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## A Path to Overcoming Resegregation in Oklahoma Schools

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# A PATH TO OVERCOMING RESEGREGATION IN OKLAHOMA SCHOOLS

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## I. INTRODUCTION

When Ellis Walker “E.W.” Woods saw a flyer for teaching positions for Black

teachers in Oklahoma, he set out on foot from Tennessee.<sup>1</sup> After arriving in Oklahoma, in September 1913, Woods opened Booker T. Washington High School in Tulsa's Greenwood District, the heart of Tulsa's Black community located just north of downtown Tulsa.<sup>2</sup> At the time, there were limited educational opportunities for Black students in Tulsa.<sup>3</sup> Woods' school helped bridge this gap by offering Black students a high quality education.<sup>4</sup> Woods was also known for helping ensure students went on to obtain college and graduate degrees, and often recruited students to come back to teach at Booker T. Washington.<sup>5</sup> Woods continued as principal until 1948 and established a tradition of excellence in academics and athletics at Booker T. Washington.<sup>6</sup>

In 1950, not long after Woods' death, the school moved to a new building which included a proper gymnasium, cafeteria, and science facilities—amenities the school had gone without for years.<sup>7</sup> Throughout the 1960s, Booker T. Washington continued to excel at the highest level in athletics, winning state championships, and fostering a thriving arts program known for its marching band and Broadway-esque productions.<sup>8</sup>

Nineteen years after the Supreme Court ordered public schools to integrate in *Brown v. Board of Education*, Oklahoma courts finally ordered Tulsa Public Schools to integrate.<sup>9</sup> Originally, the school district proposed closing Booker T. Washington and busing Black students to schools located in white south Tulsa neighborhoods.<sup>10</sup> However, Booker T. Washington was a centerpiece of the Black community in Tulsa and the community strongly opposed closing the school.<sup>11</sup> Consequently, the school board and the community ultimately agreed to integrate Booker T. Washington as a magnet school.<sup>12</sup>

In the fall of 1973, Booker T. Washington High School opened as a voluntary magnet school with a 50% white and 50% Black student enrollment.<sup>13</sup> Administrators attracted white students to Booker T. Washington by offering classes not offered at other schools such as Chinese language, Italian language, and computer science.<sup>14</sup> Further, the school board recruited the most desired and qualified teachers to teach at the magnet school.<sup>15</sup> The school also recruited local media personalities to teach mass media classes and employed an artist-in-residence to lead art classes.<sup>16</sup>

On the first day of integrated classes, white students arrived in buses, and for many

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1. Andrea Jobe, *Freedom's School*, YOUTUBE (2014), <https://www.youtube.com/watch?v=mnWaY-j2m2U>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Jobe, *supra* note 1.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Jobe, *supra* note 1.

12. *Id.*

13. *Id.*

14. *Id.*; U.S. COMM'N ON C.R., OKLA. ADVISORY COMM., SCH. DESEGREGATION IN TULSA 70 (1977).

15. U.S. COMM'N ON C.R., *supra* note 14, at 69.

16. *Id.* at 70.

it was their first time ever stepping foot in the historically Black neighborhood.<sup>17</sup> National news covered the white students' arrival at Booker T. Washington High School, and fears of resistance or violence quickly subsided.<sup>18</sup> Integration at Booker T. Washington was successful from the start.<sup>19</sup> Soon, the school had more students applying than space available.<sup>20</sup>

Today, Booker T. Washington High School remains largely integrated and has continued in its tradition of excellence.<sup>21</sup> In 2019, student enrollment at Booker T. Washington High School was 37% white, 29% Black, and 34% other minority groups.<sup>22</sup> Further, the school has repeatedly ranked among the nation's top 100 high schools.<sup>23</sup> It operates one of only two International Baccalaureate programs in Oklahoma and offers courses in six different foreign languages.<sup>24</sup>

Despite successful integration at Booker T. Washington high school, other Oklahoma schools have not managed to achieve the same level of integration and academic achievement. Today, many of Oklahoma public schools are racially isolated.<sup>25</sup> This problem of segregation in education has persisted without remedy.<sup>26</sup> For example, in 2019, Oklahoma City's Northeast High School had 98% minority student enrollment.<sup>27</sup> Tulsa's McClain High School has 93% minority student enrollment.<sup>28</sup> For nearly twenty years, Oklahoma City Public Schools operated integration policies under federal court orders.<sup>29</sup> However, when the Court lifted those orders in 1991, the district quickly abandoned integration policies.<sup>30</sup>

Throughout Tulsa's history, the city has remained largely geographically segregated with Black residents predominately living in north Tulsa neighborhoods.<sup>31</sup> Geographic segregation is so pronounced in Tulsa that the winning candidate in the 2016 Mayoral election ran on a platform which promised to bridge the inequities between races—a divide

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17. Jobe, *supra* note 1.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*; 2019 School Profiles: Booker T. Washington High School, OKLA. OFF. OF EDUC. QUALITY & ACCOUNTABILITY, <https://www.schoolreportcard.org/doc/profiles/2019/reports/src/201972i001735.pdf> (last visited Nov. 8, 2021).

22. *Id.*

23. School Profile, BOOKER T. WASHINGTON FOUND., <http://btwfoundation.net/school-profile/> (last visited Nov. 27, 2020).

24. Academics, BOOKER T. WASHINGTON HIGH SCH., <https://btw.tulsaschools.org/academics/> (last visited Nov. 27, 2020); School Profile, *supra* note 23.

25. Jennifer Palmer & Whitney Bryen, *Then & Now: Brown v. Board's Legacy in Oklahoma City Schools*, OKLA. WATCH, <https://oklahomawatch.org/2019/05/17/then-and-now-brown-v-boards-legacy-in-oklahoma-city-schools/> (last updated Feb. 5, 2020).

26. *Id.*

27. 2019 School Profiles: Northeast High School, OKLA. OFF. OF EDUC. QUALITY & ACCOUNTABILITY, <https://www.schoolreportcard.org/doc/profiles/2019/reports/src/201955i089760.pdf> (last visited Nov. 8, 2021).

28. 2019 School Profiles: McClain HS for Science & Technology, OKLA. OFF. OF EDUC. QUALITY & ACCOUNTABILITY, <https://www.schoolreportcard.org/doc/profiles/2019/reports/src/201972i001720.pdf> (last visited Nov. 8, 2021).

29. Bd. of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237, 241 (1991).

30. *Id.* at 250.

31. David Blatt, *Schools, Housing, & Poverty: Thoughts on Segregation in Tulsa*, OKLA. POL'Y INST., <https://okpolicy.org/schools-housing-poverty-thoughts-segregation-tulsa/> (last updated Dec. 10, 2020).

that is emphasized by geographic boundaries.<sup>32</sup> Residential segregation is also reflected in school enrollments.<sup>33</sup> Nevertheless, much of the discussion and reforms in Oklahoma education over the last few decades have focused on school funding and curriculum, not racial equality.<sup>34</sup>

Segregation in Oklahoma schools mirrors similar trends around the country.<sup>35</sup> The reality is far different from the aspirations of integrated schools expressed in 1954 in *Brown v. Board of Education*.<sup>36</sup> In the sixty-six years since *Brown* was decided, resistance to integration has continued with renewed vigor and manifest itself in new ways.<sup>37</sup> In *Brown*, the Court invalidated the principle of separate but equal in the context of education.<sup>38</sup> This placed the burden on school districts to dismantle all vestiges of segregation in education.<sup>39</sup> In *Brown*, the Court expressly invalidated only de jure segregation, or segregation imposed by state action.<sup>40</sup> However, the *Brown* Court did not address de facto segregation, or “racial imbalance cause by other factors,” such residential demographic patterns.<sup>41</sup> This oversight in *Brown* was the focus of *Parents Involved in Community Schools v. Seattle School District*.<sup>42</sup> In *Parents Involved*, the Court significantly limited the means by which schools could voluntarily implement integration policies.<sup>43</sup>

School boards throughout the country recognize that the social and psychological effects of segregation in education outlawed in *Brown* still exist.<sup>44</sup> Some districts have successfully implemented policies that voluntarily address segregation within the limitations imposed by *Parents Involved*, while others are still fighting for more equitable school assignment policies.<sup>45</sup> This Comment will look at one voluntary student assignment plan that could provide a model for districts seeking more integrated schools within the confines of the *Parents Involved* decision.<sup>46</sup>

In Part II, this Comment will briefly examine the original arguments the Supreme

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32. *Bringing Tulsa Together*, GT BYNUM, [https://www.gtbynum.com/bringing\\_tulsa\\_together](https://www.gtbynum.com/bringing_tulsa_together) (last visited Sept. 22, 2020).

33. Blatt, *supra* note 31.

34. Telephone interview with Rebecca Fine, Educ. Pol’y Analyst, Okla. Pol’y Inst. (Sept. 10, 2020).

35. See ERICA FRANKENBERG ET AL., *HARMING OUR COMMON FUTURE: AMERICA’S SEGREGATED SCHOOLS 65 YEARS AFTER BROWN* 4–5 (2019).

36. See *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.* (“Brown I”), 347 U.S. 483 (1954); FRANKENBERG ET AL., *supra* note 35, at 4–5.

37. See FRANKENBERG ET AL., *supra* note 35, at 4–5.

38. *Brown I*, 347 U.S. at 483.

39. *Brown v. Bd. of Educ. of Topeka, Kan.* (“Brown II”), 349 U.S. 294, 299 (1955); *Brown I*, 347 U.S. at 495.

40. See *Brown I*, 347 U.S. at 495; *Brown II*, 349 U.S. at 299.

41. See *Brown I*, 347 U.S. at 495; *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 843 (2007).

42. See *Parents Involved in Cmty. Schs.*, 551 U.S. at 709.

43. Erwin Chemerinsky, *Making Schools More Separate and Unequal*, in *THE PURSUIT OF RACIAL AND ETHNIC EQUITY IN AMERICAN PUBLIC SCHOOLS* 279, 283 (Kristi L. Bowman ed. 2015).

44. Erica Frankenberg & Kendra Taylor, *De Facto Segregation: Tracing a Legal Basis for Contemporary Inequality*, 47 J.L. & EDUC. 189, 229 (2018).

45. See generally LISA CHAVEZ & ERICA FRANKENBERG, *INTEGRATION DEFENDED: BERKLEY UNIFIED STRATEGY TO MAINTAIN SCHOOL DIVERSITY* (2009).

46. *Id.* at iv.

Court relied upon to support its holding in *Brown v. Board of Education* and how the goals established in this landmark case have yet to be achieved in the United States. Part III, will discuss the history and modern manifestations of school segregation in Oklahoma's two major metropolitan areas, Oklahoma City and Tulsa. Next, in Part IV, this comment will address the legal barriers to voluntary desegregation created by the Court's 2007 decision in *Parents Involved in Community Schools v. Seattle School District*. Finally, Part V will explore legal means of implementing voluntary desegregation and recommend a student assignment plan that would address residential segregation in Oklahoma City and Tulsa.

## II. THE SUPREME COURT'S HOLDING IN *BROWN* STILL HAS RELEVANCE AND ITS GOALS HAVE NOT BEEN ACHIEVED

In 1954, the Supreme Court held in *Brown v. Board of Education of Topeka* (“*Brown I*”) that schools that are equal in terms of facilities, curriculum, teachers, and other tangibles, are inherently unequal if they are racially segregated.<sup>47</sup> The Court noted that segregation's psychological effects on Black students included instilling a lifelong sense of inferiority and hindering motivation to learn and educational development.<sup>48</sup> Social science research adopted by the *Brown* Court suggested inferior status attributed to minority students through segregation left children “confused about their own personal worth.”<sup>49</sup> Depending on the individual child's particular situation and attributes, this confusion may lead some children to react with “aggressions and hostility” while others might respond with “withdrawal and submissive behavior.”<sup>50</sup> The children's reactions can be “self-destructive” in that they lead to punishment and is used by the majority “as justification for continuing prejudice and segregation.”<sup>51</sup> Looking at these original arguments in *Brown I*, it is easy to see how the “detrimental” psychological effects of segregated schools are still relevant today. Ultimately, the *Brown* Court held laws and policies which denied students admission to a school based on that student's race violated the student's constitutional equal protection rights.<sup>52</sup>

One year after *Brown I*, the Supreme Court issued the *Brown II* opinion which addressed the relief plaintiffs were entitled to.<sup>53</sup> The Court placed the burden on the individual school districts to develop nondiscriminatory student assignment policies and to implement integration “with all deliberate speed.”<sup>54</sup> Thereafter, the Court remanded the cases to their original local courts, with instructions to oversee compliance with *Brown I*.<sup>55</sup>

Over a decade later, in *Green v. City School Board of New Kent City*, the Supreme

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47. *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.* (“*Brown I*”), 347 U.S. 483, 494–95 (1954).

48. *Id.* at 494.

49. Minn. L. Rev. Editorial Board, *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, 37 U. MINN. L. SCH. 427, 429 (1953); *Brown I*, 347 U.S. at 494–95.

50. Minn. L. Rev. Editorial Board, *supra* note 49 at 430.

51. *Id.*

52. *Brown I*, 347 U.S. at 488.

53. *Brown v. Bd. of Educ. of Topeka, Kan.* (“*Brown II*”), 349 U.S. 294, 299, 301 (1955).

54. *Id.* at 299, 301.

55. *Id.* at 300.

Court took a more aggressive approach to remedying the harm identified in *Brown*.<sup>56</sup> In *Green*, a Virginia town implemented a “freedom of choice” policy in response to the holding in *Brown*.<sup>57</sup> Under this policy students were to be assigned to their previous school unless they applied to a different school and were approved for the alternate assignment.<sup>58</sup> Under this plan, the schools remained completely segregated; no reassignments occurred.<sup>59</sup> The Court found this policy insufficient, further clarifying that districts courts were to evaluate a school’s plan in terms of its effectiveness in achieving desegregation, which was the result of a “well-entrenched system.”<sup>60</sup> The Court in *Green* charged the school district with “the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”<sup>61</sup> Further, the Court noted schools under federal desegregation decrees should remain within the court’s jurisdiction “until it is clear that state-imposed segregation has been completely removed.”<sup>62</sup> In *Green*, the Court acknowledged the need for schools to eliminate not only the segregative policies, but also the effects of years of systematic discrimination, to achieve actual integration.<sup>63</sup>

#### A. *Brown’s Promise of Integration Has Not Been Achieved Nationally*

Over sixty-six years have passed since the Supreme Court decided *Brown*.<sup>64</sup> However, since the early 1990s, schools in the United States have become increasingly segregated, or resegregated, by race and socioeconomic status.<sup>65</sup> In recent years, public schools have experienced demographic shifts, with increased Latino student enrollment.<sup>66</sup> Today, white students make up a minority of the public school student enrollment.<sup>67</sup> Yet, white students are the most racially isolated group.<sup>68</sup> On average, white students attend schools with 69% white student population.<sup>69</sup> Black students are similarly racially isolated, making up only 15% of public school enrollment but on average attending schools that are 47% Black.<sup>70</sup> According to the U.S. Government Accountability Office, between 2000–01 and 2013–14, the percentage of all public schools with a high percentage of Black or Latino students grew from 9% to 16%.<sup>71</sup> These schools also had 75–100% of students

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56. See *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430 (1968).

57. *Id.* at 433.

58. *Id.*

59. *Id.*

60. *Id.* at 437, 439.

61. *Green*, 391 U.S. at 437–38.

62. *Id.* at 439.

63. *Id.*

64. See *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.* (“*Brown I*”), 347 U.S. 483 (1954).

65. FRANKENBERG ET AL., *supra* note 35, at 4–5.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. FRANKENBERG ET AL., *supra* note 35, at 4–5.

71. U.S. GOV’T ACCOUNTABILITY OFF., K-12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION (2016).

eligible for free and reduced lunch and had fewer college preparatory courses.<sup>72</sup> This data demonstrates that American schools are increasingly segregated and unequal.<sup>73</sup> Unfortunately, the aspirations of *Brown*, to remedy the harmful effects of segregated schools, have yet to be realized.<sup>74</sup>

### III. OKLAHOMA SCHOOLS HAVE FAILED TO FULLY DESEGREGATE

Resegregation is also happening in Oklahoma schools.<sup>75</sup> Nine years after *Brown*, it was judicially determined that Oklahoma City School District was maintaining segregated schools.<sup>76</sup> Even more surprising is the fact that it would be another seven years before the Tenth Circuit would decide that Tulsa Public School District maintained segregating policies.<sup>77</sup> These judicial findings resulted in the Oklahoma City school district being subjected to a federal desegregation order for twenty-eight years and Tulsa for nearly thirteen years.<sup>78</sup> Despite these orders, many of today's Black students remain racially isolated in a number of schools in Oklahoma City and Tulsa.<sup>79</sup>

#### *A. Oklahoma City and Tulsa Carry Long Legacies of School Segregation*

When Oklahoma entered the Union as a state in 1907, the state constitution required white and Black students to attend separate schools.<sup>80</sup> Oklahoma law also recognized that it constituted a misdemeanor if teachers knowingly allowed a student to attend a school designated for another race.<sup>81</sup> Teachers who violated the statute faced fines and penalties, such as revocation of their teaching certificate for a year at minimum.<sup>82</sup> Additionally, any white student attending school with a Black student could face fines.<sup>83</sup> While *Brown I* held such laws unconstitutional, these provisions remained in the Oklahoma Constitution and state statutes until 1963.<sup>84</sup>

In addition to specific state laws that mandated school segregation, some residential laws also amplified the practice.<sup>85</sup> For example, in 1916, Tulsa passed a law that prohibited prospective home buyers from purchasing a house on a block with 75% or greater residents

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72. *Id.*

73. George B. Daniels & Rachel Pereira, *May It Please the Court: Federal Courts and School Desegregation Post-Parents Involved*, 17 U. PA. J. CONST. L. 625, 630 (2015).

74. *Id.*

75. Blatt, *supra* note 31; Palmer & Bryen, *supra* note 25.

76. *Dowell v. Sch. Bd. of Okla. City Pub. Schs.*, 219 F. Supp. 427, 447–48 (W.D. Okla. 1963).

77. *United States v. Bd. of Educ., Indep. Sch. Dist. No. 1, Tulsa Cnty.*, 429 F.2d 1253, 1256–57 (10th Cir. 1970).

78. *See generally Dowell v. Bd. of Educ. of Okla. City Pub. Schs.*, 8 F.3d 1501, 1505 (10th Cir. 1993); Civil Docket, *United States v. Bd. of Educ., Indep. Sch. Dist. No. 1, Tulsa Cnty., Okla.*, (N.D. Okla. 1968) (No. 68-C-0185).

79. Blatt, *supra* note 31; Palmer & Bryen, *supra* note 25.

80. *Dowell*, 219 F. Supp. at 431.

81. *Id.* at 432.

82. *Id.*

83. *Id.* at 432–33.

84. *Id.* at 433.

85. *Dowell*, 219 F. Supp. at 433.



of the opposite race.<sup>86</sup> Oklahoma City passed a similar ordinance in 1918.<sup>87</sup> Oklahoma courts consistently enforced racially restrictive covenants until the practice was deemed unconstitutional in 1948.<sup>88</sup> Though eventually abrogated, these laws remained valid for nearly fifty years, and contributed to the practice and pattern of racially divided neighborhoods.<sup>89</sup>

In the post-*Brown* era, Oklahoma City neighborhoods remained divided by race, with east and southeast sections of the city made up largely of Black residents while other areas of the city consisted largely of white residents.<sup>90</sup> Similarly, in Tulsa, Black residents lived primarily in concentrated areas of north and southwest Tulsa.<sup>91</sup>

After the *Brown* decisions, Oklahomans openly resisted integration.<sup>92</sup> For example, on August 1, 1955, the Oklahoma City Public School Board passed a resolution acknowledging the effect of the Supreme Court decision on the district's policies.<sup>93</sup> In the resolution, the board adopted new attendance boundaries, but noted that students could remain in their current schools or request a transfer.<sup>94</sup> However, other than this resolution, no evidence exists that the school board took any further action to integrate the district.<sup>95</sup> In response to the new attendance boundaries, both white and Black families moved within the district, self-segregating along new attendance boundaries.<sup>96</sup> On a personal level, white families moved to different attendance zones or transferred their children to avoid integrated schools.<sup>97</sup> This practice, commonly referred to as white flight, resulted in many schools transitioning from all white enrollment to all Black enrollment in a relatively short period of time. For example, Creston Hills Elementary, located in Northeast Oklahoma City, flipped from all white student enrollment to all Black student enrollment within two years of the 1955 resolution.<sup>98</sup>

Likewise in Tulsa, attendance zones continued to reflect the racially segregated composition of neighborhoods.<sup>99</sup> After the formally all-white school, Burroughs Elementary, integrated in 1955, white families moved out of the area.<sup>100</sup> Burroughs Elementary had Black student enrollment of over 50% by 1959.<sup>101</sup> On the other hand, no white student attended any of the formally Black elementary schools in north Tulsa until 1966, when one white student enrolled at Johnson Elementary School.<sup>102</sup> Between 1955

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86. ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS AND RECONCILIATION 84 (2002).

87. *Id.*

88. *Dowell*, 219 F. Supp. at 433.

89. *Id.* at 433.

90. *Id.* at 433–34.

91. *United States v. Bd. of Educ., Indep. Sch. Dist. No. 1, Tulsa Cnty.*, 429 F.2d 1253 (10th Cir. 1970).

92. *Dowell*, 219 F. Supp. at 434; *Bd. of Educ., Indep. Sch. Dist. No. 1, Tulsa Cnty.*, 429 F.2d at 1253.

93. *Dowell*, 219 F. Supp. at 434.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Palmer & Bryen, *supra* note 25.

99. *United States v. Bd. of Educ., Indep. Sch. Dist. No. 1, Tulsa Cnty.*, 429 F.2d 1253, 1256 (10th Cir. 1970).

100. U.S. COMM'N ON C.R., *supra* note 14, at 36.

101. *Id.*

102. *Bd. of Educ., Indep. Sch. Dist. No. 1, Tulsa Cnty.*, 429 F.2d at 1255.

and 1970, Tulsa Public Schools constructed fourteen new schools.<sup>103</sup> Eleven of the new schools opened with all-white student enrollment and three with nearly all-Black student enrollment.<sup>104</sup>

*B. Court-Ordered Integration Had a Limited Effect on Oklahoma City and Tulsa Public Schools*

*Dowell v. School Board of Oklahoma City Public Schools* was the first case to succeed in challenging segregation policies in Oklahoma City Public Schools (“OCPS”).<sup>105</sup> In *Dowell*, the parents of Robert Dowell filed suit against OCPS for racially segregated school transfer policies.<sup>106</sup> In 1960, the Dowells requested their son be transferred to a high school across the street from their home, Northeast High School.<sup>107</sup> Notwithstanding the Dowell’s request and the convenience of the school, Robert was assigned to the predominately Black Douglass High School located three miles away.<sup>108</sup> Dowell was denied multiple transfer requests.<sup>109</sup> The United States District Court for the Western District of Oklahoma found Dowell’s transfer was denied based on his race and that there was a pattern of Black students being denied transfers to schools where white students were granted transfers.<sup>110</sup> The district court also determined the school’s administration, teachers, and support staff were similarly segregated.<sup>111</sup> The district court also found that the OCPS transfer policy perpetuated segregation and that the school district had not acted in good faith to integrate following *Brown*.<sup>112</sup> The district court enjoined OCPS from the continued use of policies perpetuating segregation and ordered OCPS to integrate faculty and staff as well as students.<sup>113</sup> Further, the district court maintained jurisdiction over OCPS to monitor compliance.<sup>114</sup>

In a 1965 district court review of the OCPS’s compliance with desegregation orders, the court found the district’s neighborhood-based attendance zones did not sufficiently mitigate the effects of residential segregation and contributed to single-race schools.<sup>115</sup> The district court reviewed OCPS’s policies again in 1972 and found the voluntary desegregation policies had been ineffective in creating a unitary system.<sup>116</sup> In response, the district court ordered OCPS to implement a plan proposed by the plaintiffs and prepared by Dr. John A. Finger, an expert at Rhode Island State University.<sup>117</sup> This plan, otherwise known as “The Finger Plan,” involved reorganizing the schools by grade,

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103. *Id.* at 1256.

104. *Id.*

105. *Dowell v. Sch. Bd. of Okla. City Pub. Schs.*, 219 F. Supp. 427, 448 (W.D. Okla. 1963).

106. *Id.* at 435.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Dowell*, 219 F. Supp. at 439.

111. *Id.* at 442.

112. *Id.*

113. *Id.* at 442, 447–48.

114. *Id.* at 447–48.

115. *See Dowell*, 244 F. Supp. at 971.

116. *Bd. of Ed. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 241 (1991).

117. *Id.*

modifying attendance zones, and busing students in order to achieve schools with greater racial balance—approximately 20% Black student enrollment.<sup>118</sup> The Finger Plan remained in effect until 1984.<sup>119</sup>

Unlike the aggressive district-wide desegregation plan in Oklahoma City, the United States Court of Appeals for the Tenth Circuit took a more narrow approach to desegregation in Tulsa Public Schools.<sup>120</sup> In 1970, the United States sued Tulsa Public School District in the Federal District Court for the Northern District of Oklahoma.<sup>121</sup> The United States alleged Tulsa Public School District's policies packed attendance zones by race, granted transfers based on race, and maintained nearly fully segregated faculties.<sup>122</sup> The district court dismissed the complaint holding that none of Tulsa Public School District's policies violated the Constitution.<sup>123</sup>

On appeal, the Tenth Circuit found the district's neighborhood-based school policies "constituted a system of state-imposed and state-preserved segregation," and ordered the district to act affirmatively to achieve a unitary status.<sup>124</sup> In order to achieve a unitary system, the United States came to an agreement with Tulsa Public Schools which included racially balancing faculty, revising transfer policies to include majority to minority transfers and providing for transportation, and constructing new schools in such a way as to promote a unitary system.<sup>125</sup> Tulsa Public Schools closed two middle schools and redrew attendance zones to achieve not more than 33% Black student population at any one middle school.<sup>126</sup> The district converted the formerly all-Black Booker T. Washington High School to an integrated Metro Learning Center and committed to ensuring Black student enrollment at other high schools stayed between 7% and 22%.<sup>127</sup>

The parties, however, did not agree on policies for integrating certain elementary schools and that issue returned to the Tenth Circuit in 1972.<sup>128</sup> The Tenth Circuit held that five of the nine segregated elementary schools were de facto segregated, meaning they were segregated as a result of residential movements, not state action.<sup>129</sup> The court further noted that three of the five de facto segregated schools were all-white schools prior to integration, and flipped to an all-Black student population following integration.<sup>130</sup> The court determined the five schools, each with Black student enrollment at 85.5% to 99.4%, were segregated not on account of state action but "outward movement of [B]lacks, combined with the familiar 'white flight.'"<sup>131</sup> The Tenth Circuit rejected the government

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118. *Dowell*, 498 U.S. at 241; *Dowell*, 338 F. Supp. at 1269.

119. *Dowell*, 498 U.S. at 242.

120. *United States v. Bd. of Educ., Indep. Sch. Dist. No. 1, Tulsa Cnty., Okla.*, 459 F.2d 720, 724 (10th Cir. 1972).

121. *United States v. Bd. of Educ., Indep. Sch. Dist. No. 1, Tulsa Cnty.*, 429 F.2d 1253, 1254 (10th Cir. 1970).

122. *Id.*

123. *Id.* at 1255.

124. *Id.* at 1259.

125. *Bd. of Educ., Indep. Sch. Dist. No. 1, Tulsa Cnty., Okla.*, 459 F.2d at 722.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 723.

130. *Bd. of Educ., Indep. Sch. Dist. No. 1, Tulsa Cnty., Okla.*, 459 F.2d at 722.

131. *Id.* at 722–23.

and intervenors' argument that the minority to majority transfer policies constituted state action which perpetuated segregation.<sup>132</sup> The court concluded de facto segregation did not require judicially ordered integration, noting, "neighborhood school plans, when impartially maintained and administered, do not violate constitutional rights even though the result of such plans is racial imbalance."<sup>133</sup> Therefore, ultimately, only four Tulsa Public elementary schools were under court orders to desegregate.<sup>134</sup>

In determining the constitutionality of school policies in Oklahoma City and Tulsa, the District Court for the Western District of Oklahoma and the Tenth Circuit took differing stances on the impact of residential segregation.<sup>135</sup> In the Oklahoma City cases, the district court recognized the effects of decades of racially restrictive covenants which had created segregated neighborhoods and determined that this was state action which compelled the district to abandon neighborhood school assignment plans.<sup>136</sup> Further, even when one-race schools flipped from all-white to all-Black due to white flight, the district court continued to hold that the Oklahoma City School District was maintaining a dual system.<sup>137</sup> By contrast, in the Tulsa cases, the Tenth Circuit determined that schools that flipped from all-white to all-Black were the result of individual choices not connected to state action, or in other words, de facto segregation.<sup>138</sup> However, the situations in Tulsa and Oklahoma City were not all that different. Both cities had years of residential segregation to overcome.<sup>139</sup> Both maintained segregative transfer policies which arguably enabled white flight.<sup>140</sup>

Accordingly, after the Supreme Court found de facto segregation actionable in *Keyes v. School District No. 1, Denver*, the Supreme Court vacated the Tenth Circuit's judgment that de facto segregated schools in Tulsa were not within desegregation orders.<sup>141</sup> In 1975, the district court approved a Tulsa Public School plan to further integrate Emerson Elementary, which the court had previously deemed de facto segregated.<sup>142</sup> Under the new plan, the district would be required to maintain 50% white student enrollment and 50% Black student enrollment at Emerson.<sup>143</sup> Nevertheless, this hazy distinction between de jure and de facto segregation continues to be a basis for avoiding court-ordered policy

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132. *Id.* at 723.

133. *Id.* at 724.

134. *Id.*

135. *Bd. of Educ., Indep. Sch. Dist. No. 1, Tulsa Cnty., Okla.*, 459 F.2d at 724; see *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 243–44 (1991).

136. *Dowell*, 498 U.S. at 243–44; *Restrictive Covenant*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/restrictive\\_covenant](https://www.law.cornell.edu/wex/restrictive_covenant) (last visited Nov. 27, 2020) (restrictive covenants restricts future use of land and restrictive covenants based on race would be, for example "the property may be occupied only by Caucasians.").

137. Palmer & Bryen, *supra* note 25.

138. *Bd. of Educ., Indep. Sch. Dist. No. 1, Tulsa Cnty., Okla.*, 459 F.2d at 724.

139. See *id.*; *Dowell*, 498 U.S. at 243–44.

140. See *Bd. of Educ., Indep. Sch. Dist. No. 1, Tulsa Cnty., Okla.*, 459 F.2d at 724; *Dowell*, 498 U.S. at 243–44.

141. *Keyes v. Sch. Dist. No. 1, Denver*, 413 U.S. 189, 212 (1973); *Smith v. Bd. of Educ., Indep. Sch. Dist. No. 1, Tulsa Cnty., Okla.*, 413 U.S. 916 (1973).

142. U.S. COMM'N ON C.R., *supra* note 14, at 73.

143. *Id.*

changes.<sup>144</sup>

Despite federal desegregation orders, by the early 1970s school segregation was particularly severe in Oklahoma.<sup>145</sup> A 1974 study used a dissimilarity index to measure the levels of segregation in cities across the U.S.<sup>146</sup> According to the study, Tulsa and Oklahoma City ranked highest among cities with the most racially segregated school systems.<sup>147</sup> On a scale on which zero represented perfect integration and one-hundred represented full segregation, the cities each received scores of ninety-seventy.<sup>148</sup> Furthermore, white families fled the districts. During the era in which Oklahoma City Public School District was under desegregation orders, 1963 to 1991, enrollment in the district dropped from over 75,000 to just below 37,000.<sup>149</sup> In Tulsa, between 1968 and 1973, enrollment in surrounding suburban schools such as, Union, Jenks, and Broken Arrow, increased by nearly 2,000 students in each district, while Tulsa Public Schools saw a decrease in enrollment by 12,000 students.<sup>150</sup> While federal orders to desegregate Oklahoma City and Tulsa schools initiated valuable policy changes, those changes did not necessarily result in integrated schools or schools that were reflective of the racial make-up of the cities.<sup>151</sup>

*C. Courts Lifted Desegregation Orders in Oklahoma on the Grounds That Continued Segregations Was De Facto. Not Because Schools Were in Fact Integrated*

By 1973, Tulsa Public Schools magnet program provided students integrated education from kindergarten through twelfth grade.<sup>152</sup> However, attendance at the magnet schools was voluntary and integration at other schools in the district were based upon district assignment.<sup>153</sup> Many Black students who could not secure a spot at a magnet school were assigned to bus to predominantly white schools in other areas of town, bearing a heavier burden than white students in busing.<sup>154</sup> Tulsa Public Schools remained within the district court's jurisdiction until 1983 and submitted annual reports on the school's integration plans.<sup>155</sup> However, most of the school district's integration plans and reports focused on voluntary integration through the magnet program.<sup>156</sup> Outside of the magnet program, many Tulsa Public Schools remained segregated, particularly at the elementary

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144. See Frankenberg & Taylor, *supra* note 44, at 229–31.

145. Blatt, *supra* note 31.

146. *Id.*

147. *Id.*

148. Blatt, *supra* note 31.

149. Palmer & Bryen, *supra* note 25.

150. U.S. COMM'N ON C.R., *supra* note 14, at 22.

151. See generally *United States v. Bd. of Educ., Indep. Sch. Dist. No. 1, Tulsa Cnty., Okla.*, 459 F.2d 720, 722 (10th Cir. 1972); *Dowell v. Bd. of Educ. of Okla. City Pub. Schs.*, 338 F. Supp. 1256, 1273 (W.D. Okla. 1972); Blatt, *supra* note 31.

152. U.S. COMM'N ON C.R., *supra* note 14, at 72–73.

153. *Id.*

154. *Id.* at 79.

155. Civil Docket at 12, *United States v. Bd. of Educ., Indep. Sch. Dist. No. 1, Tulsa Cnty., Okla.*, (N.D. Okla. 1968) (No. 68-C-0185).

156. U.S. COMM'N ON C.R., *supra* note 14, at 96.

level.<sup>157</sup> In 1976, school district officials stated that the magnet program met the obligations the school district owed to the courts and, thus, the school district had no plans to further desegregate.<sup>158</sup> In 1983, the district court entered an order closing the school desegregation case and releasing Tulsa Public Schools from desegregation orders.<sup>159</sup>

Similarly, in 1977, the United States District Court for the Western District of Oklahoma granted Oklahoma City School Board's motion to close the *Dowell* case, finding that the Finger Plan had "worked and that substantial compliance with constitutional requirement ha[d] been achieved."<sup>160</sup> According to the court, it did not expect, by closing the case and releasing the district from the supervision of the court, that the plan would be dismantled.<sup>161</sup> However, in 1985, when the district pursued a new policy which would retreat from busing, the plaintiffs moved to reopen the case, arguing the new plan would be a return to segregation.<sup>162</sup> Therein, the Tenth Circuit held that the 1977 order to close the case had not lifted the injunction and that the school district continued to be subject to desegregation orders.<sup>163</sup> In a subsequent decision, the Tenth Circuit also found the school district could not be relieved of the injunctive orders.<sup>164</sup> In a landmark 1991 decision, the Supreme Court reversed, holding that the district could be relieved of the injunctive orders if the district court found the school district "was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the school board would return to its former ways . . . ."<sup>165</sup> On remand, the district court found, and the Tenth Circuit affirmed, that the OCPS had complied in good faith with the desegregation decree until 1985.<sup>166</sup> Further, the court noted that continued residential segregation was not a vestige of de jure segregation, and that discontinuing busing for some grades would not be a violation of the Equal Protection Clause.<sup>167</sup> Thus, the OCPS was relieved of federal desegregation orders and could pursue new policies without the court's supervision.<sup>168</sup>

*D. Residential Segregations Continues to Drive Racial Segregations in Oklahoma City and Tulsa Schools, Not Only Within School Districts but Between Neighboring School Districts*

Since OCPS were released from desegregation orders, the district has experienced shifting demographics which have created new forms of racial isolation.<sup>169</sup> Between 1989

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157. *Id.*

158. *Id.* at 98.

159. Civil Docket at 12, *United States v. Bd. of Ed., Indep. Sch. Dist. No. 1, Tulsa Cty., Okla.*, (N.D. Okla. 1968) (No. 68-C-0185) (same).

160. *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 241 (1991).

161. *Id.*

162. *Id.* at 242.

163. *Id.*

164. *Id.*

165. *Dowell*, 498 U.S. at 247.

166. *Dowell v. Bd. Of Educ. of Okla. City Pub. Schs.*, 8 F.3d 1501, 1520 (10th Cir. 1993).

167. *Id.*

168. *Id.*

169. See Palmer & Bryen, *supra* note 25; Ben Felder, *As Hispanic School Enrollment Grows, Segregation Increases in Oklahoma City*, OKLAHOMAN, <http://newsok.com/article/5518612> (last updated Sept. 19, 2016,

and 2017, white student enrollment in Oklahoma City Public schools dropped from over 17,225 to 5,607, illustrating continual white flight from urban school districts to the suburbs.<sup>170</sup> Enrollment of Black students also dropped by over 6,000 as Latino enrollment has increased dramatically.<sup>171</sup> In 2016, 54% of students enrolled in Oklahoma City Public Schools were Latino and only 15% were white.<sup>172</sup> Latino students are also experiencing racial isolation, with 71% of Latino students attending schools with 70% or higher Latino student bodies in 2015.<sup>173</sup> This rate of racial isolation is comparable to Black student isolation in 1970 prior to busing.<sup>174</sup> Additionally, Black students are still experiencing racial isolation in some Oklahoma City schools.<sup>175</sup> In 2019, Oklahoma City's Northeast Academy, the school at the center of the original *Dowell* case, had 90% Black student enrollment.<sup>176</sup> Ultimately, much of the segregation in Oklahoma City metro area schools can be attributed to residential segregation which is the catalyst for racial imbalance within Oklahoma City Public Schools and suburban school districts.<sup>177</sup>

Compared to other cities, Tulsa has made greater headway towards integration.<sup>178</sup> By 2010–2011, Tulsa ranked forty-seventh among the 100 largest metropolitan areas on a dissimilarity index which measured levels of segregation.<sup>179</sup> Additionally, Tulsa scored 62.9 on the dissimilarity index, with 100 representing complete segregation; down almost 30% from the city's previous score of ninety-seven in 1974.<sup>180</sup> However, in 2014 Black students made up 11.9% of the public-school enrollment in Tulsa County, yet accounted for over 75% of the student enrollment at twelve schools, all within Tulsa Public School District.<sup>181</sup> Meanwhile, seventy-one schools in Tulsa County had a less than 5% Black student enrollment and all but two of these schools were in suburban school districts.<sup>182</sup> It is also notable that the average white student in the Tulsa metro area attends a school with a 55% poverty rate, while the average Black student attends a school with an 81% poverty rate.<sup>183</sup>

These demographics reveal that racial isolation continues within Oklahoma's major metropolitan school districts—Oklahoma City Public Schools and Tulsa Public Schools.<sup>184</sup> However, the surrounding suburban districts also play a part in racial segregation between school districts.<sup>185</sup> Therefore, any plan to achieve greater integration in Oklahoma City and Tulsa schools would have to account for integration both within the

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170. Palmer & Bryen, *supra* note 25.

171. *Id.*

172. Felder, *supra* note 169.

173. *Id.*

174. *Id.*

175. Palmer & Bryen, *supra* note 25.

176. *Id.*

177. Felder, *supra* note 169.

178. *See generally* Blatt, *supra* note 31.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. Blatt, *supra* note 31.

184. Felder, *supra* note 169; Blatt, *supra* note 31.

185. Felder, *supra* note 169; Blatt, *supra* note 31.

districts as well as integration between suburban and urban school districts.

#### IV. SINCE COURTS LIFTED DESEGREGATIONS ORDERS, LEGAL BARRIERS HAVE HINDERED VOLUNTARY DESEGREGATION PLANS

In the Supreme Court's 1991 *Dowell* decision, the Court held that desegregation injunctive orders should be lifted if the school board had complied in "good faith" and "the vestiges of past discrimination had been eliminated to the extent practicable."<sup>186</sup> By the time the Court decided *Dowell*, it had tempered ambitions to eliminate racial discrimination "root and branch" to simply eliminate "to the extent practicable."<sup>187</sup> After the *Dowell* decision, between 1992 and 2002, all but one request for unitary status was granted nationwide, meaning many schools were no longer under the watchful eye of district courts.<sup>188</sup>

##### A. Parents Involved in Community Schools v. Seattle School District *Limited Voluntary Integration*

Despite the withdrawal of court ordered integration following *Dowell*, many school districts nevertheless voluntarily sought to continue to implement policies that increase racial diversity.<sup>189</sup> However, the Court's holding in *Parents Involved in Community Schools v. Seattle School District* limited the ability of school districts to implement voluntary desegregation policies.<sup>190</sup> The *Parents Involved* case dealt with school districts in Seattle, Washington and Louisville, Kentucky which used race as one factor in determining school assignments in an effort to achieve greater racial balance in their schools.<sup>191</sup> The Seattle school district used classification of "white" and "nonwhite" as a tiebreaking factor when allocating spots in high schools where more students ranked the school as their first choice than there were spots available.<sup>192</sup> The school district only considered race as a tiebreaker when the school the student sought to attend was not within ten percentage points of the district's ideal racial balance.<sup>193</sup> Seattle had never operated a legally segregated school, nevertheless, the school district voluntarily used this policy to address the effect of residential segregation and achieve more integrated schools.<sup>194</sup>

Similarly, the Jefferson County school district in Louisville classified students as "Black" or "other" and used these classifications when making certain elementary school assignments and ruling on transfer requests.<sup>195</sup> However, Jefferson County schools had operated under federal desegregation orders from 1975 until 2000, when the district court found that the school district had achieved unitary status.<sup>196</sup> Following the district's

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186. Bd. of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237, 249–50 (1991).

187. *Id.*; Green v. Cty. Sch. Bd. of New Kent Cnty., 391 U.S. 430, 437–38 (1968).

188. Daniels & Pereira, *supra* note 73, at 625.

189. Chemerinsky, *supra* note 43.

190. *Id.*

191. *Id.*

192. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 710–11 (2007).

193. *Id.* at 712.

194. *Id.*

195. *Id.* at 710.

196. *Id.* at 715–16.



release from federal desegregation orders, the district adopted a voluntary student assignment plan.<sup>197</sup> Under the plan, the district maintained integration by requiring schools to have between 15%-50% Black student enrollment, a range that was in line with the district's 34% Black student enrollment.<sup>198</sup> The district grouped elementary schools in clusters based on their geographic location and students enrolled by applying and submitting their preferences of schools within their assigned cluster.<sup>199</sup> However, if a school was at its enrollment limit based on racial guidelines, a student who would contribute to racial imbalance would not be admitted to that school.<sup>200</sup>

The Supreme Court held that the policies of both the Seattle and Louisville school districts were unconstitutional violations of the Equal Protection Clause.<sup>201</sup> The majority held that even if the districts used race for the purpose of desegregation, these policies were subject to strict scrutiny and only permissible if necessary to achieve a compelling interest and narrowly tailored.<sup>202</sup> In a plurality opinion, four Justices in the majority found that desegregation efforts were not a compelling interest, while Justice Kennedy and the dissenters argued that "encourag[ing] a diverse student body" was a compelling interest.<sup>203</sup> However, the majority ultimately concluded that the districts had failed to prove that there was no race neutral means of achieving racially diverse schools.<sup>204</sup> Writing for the majority, Chief Justice Roberts argued that the Constitution called for color-blindness, reasoning "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>205</sup>

The Court's decision in *Parents Involved* placed a different Fourteenth Amendment standard on schools that are under federal desegregation orders verses schools that are not.<sup>206</sup> Schools that were not under court orders to desegregate would need to have policies that would satisfy strict scrutiny—policies narrowly tailored to meet a compelling government interest.<sup>207</sup> The Court held that efforts to eliminate the remaining vestiges of past racial discrimination were not a compelling interest unless the school district was in fact under court orders to desegregate.<sup>208</sup> This holding has led scholars to question, "[i]f a school district is obviously segregated, but a judge does not say it is segregated, is it segregated?"<sup>209</sup>

Conversely, Justice Breyer argued in his dissent that the majority's position abandoned the promises of *Brown*.<sup>210</sup> Further, Justice Breyer contended that the majority's decision was in opposition to principles set out in *Swann v. Charlotte-Mecklenburg Board*

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197. *Parents Involved in Cmty. Schs.*, 551 U.S. at 716.

198. *Id.*

199. *Id.*

200. *Id.* at 716.

201. *Id.* at 747–48.

202. Chemerinsky, *supra* note 43, at 281.

203. *Id.*

204. *Id.*

205. *Id.* at 282 (quoting *Parents Involved in Cmty. Schs.*, 551 U.S. at 748).

206. Daniels & Pereira, *supra* note 73, at 632.

207. *Id.* at 633.

208. *Id.*

209. *Id.* at 634.

210. Chemerinsky, *supra* note 43, at 282.

of Education.<sup>211</sup> In *Swann*, the Court noted that “in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole,” and “[t]o do this as an educational policy is within the broad discretionary powers of school authorities.”<sup>212</sup> Justice Breyer argued lower courts interpreted *Swann* as encouraging the use of racial quotas and that these powers were not limited to schools under court orders to desegregate.<sup>213</sup> Justice Breyer noted the distinction between de jure segregation, “segregation by state action” which is subject to court ordered desegregation, and de facto segregation, “racial imbalance caused by other factors.”<sup>214</sup> However according to Justice Breyer, this “distinction concerns what the Constitution *requires* school boards to do, not what it *permits* them to do.”<sup>215</sup> Prior to the majority’s decision, courts did not rely on the de jure/de facto distinction to limit what remedies schools could implement voluntarily.<sup>216</sup>

One of the effects of *Parents Involved* was that it gave school districts that were already unwilling to adopt integration plans an excuse not to adopt such plans.<sup>217</sup> Further, it discouraged interested school districts from adopting new desegregation plans and caused some school districts to abandon desegregation plans already in place.<sup>218</sup> Even if a school district could devise a desegregation plan that could survive strict scrutiny, the risk of a future legal battle proved enough to dissuade many from even trying.<sup>219</sup>

On the other hand, some scholars have pointed out that much of the segregation in metropolitan areas is between school districts, not within school districts.<sup>220</sup> Therefore, where segregation is happening between school districts, the *Parents Involved* decision would have little impact on the district’s integration strategy or lack thereof because there is not a clear strategy for integration within a district that is already largely racially isolated.<sup>221</sup>

#### V. LEGAL MEANS EXIST FOR TACKLING DE FACTO SEGREGATION AND SHOULD BE APPLIED IN OKLAHOMA

Legal means exist for addressing the effects of de facto segregation and creating more integrated schools.<sup>222</sup> Those means can be traced to student assignment plans used in public schools in Berkley, California and Tulsa Public Schools’ magnet program.<sup>223</sup> These means include using neighborhood-based demographic data to formulate student

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211. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 823 (2007).

212. *Id.* at 23 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)).

213. *Parents Involved in Cmty. Schs.*, 551 U.S. at 824.

214. *Id.* at 844.

215. Daniels & Pereira, *supra* note 73, at 636 (quoting *Parents Involved in Cmty. Schs.*, 551 U.S. at 843–44).

216. *Parents Involved in Cmty. Schs.*, 551 U.S. at 844.

217. Chemerinsky, *supra* note 43, at 283.

218. *Id.*

219. *Id.* at 284.

220. Danielle R. Holley-Walker, *After Unitary Status, in THE PURSUIT OF RACIAL AND ETHNIC EQUITY IN AMERICAN PUBLIC SCHOOLS* 315, 318–19 (Kristi L. Bowman ed. 2015).

221. *Id.* at 319.

222. See generally CHAVEZ & FRANKENBERG, *supra* note 45, at 6.

223. *Id.*; TULSA PUB. SChS., *Reg. 2206-R2: Procedure for Admission to Magnet Schools, in SCHOOL BOARD POLICY MANUAL* (2019).

assignment plans, which will be discussed in this section.<sup>224</sup>

*A. Student Assignment Policies Provide Avenues for Voluntary Integration*

As many southern school districts have been granted unitary status and released from federal desegregation orders, they have been left with the question of what to do with their integration policies.<sup>225</sup> In a study of post-unitary status southern school districts' student assignment plans, the major trends included traditional attendance zone assignments to schools based on a student's residence.<sup>226</sup> Additionally, some districts used attendance zones as the primary means of making student assignment, then, permitted voluntary transfers to schools where the student is not the majority race.<sup>227</sup> Other districts have replaced racial considerations in student assignment plans with socioeconomic status to produce more school diversity.<sup>228</sup> Finally, another trend involves the use of magnet schools offering specialized curriculum and drawing in students residing in all areas of the community.<sup>229</sup>

Berkley Unified School District ("Berkley") in Berkley, California provides one example of race neutral voluntary integration policies that could provide a model for other districts.<sup>230</sup> Berkley began its voluntary desegregation efforts in the 1960s and the policies have continued to evolve.<sup>231</sup> Berkley's current plan was implemented prior to the *Parents Involved* decision.<sup>232</sup> However, the plan has achieved integrated elementary schools without using student's race as a factor in school assignments and, thus, could provide an example for other districts in the post-*Parents Involved* era.<sup>233</sup>

Berkley's student assignment plan divides the district geographically into over 400 residential planning areas, typically the size of 4–8 residential blocks.<sup>234</sup> Each area is assigned a diversity code based on that neighborhood's race, income, and educational demographics.<sup>235</sup> All the students in a residential planning areas are assigned the same diversity code, regardless of whether the code reflects that individual student's circumstances.<sup>236</sup> These codes are then used when making school assignments with the goal of achieving schools that reflect the diversity of the attendance zone.<sup>237</sup> Parents apply for their student to attend their preferred school and students are assigned to schools using an computer program that takes into account various priority criteria and balancing diversity codes.<sup>238</sup> The Berkley plan does not use the individual student's race or

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224. *Id.*

225. Holley-Walker, *supra* note 220, at 315.

226. *Id.* at 319.

227. *Id.*

228. *Id.*

229. *Id.* at 320.

230. CHAVEZ & FRANKENBERG, *supra* note 45, at iv.

231. *Id.* at 1.

232. *Id.*

233. *Id.* at 1.

234. *Id.* at 2, 6.

235. CHAVEZ & FRANKENBERG, *supra* note 45, at 2, 6.

236. *Id.* at 6.

237. *Id.* at 7.

238. *Id.*

socioeconomic status when making school assignments, but instead uses the diversity score of the neighborhood in which that student resides.<sup>239</sup>

The district's plan for the most part proved successful in integrating students by race.<sup>240</sup> Within the first five years of implementing the policy, only three elementary schools had student demographics that deviated by more than ten percentage points from the district's overall percentage of a given racial group.<sup>241</sup> However, two of those schools were Spanish language immersion schools which had Latino student populations exceeding the district average.<sup>242</sup> While the district's plan helped maintain more diverse schools, it is not clear whether it was wholly successful in attracting students to attend Berkley schools.<sup>243</sup> In the first five years after implementing the policy, the district had 23% of students opting out of public elementary schools for private school.<sup>244</sup> This number is relatively high compared to the overall private school attendance in California, 9%, and the average private school attendance in larger metropolitan areas, 15%.<sup>245</sup>

Though the Berkley plan was not devised specifically in response to the *Parents Involved* decision, it provides some insight into the type of voluntary integration plan that might be upheld post-*Parents Involved*.<sup>246</sup> In 2006, the Berkley student assignment plan was challenged in California courts as a violation of state law which prohibited the use of a student's race for preferential or discriminatory purposes in public institutions.<sup>247</sup> The trial court sided with the school district and California Appellate Court agreed.<sup>248</sup> Both reasoned that the policy did not consider an individual student's race but only the make-up of the planning area in which the student lives.<sup>249</sup> The petitioners appealed the California Appellate Court's decision and, in 2009, subsequent to the *Parents Involved* decision, the California Supreme Court denied the appeal.<sup>250</sup> The procedural history of the case suggests that courts might uphold this type of student assignment plan if utilized in other districts.<sup>251</sup>

#### *B. Berkley's Student Assignment Policy Could Provide a Model for Oklahoma Schools*

A student assignment plan like Berkley's could provide a model for Oklahoma City and Tulsa public schools to voluntarily integrate.<sup>252</sup> Tulsa Public School's current system for assigning students to magnet elementary schools already has vague similarities to the Berkley student assignment plan.<sup>253</sup>

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239. *Id.*

240. CHAVEZ & FRANKENBERG, *supra* note 45, at 13.

241. *Id.*

242. *Id.*

243. *Id.* at 11–12.

244. *Id.* at 12.

245. CHAVEZ & FRANKENBERG, *supra* note 45, at 12.

246. *Id.* at iv.

247. *Id.* at 1, 8.

248. *Id.* at 8.

249. *Id.*

250. CHAVEZ & FRANKENBERG, *supra* note 45, at 8.

251. *Id.* at 25.

252. *Id.*

253. TULSA PUB. SCHS., *supra* note 223.

Tulsa Public Schools have neighborhood-based elementary schools as well as optional magnet elementary schools which are highly sought-after.<sup>254</sup> Students apply to attend magnet elementary schools but are not guaranteed admission.<sup>255</sup> Admission to the magnet elementary schools is based on the quadrant of the city in which the student resides and a random lottery.<sup>256</sup> The school district divides the district into four quadrants based on the neighborhood school assignment.<sup>257</sup> Admission to magnet schools is limited to a certain number of students per quadrant.<sup>258</sup> Students who apply to the magnet elementary school are entered into a lottery drawing for a chance to receive one of the enrollment spaces reserved for their quadrant.<sup>259</sup>

While race and socioeconomic factors are not explicitly noted in the policy, the quadrants do reflect geographical divisions within the city based on race and income.<sup>260</sup> For example, Quadrant IV includes the highest income areas in the school district.<sup>261</sup> Quadrant I encompasses most of north Tulsa, an area that is home to over 40% of Tulsa's Black residents.<sup>262</sup> In some sections of Quadrant I, over 80% of the residents are Black.<sup>263</sup> Additionally, the poverty rate in north Tulsa is over 35% percent, compared to an average of 17% throughout the rest of Tulsa.<sup>264</sup>

By distributing magnet school spaces among each quadrant, the school district ensures that the magnet elementary schools enroll students residing throughout the city.<sup>265</sup> Because Tulsa's neighborhoods are largely segregated by race and income, enrolling students from throughout the city increases integration in the magnet elementary schools.<sup>266</sup> For example, Tulsa neighborhood elementary schools tend to be more racially isolated than the magnet elementary schools.<sup>267</sup> The neighborhood school Greenwood Leadership Academy, located in north Tulsa, enrolled nearly 69% Black students and only

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254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. TULSA PUB. SCHS., *supra* note 223.

259. *Id.*

260. *Id.*; *High School Boundary Map: Tulsa County, Oklahoma*, TULSA PUB. SCHS., <https://resources.finalsite.net/images/v1534955426/tulsaschoolsorg/qqk77oplvzj2txnjagd/HighSchoolBoundaries.pdf> (last updated July 1, 2018); *Tulsa, OK: Economy*, DATA USA, <https://datausa.io/profile/geo/tulsa-ok#economy> (last visited Jan. 12, 2021).

261. *Id.*

262. TULSA PUB. SCHS., *supra* note 223; *High School Boundary Map: Tulsa County, Oklahoma*, *supra* note 260; Brian Root, *Policing, Poverty, and Racial Inequality in Tulsa, Oklahoma*, HUM. RTS. WATCH, <https://www.hrw.org/video-photos/interactive/2019/09/11/policing-poverty-and-racial-inequality-tulsa-oklahoma> (last visited Jan. 12, 2021).

263. Root, *supra* note 262.

264. *Id.*

265. TULSA PUB. SCHS., *supra* note 223.

266. Root, *supra* note 262.

267. *See generally 2019 School Profiles: Greenwood Leadership Academy*, OKLA. OFF. OF EDUC. QUALITY & ACCOUNTABILITY, <https://www.edprofiles.info/doc/profiles/2019/reports/src/201972i001194.pdf> (last visited Oct. 2, 2021); *2019 School Profiles: Eliot Elementary*, OKLA. OFF. OF EDUC. QUALITY & ACCOUNTABILITY, <https://www.edprofiles.info/doc/profiles/2019/reports/src/201972i001175.pdf> (last visited Oct. 2, 2021); *2019 School Profiles: Mayo Demonstration School*, OKLA. OFF. OF EDUC. QUALITY & ACCOUNTABILITY, <https://www.edprofiles.info/doc/profiles/2019/reports/src/201972i001315.pdf> (last visited Oct. 2, 2021).

7.3% white students in 2019.<sup>268</sup> In the same year, in a neighborhood seven miles south of Greenwood, Eliot elementary school enrolled 67% white students and only 6% Black students.<sup>269</sup> By contrast, the magnet school Mayo Demonstration School, drawing students from all areas of the city, enrolled 46% white students, 19% Black students, and 34% of students from other minority groups.<sup>270</sup>

Tulsa's plan is currently limited to magnet schools.<sup>271</sup> This could be a starting point for designing a voluntary integration student assignment plan. Like the Berkley plan, Tulsa's magnet school policy divides up the district and admits a designated percent of student from the various neighborhoods.<sup>272</sup> In doing so, Tulsa Public Schools overcome some of the effects of residential segregations that impact neighborhood schools.<sup>273</sup> However, Tulsa's magnet school policy only divides the city in four quadrants, which is nothing close to the over 400 residential planning areas in Berkley's schools.<sup>274</sup> Additionally, Tulsa's policy does not balance factors such as race and income based on neighborhood demographics.<sup>275</sup> Nevertheless, the fact that the current policy has created greater integration in the magnet schools suggests a plan like Berkley's could be effective in overcoming residential segregation and creating more integrated schools in Tulsa.<sup>276</sup> Because Oklahoma City has residential segregation similar to that in Tulsa, there is no reason to think a plan like Berkley's would not also create more integrated schools in Oklahoma City.<sup>277</sup>

While a student assignment plan like the Berkley plan would likely be a legal means of creating more integration within the individual school district, it would not necessarily provide perfect integration. As previously noted, much of the segregation and racial isolation which exists today occurs between school districts, rather than within school districts.<sup>278</sup> Therefore, a truly integrated student assignment plan would also need to factor in inter-district integration.<sup>279</sup>

### *C. School Districts Could Face Legal Challenges for Maintaining De Facto Segregated Schools*

Whether or not a school district has voluntarily implemented integration plans to combat de facto school segregation, a recent New Jersey case indicates some schools may be forced to take action.<sup>280</sup> In 2018, a non-profit activist group and parents of New Jersey

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268. 2019 School Profiles: *Greenwood Leadership Academy*, *supra* note 267.

269. 2019 School Profiles: *Eliot Elementary*, *supra* note 267.

270. 2019 School Profiles: *Mayo Demonstration School*, *supra* note 267.

271. TULSA PUB. SCHS., *supra* note 223.

272. CHAVEZ & FRANKENBERG, *supra* note 45, at 2, 6; TULSA PUB. SCHS., *supra* note 223.

273. OKLA. OFFICE OF EDUC. QUALITY & ACCOUNTABILITY, *supra* note 275; Root, *supra* note 262.

274. CHAVEZ & FRANKENBERG, *supra* note 45, at 2, 6; TULSA PUB. SCHS., *supra* note 223.

275. TULSA PUB. SCHS., *supra* note 223.

276. *See generally* CHAVEZ & FRANKENBERG, *supra* note 45, at v; OKLA. OFFICE OF EDUC. QUALITY & ACCOUNTABILITY, *supra* note 275.

277. Felder, *supra* note 169.

278. *See discussion supra* Part III.D.

279. *See id.*

280. *See Amended Complaint Declaratory Judgment & Other Relief, Latino Action Network v. State*, No. MER-L-001076-18 (N.J. Super Ct. Law Div. Mercer Cnty. Aug. 2, 2019), <http://theinclusionproject.rutgers.edu/wp->

students brought an action against the State of New Jersey, the State Board of Education, and the Commissioner of Education.<sup>281</sup> The plaintiffs claimed that policies which require students to attend schools in their municipalities perpetuate residential and school segregation and violate the New Jersey Constitution.<sup>282</sup> The plaintiffs provided striking data on segregation in the New Jersey schools system.<sup>283</sup> For example, in the 2016-2017 school year, 24% of Black students statewide attended schools with over 99.9% non-white student enrollment.<sup>284</sup>

On January 10, 2020 the Superior Court of New Jersey deferred ruling on Plaintiff's motion for summary judgment until after discovery and denied a motion to dismiss for failure to join indispensable parties.<sup>285</sup> The court noted that the case would implicate all of the school districts in the state of New Jersey, including charter schools, and gave the school districts an opportunity to intervene.<sup>286</sup> While the case is still only in discovery, this suit has the potential to impact every school and student in the state of New Jersey.<sup>287</sup> A potentially monumental case such as this one indicates that, as resegregation becomes increasingly poignant, parents and activists might force schools into integration through litigation.

## VI. CONCLUSION

Though Oklahoma schools have come a long way since the state constitutionally mandated segregation pre-*Brown*, the state has not yet achieved integration.<sup>288</sup> In *Brown*, the Court held that schools which are equal in terms of facilities, curriculum, teachers, and other tangibles, are inherently unequal if they are racially segregated.<sup>289</sup> As long as there are schools like Northeast High School in Oklahoma City, with 98% minority enrollment, and McClain High School in Tulsa, with 93% minority enrollment, Oklahoma schools will be racially segregated and inherently unequal.<sup>290</sup> The Court emphasized in *Brown* that racially segregated schools had “detrimental” psychological effects on students.<sup>291</sup> Increasingly racially isolated schools in Oklahoma, and across the country, could burden students with these psychological effects that *Brown* sought to remedy over six-five years ago.<sup>292</sup>

The desegregation era brought important changes to Oklahoma metropolitan area

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content/uploads/2020/06/filed-amended-complaint.pdf.

281. *Id.* at 3–6.

282. *Id.* at 16.

283. *Id.* at 8.

284. *Id.*

285. Transcript of Motion at 76–77, *Latino Action Network v. State*, No. MER-L-001076-18 (N.J. Super Ct. Law Div. Mercer Cnty. Jan. 10, 2020), <http://theinclusionproject.rutgers.edu/wp-content/uploads/2020/06/transcript-of-proceedings-on-motion-to-dismiss-before-judge-jacobson.pdf>.

286. *Id.* at 68.

287. *Id.*

288. *Dowell v. Sch. Bd. of Okla. City Pub. Schs.*, 219 F. Supp. 427, 431 (W.D. Okla. 1963); see discussion *supra* Part III.A., III.D.

289. *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.* (“*Brown I*”), 347 U.S. 483, 494–95 (1954).

290. *2019 School Profiles: Northeast High School*, *supra* note 27; *2019 School Profiles: McLain HS for Science & Technology*, *supra* note 28.

291. *Brown I*, 347 U.S. at 494.

292. See discussion *supra* Part II.

schools, including Oklahoma City's busing plan and Tulsa's magnet school program.<sup>293</sup> Yet, in 1991, when courts released OCPS from judicial oversight and closed the district's desegregation case, Oklahoma City dismantled its integration policies by ending busing.<sup>294</sup> In Tulsa, desegregation efforts aimed to create integrated magnet schools where parents could voluntarily enroll their children.<sup>295</sup> However, the focus on magnet schools left traditional neighborhood schools with inadequate integration policies.<sup>296</sup> Even today, there is evidence of greater integration in Tulsa's magnet schools than neighborhood schools.<sup>297</sup>

It is easy to see the need for more strategic policies for integration and diversity in Oklahoma City and Tulsa schools.<sup>298</sup> However, without federal orders to desegregate, the onus is on the districts to choose to pursue the goal of integration.<sup>299</sup> Additionally, legal hurdles such as the *Parent's Involved* decision have discouraged many districts from this pursuit and made it legally risky to implement or continue pre-unitary status policies.<sup>300</sup> However, examples such as Berkley schools reveal there are still means of implementing integration policies without making student assignments based on race.<sup>301</sup>

The *Brown* decision continues to be one of the most revered Supreme Court decisions, and schools should continue in the pursuit of living up to the goals of this case.<sup>302</sup> If schools are unwilling or unable to seek out integrative policies, perhaps a new wave of desegregation litigation could spur change.<sup>303</sup>

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293. See discussion *supra* Part III.B.

294. See discussion *supra* Part III.C.

295. See discussion *supra* Part III.C.

296. See discussion *supra* Part III.C.

297. See discussion *supra* Part V.B.

298. See discussion *supra* Part III.D.

299. See discussion *supra* Part III.C.

300. See discussion *supra* Part IV.

301. See discussion *supra* Part V.

302. See generally FRANKENBERG ET AL., *supra* note 35.

303. See discussion *supra* Part V.C.

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