

STILL SEPARATE, STILL UNEQUAL: LITIGATION AS A TOOL TO ADDRESS NEW YORK CITY’S SEGREGATED PUBLIC SCHOOLS

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INTRODUCTION	305
I. THE FOUNDATIONS OF DESEGREGATION LITIGATION.....	310
II. SUING IN FEDERAL COURT: A DEAD END FOR SCHOOL DISTRICTS EXPERIENCING DE FACTO SEGREGATION	313
<i>A. The Process of Federal Desegregation Litigation</i>	313
<i>B. The Impact of Desegregation Litigation</i>	314
III. SCHOOL FINANCE LITIGATION IN STATE COURTS: SUCCESS REMAINS TO BE SEEN	316
<i>A. Connecticut: The Slow Aftermath of Sheff</i>	316
<i>B. New York: Still Waiting for Funds</i>	318
IV. A STRATEGY IN STATE COURT: INTEGRATION AS CONSTITUTIONAL MANDATE	321
<i>A. Minnesota: A New Attempt</i>	321
<i>B. New York: A Weak Education Article</i>	322
V. A CREATIVE LITIGATION FRONTIER: THE NEW YORK CITY HUMAN RIGHTS LAW.....	325
<i>A. Background on Litigation Under the NYCHRL</i>	325
<i>B. Litigation Against School Inequity Under the NYCHRL</i>	327
VI. BEYOND LITIGATION	331
CONCLUSION.....	333

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INTRODUCTION

It is a false narrative that school segregation only exists in southern states.¹ In fact, New York City (“NYC”) is one of the most segregated school districts in America.² NYC public schools have failed—and still fail—to provide Black and Latinx³ students with the same resources and opportunities as white students.⁴ These racial disparities have persisted in NYC for as long as the South has dealt with federally mandated desegregation.⁵ In the late 1950s, while the federal government tried to enforce the Supreme Court’s *Brown v. Board of Education*⁶ decision in Southern schools, white families in NYC actively fought against a citywide integration plan.⁷

¹ E.g., Rebecca Klein, *The South Isn’t the Reason Schools Are Still Segregated*, *New York Is*, HUFFPOST (Apr. 1, 2016, 5:05 AM), <https://perma.cc/MK8X-AF5U>.

² JOHN KUCSERA & GARY ORFIELD, UCLA CIVIL RIGHTS PROJECT, *NEW YORK STATE’S EXTREME SCHOOL SEGREGATION: INEQUALITY, INACTION AND A DAMAGED FUTURE*, at vi (2014), <https://perma.cc/6U37-BEVB>.

³ This Note uses the term “Latinx” to encompass folks who have been described as Latino and/or Hispanic as a way to recognize both a gender-neutral and an anti-Spanish colonialist depiction of people who are from Latin America and/or speak Spanish, unless a source specifically uses a different term. For more information, see Yara Simón, *Hispanic vs. Latino vs. Latinx: A Brief History of How These Words Originated*, REMEZCLA: CULTURE (Sept. 14, 2018, 2:27 PM), <https://perma.cc/AA4G-GYMU> and Terry Blas, *I’m Latino. I’m Hispanic. And They’re Different, So I Drew a Comic to Explain.*, VOX, <https://perma.cc/J8GC-QWR6> (last updated Aug. 12, 2016, 8:42 AM).

⁴ KUCSERA, *supra* note 2, at 24, 29.

⁵ See MICHAEL F. DELMONT, *WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION* 29-30 (2016); Klein, *supra* note 1.

⁶ *Brown v. Board of Education* was a landmark decision in which the Supreme Court ruled that racial segregation in public schools was unconstitutional. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (*Brown I*) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)). However, schools did not integrate immediately after this decision. Instead, it took legislative interventions from Congress to galvanize the process. See Ian Millhiser, ‘*Brown v. Board of Education*’ Didn’t End Segregation, Big Government Did, *NATION* (May 14, 2014), <https://perma.cc/V3G2-3BMU> (explaining that Southern lawyers used the Civil Rights Act of 1964 to challenge schools that refused to integrate).

⁷ See, e.g., DELMONT, *supra* note 5, at 32-34; Nikole Hannah-Jones, *Choosing a School for My Daughter in a Segregated City*, *N.Y. TIMES MAG.* (June 9, 2016), <https://perma.cc/6A4D-T362>; Yasmeen Khan, *Demand for School Integration Leads to Massive 1964 Boycott — in New York City*, *WNYC* (Feb. 3, 2016), <https://perma.cc/W7CJ-DV4W>; Christina Veiga, *New York City Students Share Why They’re Fighting for School Integration*, *CHALKBEAT* (Dec. 26, 2017), <https://perma.cc/3SFX-ZRP6>. See generally Southern Manifesto, 102 CONG. REC. 4459 (1956). The NYC Board of Education formed the Commission on Integration in 1955 to create an integration plan in compliance with the Supreme Court’s order in *Brown I*. Khan, *supra*. The integration plan sought to rezone a small percentage of schools to prevent overcrowding and to improve the quality of education for predominantly Black and Latinx schools. *Id.*

School segregation has worsened in the last twenty years.⁸ Schools have resegregated in the South and have stayed segregated in the North.⁹ In fact, the number of segregated schools nationwide nearly doubled between 1996 and 2016.¹⁰ As of 2014, more than one-third of Black students in the South attend an “intensely segregated” (ninety to one hundred percent minority) school.¹¹ The most segregated school systems, however, are in the North. In 2010, close to seventy-five percent of Black students attended a school in NYC where less than ten percent of their peers were white.¹² Northern urban districts, which never officially enforced school segregation, have maintained dual systems of education through decades of redlining and strategic and exclusionary zoning.¹³ School districts in NYC, Newark, Philadelphia, and Washington D.C. are made up of a majority of minority and low-income students and are heavily segregated.¹⁴ Half of NYC’s schools are at least ninety percent Black or Latinx,¹⁵ while Black and Latinx students comprise only about sixty-seven percent of the City’s public school population.¹⁶

⁸ See Will Stancil, *School Segregation Is Not a Myth*, ATLANTIC (Mar. 14, 2018), <https://perma.cc/AK6C-CD6S>. See generally GARY ORFIELD ET AL., UCLA CIVIL RIGHTS PROJECT, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE (2014), <https://perma.cc/679R-L7KV> (providing a statistical analysis to demonstrate that segregation has substantially increased in school districts and offering recommendations to adhere to the promise articulated in *Brown*).

⁹ See, e.g., ERICA FRANKENBERG ET AL., UCLA CIVIL RIGHTS PROJECT & CTR. FOR EDUC. & CIVIL RIGHTS, SOUTHERN SCHOOLS: MORE THAN A HALF-CENTURY AFTER THE CIVIL RIGHTS REVOLUTION 7-8 (2017), <https://perma.cc/T9XZ-A89G>; Mimi Kirk, *Southern Schools Are Resegregating*, CITYLAB (May 31, 2017), <https://perma.cc/ZA9A-CCT3>.

¹⁰ Stancil, *supra* note 8 (defining a segregated school as a school where less than forty percent of students are white); see also U.S. GOV’T ACCOUNTABILITY OFFICE, K-12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION (2016), <https://perma.cc/CVT8-YAJW> (“From school years 2000-01 to 2013-14 . . . the percentage of all K-12 public schools that had high percentages of poor and Black or Hispanic students grew from nine to sixteen percent . . .”).

¹¹ ERICA FRANKENBERG ET AL., *supra* note 9, at 8.

¹² See JOHN KUCSERA, UCLA CIVIL RIGHTS PROJECT, *New York Metro, Summary in NEW YORK STATE’S EXTREME SCHOOL SEGREGATION: INEQUALITY, INACTION AND A DAMAGED FUTURE* 3 (2014), <https://perma.cc/8VXM-CUES>.

¹³ Emily Lieb, *How Segregated Schools Built Segregated Cities*, CITYLAB (Feb. 2, 2017), <https://perma.cc/94PD-P9FC>; Abel McDaniels, *A New Path for School Integration*, CTR. FOR AM. PROGRESS (Dec. 19, 2017 9:01 AM), <https://perma.cc/8352-5EHE>.

¹⁴ Alvin Chang, *We Can Draw School Zones to Make Classrooms Less Segregated. This Is How Well Your District Does.*, VOX, <https://perma.cc/WD58-FHHE> (last updated Aug. 27, 2018, 8:46 AM) (providing graphs that illustrate demographics of school attendance zones in major cities).

¹⁵ Yasmeen Khan & Beth Fertig, *School Integration 2.0: How Could New York City Do It Better?*, WNYC (June 9, 2016), <https://perma.cc/U6GQ-EQJL>.

¹⁶ NICOLE MADER & ANA CARLA SANT’ANNA COSTA, THE NEW SCH., CTR. FOR N.Y.C. AFFAIRS, NO HEAVY LIFTING REQUIRED: NEW YORK CITY’S UNAMBITIOUS SCHOOL

School segregation perpetuates white supremacy, a mechanism that ensures white students are afforded better teachers, facilities, and opportunities than Black and Latinx students.¹⁷ Research clearly shows that integrated schools positively impact all students regardless of their race.¹⁸ Students who attend racially diverse schools have smaller test score gaps and develop enhanced critical thinking, problem-solving skills, and creativity from working with peers who have different experiences from their own.¹⁹ It is for these reasons that students, parents, and activists have fought and are fighting to change school policies, in an effort to improve the current academic reality for Black and Latinx students.

While this article focuses on litigation as a way to address educational inequality in NYC public schools, litigation is only one tool in a broader effort to remedy the impact of segregation. In order to integrate NYC public schools, the students and families most impacted by segregation must organize their communities, local politicians must enact responsive local legislation, and privileged parents must shift their views of public education.²⁰

Litigation has been used successfully to challenge segregation since the landmark decision of *Brown v. Board of Education*.²¹ Those negatively impacted by school segregation, however, must be the ones who push for a lawsuit to address the ramifications of segregated schools, in order to ensure their needs are met and their desired outcomes are

'DIVERSITY' PLAN (2018), <https://perma.cc/5R6R-HFRU>; *NYC Public Schools at a Glance*, N.Y. ST. EDUC. DEP'T, <https://data.nysed.gov/profile.php?instid=7889678368> [<https://perma.cc/XE58-D2QR>] (last visited May 9, 2019).

¹⁷ See Madina Toure, *NYC Has the Most Segregated Schools in the Country. How Do We Fix That?*, OBSERVER (June 14, 2018, 5:03 PM), <https://perma.cc/GZ2T-4TBE> (highlighting that NYC public schools have always been segregated due to white resistance and backlash); Veiga, *supra* note 7.

¹⁸ See AMY STUART WELLS ET AL., THE CENTURY FOUND., *HOW RACIALLY DIVERSE SCHOOLS AND CLASSROOMS CAN BENEFIT ALL STUDENTS* 11-15 (2016), <https://perma.cc/3EUV-CPEQ> (discussing the benefits of children attending diverse schools, including closing the "achievement gap," positive learning outcomes, and an increased interracial understanding of other students).

¹⁹ *Id.* at 14.

²⁰ See GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 67-68 (1992); Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470, 512 (1976). I developed this understanding, and the need for community organizing, in my experience as a former educator in NYC public schools.

²¹ See Nikole Hannah-Jones, *School Districts Still Face Fights—and Confusion—on Integration*, ATLANTIC (May 2, 2014), <https://perma.cc/X9C3-RHBM> ("The pace of the change brought by the federal courts was breathtaking. In 1963, about [one] percent of [B]lack children in the South attended school with white children. By the early 1970s . . . [ninety] percent of [B]lack children attended desegregated schools.").

reached.²² In NYC, it is Black and Latinx students who decide whether to initiate a lawsuit to challenge their school system's failure to provide them with equal opportunities and resources to their white counterparts. It is incumbent on attorneys who represent students in desegregation litigation to make decisions that are driven by the desired outcomes of the community they serve. For example, the Legal Defense Fund ("LDF")²³ has been successful in obtaining court orders that require districts to comply with the mandate of *Brown v. Board of Education*.²⁴ However, in the aftermath of *Brown*, a central critique of this strategy is that civil rights attorneys have considered the desires of and the litigation's impact on "constituents," who may have had a disconnected interest in the outcome of the lawsuit but had more access to civil rights lawyers to address school segregation, rather than the desires of and impact on "clients," whom their lawsuits purportedly served.²⁵ In addition to meeting their burden of proof in court, lawyers must stay rooted in understanding and advocating for the needs of students and families in segregated communities.

The options for challenging school segregation in federal courts, however, are limited, particularly in Northern school districts like NYC. According to the standard set by the Supreme Court, NYC public schools have never experienced *de jure*—intentional or "by law"—segregation.²⁶ Instead, "school officials, politicians, and parents" who are against desegregation speak about segregation in NYC schools in such a way that it is "innocent, natural, and lawful."²⁷ While school segregation is in part a

²² See Bell, *supra* note 20, at 471-72 ("[Civil rights lawyers] have not waived in their determination to implement *Brown* using racial balance developed in the hard-fought legal battles of the last two decades Now that traditional racial balance remedies are becoming increasingly difficult to achieve or maintain, there is tardy concern that racial balance may not be the relief actually desired by the victims of segregated schools," whose "educational interests may no longer accord with the integration ideals of their attorneys.").

²³ For more information about the LDF, see *Our Mission*, LDF, <https://perma.cc/JKB9-C6JT> (last visited June 1, 2019).

²⁴ See *Desegregation Cases / Issues*, LDF, <https://perma.cc/QJM6-FL92> (last visited June 1, 2019).

²⁵ Ronald Edmonds provides an example of this dynamic: low-income Black students may be the particular clients in a class action desegregation lawsuit, but the constituents are white and middle-class Blacks who drive the lawsuit forward with more access to civil rights attorneys and often "categorically oppose[] majority Black schools." Ronald R. Edmonds, *Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits*, 3 NAT'L BLACK L.J. 176, 178-79 (1974); see also Bell, *supra* note 20, at 490-91 (discussing the problem—articulated by Edmonds—that civil rights attorneys face when white supporters, who contribute financially to a civil rights organization, do not share the same social outlook as the client, who is typically from a majority-Black school district).

²⁶ "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is purpose or intent to segregate." *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973).

²⁷ DELMONT, *supra* note 5, at 32.

result of housing segregation caused by state action, in the eyes of the judicial system, school segregation in New York exists “by fact” and without action by the state.²⁸ In 1974, the Supreme Court made clear that, in order to successfully challenge a school district for school segregation, state action must be the cause of that segregation.²⁹ For this reason, as an alternative to challenging school segregation in federal courts, advocates and plaintiffs have used school finance litigation in state courts across the country, including in New York, to address the unequal funding schemes that are permissible under state constitutions and that, in turn, negatively impact schools with high concentrations of low-income students and high percentages of minority students.³⁰ Unfortunately, school finance litigation has not been a successful tool for plaintiffs in New York, as the New York Court of Appeals has interpreted Article XI of the New York State Constitution, the State’s Education Article, only to require public schools to provide a low standard of education quality.³¹

Due to the New York Court of Appeals’ articulation that schools only need to provide a minimum standard of education quality to its students under the Education Article, challenges brought under the New York State Constitution are unlikely to be successful. Thus, advocates must be creative. This Note demonstrates how the NYC Human Rights Law (“NYCHRL”), a powerful civil rights act, can be used to address racial segregation in NYC public schools and to fight for equality, since the New York Court of Appeals has blocked all other judicial avenues for relief.³² Combined with ongoing grassroots and legislative advocacy, the NYCHRL can be utilized to effectively address school inequality and integrate NYC public schools. Litigation is a tool to be used in conjunction

²⁸ The Supreme Court has issued rulings that essentially only allow challenges under the Constitution for de jure, not de facto, segregation in federal court cases. *See infra* Section II.A. “De jure” means according to law; “de facto” means existing in fact. *De Jure*, BLACK’S LAW DICTIONARY (10th ed. 2014); *De Facto*, BLACK’S LAW DICTIONARY (10th ed. 2014). Richard Rothstein has described the idea that neighborhoods are de facto segregated as a “myth.” Richard Rothstein, *The Reason America’s Schools Are So Segregated – and the Only Way To Fix It*, WASH. POST (Dec. 16, 2016), <https://perma.cc/F4PK-LYFT>. For a deeper analysis of the close relationship between state action and residential segregation in America, see RICHARD ROTHSTEIN, *THE COLOR OF LAW* 215-17 (2017) (“Residential segregation was created by state action If school boards had not placed schools and drawn attendance boundaries to ensure the separation of black and white pupils, families might not have had to relocate to have access to education for their children.”) (emphasis in original).

²⁹ *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (“[I]t must be shown that racially discriminatory acts of the state or local school districts, or of a single school district[,] have been a substantial cause of interdistrict segregation.”)

³⁰ James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 537 (1999).

³¹ *See infra* Sections III.B and IV.B.

³² *See infra* Sections III.B and IV.B.

with organizing to address school segregation because, as stated by Louis Menand of the *New Yorker*, “[d]e-facto discrimination—we now call it ‘institutional racism’ or ‘structural racism’—is much harder to address. It requires more of people than just striking down a law.”³³

Part I of this Note provides an overview of the foundation of desegregation litigation in federal courts. Part II briefly outlines the process for desegregation litigation in federal court and explains why federal litigation is not a viable option for plaintiffs in NYC. Part III discusses school finance litigation strategies in New York and other states. Part IV then examines litigation in Minnesota that has sought to persuade courts to read in an anti-segregation mandate into the state constitution and outlines how the New York Court of Appeals has instead interpreted the Education Article as holding schools to a weak standard. Part V focuses on the NYCHRL and argues that it provides plaintiffs with a creative avenue to seek relief for educational inequity by examining current litigation challenging unequal sports access for high school students in NYC. Finally, Part VI discusses how grassroots movements are persistently organizing to integrate the NYC public school system and provides suggestions for future litigation under the NYCHRL.

I. THE FOUNDATIONS OF DESEGREGATION LITIGATION

On May 17, 1954, the Supreme Court issued its decision on *Brown v. Board of Education (Brown I)*, which struck down the “separate but equal” doctrine established in *Plessy v. Ferguson*.³⁴ *Brown I* consolidated four cases, with students and parents from school districts in Kansas, South Carolina, Virginia, and Delaware as plaintiffs, represented by the LDF.³⁵ In this monumental decision, the Supreme Court abolished state-sponsored segregation in public schools across United States by ruling that school segregation deprived the plaintiffs of equal protection of the laws under the Fourteenth Amendment of the U.S. Constitution.³⁶

If only it were that simple. In *Brown I*, the Supreme Court did not order school districts to desegregate.³⁷ Instead, one year after the *Brown I* decision, the Supreme Court returned to the issue of school segregation in *Brown v. Board of Education (Brown II)*, which ordered school districts

³³ Louis Menand, *The Supreme Court Case that Enshrined White Supremacy in Law*, *NEW YORKER* (Feb. 4, 2019), <https://perma.cc/YM9P-T9DA>.

³⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (*Brown I*) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

³⁵ *Brown I*, 347 U.S. at 486 n.1; *Case: Landmark: Brown v. Board of Education*, LDF, <https://perma.cc/8SYQ-HQVN> (last visited Apr. 17, 2019).

³⁶ *Brown I*, 347 U.S. at 495.

³⁷ *See id.*

to desegregate “with all deliberate speed.”³⁸ This vague phrase allowed segregationists to continue delaying integration for years.³⁹ After *Brown II*, plaintiffs spurred lawsuits in federal district courts across the country, asking courts to issue orders forcing segregated school districts to integrate.⁴⁰ As a result, courts issued orders mandating that states establish concrete integration plans, which included “busing, facilities upgrades, and compliance monitoring.”⁴¹ The impact on schools was drastic: in 1963, “[one] percent of black children in the South attended school with white children. By the early 1970s . . . [ninety] percent of Black children attended desegregated schools.”⁴²

Unfortunately, the Supreme Court’s precedent after *Brown I* and *Brown II* has not made the battle to integrate schools easier for students and families. After forcing school districts with de jure segregation to integrate their public schools, the Supreme Court began to chip away at families’ capacity to hold school districts and government actors accountable for allowing segregation in other schools to continue. In 1974, in *Milliken v. Bradley*, the Court held that a federal district court may not impose a multidistrict remedy for “a single-district de jure segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts.”⁴³ *Milliken* affected urban school districts’ ability to desegregate their schools

³⁸ *Brown v. Bd. of Educ. II*, 349 U.S. 294, 301 (1955) (*Brown II*). See Arthur E. Sutherland, *Segregation by Race in Public Schools Retrospect and Prospect*, 20 L. & CONTEMP. PROBS. 169 n.1 (1955), for a discussion of states that had de jure segregation at the time *Brown II* was decided.

³⁹ This delay manifested itself in racist violence. For example, in 1957, Governor Orval Faubus of Arkansas called on the state’s National Guard to forcibly prevent Black students from integrating Central High School in Little Rock, Arkansas. Only after President Dwight D. Eisenhower deployed federal troops were the Black students able to enter the school as angry protesters harassed them. Richard Kreitner, *September 4, 1958: Arkansas Governor Calls Out the National Guard to Prevent Public School Integration*, NATION (Sept. 4, 2015), <https://perma.cc/E5QH-HPGU>; David Smith, *Little Rock Nine: The Day Young Students Shattered Racial Segregation*, GUARDIAN (Sept. 24, 2017, 7:00 AM), <https://perma.cc/X6WD-BS9V>.

⁴⁰ See generally Frank T. Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, 39 L. & CONTEMP. PROBS. 10-49 (1975) (providing a discussion of the implementation of the *Brown I* mandate by federal courts).

⁴¹ COWEN INST. FOR PUB. EDUC. INITIATIVES, TULANE UNIV., DESEGREGATION LITIGATION: AN OVERVIEW 1, <https://perma.cc/RG53-NU9K> (last visited June 1, 2019).

⁴² Hannah-Jones, *supra* note 21.

⁴³ *Milliken v. Bradley*, 418 U.S. 717, 721 (1974). In *Milliken*, the Court highlighted that the evidence only demonstrated a de jure segregation problem in the Detroit school district, rather than a constitutional violation in any of the fifty-three outlying school districts or an interdistrict violation thereof. *Id.* at 745. Further, urban school districts like Detroit could not set aside arbitrary district lines on the basis of race. *Id.* at 745.

through the use of busing measures⁴⁴ involving white suburban districts.⁴⁵ Justice Thurgood Marshall, who was one of the counsel for plaintiffs in *Brown I*, dissented in *Milliken*, stating that the Court had taken a “giant step backward” in the fight to integrate public schools.⁴⁶ Further contextualizing the negative impact of *Milliken*, Michael F. Delmont describes the decision in *Milliken* as “plac[ing] a nearly impossible burden of proof on those seeking school desegregation across city and suburban lines by requiring evidence of deliberate segregation across multiple school districts.”⁴⁷ Robert A. Sedler additionally observes that, after *Milliken*, “[t]he substantive right that has emerged is not a right to attend a racially integrated school, but only a right to attend school in a school system in which there are no vestiges of de jure segregation.”⁴⁸

Then, in the 1990s, a series of cases curtailed a plaintiff’s power to challenge de facto school segregation,⁴⁹ by making “it easier for [school] districts to be released from court oversight.”⁵⁰ These cases increased the rate at which school districts were released from court supervision, as “more than twice as many districts were released [from judicial supervision] in the 2000s as in the 1990s.”⁵¹ By 2007, 193 of 480 Southern school

⁴⁴ Busing was one tactic used to desegregate public schools by transporting primarily Black students into white districts. Michael F. Delmont describes the white parents’ uproar against “busing” in his book and corresponding website. DELMONT, *supra* note 5, at 3 (“Describing opposition to “busing” as something other than resistance to school desegregation was a choice that obscured the histories of racial discrimination and legal contexts for desegregation orders.”).

⁴⁵ See Robert A. Sedler, *The Profound Impact of Milliken v. Bradley*, 33 WAYNE L. REV. 1693, 1695-96 (1987).

⁴⁶ *Milliken*, 418 U.S. at 782 (Marshall, J., dissenting).

⁴⁷ DELMONT, *supra* note 5, at 17.

⁴⁸ Sedler, *supra* note 45, at 1694,-95.

⁴⁹ Hannah-Jones, *supra* note 21.

⁵⁰ 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, 877-78 (2012). In *Board of Education v. Dowell*, the Supreme Court ruled that desegregation orders were intended to be a “temporary measure” and that, in deciding whether to dissolve the orders, courts should consider whether schools “had complied in good faith with the desegregation degree since it was entered” and “whether the vestiges of past discrimination had been eliminated to the extent practicable.” *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247, 249-50 (1991). In *Freeman v. Pitts*, the Court ruled that courts could withdraw supervision over certain aspects in which school district has achieved partial unitary status, since “[a] district court need not retain active control over every aspect of school administration until a school district has demonstrated unitary status in all facets of its system.” *Freeman v. Pitts*, 503 U.S. 467, 471 (1992). Finally, in *Missouri v. Jenkins*, the Court held that desegregation orders must be a limited remedy for victims of de jure segregation. *Missouri v. Jenkins*, 515 U.S. 70, 137 (1995). See Reardon, et al., *supra*, at 877-78.

⁵¹ Reardon et al., *supra* note 50, at 899.

districts that were under court ordered supervision were granted unitary status.⁵²

Finally, in the 2007 *Parents Involved* decision, the Supreme Court struck down voluntary racial integration plans in Louisville, Kentucky, and Seattle, Washington, on the basis that these school districts lacked a compelling interest for using race-based assignments and, further, that alternative race-neutral methods would be effective in achieving each district's integration goals.⁵³ *Parents Involved* has prevented school districts from considering race when implementing voluntary school integration plans.⁵⁴ While *Brown I*'s monumental decision opened the door for many students and families to challenge segregation in their districts, the Supreme Court's subsequent legal precedent has left few options for advocates who are trying to integrate public schools through the federal courts.

II. SUING IN FEDERAL COURT: A DEAD END FOR SCHOOL DISTRICTS EXPERIENCING DE FACTO SEGREGATION

A. *The Process of Federal Desegregation Litigation*

Desegregation litigation in federal district court is an arduous process.⁵⁵ As previously mentioned, federal courts can only order integration (or school desegregation) of a school district that once experienced—or is experiencing—state-mandated, de jure segregation.⁵⁶ De jure segregation is found when “a current condition of segregation result[s] from *intentional state action directed specifically* to the [allegedly segregated] school[.]”⁵⁷ Thus, a plaintiff must prove either that state-mandated intentional segregation is present in the school district or that a state policy

⁵² *Id.* at 878 (discussing data from the U.S. Commission on Civil Rights, which was obtained after reviewing the status of desegregation orders in Alabama, Georgia, Florida, Louisiana, Mississippi, North Carolina, and South Carolina).

⁵³ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730-31, 733 (2007) (plurality opinion); Erwin Chemerinsky, *Making Schools More Separate and Unequal: Parents Involved in Community Schools v. Seattle School District No. 1*, 2014 MICH. ST. L. REV. 633, 635-37 (2014).

⁵⁴ Chemerinsky, *supra* note 53, at 638.

⁵⁵ See generally *School Desegregation and Integration: De Jure*, UNIV. MO. SCH. LAW, <https://perma.cc/5ARP-Z4Z7> (last updated May 27, 2016, 9:27 AM) (outlining the process of desegregation litigation in federal court and noting key Supreme Court cases in school desegregation jurisprudence).

⁵⁶ See, e.g., *Bd. of Educ. v. Dowell*, 498 U.S. 237, 240 (1991) (initiating District Court supervision upon finding that “Oklahoma City was operating a ‘dual’ school system – one that was intentionally segregated by race.”).

⁵⁷ *Missouri v. Jenkins*, 515 U.S. 70, 115 (1995) (Thomas, J., concurring) (alteration in original) (emphasis in original) (quoting *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 205-06 (1973)).

which has led to de facto segregation has a discriminatory intent.⁵⁸ While post-*Brown* state-mandated segregation is clearly impermissible, it is extremely challenging for plaintiffs to prove that a policy's underlying intent is discriminatory.⁵⁹ If the plaintiff is successful, however, the district court will find that the school district unconstitutionally segregates students in violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, as per *Brown I*.⁶⁰ The district court will then issue a desegregation order that requires the school board to implement remedial measures that will desegregate the school district.⁶¹ Usually, the district court gives the school board and other interested parties the opportunity to present a desegregation plan.⁶² The school district can also appeal the decision.⁶³ After the district court issues a final desegregation order, the court then monitors the execution of that order, which could include requiring the school board to provide reports about its compliance with the plan or appointing a compliance officer.⁶⁴ Once a school district eliminates all traces of intentional segregation, it will achieve "unitary status" and judicial oversight will end.⁶⁵

B. *The Impact of Desegregation Litigation*

The U.S. Department of Justice has not been forthcoming in providing up-to-date data on active desegregation orders.⁶⁶ Further, some federal courts are unaware of the number of segregation orders in their dockets or are simply releasing districts from judicial oversight, even where segregation continues.⁶⁷ To this extent, even students that attend school in districts that experience de jure segregation face frustrating battles to integrate their schools.

⁵⁸ See Derrick Darby & Richard E. Levy, *Postracial Remedies*, 50 U. MICH. J.L. REFORM 387, 437 (2017).

⁵⁹ *Id.*

⁶⁰ *Brown I*, 347 U.S. 483, 495 (1954).

⁶¹ COWEN INST. FOR PUB. EDUC. INITIATIVES, TULANE UNIV., *supra* note 41, at 1.

⁶² *Id.* It is unclear how desegregation orders are monitored today. See Hannah-Jones, *supra* note 21.

⁶³ See, e.g., Eliot C. McLaughlin, *Mississippi School District Ends Segregation Fight*, CNN, <https://perma.cc/R4MX-SHYD> (last updated Mar. 14, 2017, 5:41 PM).

⁶⁴ COWEN INST. FOR PUB. EDUC. INITIATIVES, TULANE UNIV., *supra* note 41, at 2.

⁶⁵ *Id.* For example, in order for the New Kent School Board to have achieved unitary status as a desegregated school system, the school district needed to demonstrate a good faith elimination of all traces of intentional segregation in student assignment, faculty assignment, staff assignment, transportation, extracurricular activities, and facilities. See *Green v. Cty. Sch. Bd. of New Kent*, 391 U.S. 430, 435 (1968).

⁶⁶ Hannah-Jones, *supra* note 21.

⁶⁷ *Id.*

As a result of current desegregation jurisprudence, students and parents who initiate new lawsuits against their school districts are unlikely to succeed in federal court because it has become increasingly difficult to prove intentional discrimination by the state.⁶⁸ Specifically, this is because plaintiffs must prove more than a mere discriminatory effect, and school boards are able to mask their discriminatory motives.⁶⁹ “Given its illegality, discriminatory intent is seldom, if ever, explicit,” and “nearly impossible to prove in practice.”⁷⁰ This is because, even if a court orders a school district to desegregate, it is highly likely that the district will not comply or properly oversee desegregation, or will resegregate.⁷¹

Despite the improbability of obtaining relief through federal desegregation litigation, a *Brown*-era case in Cleveland, Mississippi recently reached a hopeful conclusion. In 2017, after the U.S. District Court for the Northern District of Mississippi ordered the Cleveland School District to desegregate its school system, the school district voted to end its appeal.⁷² Instead, the court accepted the parties’ proposal: to combine the two segregated high schools in the district into one integrated school.⁷³ The case had been active since 1969, when a judge initially ordered the Cleveland School District to desegregate, but the district had failed in its attempts to follow the court’s order.⁷⁴ The newly integrated Cleveland Central High School opened its doors in the fall of 2017.⁷⁵

⁶⁸ Eric S. Stein, *Attacking School Segregation Root and Branch*, 99 YALE L.J. 2003, 2004 (1990).

⁶⁹ *Id.*

⁷⁰ Darby & Levy, *supra* note 58, at 437. “We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate.” *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 205-06 (1973); see *Milliken v. Bradley*, 418 U.S. 717, 755 (1974); *Why Is This Happening? with Chris Hayes: Investigating School Segregation with Nikole Hannah-Jones*, NBC (July 31, 2018), <https://perma.cc/XDU3-FVLV> (discussing the rise of de facto segregation despite the fact that racially restrictive covenants and mandated segregation have been outlawed).

⁷¹ See Stancil, *supra* note 8.

⁷² McLaughlin, *supra* note 63; see *Cowan v. Bolivar Cty. Bd. of Educ.*, No. 2:65-CV-00031-DMB, 2017 WL 988411 (N.D. Miss. Mar. 13, 2017).

⁷³ *Cowan*, 2017 WL 988411, at *1-2 (“Under this agreement, the District will consolidate its ninth through twelfth grade students into a single comprehensive high school housed in the current facilities at Cleveland High School and Margaret Green Junior High School.”); Edwin Rios, *A Mississippi Town Finally Desegregated Its Schools, 60 Years Later*, MOTHER JONES, Nov.-Dec. 2017, <https://perma.cc/7M88-RJ98>.

⁷⁴ “In 1989, a court ordered the Cleveland school district to bus students between the two high schools for shared classes.” Rios, *supra* note 73. In 2011, the Justice Department found that the district “failed to make good faith efforts to eliminate the vestiges of its former dual school system.” *Id.* In 2013, a court ordered the Cleveland school district to allow students to enroll in whichever school they wanted. *Id.*

⁷⁵ Kelsey Davis & Aallyah Wright, *Cleveland Central High Opens New Era for School District*, MISSISSIPPI TODAY (Aug. 7, 2017), <https://perma.cc/SZ8X-795B>.

The outcome of the Cleveland litigation is a best-case scenario for challenging ongoing school segregation that is a result of prior de jure segregation. To challenge de facto segregation, however, creative litigation strategies are required. In places like New York City, one litigation option is to address school funding schemes that lead to unequal distribution of resources between predominantly Black and Latinx schools and those of their white peers, in what is dubbed “school finance litigation.” Another option is to ask courts to “read in” anti-segregation language into the New York State constitution, a strategy that has been successful in other states. And finally, as this Note argues, advocates can use the local Human Rights Law as a tool to address inequality that is a symptom of school segregation.

III. SCHOOL FINANCE LITIGATION IN STATE COURTS: SUCCESS REMAINS TO BE SEEN

For decades, state finance litigation has been an attractive strategy for plaintiffs fighting de facto segregation, including plaintiffs who bring claims in state courts.⁷⁶ Plaintiffs have used school finance litigation to challenge funding schemes of school districts with predominantly students of color, who are provided with fewer resources than students of predominantly white schools.⁷⁷ The premise of state financial litigation is that unequal or inadequate school funding violates both the equal protection and the education clauses of a state’s constitution.⁷⁸ Originally, litigants sought equalized funding for school districts under state constitutions; however, their losses outnumbered their successes.⁷⁹ As a result, litigants then shifted “their focus from equitable funding to inadequate funding.”⁸⁰

A. *Connecticut: The Slow Aftermath of Sheff*

A line of cases arising out of Hartford, Connecticut, illustrates the successful use of state finance litigation to address unequal funding schemes. In 1977, in *Horton v. Meskill*, the Connecticut Supreme Court

⁷⁶ See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 252-53 (1999).

⁷⁷ See *id.* at 253.

⁷⁸ James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1229 (2008). For more information about state finance litigation in states across the United States, see *School Finance Litigation, by Year, Case, and Status, by State: 1970-2009*, NAT’L CTR. FOR EDUC. STAT., <https://nces.ed.gov/edfin/litigation.asp> (last visited Apr. 2, 2019).

⁷⁹ Ryan, *supra* note 78.

⁸⁰ *Id.*

held that unequal school financing violates a student's right to "a substantially equal educational opportunity," as required by the education clause of the Connecticut State Constitution.⁸¹ In 1996, in *Sheff v. O'Neill*, the same court expanded on the *Horton* decision and declared that de facto school segregation in Hartford public schools violated Connecticut's constitutional mandate to provide the city's children with a "substantially equal" education.⁸² The court read two clauses of the Connecticut Constitution together: "the education clause, which guarantees 'free public elementary and secondary schools in the state' and the segregation clause, which guarantees that no person shall 'be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil rights because of . . . race [or] ancestry.'"⁸³ The Court found that Connecticut's segregation clause informed the state's education clause.⁸⁴ As such, "the existence of racial and ethnic isolation in the public school system deprive[d] school children of a substantially equal educational opportunity" and violated the state's constitution.⁸⁵ The court then ordered the Connecticut legislature to take remedial measures and to develop a plan to address segregation in Hartford public schools.⁸⁶

Despite this monumental decision, only eleven percent of Hartford students attended integrated schools during the 2007–2008 school year.⁸⁷ Advocates on behalf of the plaintiffs in *Sheff* returned to court in an attempt to hold the state and the city accountable.⁸⁸ In 2015, Connecticut settled with the plaintiffs to add more seats in suburban school districts

⁸¹ *Horton v. Meskill*, 376 A.2d 359, 374-75 (Conn. 1977).

⁸² *Sheff v. O'Neill*, 678 A.2d 1267, 1280-86 (Conn. 1996) ("We therefore hold that, textually, [the education clause] . . . requires the legislature to take affirmative responsibility to remedy segregation in our public schools, regardless of whether that segregation has occurred de jure or de facto In summary, under our law, which imposes an affirmative constitutional obligation on the legislature to provide a substantially equal educational opportunity for all public schoolchildren, the state action doctrine is not a defense to the plaintiffs' claims of constitutional deprivation."); see also Ryan, *supra* note 30, at 530.

⁸³ Ryan, *supra* note 30, at 530 (alteration in original) (quoting *Sheff*, 678 A.2d at 1270 n.1, n.2).

⁸⁴ *Sheff*, 678 A.2d at 1283; Ryan, *supra* note 30, at 530.

⁸⁵ *Sheff*, 678 A.2d at 1281, 1281-83; Ryan, *supra* note 30, at 530.

⁸⁶ *Sheff*, 678 A.2d at 1290.

⁸⁷ An integrated school is one where "less than three-quarters of a school's student population are minorities." Jacqueline Rabe Thomas, *Nearly Half the Students from Hartford Now Attend Integrated Schools*, CT MIRROR (Nov. 26, 2013), <https://perma.cc/B447-2S9A>.

⁸⁸ See Denisa R. Superville, *New Settlement Reached in Hartford, Conn., Desegregation Case*, EDUC. WEEK: DISTRICT DOSSIER (Feb. 27, 2015, 5:05 PM), <https://perma.cc/XK3P-G238>.

for inner-city students and to work towards having fifty percent of Hartford students in magnet schools.⁸⁹ Twenty-two years after *Sheff*'s original ruling, Hartford is still not fully integrated, but substantial improvement has been made. By the fall of 2016, forty-nine percent of Hartford minority students attended integrated schools.⁹⁰ Hartford now faces, however, a common problem that school systems across the country are facing since *Brown I*: white parents are not convinced that it is in their children's best interests to attend integrated magnet schools outside of their neighborhoods or their zones.⁹¹ In 2017, 45.6% of Hartford minority students attended integrated schools, a drop from 49% in 2016 and below the recent settlement-mandated percentage of 47.5%.⁹²

B. *New York: Still Waiting for Funds*

Similar to the strategy used by the plaintiffs in *Sheff*, school finance litigation has been used to address school inequity in New York as well. The Education Article of the New York State Constitution provides that "the legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."⁹³ In the 1982 *Levittown* decision, the New York Court of Appeals, the State's highest court, interpreted New York State's Education Article to entitle students to a "sound basic education."⁹⁴

Subsequently, in 1993, the Campaign for Fiscal Equity ("CFE"), an interest group comprised of parents,⁹⁵ filed a lawsuit against the state alleging that the "State's educational financing scheme fail[ed] to provide

⁸⁹ *Id.* A system of magnet schools, which parents could voluntarily opt their children into, was the method that Hartford employed to desegregate its schools. Carmen Baskauf & Lucy Nalpathanchil, *With Sheff Back in Court, A Look at School Integration in Hartford*, CONN. PUB. RADIO (Oct. 23, 2018), <https://perma.cc/GB8V-MVBB>. This method has been recognized as a model for integration across the country, yet the Hartford district still faces its own challenges to achieve integration. *Id.* For more information about magnet schools, see Ali Trachta, *Charter Schools vs. Magnet Schools*, NICHE, <https://perma.cc/7VPJ-PX66> (last visited May 2, 2019).

⁹⁰ Kathleen Megan & Matthew Kauffman, *Under New Rules, State Says More Hartford Students Attend Integrated Schools*, HARTFORD COURANT (Dec. 1, 2016, 5:46 PM), <https://perma.cc/P7HR-L38A>.

⁹¹ *This American Life: The Problem We All Live With - Part Two*, CHI. PUB. MEDIA (Aug. 7, 2015), <https://www.thisamericanlife.org/563/the-problem-we-all-live-with-part-two> [<https://perma.cc/98WU-ZWVU>].

⁹² Matthew Kauffman, *Number of Hartford Students in Integrated Schools Drops by Hundreds*, HARTFORD COURANT (Dec. 20, 2017, 1:45 PM), <https://perma.cc/KF35-GKF5>.

⁹³ N.Y. CONST. art. XI, § 1.

⁹⁴ Bd. of Educ., *Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 48 (1982).

⁹⁵ A group of parents formed an interest group called the Campaign for Fiscal Equity ("CFE") and filed a lawsuit alleging that their children were not being provided access to an adequate education. CFE no longer exists as a non-profit. The Alliance for Quality Education

public school students in the City of New York . . . [with] an opportunity to obtain a sound basic education as required by the State Constitution.”⁹⁶ The State filed a motion to dismiss the claim for failure to state a cause of action, and the New York Court of Appeals eventually denied the motion, holding that the plaintiffs did have a viable cause of action under the Education Clause.⁹⁷ Affirming the underlying principles of *Levittown*, the court clearly stated that “a system which failed to provide for a sound basic education would violate the Education Article.”⁹⁸ The court articulated that a “sound basic education” “should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury” and “minimally adequate physical facilities and classrooms.”⁹⁹ The court concluded that, to prove their case, plaintiffs must establish “a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children.”¹⁰⁰

After years of preparing for trial and organizing with community groups, the trial court found that the State’s method for funding education in NYC violated students’ rights under the State Education Article.¹⁰¹ However, the Appellate Division reversed the trial court, articulating further that the Education Article only mandates an opportunity to receive the “skills necessary to obtain employment, and to competently discharge one’s civic responsibilities”¹⁰² and that the facilities and resources in NYC’s public schools were not “so inadequate as to deprive students of the opportunity to acquire the skills that constitute a sound basic education.”¹⁰³ Further, the Appellate Division determined that the State is not responsible for the demographic factors facing certain students, such as “poverty, high crime neighborhoods, single parent or dysfunctional homes, homes where English is not spoken, or homes where parents offer

was created in 2000 to provide support for CFE and continues to work for educational equity in New York state. *Equity*, ALLIANCE FOR QUALITY EDUC., <https://perma.cc/PP4F-3YF2> (last visited May 2, 2019).

⁹⁶ Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 314 (1995) (*CFE I*).

⁹⁷ Campaign for Fiscal Equity, Inc. v. State, 295 A.D.2d 1, 4 (N.Y. App. Div. 1st Dep’t 2002) (discussing *CFE I*, 86 N.Y.2d 307 (1995)). In denying the state’s motion to dismiss, the New York Court of Appeals established a framework for the trial court to determine whether the state was providing NYC public school students with a sound basic education. Campaign for Fiscal Equity, Inc. v. State, 187 Misc. 1, 6 (N.Y. Sup. Ct. N.Y. Cty. 2001).

⁹⁸ *CFE I*, 86 N.Y.2d at 316.

⁹⁹ *Id.* at 316, 317.

¹⁰⁰ *Id.* at 318.

¹⁰¹ Campaign for Fiscal Equity v. New York, No. 111070/93, 2001 WL 35912269 (N.Y. Sup. Ct. N.Y. Cty. January 31, 2001) (per curiam); ALLIANCE FOR QUALITY EDUC., *supra* note 95.

¹⁰² Campaign for Fiscal Equity, Inc. v. State, 295 A.D.2d 1, 8 (App. Div. 1st Dep’t 2002).

¹⁰³ *Id.* at 11.

little help with homework and motivation.”¹⁰⁴ Ultimately, the court stated that this was because the appropriate “cure lies in eliminating the socio-economic conditions facing certain students.”¹⁰⁵

The New York Court of Appeals reversed this decision in 2003, holding that the plaintiffs had demonstrated a causal link between the state’s current funding system and its failure to provide NYC school children with “better teachers, facilities, and instrumentalities of learning.”¹⁰⁶ The court noted:

Plaintiffs have prevailed here owing to a unique combination of circumstances: New York City schools have the *most* student need in the state and the *highest* local costs yet receive some of the *lowest* per-student funding and have some of the *worst* results. Plaintiffs in other districts who cannot demonstrate a similar combination may find tougher going in the courts.¹⁰⁷

As a result, the court directed the Legislature and the Governor to articulate a funding scheme as a way to reform the education funding system in NYC.¹⁰⁸ In 2006, the New York Court of Appeals accepted the state’s minimum funding amount recommendation as reasonable,¹⁰⁹ which the State still owes today.¹¹⁰

The CFE line of cases demonstrate that, even when plaintiffs successfully prove a causal link between a lack of funding for schools and students’ access to the constitutionally-mandated level of education, this is still not enough to ensure educational equality in NYC.

¹⁰⁴ *Id.* at 16. The Appellate Division relied on the plaintiffs’ expert, who “conceded that investing money ‘in the family’ rather than the schools ‘might pay off even more.’” *Id.*

¹⁰⁵ *Id.* For more information about how socio-economic status of students is linked to school funding, see MATTHEW M. CHINGOS & KRISTEN BLAGG, DO POOR KIDS GET THEIR FAIR SHARE OF SCHOOL FUNDING? (2017), <https://perma.cc/89SP-EHJV>.

¹⁰⁶ Campaign for Fiscal Equity, Inc. v. State, 100 N.Y.2d 893, 919 (2003) (*CFE II*). The trial court concluded that, for example, that teacher certification rates “are too low” in NYC, based on evidence that established a correlation between teacher certification and increased student performance. *Id.* (citing Campaign for Fiscal Equity, Inc. v. State, 187 Misc. 2d 1, 26-27 (N.Y. Sup. Ct. N.Y. Cty. 2001)).

¹⁰⁷ *Id.* at 932 (emphasis in original).

¹⁰⁸ *Id.* at 930, 958; ALLIANCE FOR QUALITY EDUC., *supra* note 95. Between 2004 and 2006, the state failed to establish a minimum funding amount per the court’s order. Then, the trial court appointed a Panel of Judicial Referees to make recommendations to the court, the State’s Governor appealed that decision, and the Appellate Division ordered the state to comply. ALLIANCE FOR QUALITY EDUC., *supra* note 95.

¹⁰⁹ Campaign for Fiscal Equity, Inc. v. State, 8 N.Y.3d 14, 19-20 (2006).

¹¹⁰ Joint Legislative Hearing on the Executive Proposal 2018-2019, Testimony by Alliance for Quality Education (Jan. 31, 2018), <https://perma.cc/3NAG-6UHU>.

IV. A STRATEGY IN STATE COURT: INTEGRATION AS CONSTITUTIONAL MANDATE

State finance litigation, as it pertains to challenging unequal resources, has largely fallen out of use because success in court has not translated to the full integration of school districts. In many states, including New York, advocates have tried to persuade state courts that integration is a mandate required by their respective state constitutions.

A. *Minnesota: A New Attempt*

Advocates in Minnesota are trying a new strategy that frames segregation not only as an issue of unequal resources but also as an issue that violates the state constitution itself.¹¹¹ In 2016, seven parents and guardians filed a lawsuit against the State of Minnesota in Hennepin County District Court, claiming that state officials violated the Education Clause of the Minnesota Constitution by denying them an “adequate education” and enabling a segregated education.¹¹² The plaintiffs argued that, under the seminal Minnesota state case *Skeen v. State*, the Supreme Court of Minnesota had interpreted its education clause to mean that schools must meet “baseline level of adequacy and uniformity” of education, and that a separate but equal education system does not meet that requirement.¹¹³ The Minnesota Court of Appeals dismissed the plaintiffs’ case on the grounds that it was not justiciable (able to be litigated) because it is the state legislature’s responsibility to establish “qualitative educational standards,” not the judiciary’s.¹¹⁴

In January 2018, the Minnesota Supreme Court heard oral arguments on the issue of justiciability.¹¹⁵ The plaintiffs argued that the judiciary has the power to determine whether the legislature violated its constitutional obligation under Minnesota’s Education Clause, and the court concluded that the plaintiffs’ claims could be litigated.¹¹⁶ The plaintiffs’ supporters believe that a victory in this case could be used as persuasive precedent to support efforts to make school segregation an issue under other state

¹¹¹ Brandie Burris-Gallagher, *The Court’s Role in Education: Why the Cruz-Guzman Lawsuit Is a Big Deal*, EDALLIES (Jan. 9, 2018), <https://perma.cc/QXQ8-C5VJ>.

¹¹² Appellants’ Brief at 3, *Cruz-Guzman v. State*, 892 N.W.2d 533 (Minn. Ct. App. 2017) (No. A16-1265), 2016 WL 10894525.

¹¹³ Plaintiffs-Petitioners’ Brief and Addendum at 12-13, 27, *Cruz-Guzman v. State*, 892 N.W.2d 583 (Minn. Ct. App. 2017) (No. A16-1265), 2017 WL 7550718; *see also* *Skeen v. State*, 505 N.W.2d 299, 312 (Minn. 1993).

¹¹⁴ *Cruz-Guzman*, 892 N.W.2d at 541; *see also* Burris-Gallagher, *supra* note 111.

¹¹⁵ Burris-Gallagher, *supra* note 111.

¹¹⁶ *Cruz-Guzman v. State*, 916 N.W.2d 1, 9 (Minn. 2018).

constitutions throughout the United States.¹¹⁷ However, charter school interest groups, who support the State of Minnesota in this case, claim that state constitutional protections against school segregation would impede on parents' rights to school choice.¹¹⁸ This same argument could be made in NYC, where research shows that, while segregation was caused by red-lining and housing discrimination, school choice has exacerbated the problem.¹¹⁹ Advocates for integration in New York, however, face a similar obstacle as those in Minnesota: convincing the New York Court of Appeals that segregation violates the New York State Constitution.

B. *New York: A Weak Education Article*

Advocates in New York have taken the fight against school segregation to the New York Court of Appeals under the State's Education Clause.¹²⁰ The New York Court of Appeals, however, has effectively prevented advocates from using the Education Clause to remedy school segregation by articulating a low standard of quality education that a school system must provide to its students.¹²¹

To fulfill its constitutional obligation and provide a sound basic education, the state must provide certain educational "inputs" to ensure that required student "outputs" are met.¹²² In other words, the state must provide "the physical facilities and pedagogical services and resources . . . to provide students with the opportunity to obtain these essential skills" and

¹¹⁷ Rachel M. Cohen, *School Desegregation Lawsuit Threatens*, AM. PROSPECT (Jan. 26, 2016), <https://perma.cc/UCY9-9HR9>; Dana Goldstein, *How Do You Get Better Schools? Take the State to Court, More Advocates Say*, N.Y. TIMES (Aug. 21, 2018, 6:00 AM), <https://perma.cc/7M2W-AD6N>.

¹¹⁸ Cohen, *supra* note 117; Goldstein, *supra* note 117.

¹¹⁹ While the term "school choice" may seem like it has nothing to do with the government action, policy decisions have allowed charter schools to flourish and parents to flee their zoned schools, which leaves poor, underperforming, and segregated schools in their wake. See NICOLE MADER ET AL., THE NEW SCH., CTR. FOR N.Y.C. AFFAIRS, THE PARADOX OF CHOICE: HOW SCHOOL CHOICE DIVIDES N.Y.C. ELEMENTARY SCHOOLS 4 (May 2018), <https://perma.cc/B2FK-G3ET>; Elizabeth A. Harris, *First Test for New York Chancellor: A Middle School Desegregation Plan*, N.Y. TIMES (May 1, 2018), <https://perma.cc/6F3Y-ZJWF>; Kate Taylor, *A Manhattan District Where School Choice Amounts to Segregation*, N.Y. TIMES (June 7, 2017), <https://perma.cc/U3MD-75CG>.

¹²⁰ *New York Civil Liberties Union (NYCLU) v. New York*, 4 N.Y.3d 175 (2005); *Paynter v. New York*, 100 N.Y.2d 434 (2003).

¹²¹ See generally *NYCLU*, 4 N.Y.3d 175; *Paynter*, 100 N.Y.2d 434.

¹²² *Paynter*, 100 N.Y.2d at 440 ("[T]he State fails to provide [students] a sound basic education in that it provides deficient inputs--teaching, facilities and instrumentalities of learning--which lead to deficient outputs such as test results and graduation rates.") (discussing the pleading standard elaborated in *CFE I*, 86 N.Y.2d 307, 317-18 (1995)); see also Bran C. Noonan, *The Fate of New York Public Education is a Matter of Interpretation: A Story of Competing Methods of Constitutional Interpretation, the Nature of Law, and a Functional Approach to the New York Education Article*, 70 ALB. L. REV. 625, 630-31 (2007).

achievements, as required by the New York State Constitution.¹²³ Thus, to succeed, plaintiffs must clearly demonstrate that there is a causal connection between the deficient state input and subsequent deficient student output.¹²⁴ While the strength of that link is difficult to measure, it can be proven through evidence demonstrating how poor facilities, overcrowded school buildings, and outdated curriculums lead to low graduation rates and test scores.¹²⁵

After the New York Court of Appeals mandated the state to establish a minimum funding amount for NYC Public Schools in 2003,¹²⁶ advocates tried to use the Education Article to address inequitable funding and school segregation in other parts of the State outside of New York City. Two New York Court of Appeals cases, *Paynter v. State of New York* and *New York Civil Liberties Union v. State of New York*, demonstrate that the Education Article fails to protect students against school segregation in New York, including New York City.¹²⁷ Further, these cases demonstrate how the New York Court of Appeals has limited the scope of its remedy in *Campaign for Fiscal Equity*.

The New York Civil Liberties Union (“NYCLU”), representing the plaintiffs, sought to extend the rulings of *Campaign for Fiscal Equity* and alleged “that students in 27 named schools outside of New York City [were] being denied the opportunity for a sound basic education.”¹²⁸ Since the New York Court of Appeals had mandated a funding scheme to make up for inequities in the NYC public schools in the *Campaign for Fiscal Equity* cases, NYCLU maintained that the State must put in place corrective measures to address “impoverished education in schools outside of New York City.”¹²⁹ The New York Court of Appeals disagreed, stating that the “New York Constitution does not require equality in educational offerings throughout the state.”¹³⁰ The Constitution does, however, require the state to meet the minimum standards of educational quality.¹³¹ In doing so, the court emphasized that local governments should maintain

¹²³ *CFE I*, 86 N.Y.2d 307, 316 (1995).

¹²⁴ *CFE I*, 86 N.Y.2d at 318; *CFE II*, 100 N.Y.2d 893, 919 (2003).

¹²⁵ *CFE II*, 100 N.Y.2d at 908.

¹²⁶ See sources cited *supra* notes 106-108 and accompanying text.

¹²⁷ *NYCLU v. New York*, 4 N.Y.3d 175 (2005); *Paynter v. New York*, 100 N.Y.2d 434 (2003).

¹²⁸ *NYCLU*, 4 N.Y.3d at 178.

¹²⁹ Appellants’ Brief at 1, *NYCLU v. New York*, 3 A.D.3d 811 (N.Y. App. Div. 2004) (No. 93834), 2003 WL 25793131.

¹³⁰ *NYCLU*, 4 N.Y.3d at 178 (citing *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27 (1982)).

¹³¹ *Id.*

control over their local school districts and limited how retroactive funding could be provided to remedy inadequate resources in individual public schools across the state.¹³²

In *Paynter v. New York*, fifteen students in the Rochester City School District alleged that racial and socioeconomic segregation—by the State’s action or inaction—deprived them of a sound basic education under the New York State Constitution.¹³³ The case never went to trial, as the New York Court of Appeals affirmed the State’s motion to dismiss the claim.¹³⁴ The plaintiffs did not claim that the State provided deficient “teaching, facilities, or instrumentalities of learning.”¹³⁵ Rather, they argued that the State’s practices and policies resulted in a segregated demographic composition of the schools, which led to “some of the lowest test scores and graduation rates in the state.”¹³⁶ The court stated that proof of “academic failure” alone, without proof that the State had failed in their duty under the New York State Constitution, does not rise to a cause of action under the Education Article.¹³⁷ Further, the court articulated that New York State has no constitutional responsibility to change the demographics of school districts with high concentrations of poverty and racial isolation in order to improve academic performance.¹³⁸ This holding reinforces the notion that if the state merely provides “adequate resources,” it “satisfies its constitutional promise under the Education Article, even though student performance remains substandard,” segregated student body notwithstanding.¹³⁹

Paynter and *NYCLU* reveal that the Education Article provides a limited avenue for students and their families to address persistent inequities in school systems across the state. The New York Court of Appeals remains hesitant to expand the holdings of the *CFE* cases to address inequality that is unrelated to school funding outside of the NYCs public schools. Further, the court refuses to apply the Education Article in such a way that could remedy the segregation that exists in NYC and throughout the state. In effect, the New York Court of Appeals has essentially closed off the state constitution as a way for students and parents in segregated school districts to seek relief throughout the state. And, while NYC public schools have achieved some success and received a judgment

¹³² See *id.* at 181.

¹³³ *Paynter v. New York*, 100 N.Y.2d 434, 437-38 (2003).

¹³⁴ *Id.* at 439.

¹³⁵ *Id.* at 437-38.

¹³⁶ *Id.* at 438, 440-41.

¹³⁷ *Id.* at 441.

¹³⁸ *Paynter*, 100 N.Y.2d at 442-43.

¹³⁹ *Id.* at 441.

establishing a minimum funding scheme to provide students with an adequate education, the system remains deeply segregated.

V. A CREATIVE LITIGATION FRONTIER: THE NEW YORK CITY HUMAN RIGHTS LAW

A. *Background on Litigation Under the NYCHRL*

Because the New York Court of Appeals held that segregated schools do not violate the Education Article in *Paynter*, advocates are, and should be, looking for other ways to seek relief. The New York City Human Rights Law (“NYCHRL”) may be a promising tool for advocates to use in challenging aspects of educational inequity that are facets of school segregation, such as discrimination based on race, color, or national origin in public accommodations.¹⁴⁰

The NYCHRL was created in 1965 after incorporating two local laws: Local Law 80, which banned discrimination in private housing, and Local Law 55, which created the Commission on Intergroup Relations.¹⁴¹ The NYC Commission on Human Rights is the administrative body charged with enforcing the NYCHRL and educating the public about the law.¹⁴² Today, the Human Rights Law is “one of the most comprehensive civil rights laws in the nation” and “prohibits discrimination in employment, housing, and public accommodations”¹⁴³ based on “race, color, religion/creed, age, national origin, alienage or citizenship status, gender (including sexual harassment), gender identity, sexual orientation, disability, pregnancy, marital status, and partnership status.”¹⁴⁴ Since its inception, the NYCHRL has protected New Yorkers against discrimination on the basis of race, sex, age, and national origin, while the other classes were added later over time.¹⁴⁵ The NYCHRL has generally been used to

¹⁴⁰ N.Y. ADMIN. CODE § 8-101 (2019).

¹⁴¹ Marta B. Varela, *The First Forty Years of the Commission on Human Rights*, 23 FORDHAM URB. L.J. 983, 984 n.11, 985 (1996); *Commission’s History*, N.Y.C. COMM’N ON HUMAN RIGHTS, <https://perma.cc/Q7SP-KN25> (last visited Jan. 7, 2018).

¹⁴² *Inside the NYC Commission on Human Rights*, N.Y.C. COMM’N ON HUMAN RIGHTS, <https://perma.cc/NZ49-22L6> (last visited Jan. 7, 2018).

¹⁴³ N.Y.C. COMM’N ON HUMAN RIGHTS, *supra* note 142. Private entities that are considered public accommodations include “a nursery, elementary, secondary, undergraduate, or post-graduate private school, or other place of education,” as long as their operations affect commerce. 42 U.S.C. § 12181(7)(J) (2019).

¹⁴⁴ N.Y.C. COMM’N ON HUMAN RIGHTS, *supra* note 142.

¹⁴⁵ In 1970, an Executive Order expanded the NYCHRL to include “creed,” “color,” and “ancestry.” Varela, *supra* note 141, at 985-86. In 1972, Local Law added “religion” to the list of protected classes. *Id.* at 986. In 1981, Local Law included “disabilities,” including both mental and physical disabilities. *Id.* at 987. In 1984, Local Law included “sexual orientation” as a protected class, which was unique in the United States at the time. *Id.* In 1989, Local Law

combat discriminatory practices by employers, such as retaliation and harassment, to offer “additional protections in housing,” and to protect against “bias-based profiling by law enforcement.”¹⁴⁶

Until recently, state and federal courts in New York have not taken litigation under the NYCHRL seriously. Specifically, state and federal courts previously declined to develop a unique legal standard under the NYCHRL.¹⁴⁷ If courts did engage in an analysis of the NYCHRL, judges chose to follow “rote parallelism”¹⁴⁸ because the courts viewed the NYCHRL as a carbon copy of its corresponding state and federal law, instead of liberally construing the NYCHRL to reach its potential in providing New Yorkers with more protection against various forms of discrimination.¹⁴⁹ Federal law even supports liberal construction of local law. For example, Title VII, the federal counterpart to the NYCHRL, states that nothing in the law exempts a person from liability under any present or future local law.¹⁵⁰

Recognizing this problem, the NYC Council passed the Local Civil Rights Restoration Act in 2005 to combat this prevailing practice in the judiciary.¹⁵¹ The NYC Council envisioned that the NYCHRL would be the ceiling of protection and not the floor, as state and federal laws are treated.¹⁵² Therefore, the Restoration Act mandates that “the provisions of [the NYCHRL] are to be *construed independently* from similar or identical provisions of New York state or federal statutes.”¹⁵³ In this way, the NYCHRL is intended to “meld the broadest vision of social justice with the strongest law enforcement deterrent” and to protect the rights of all people to be free from discrimination, in a way that the federal civil rights law and state human rights law have not been able to accomplish.¹⁵⁴

added “alienage” and “citizenship status.” *Id.* at 988. Finally, in 1991, “sex” was changed to “gender.” *Id.* at 989.

¹⁴⁶ N.Y.C. COMM’N ON HUMAN RIGHTS, *supra* note 142.

¹⁴⁷ Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 FORDHAM URB. L.J. 255, 255-56 (2006).

¹⁴⁸ “Rote parallelism” refers to the judicial practice of automatically applying a federal or state legal standard to similar local laws. *Id.* at 262.

¹⁴⁹ *See id.* at 262-63.

¹⁵⁰ 42 U.S.C. § 2000e-7 (2005).

¹⁵¹ Gurian, *supra* note 147, at 256; *see also* 2005 N.Y.C. Local Law No. 85, § 7 (revising N.Y.C. Admin. Code § 8-130).

¹⁵² Gurian, *supra* note 147, at 257 (citing 2005 N.Y.C. Local Law No. 85, § 7).

¹⁵³ Jyotin Hamid & Mary Beth Hogan, *The New York City Civil Rights Restoration Act Grows Teeth*, N.Y. ST. B.J., 34, 35 (July-Aug. 2009) (alterations in original) (emphasis in original) (quoting 2005 N.Y.C. Local Law No. 85, § 7).

¹⁵⁴ Gurian, *supra* note 147, at 262; *see Williams v. N.Y.C. Housing Auth.*, 61 A.D.3d 62, 74 (N.Y. App. Div. 2009).

The power of the NYCHRL has come to fruition in employment discrimination and sexual harassment cases.¹⁵⁵ In these contexts, both state and federal courts have acknowledged that the NYCHRL requires a different analysis than the New York State Human Rights Law (NYSHRL) and Title VII.¹⁵⁶ For example, under the NYSHRL and Title VII, plaintiffs must prove that the harassment or discrimination is either severe or pervasive.¹⁵⁷ However, under the NYCHRL, plaintiffs must demonstrate only that they were treated less well than other employees based on a protected class.¹⁵⁸ In cases involving discrimination based on race, if a defendant has put forth “one or more nondiscriminatory motivations for its actions,”¹⁵⁹ a plaintiff must respond “with some evidence that at least one of the reasons proffered . . . is false, misleading, or incomplete.”¹⁶⁰ In addition, in some jurisdictions, employers can successfully assert a defense under NYSHRL and Title VII by demonstrating that they maintain anti-harassment policies and reporting avenues and promptly address complaints.¹⁶¹ However, employers are strictly liable for harassment by managers and supervisors under the NYCHRL.¹⁶² Overall, the NYCHRL provides greater protections to plaintiffs than its state or federal counterparts.¹⁶³ Since neither federal equal protection laws nor the federal or state constitutions have proven useful in protecting against segregation, the Human Rights Law is a promising new frontier for NYC advocates to use in desegregation litigation.

B. Litigation Against School Inequity Under the NYCHRL

In the realm of education discrimination, school equity advocates have not used the NYCHRL as an avenue to combat school segregation in the same way as it has been used to seek relief from workplace discrimination and harassment. To that end, school equity advocates have little jurisprudence to draw from to craft their positions under the NYCHRL. Broadly, however, the NYCHRL protects individuals from discrimination

¹⁵⁵ See Hamid & Hogan, *supra* note 153, at 34-35; Kate Webber Nuñez, *Toxic Cultures Require A Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN ST. L. REV. 463, 466 (2018).

¹⁵⁶ *Zakrzewska v. New Sch.*, 14 N.Y.3d 469, 479-81 (2010); *Morse v. Fidessa Corp.*, 165 A.D.3d 61, 62, 65-70 (N.Y. App. Div. 2018); *Williams*, 61 A.D.3d at 66-71; Hamid & Hogan, *supra* note 153, at 34-35.

¹⁵⁷ *Williams*, 61 A.D.3d at 77; Nuñez, *supra* note 155, at 476.

¹⁵⁸ *Williams*, 61 A.D.3d at 78; Nuñez, *supra* note 155, at 500.

¹⁵⁹ *Bennett v. Health Mgt. Sys., Inc.*, 92 A.D.3d 29, 39 (N.Y. App. Div. 2011).

¹⁶⁰ *Id.* at 45; See *Cadet-Legros v. New York Univ. Hosp. Ctr.*, 135 A.D.3d 196, 201 (N.Y. App. Div. 2015).

¹⁶¹ Nuñez, *supra* note 155, at 497.

¹⁶² *Id.*; *Zakrzewska v. New Sch.*, 14 N.Y.3d 469, 479-81 (2010).

¹⁶³ See Hamid & Hogan, *supra* note 153, at 34-35.

in the area of public accommodations.¹⁶⁴ Since public schools are public accommodations, the NYC public school system must meet, and is subject to, the requirements of this law.¹⁶⁵

Despite the lack of jurisprudence, advocates have started to explore using the NYCHRL to combat educational discrimination in NYC public schools. In 2018, four Black and Latinx public high school students, on behalf of a class of all Black and Latinx students who attend segregated NYC schools, and IntegrateNYC, a student-led advocacy organization, filed *L.P. v. New York City Department of Education*, a lawsuit against the NYC Department of Education (“DOE”), the Public Schools Athletic League (“PSAL”),¹⁶⁶ and PSAL’s Executive Director, Donald J. Douglas, as defendants.¹⁶⁷ The plaintiffs, represented by the New York Lawyers for the Public Interest (“NYLPI”), argued that the defendants violated the NYCHRL by maintaining “discriminatory policies that deny Black and Latin[x] students equal access to the life-changing possibilities of sports,”¹⁶⁸ which negatively impacts their physical health, mental health, teamwork skills, community ties, and friendships, and negatively influences their college opportunities.¹⁶⁹ While this lawsuit is not particularly addressing school segregation at large, it addresses a facet of school inequality—sports access—that disproportionately affects students of color in NYC public schools.¹⁷⁰

Importantly, the students brought the case against the defendants as providers and managers of NYC public school accommodations.¹⁷¹ The students claimed that, as managers, the defendants withheld and denied

¹⁶⁴ *Law: Overview*, N.Y.C. COMM’N ON HUMAN RIGHTS, <https://perma.cc/9MWP-PPDP> (last visited May 12, 2019).

¹⁶⁵ Examples of public accommodations that are impacted by the NYCHRL are stores, banks, medical or dental offices, government agencies, hair salons, hotels, hospitals, theaters, restaurants, schools, and taxis. *Law: In Public Places*, N.Y.C. COMM’N ON HUMAN RIGHTS, <https://perma.cc/BCM9-CYSZ> (last visited May 2, 2019); see also Class Action Complaint at 35, *L.P. v. N.Y.C. Dep’t of Educ.*, No. 155825/2018 (June 21, 2018) [hereinafter *L.P. v. N.Y.C. Dep’t of Educ. Complaint*], <https://perma.cc/YU5H-RXXW>.

¹⁶⁶ PSAL is a DOE-created body that provides and regulates sports teams for all NYC public high schools. *What We Do*, PUB. SCH. ATHLETIC LEAGUE, <https://perma.cc/6QV6-3ACA> (last visited May 12, 2019).

¹⁶⁷ *L.P. v. N.Y.C. Dep’t of Educ. Complaint*, *supra* note 165, at 2. The New York Lawyers for the Public Interest (“NYLPI”) represents IntegrateNYC and the plaintiffs. Press Release, N.Y. Lawyers for the Pub. Interest, *NYLPI Files Discrimination Lawsuit Against N.Y.C. Dep’t of Educ. and Public Sch. Athletic League Calling for Equal Access to Sch. Sports* (June 21, 2018), <https://perma.cc/H7RB-V8UV>.

¹⁶⁸ *L.P. v. N.Y.C. Dep’t of Educ. Complaint*, *supra* note 165, at 2.

¹⁶⁹ *Id.* at 2, 5, 35.

¹⁷⁰ See generally *id.*

¹⁷¹ *Id.* at 35.

their rightful access to “accommodations, facilities, advantages, and privileges related to sports teams on account of [their] race” and promulgated and maintained “practices that result in a disparate impact [based upon race] to the detriment of the [students].”¹⁷² The students demonstrated their claims with evidence of the disproportionate lack of access to sports teams for Black and Latinx students, and the disparate impact on them resulting from policies that benefit schools with established sports teams.¹⁷³ These policies include “‘grandfathering’ established teams,” which favors established schools with fewer Black and Latinx students, “maintaining an opaque and discretionary team-granting system” which leads to a lower grant rate of sports teams in schools with higher proportions of Black and Latinx students, and “preventing students from participating on PSAL teams outside the school where they are enrolled.”¹⁷⁴

This lawsuit was filed after years of legislative and grassroots advocacy from students and teachers impacted by the lack of access to sports teams. Over two decades ago, NYC began dismantling many large, underperforming high schools to create smaller high schools,¹⁷⁵ with the idea that smaller educational settings would foster better academic relationships between students and their teachers and increase graduation rates.¹⁷⁶ These schools, however, were primarily comprised of people of color and immigrant students and, thus, these same populations now comprise the newer, smaller schools as well.¹⁷⁷ PSAL did not adapt their policies to permit creating and maintaining sports teams at these smaller schools.¹⁷⁸ Thus, “[t]he schools with the least access to sports teams ‘have the highest numbers of students of color, or for whom English is not their

¹⁷² *Id.* at 35-36.

¹⁷³ *L.P. v. N.Y.C. Dep’t of Educ. Complaint*, *supra* note 165, at 14-16. The complaint cites data showing that, on average, Black and Latinx students attend a school with “nearly ten fewer teams than students of other races.” *Id.* at 14. Further, “[a]pproximately 7.9% of Black and Latin[x] students in the city are currently enrolled at schools with no PSAL teams—more than twice the rate for students of other races (3.4%).” *Id.*

¹⁷⁴ *Id.* at 20-21.

¹⁷⁵ Jim Dwyer, *In Schools Where Sports May Be Most Vital, New York City Offers Least Help*, N.Y. TIMES (May 27, 2014), <https://perma.cc/C5UJ-AMYJ>.

¹⁷⁶ Taylor McGraw, *Episode 3: Who Gets to Play?*, MISEDUCATION (July 1, 2018), <https://www.bellvoices.org/season1/2018/7/1/episode-3-who-gets-to-play> [<https://perma.cc/D43X-C5EX>].

¹⁷⁷ *See* Dwyer, *supra* note 175.

¹⁷⁸ *Id.*

first language.”¹⁷⁹ As a result, students of color in these smaller schools who wanted to play on particular sports teams suffered.¹⁸⁰

In 2011, David Garcia-Rosen, a teacher and an activist, other school administrators, and high school students in the Bronx created the Small Schools Athletic League to provide these students with access to sports teams, with virtually no support from the Education Department or PSAL.¹⁸¹ Unfortunately, this proposal did not steadily increase access to sports teams, since students in predominantly Black and Latinx schools across the city still did not have equal access to sports teams.¹⁸² The Fair Play Coalition, a collection of students, teachers, coaches, and lawyers, are using the lawsuit to expand access to school sports across NYC and guarantee that all students have an opportunity to play a sport that PSAL offers students.¹⁸³

The students in *L.P.* are seeking declaratory and injunctive relief against defendants, yet also offer as solutions alternative policies that the defendants should implement for less discriminatory outcomes, such as “mandat[ing] that every small New York City high school be considered part of an ‘umbrella program’ with co-located or nearby schools” such that each group would have the same number of students.¹⁸⁴ PSAL, then, “could grant each program an equal number of PSAL teams,” to ensure that all NYC public high school students have an equal opportunity to access sports teams.¹⁸⁵ The defendants have responded and denied the claims.¹⁸⁶

In 2019, the NYC Department of Education unveiled a pilot program entitled “PSAL-All Access.”¹⁸⁷ Twenty-six schools from Manhattan, the

¹⁷⁹ *Id.* (quoting David Garcia-Rosen, a history teacher and dean at International Community High School in the Bronx, N.Y.).

¹⁸⁰ McGraw, *supra* note 176. This podcast episode is dedicated to highlighting voices of advocates and students of color from smaller public high schools who did not have access to sports such as, for example, a basketball team, baseball team, soccer team, or track team. *Id.*

¹⁸¹ *Id.* After pressure from the Fair Play Coalition, the Department of Education provided funding, adding 214 teams since 2014. Jim Dwyer, *New York’s Playing Fields Aren’t Level, Students Say*, N.Y. TIMES (June 28, 2018), <https://perma.cc/SK2T-Y8B6>. However, upon creation of the league, the principals of the small schools used their own in-house budgets to fund the teams, including hiring referees and getting equipment, until the Department provided a one-time grant of \$250,000. Dwyer, *supra* note 175; McGraw, *supra* note 176.

¹⁸² Dwyer, *supra* note 175.

¹⁸³ Amelia Harper, *New York City Students File Lawsuit Demanding Equal Access to Sports in High School*, EDUC. DRIVE (July 10, 2018), <https://perma.cc/A4E7-Q87S>.

¹⁸⁴ *L.P. v. N.Y.C. Dep’t of Educ.* Complaint, *supra* note 165, at 32.

¹⁸⁵ *Id.*

¹⁸⁶ *See generally* Answer, *L.P. v. N.Y.C. Dep’t of Educ.*, No. 155825/2018 (Aug. 27, 2018).

¹⁸⁷ Ben Chapman, *NYC Takes a Swing at Unequal School Sports System Long Accused of Racism*, N.Y. DAILY NEWS (Mar. 15, 2019, 5:30 AM), <https://perma.cc/WZ2Z-PE6L>.

Bronx, and Brooklyn that enroll 8,500 students will have access to nineteen PSAL sports teams.¹⁸⁸ The program will also permit students from these participating schools to join sports teams at nearby schools if their respective school does not provide a certain sports team.¹⁸⁹ However, Melissa Iachan, Senior Staff Attorney at NYLPI and a lead lawyer in *L.P.*, stated that the program “is too small to make a dent in the issue” before the court, as “the pilot program does not change the pervasive systematic racial inequality in the current PSAL system.”¹⁹⁰

At this point, the parties have entered a settlement negotiation agreement and the court has granted the plaintiffs an extension to move for class certification.¹⁹¹ It is conceivable that the students could be successful if the New York Supreme Court of Bronx County views that they are treated “less well” than their white student counterparts—who have access to PSAL sports teams—because of their race and ethnicity, taking the NYCHRL to the “furthest reaches of what is constitutionally permissible.”¹⁹² In this case, the court will have to ensure that NYC public schools are no longer separate and unequal, but have equal sports resources, taking a step towards integration.

The lawsuit against the DOE and PSAL under the NYCHRL is an example of litigation advocacy that looks beyond federal and state law and takes advantage of a local law that could finally safeguard plaintiffs against a form of discrimination that they would not originally be protected from—school segregation. This lawsuit advises advocates to strategize and challenge individual aspects of educational inequity, whether it be access to sports teams, extracurricular activities, or after-school programs.

VI. BEYOND LITIGATION

Underlying any litigation effort must be a desire to truly serve the needs of communities affected by educational inequity. *Brown I* made school segregation a national issue after the LDF constructed a decades-

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Stipulation and Order at 1, *L.P. v. N.Y.C. Dep’t of Educ.*, No. 155825/2018 (May 16, 2019). Additionally, ongoing organizing efforts have led to the passage of Res. No. 85-B, a City Council bill that will require PSAL to make public its “policies, procedures, resource-allocation and decision-making criteria,” an issue that is addressed in the NYCHRL litigation. Press Release, N.Y. Lawyers for the Pub. Interest, Public High School Students at City Hall to Celebrate Unanimous Passage of Sports Equity Legislation (May 29, 2019), <https://perma.cc/KL3D-TB7J>; Res. No. 85-B, 2019 N.Y.C. Council Sess. (N.Y. 2019).

¹⁹² Gurian, *supra* note 147, at 262.

long strategy to combat racial discrimination in education.¹⁹³ In NYC, grassroots organizing around integrating schools has been a long-standing tradition that is in full force today.¹⁹⁴ Unlike pre-*Brown* efforts, however, it is incumbent on attorneys to work with the specific communities impacted by school segregation and not to solely litigate on behalf of marginalized groups.¹⁹⁵

One way to practice this type of lawyering is to follow the advocacy that led to the NYLPI's complaint against the DOE and PSAL. Advocates, including students and teachers from segregated schools in NYC, organized for years before the complaint was even filed.¹⁹⁶ After addressing the lack of sports access through organizing, the complaint was filed in continuation of the ongoing fight. Thus, litigation stemmed from the organizing, and in turn was tailored to address only a portion of school inequity that results from school segregation. In this way, a suggested strategy could be to fight inequalities piece by piece, while confronting the whole systemic problem of racial segregation in NYC public schools.

A recommendation for future litigation is to address the high rates of school suspensions that impact Black and Latinx students. Advocates are currently organizing to reduce the maximum number of days that students can be suspended from school.¹⁹⁷ A potential claim under the NYCHRL could be that the disproportionate rate at which Black and Latinx students are suspended in NYC public schools, as compared to other races, results in disparate impact on those students.¹⁹⁸ Advocates may have additional leverage with this argument because, as of 2011, the DOE must report discipline and suspension data to the NYC Council as mandated by the

¹⁹³ Bell, *supra* note 20, at 472-73.

¹⁹⁴ See, e.g., FAIR PLAY COALITION, <https://perma.cc/26NC-BPPQ> (last visited Mar. 19, 2019) (youth-led coalition with a goal of equalizing sports access for all NYC students); INTEGRATE NYC, <https://perma.cc/B6BA-6ENU> (last visited Mar. 19, 2019); NEW YORK APPLESEED, <https://nyappleseed.org> <https://perma.cc/7GYH-5GVZ> (last visited Mar. 19, 2019) (organization working to integrate schools with stakeholders and advocacy groups); *Enrollment Equity Campaign*, TEENS TAKE CHARGE, <https://perma.cc/J4TT-FMH2> (last visited Mar. 19, 2019) (student-led coalition that is working to shift power in the education system to young people and calling on Mayor de Blasio to integrate NYC public schools).

¹⁹⁵ LÓPEZ, *supra* note 20, at 28-32.

¹⁹⁶ See *supra* Section V.B.

¹⁹⁷ *School to Prison Pipeline*, OFENY, <https://perma.cc/K4ES-YNU5> (last visited June 3, 2019); Sara Mosle, *In Offshoot of Black Lives Matter Movement, Students Push for Changes in New York City Schools*, CHALKBEAT (Feb. 8, 2019), <https://perma.cc/F24F-RR89>.

¹⁹⁸ See, e.g., Sarah D. Sparks & Alyson Klein, *Discipline Disparities Grow for Students of Color*, *New Federal Data Show*, EDUC. WEEK (Apr. 24, 2018), <https://perma.cc/22FP-WA4V>; Patrick Wall, *Black and Hispanic Students in New York City Most Likely To Be Arrested and Handcuffed, Data Shows*, CHALKBEAT (Sept. 26, 2017), <https://perma.cc/7QV4-CRJ3>; Alex Zimmerman, *Suspensions Continue to Fall in New York City Schools Under de Blasio*, CHALKBEAT (Mar. 31, 2017), <https://perma.cc/ZW5Y-Z4X2>.

NYCHRL.¹⁹⁹ In sum, lawyers must work in conjunction with communities impacted by racial segregation in school to determine the best course of action to fit their needs.

CONCLUSION

Before the U.S. Supreme Court decided *Brown I*, Ella Baker, an organizer and civil rights leader, expressed her frustration with the general ignorance surrounding school segregation in New York.²⁰⁰ With the NAACP's focus on remedying segregation in the South, she commented, "[W]hat do you do about the poor children right here?"²⁰¹ Students, parents, and advocates are still asking that same question today and, like Baker, are actively trying to remedy school segregation in NYC. Educational inequity, as a function of school segregation, is a persistent problem in NYC that is gaining political traction but is long overdue to be readily fixed.

It goes without saying that all children in NYC, regardless of race, should be provided access to an excellent education. As one option, advocates should creatively initiate litigation that challenges facets of unequal school systems under the NYCHRL. But, it is important to acknowledge that this tactic will not solve education inequality, as there is no single solution to this problem. To ensure that all children in NYC receive the education that they deserve, advocates must: challenge funding schemes, access to sports and after-school programs, and distributions based on race, gender, and test scores across the city; understand the effect that white supremacy has had on keeping our schools separate and unequal; and listen to the realities of NYC public school students and follow their lead.²⁰²

¹⁹⁹ N.Y. ADMIN. CODE § 8-101 (2019).

²⁰⁰ DELMONT, *supra* note 5, at 30.

²⁰¹ *Id.*

²⁰² *Enrollment Equity Plan*, TEENS TAKE CHARGE, <https://perma.cc/4NWU-XVUG> (last visited June 16, 2019); *Real Integration*, INTEGRATENYC, <https://perma.cc/MZJ4-BLHH> (last visited Mar. 19, 2019).