸⁷ requiring detailed comparisons of impacts on persons in protected classes compared to impacts on persons not in protected classes;⁸⁸
- Development of a general “Disparate Impact Analysis;”⁸⁹
- Monitoring subrecipients;⁹⁰ and
- An ongoing monitoring plan⁹¹

Additionally, if the transit provider forecasts a potential disparate impact associated with a proposed action, it must “determine whether alternatives exist that would serve the same legitimate objectives but with less of a disparate effect on the basis of race, color or national origin” in advance.⁹² If alternatives exist, “the

84. U.S. DEP’T OF TRANSP., FED. TRANSIT ADMIN., CIRCULAR 4702.1B: TITLE VI REQUIREMENTS AND GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS, (October 1, 2012) [hereinafter FTA Guidance], available at http://www.fta.dot.gov/documents/FTA_Title_VI_FINAL.pdf.

85. *Id.* at App. A-2 (defining “large fixed route transit providers” as “Transit Providers that operate 50 or more fixed route vehicles in peak service and are located in an Urbanized Area (UZA) of 200,000 or more”).

86. *Id.* at III-11 (requiring Title VI equity analysis for all grantees and implementing 49 C.F.R. § 21.9 of the general Title VI regulations of the Department of Transportation).

87. *Id.* at IV-4.

88. *Id.* at IV-11.

89. *Id.* at IV-13.

90. *Id.* at III-10.

91. *Id.* at VI-2.

92. *Id.* at IV-16.

transit provider must revisit the service changes and make adjustments that will eliminate unnecessary disparate effects”⁹³

The Department of Transportation’s 2012 guidance on Environmental Justice,⁹⁴ the Department of Agriculture’s Civil Rights Impact Analysis,⁹⁵ and the Department of Housing and Urban Development’s “Affirmatively Furthering Fair Housing” mandate⁹⁶ include similar requirements.

What would such a proactive Title VI assessment look like as applied to conditions of racial isolation and poverty concentration in public schools? With consistent national research linking attendance in racially isolated schools to a wide range of negative educational outcomes, including lower student achievement results, higher dropout rates, lower college completion rates, less qualified teachers, high rates of teacher turnover, less challenging curriculum, and higher rates of student discipline,⁹⁷ and additional

93. *Id.*

94. *See* Updated Environmental Justice Order 5610.2(a), 77 Fed. Reg. 27534-02 (May 10, 2012). The environmental justice guidance was adopted pursuant to both Title VI and the President’s Executive Order on Environmental Justice (which was also grounded in Title VI). The guidance requires all DOT funded programs to identify in advance potential “disproportionately high and adverse effects on minority populations and low-income populations” and to propose “measures to avoid, minimize and/or mitigate” these impacts. *Id.* at 27536.

95. *See* OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF AGRIC., DR 4300-4, CIVIL RIGHTS IMPACT ANALYSIS (2003), *available at* <http://www.ocio.usda.gov/directives/doc/DR4300-4.pdf>. The Civil Rights Impact Analysis applies a pre-clearance obligation on all sub-agencies under the USDA’s purview.

96. At the Department of Housing and Urban Development (HUD), a special section of the Fair Housing Act, 42 U.S.C. § 3608, creates a duty on the part of the federal government (and its grantees) “affirmatively to further the policies of this subchapter” (that is, fair housing). The Housing and Community Development Act, 42 U.S.C. § 5304 repeats this admonition and courts have interpreted this to encompass both a duty to avoid actions that perpetuate segregation, and to take affirmative steps to promote racial integration. *See* NAACP, Boston Chapter v. Sec’y of Hous. & Urban Dev., 817 F.2d 149, 154 (1st Cir. 1987); Otero v. N.Y. City Hous. Auth., 484 F.2d 1122, 1133-34 (2d Cir. 1973); Thompson v. HUD, 348 F. Supp. 2d 398 (D. Md. 2005); U.S. ex rel. Anti-Discrimination Center of Metro N.Y., Inc. v. Westchester County 495 F.Supp.2d 375 (S.D.N.Y. 2007); U.S. ex rel. Anti-Discrimination Center of Metro N.Y., Inc. v. Westchester County, N.Y., 668 F.Supp.2d 548 (S.D.N.Y. 2009). HUD recently issued a proposed rule to enhance state and local compliance with this obligation. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710 (July 19, 2013). However, HUD’s mandate to its grantees to consider and avoid actions that perpetuate or increase segregation is not limited to Title VIII; it also flows also from Title VI, as reflected in HUD’s Title VI regulations. *See* 24 C.F.R. § 1.4. HUD has also invoked its Title VI review process to affirmatively address housing segregation through investigation and enforcement; these reviews are often done concurrently with Title VIII reviews. *See* LAWYERS COMM. FOR CIVIL RIGHTS, NAT’L FAIR HOUS. ALLIANCE & POVERTY & RACE RESEARCH ACTION COUNCIL, AFFIRMATIVELY FURTHERING FAIR HOUSING AT HUD: A FIRST TERM REPORT CARD: PART II: HUD ENFORCEMENT OF THE AFFIRMATIVELY FURTHERING FAIR HOUSING REQUIREMENT (2013). *See also* OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, DEP’T OF HOUS. & URBAN DEV., HUD HANDBOOK 8040.1 COMPLIANCE AND ENFORCEMENT PROCEDURES FOR TITLE VI.

97. *See* ORFIELD ET AL., *supra* note 11, at 6–9.

research documenting impacts of concentrated poverty,⁹⁸ the Department would be justified in demanding that its grantees account for the predictable impacts their policies and planning decisions have on local segregation patterns.

A Title VI “school diversity assessment” analogous to the Department of Transportation’s procedures would require a prospective state and local racial impact assessment of school construction spending decisions (by the state and local districts), school siting (by local districts, often with state approval), and school districting and boundary decisions (usually at the local level).

As noted earlier, the Department has been reluctant to use its Title VI authority to affirmatively promote school integration outside the enforcement context. However, the Department’s reluctance to take on existing “non-intentional” segregated *conditions* in local districts is sharply distinguishable from its failure to use its inherent authority under Title VI (as the Department of Transportation has done) to require states and districts to proactively assess the discriminatory impacts of *new* policy and funding decisions affecting education. Such decisions are more analogous to the siting of new transit stations, fare increases, or changes in transit service to a particular neighborhood.

Using the other agencies’ Title VI guidelines as a framework, the following types of questions are appropriate for a new Department of Education Title VI school diversity assessment guidance:

- 1) Is the planned state or local government action likely to increase or perpetuate racial isolation or exclusion of students in any racial or ethnic group? Examples include: new school construction (or substantial rehabilitation/reinvestment in an existing school location), school boundary zone changes, school district consolidation or secession, new state charter school funding, state bonding decisions, and changes in the state school construction grant formula.
- 2) Will the proposed policy or action increase the exposure of children in any racial or ethnic group to concentrated poverty conditions within schools? Will the projected increase in segregation have a significant impact on white children

98. See Derek W. Black, *Middle-Income Peers As Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 404–09 (2012) (summarizing research on harms of racial and poverty isolation). Note that “reduction of poverty concentration” does not have its own independent doctrinal support per se, but that impact is cognizable under Title VI to the extent that conditions of poverty concentration have a disparate racial impact.

by preventing the opportunity to benefit from inter-racial contact?⁹⁹

- 3) Are there feasible alternatives available that mitigate the harmful effects projected by the proposal? This is the crucial step that would require the state or local agency to think beyond the local status quo and consider what changes to the proposed action might enhance racial and economic diversity and exposure for students. In the absence of available alternatives to the planned action and where no clear “alternative” exists, this step would also require state and local agencies to consider what remedial steps are available to alleviate the harmful impacts of the resulting segregation.

An example of how such an equity analysis might be conducted was recently provided by local advocates and researchers in Richmond, Virginia, in response to a proposed school closing and rezoning plan. Their policy memo, “Increasing Diversity in the City Schools: Unexplored Paths of Opportunity,” projected the segregative impacts of the Richmond School Board’s decision to close three elementary schools and rezone fourteen others, and set out a series of alternative proposals that would limit resegregation and promote diversity.¹⁰⁰ Similar analyses have been performed recently in New York City¹⁰¹ and Boston.¹⁰² The methodology is not difficult and could be easily replicated by states and local school districts, perhaps in conjunction with a data tool provided by the Department of Education.¹⁰³

99. For an overview of research on the benefits of school diversity for white students, see GENEVIEVE SIEGEL-HAWLEY, *HOW NON-MINORITY STUDENTS ALSO BENEFIT FROM RACIALLY DIVERSE SCHOOLS* (2012), available at www.school-diversity.org/pdf/DiversityResearchBriefNo8.pdf.

100. GENEVIEVE SIEGEL-HAWLEY ET AL., *INCREASING DIVERSITY IN THE CITY SCHOOLS: UNEXPLORED PATHS OF OPPORTUNITY* (2013), available at www.school-diversity.org/pdf/MEMO_RPS_Rezoning.pdf.

101. NEW YORK APPLESEED, *WITHIN OUR REACH: SEGREGATION IN NYC DISTRICT ELEMENTARY SCHOOLS AND WHAT WE CAN DO ABOUT IT: SCHOOL-TO-SCHOOL DIVERSITY* (2013), available at www.appleseednetwork.org/wp-content/uploads/2013/10/First-Briefing-FINAL-with-Essential-Strategies-8_5_13.pdf.

102. NANCY McARDLE ET AL., *PROSPECTS FOR EQUITY IN BOSTON PUBLIC SCHOOLS’ SCHOOL ASSIGNMENT PLANS* (2010), available at http://diversitydata.sph.harvard.edu/Publications/Prospects_for_Equity_in%20Boston_Schools.pdf.

103. Compare the new data tools included in HUD’s proposed “Affirmatively Furthering Fair Housing” rule, designed to assist local jurisdictions in analyzing patterns of segregation and “racially and ethnically concentrated areas of poverty.” Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710 (July 19, 2013).

A proactive Department of Education school diversity planning tool could have a powerful impact on state and local decision making. Coupled with a strong community engagement component,¹⁰⁴ the assessment would require grantees to evaluate the expected impacts of their actions and consider less discriminatory, segregative alternatives. Such an assessment procedure would fit squarely within the agency's authority under Title VI.¹⁰⁵

III. IMPLEMENTING THE "COMPELLING INTEREST" IN SCHOOL DIVERSITY THROUGH GOVERNMENT FUNDING INCENTIVES¹⁰⁶

Positive incentives embedded in federal non-entitlement grant programs are an increasingly popular government tool for encouraging policy reform at the state and local level. The Department of Education has recently used the competitive grant process to achieve significant policy changes. For example, the Race to the Top grant program has disbursed grants totaling more than \$4 billion, and the Investing in Innovation program has disbursed more than \$900 million through 2012, with an estimated \$134.5 million made available in 2013.¹⁰⁷ These and other competitive grant programs advantage states and districts that adopt policy changes the Department favors. For example, the threshold criteria for the first two phases of the Race to the Top competition required states to adopt policies "establishing pre-K-to college and career data systems that track progress and foster continuous improvement."¹⁰⁸ Race to

104. Compare FTA Guidance, *supra* note 84, at III 5-6, with Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43, 732-37.

105. See *supra* Part I.

106. The argument in this section is set out in additional detail in a recent Comment by Jennifer Rebol Rust, *Investing in Integration: A Case for "Promoting Diversity" in Federal Education Funding Priorities*, 59 LOY. L. REV. 623 (2013). Since its inception, the National Coalition on School Diversity has focused on enhancing federal funding incentives to support school integration. See NAT'L COAL. ON SCH. DIVERSITY, REAFFIRMING THE ROLE OF SCHOOL INTEGRATION IN K-12 EDUCATION POLICY (2010), available at <http://www.prrac.org/pdf/DiversityIssueBriefStmt.pdf>; see also Philip Tegeler & Saba Bireda, *Incentivizing Integration? The Potential of New Funding Priorities at the U.S. Department of Education*, INTEGRATION REPORT, <http://theintegrationreport.wordpress.com> (last updated Jan. 19, 2011).

107. NAT'L COAL. ON SCH. DIVERSITY, *supra* note 3.

108. *The American Recovery and Reinvestment Act of 2009: Saving and Creating Jobs and Reforming Education*, U.S. DEP'T OF EDUC. (Mar. 7, 2009), <http://www2.ed.gov/policy/gen/leg/recovery/implementation.html>.

the Top also encouraged states to raise their caps on the total number of charter schools.¹⁰⁹ Secretary Duncan stated in an early press release that “[s]tates that do not have public charter laws or put artificial caps on the growth of charter schools will jeopardize their applications under the Race to the Top Fund.”¹¹⁰ In response to such funding incentives, over twenty-five states have made significant legislative changes, even though only eighteen states and the District of Columbia ultimately received funded.¹¹¹

This experience demonstrates how top-down competitive funding can create surprising political motivation at the state level for reforms that would otherwise take many years of political organizing or burdensome litigation to achieve.

School diversity advocates were initially encouraged by the Department’s late 2010 announcement of permissible funding preferences in discretionary grants programs.¹¹² Those preferences included a potential preference for “projects that are designed to promote student diversity, including racial and ethnic diversity, or avoid racial isolation,” in order to “promote cross-racial understanding, break down racial stereotypes, and prepare students for an increasingly diverse workforce and society.”¹¹³ If such a preference had been incorporated into subsequent Race to the Top and Investing in Innovation funding rounds, the results could have been profound. However, for reasons that remain unclear, the Department’s newly authorized “diversity preference” has only been listed in the federal charter school grants program, and its impact there has been minimal.¹¹⁴

In a 2012 Issue Brief, the National Coalition on School Diversity detailed the Department of Education’s reluctance to support school diversity across a number of programs, including Race to the Top and Investing in Innovation.¹¹⁵ Instead of including even mild

109. Overview Information; Race to the Top Fund; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010, 74 Fed. Reg. 59836-01 (Nov. 18, 2009).

110. Press Release, U.S. Dep’t of Educ., States Open to Charters Start Fast in “Race to Top” (June 8, 2009), *available at* <http://www2.ed.gov/news/pressreleases/2009/06/06082009a.html>.

111. ULRICH BOSER, RACE TO THE TOP: WHAT HAVE WE LEARNED FROM THE STATES SO FAR? 8 (2012), *available at* http://www.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/rtt_states.pdf (“In the end more than 25 states reformed their education policies in 2009 and 2010 in order to better prepare for the first two rounds of the competition.”).

112. *See* NAT’L COAL. ON SCH. DIVERSITY, *supra* note 3 at 1.

113. Notice of Final Supplemental Priorities and Definitions for Discretionary Grant Programs, 75 Fed. Reg. 78,486, 78,500 (Dec. 15, 2010). The diversity preference was one of sixteen competitive funding priorities the Department authorized.

114. As noted below, the diversity preference for charter schools was too weak, when compared with other priorities, to have any meaningful impact.

115. *See* NAT’L COAL. ON SCH. DIVERSITY, *supra* note 3.

integration incentives, funds from these programs have flowed to states and districts administering highly segregated systems.¹¹⁶ The Department is spending the vast majority of its discretionary resources to ameliorate the disparities that racial and economic segregation create and perpetuate, rather than addressing their causes.

The exclusion of school diversity incentives from the Department’s marquee education reform initiatives is also inconsistent with the Department’s implicit recognition, in the 2011 school diversity guidance,¹¹⁷ that school integration furthers many of the educational “reforms” that the Department champions.¹¹⁸

The Administration continues to support funding for the Magnet Schools Assistance Program and has strengthened some of the program’s diversity language.¹¹⁹ It has not, however, sought to increase magnet school funds; instead, it opts to support the much larger charter school funding program, which contributes to highly segregated schools.¹²⁰ And while a diversity incentive is included in the charter school funding guidelines, a charter school with a very high percentage of children in poverty is likely to score higher in the point system than a diverse school that (by definition) includes a large number of non-poor children.¹²¹

Perhaps the greatest lost opportunity for the Administration to promote school diversity is the system of “waivers”¹²² that permits

116. See ORFIELD ET AL., *supra* note 11.

117. See U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., *supra* note 2.

118. As the guidance affirms, “[r]acially isolated schools often have fewer effective teachers, higher teacher turnover rates, less rigorous curricular resources (e.g., college preparatory courses), and inferior facilities and other educational resources,” and “[p]roviding students with diverse, inclusive educational opportunities from an early age is crucial to achieving the nation’s educational and civic goals.” *Id.* at 1.

119. Magnet Schools Assistance Program, 75 Fed. Reg. 9,777 (March 4, 2010) (to be codified at 34 C.F.R. pt. 280).

120. See generally ERICA FRANKENBERG ET AL., CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS (2010), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report>; ERICA FRANKENBERG & GENEVIEVE SIEGEL-HAWLEY, EQUITY OVERLOOKED: CHARTER SCHOOLS AND CIVIL RIGHTS POLICY (2009), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/equity-overlooked-charter-schools-and-civil-rights-policy>; GARY MIRON, ET AL., SCHOOLS WITHOUT DIVERSITY: EDUCATION MANAGEMENT ORGANIZATIONS, CHARTER SCHOOLS, AND THE DEMOGRAPHIC STRATIFICATION OF THE AMERICAN SCHOOL SYSTEM (2010), available at <http://nepc.colorado.edu/publication/schools-without-diversity>.

121. The preference incentives for integrated charter schools have increased in recent funding notices, but they are still outweighed by points for charters with high poverty rates, which effectively eliminates any federal incentive to diversify local charters. See NAT’L COAL. ON SCH. DIVERSITY, *supra* note 3.

122. *ESEA Flexibility*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> (last modified Mar. 7, 2014).

states to apply for relief from the strictest accountability penalties the Elementary and Secondary Education Act imposed on “schools in need of improvement.”¹²³ In both the first and second rounds of the waiver process, Department of Education guidelines require a long list of programmatic assurances, none of which mention diversity.¹²⁴ Even though it is widely acknowledged that the lowest performing schools in most states are also the same schools that are extremely poor and often racially isolated,¹²⁵ there is nothing in the new waiver process that even acknowledges this as a potential problem. The Department essentially turns a blind eye to the underlying causes of achievement disparities in these lowest performing schools, while relieving states of most of their accountability requirements and permitting Title I funds to continue flowing.

The next test for the Administration will be its ambitious Early Learning initiative.¹²⁶ If Congress funds this proposal, will the Administration simply expand separate pre-school programs for low-income children of color? Or will there be some effort to bring children from diverse economic and racial backgrounds together in the same learning space? Early indications are not encouraging.¹²⁷ As with all other programs funded by the Department of Education, the decision not to promote integration through funding incentives is not a neutral act—it supports and maintains an existing system of educational separation for low-income children of color.

The Department of Education should focus on incentives at the state level to promote integration across school district lines to maximize the effect of its integration efforts. As Goodwin Liu and Bill Taylor have observed, “[f]or poor and minority students in urban areas, the principal means of obtaining a desegregated public education is to cross an urban district boundary into a suburban school.

123. Schools in need of improvement are defined in the most recent reauthorization of ESEA. The No Child Left Behind Act of 2001, Pub. L. No. 107–10, 115 Stat. 1425 (2002). The waiver process was precipitated in part by the large number of schools that failed to reach improvement goals after five years.

124. See Letter from the Leadership Conference on Civil and Human Rights to the Honorable Arne Duncan, Recommendations of The Leadership Conference on Civil and Human Rights Regarding Waivers of ESEA Requirements (Sep. 15, 2011), <http://www.civilrights.org/advocacy/letters/2011/esea-waivers.html>.

125. See ORFIELD ET AL., *supra* note 11.

126. The \$250 million “Competition to Build and Develop and Expand High-quality Preschool Programs,” pursuant to the Consolidated Appropriations Act of 2014, Pub. L. No. 113–76, was recently announced by the Department of Education, with regulations or funding guidance to follow. See *Public Comment Sought for New Competition to Build, Develop and Expand High-Quality Preschool Programs*, HOMEROOM (Feb. 26, 2014), <http://www.ed.gov/blog/public-comment-sought-for-new-competition-to-build-develop-and-expand-high-quality-preschool-programs>.

127. See NAT’L COAL. ON SCH. DIVERSITY, *supra* note 3.

This is easier said than done.”¹²⁸ To achieve desegregation, the Department of Education must first overcome its exaggerated deference to school district boundary lines.¹²⁹

The Obama Administration’s most recent proposal to reauthorize the ESEA¹³⁰ explicitly recognizes the key role played by interdistrict programs in promoting diversity. The Administration’s proposal includes the creation of “Promoting Public School Choice Grants,” a new program that would make competitive grants to high-need districts and give “priority for grants to applicants that propose to implement or expand an interdistrict choice program and to applicants that propose to implement or expand a program that will increase diversity.”¹³¹ Unfortunately, this proposed new section of the ESEA is not funded in the President’s 2015 budget.¹³² But the Department need not wait for Congress to act—it already has ample authority to promote diversity in its existing grant programs. The Department also has a number of models to draw on from regions with successful interdistrict transfer and regional magnet school programs, demonstrating that voluntary school integration is possible if the right incentives are in place.¹³³

128. Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 *FORDHAM L. REV.* 791, 804 (2005).

129. See Kimberly Jenkins Robinson, *The Past, Present, and Future of Equal Educational Opportunity: A Call for a New Theory of Education Federalism*, 79 *U. CHI. L. REV.* 427 (2012) (reviewing Ryan, *supra* note 21).

130. U.S. DEP’T OF EDUC., *ESEA BLUEPRINT FOR REFORM* (2010), available at www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf.

131. DEP’T OF EDUC., *INNOVATION AND INSTRUCTIONAL TEAMS: FISCAL YEAR 2015 REQUEST H-108*, available at <http://www2.ed.gov/about/overview/budget/budget15/justifications/h-108.pdf>.

132. The President’s proposed 2015 Budget also includes a funding proposal for a new “Race to the Top: Equity and Opportunity” competition that is focused on improving the academic achievement of students in high poverty schools. The initial description of this proposed funding program includes a reference to strategies that help “break up and mitigate” the effects of concentrated poverty—suggesting that one of the goals of this program could include school integration. However, as this Article goes to press it is too early to know the fate of this funding proposal or the specific language that Congress will adopt. See DEP’T OF EDUC., *supra* note 131 at H-28.

133. See Amy Stuart Wells et al., *The Story of Meaningful School Choice: Lessons from Interdistrict Transfer Plans*, in *EDUCATIONAL DELUSIONS? WHY CHOICE CAN DEEPEN INEQUALITY AND HOW TO MAKE SCHOOLS MORE FAIR* 187 (Gary Orfield & Erica Frankenberg, eds. 2013); see also CONN. STATE DEP’T OF EDUC., *A Biennial Report on School Districts’ Efforts to Reduce the Racial, Ethnic, and Economic Isolation of Connecticut’s Students* (2013), available at www.sheffmovement.org/pdf/A_Biennial_Report_on_School_Districts.pdf; Susan Eaton, *Upstream People: Can Nebraska Show a Separate, Unequal Nation a Better Way?* *ONE NATION INDIVISIBLE* (Jan. 2013), <http://www.onenationindivisible.org/our-story/upstream-people-can-nebraska-show-a-separate-unequal-nation-a-better-way/>.

IV. USES OF DATA REPORTING TO ENCOURAGE PROGRESS TOWARD INTEGRATION

The federal government collects a vast amount of demographic data from local education agencies (LEAs) and schools, primarily through the biennial Civil Rights Data Collection (CRDC).¹³⁴ Surprisingly, in spite of robust information on student race and ethnicity, as well as regular proposals for new information collection,¹³⁵ the CRDC does not provide information on either the degree of racial and economic segregation in schools or districts, or how these rates have changed over time.¹³⁶ Schools already collect information on student race, ethnicity, and free or reduced price lunch participation each year.¹³⁷ This proposed additional dimension would require minimal effort, but would provide benchmarks for district and school progress over time. For example, a Connecticut statute requires local districts to report biennially on “programs and activities undertaken . . . to reduce racial, ethnic and economic isolation” and “evidence of the progress over time in the reduction of racial, ethnic and economic isolation.”¹³⁸

Statewide progress in addressing racial segregation across school districts could also be measured, but this is not yet part of federally required state level reporting requirements.

Improved access to racial and economic segregation data over time would not only help empower advocates, but would also create an expectation of progress at the state and local levels, especially if accompanied by specific benchmarks or goals.

134. The Department of Education describes the CRDC as “a mandatory data collection, authorized under the statutes and regulations implementing Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and under the Department of Education Organization Act (20 U.S.C. § 3413).” See *Frequently Asked Questions*, CIVIL RIGHTS DATA COLLECTION, <http://ocrdata.ed.gov/Downloads/CRDCFAQs.docx> (last visited March 25, 2014); see also 34 C.F.R. § 100.6(b) (2011) (setting forth mandatory compliance reports).

135. See, e.g., 78 Fed. Reg. 37,529, 37,530 (June 21, 2013).

136. This change in data collection school diversity advocates was recommended in response to the latest CRDC notice. See Letter from Philip Tegeler, Poverty & Race Research Action Council et al, to U.S. Dep’t of Educ. (August 19, 2013), available at www.prrac.org/pdf/PRRAC_CRDC_comments_8-19-13.pdf.

137. See “Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education,” 72 Fed. Reg. 59,266 (October 19, 2007); see also *Frequently Asked Questions*, *supra* note 134.

138. CONN. GEN. STAT. § 10-226h(b) (2013). The statute, adopted in response to a state-based school desegregation decision, *Sheff v. O’Neill*, 238 Conn. 1 (1996), has a parallel reporting requirement for the state to provide “an analysis of the success of such programs and activities in reducing racial, ethnic and economic isolation.” *Id.* at § 10-226h(c).

V. CONCLUSION: THE COST OF NEUTRALITY

In a 2010 speech at the historic Edmund Pettus Bridge in Selma, Alabama, Education Secretary Duncan asked, rhetorically, "How can we better integrate our schools, promote a healthy diversity, and reduce racial isolation?"¹³⁹ But he gave no answers. Instead, Secretary Duncan listed actions that the Department of Education hoped would address the *consequences* of segregation and racial isolation, including disparities in achievement, school discipline, and dropout rates for low-income children of color. Surely these disparities must be addressed, but the Department's avoidance of school integration as a policy priority will only lead to more segregation, and greater disparities in the future.

The Department of Education already has the policy levers it needs to engage more forcefully with states and local districts to promote school diversity and reduce racial and economic isolation in public schools. The Department can exercise its unused Title VI authority to require states and districts, as a basic condition of Title I funding, to undertake proactive equity assessments that include an analysis of the discriminatory and segregative impacts of major policy and funding decisions, and to take steps to ameliorate these impacts. It can use its competitive grant programs to encourage innovative efforts to reduce racial and economic isolation of students at the state and local level, and it can require regular data reporting that will demonstrate whether a state or district is moving toward greater segregation or integration. The Department's existing statutory framework authorizes and even encourages all of these actions. The Department of Education's ongoing refusal to act within its existing authority to encourage integration is a denial of the "moral and ethical obligation" that Justice Kennedy described in *Parents Involved*.

139. Arne Duncan, U.S. Sec'y of Educ., Remarks on the 45th Anniversary of "Bloody Sunday" at the Edmund Pettus Bridge, Selma, Alabama: Crossing the Next Bridge (March 8, 2010), available at <http://www2.ed.gov/news/speeches/2010/03/03082010.html>.