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## Effective School-Integration Mobilization: The Case for Non-litigation Advocacy and Impact

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# EFFECTIVE SCHOOL-INTEGRATION MOBILIZATION: THE CASE FOR NON-LITIGATION ADVOCACY AND IMPACT

*David Tipson,\* Rene Kathawala,\*\* Nyah Berg\*\*\* & Lauren Webb\*\*\*\**

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## INTRODUCTION

Racial segregation of the public schools in New York City — the largest school district in the United States — was ignored by advocates

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and others for far too long. The effort to desegregate the schools has been led not by courtroom lawyers but by advocates and a private law firm engaged in community building and legal advocacy with compelling results. That nearly ten-year effort has already paid clear dividends. By the summer of 2019, there was widespread consensus that school integration was one of the most important challenges facing the New York City Department of Education (NYCDOE). Both Mayor Bill de Blasio and Chancellor of Schools Richard Carranza were under significant scrutiny to determine how they would respond to a new task force report proposing bold actions to address the problem.

Yet only seven years prior, despite heightened levels of segregation, integration was rarely discussed as a solution to educational inequality in the New York City school system. In a rare exception, a 2012 *New York Times* piece blithely concluded that integration efforts in prior decades had failed to achieve results.<sup>1</sup> The dominant mode of education advocacy was addressing resource disparities caused by segregation. What happened in the intervening years was neither a spontaneous burst of advocacy by community members affected by school segregation nor a unilateral action by professional legal advocates, but a complex interplay between the two types of advocacy.

Through a critical examination of our work at the nonprofit organization New York Appleseed (Appleseed) and the global law firm Orrick, Herrington & Sutcliffe LLP (Orrick) in New York City over a nearly ten-year period from 2011 to 2020, this Essay explains the role that advocates with legal training played and makes the case that legal advocates can and should utilize this successful playbook without involving what is often a regressive court system to build a path for the most effective advocacy in the future.<sup>2</sup>

Part I provides a brief history of school integration in the United States and New York, emphasizing federal caselaw that both constrained and sometimes enabled our work. Part II describes our process for framing a role for legal advocacy in response to this history, local circumstances in New York City, and ethical and strategic

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1. See Ford Fessenden, *A Portrait of Segregation in New York City's Schools*, N.Y. TIMES (May 11, 2012), <https://archive.nytimes.com/www.nytimes.com/interactive/2012/05/11/nyregion/segregation-in-new-york-city-public-schools.html> [<https://perma.cc/5NC5-CG8Y>].

2. This Essay refers to Appleseed as a “legal organization” because of its founding by attorneys and its orientation towards law and policy; it refers to its Executive Director David Tipson as a “legal advocate” because of his legal training. Appleseed, however, does not represent clients of any kind, and Tipson, though a member of the bar in other jurisdictions and a member of the New York City Bar Association, was not licensed in New York during these events.

considerations. Part III studies our implementation of that role starting in 2011 when school integration infrequently figured in the public education debate in New York City. Drawing on news articles, published reports, and the Authors' records, this Essay examines the ways in which advocates used legal training and legal analysis to (1) seed the reform movement in the early years, (2) break down initial institutional resistance, and (3) support community stakeholders joining the movement — all without resorting to litigation. In the process, this Essay situates Appleseed and Orrick's work in (and in some cases distinguishes it from) the current theory and practice of "community lawyering."

Part IV reflects on the Authors' work and its possible lessons for other legal advocates working on school integration and other social justice issues. While other law journal articles have focused on litigation's impact on school integration, there has been insufficient and even scant attention paid to advocacy focused on the administrative state and the role lawyers can play in such movements. This Essay challenges conventional wisdom around the proper role of lawyers in supporting movements for social change and argues for a broader definition of "legal advocacy." Our experiences suggest that lawyers and those with legal training must bring the same range of modes and skills to social movements that they do to their paying clients (who typically avoid litigation because of its excessive cost and delay), including an ability to work within existing legislative and administrative frameworks and with other institutions and organizations.

## I. HISTORICAL BACKGROUND

### A. School Desegregation in the United States

For the first half of the twentieth century, the reigning doctrine in the United States school system was *Plessy v. Ferguson*'s "separate but equal," which allowed for the racial division of all public facilities.<sup>3</sup> But in 1954, with the Supreme Court's decision in *Brown v. Board of Education*,<sup>4</sup> the United States took the first major step towards school

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3. *See* 163 U.S. 537 (1896).

4. 347 U.S. 483 (1954). Seven years before *Brown*, the United States Court of Appeals for the Ninth Circuit held that the creation of segregated schools for students of Mexican ancestry violated California law and the equal protection clause of the Fourteenth Amendment in *Mendez v. Westminster School District*, 161 F.2d 774 (9th Cir. 1947) (en banc).

desegregation.<sup>5</sup> *Brown* began as a class action lawsuit against the Topeka Board of Education by named plaintiff Oliver Brown, a Black man whose daughter was denied entrance to Topeka's all-white elementary schools.<sup>6</sup> Represented by the NAACP Legal Defense and Educational Fund (LDF), including lead counsel (and future Supreme Court Justice) Thurgood Marshall, Brown successfully argued that schools for Black children were not equal to schools for white children and that school segregation violated the Equal Protection Clause of the Fourteenth Amendment.<sup>7</sup> One year later, the Supreme Court revisited the question of relief and further ordered that schools be desegregated "with all deliberate speed," although it remanded the case to the district courts to determine whether such speed was being achieved.<sup>8</sup>

The Supreme Court in *Brown* purported to abolish "separate but equal," and in the wake of that decision, various states, including Kansas, began desegregating their public schools.<sup>9</sup> But when "all deliberate speed" met racist and indignant public opinion, the result was massive resistance by Southern states. In Virginia, Senator Harry Byrd opted to close schools instead of desegregating them.<sup>10</sup> Alabama Governor George Wallace physically blocked Black students from enrolling at the University of Alabama.<sup>11</sup> In Mississippi, a member of the White Citizens Council and Ku Klux Klan murdered Medgar Evers, who was suing to desegregate Jackson's schools.<sup>12</sup> And in Arkansas, Governor Orval Faubus ordered the Arkansas National

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5. See *Brown*, 347 U.S. 483.

6. See Harrison Smith & Ellie Silverman, *Linda Brown Thompson, Girl at Center of Brown v. Board of Education Case, Dies*, WASH. POST (Mar. 26, 2018), [https://www.washingtonpost.com/local/obituaries/linda-brown-young-girl-at-center-of-brown-v-board-segregation-case-dies-at-76/2018/03/26/2406d6d8-3138-11e8-8abc-22a366b72f2d\\_story.html](https://www.washingtonpost.com/local/obituaries/linda-brown-young-girl-at-center-of-brown-v-board-segregation-case-dies-at-76/2018/03/26/2406d6d8-3138-11e8-8abc-22a366b72f2d_story.html) [<https://perma.cc/K2D4-D4PV>].

7. See *Brown*, 347 U.S. 483.

8. See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

9. See, e.g., *Court Ruling Hailed: Segregation Already Ending Here, Say School Officials*, TOPEKA ST. J. (May 17, 1954), <https://www.kansasmemory.org/item/415> [<https://perma.cc/G9KR-YXEE>] ("Supt. Wendell Godwin said: 'This action will have no effect upon Topeka schools because segregation already is being terminated in an orderly manner.'").

10. See Ronald L. Heinemann, *Harry F. Byrd (1887-1966)*, ENCYC. VA. (Feb. 12, 2008), [https://www.encyclopediavirginia.org/byrd\\_harry\\_flood\\_sr\\_1887-1966](https://www.encyclopediavirginia.org/byrd_harry_flood_sr_1887-1966) [<https://perma.cc/B9HP-XPJ7>].

11. See *This Day in History, January 14: George Wallace Inaugurated as Alabama Governor*, HISTORY (Jan. 13, 2020), <https://www.history.com/this-day-in-history/george-wallace-inaugurated-as-alabama-governor> [<https://perma.cc/GKG9-8JRP>].

12. See generally MICHAEL V. WILLIAMS, *MEDGAR EVERS: MISSISSIPPI MARTYR* (2011).

Guard to block Black students from entering Little Rock Central High School, leading to a standoff against President Dwight Eisenhower's federal troops.<sup>13</sup>

By 1968, the Supreme Court was losing patience with the slow pace of school integration across the South. In *Green v. County School Board of New Kent County*,<sup>14</sup> the Court reviewed a challenge to a "freedom-of-choice" plan supposedly designed to integrate formerly segregated schools. Only 15% of Black students transferred to the formerly white school, and no white students transferred to the formerly Black school.<sup>15</sup> In a unanimous opinion, the Supreme Court recognized that the district needed to actively remove disparities between schools in order to remove the "dual system" that segregation had brought into being.<sup>16</sup> The Court announced an "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>17</sup> The Court also listed several factors to evaluate whether schools were truly integrated: (1) school administration, (2) the physical condition of the school, (3) transportation and busing, (4) personnel and faculty, (5) revision of districts and attendance areas, and (6) revision of local laws and regulations.<sup>18</sup>

*Green's* emphasis on eliminating disparities within a "dual system" opened the door to a wave of desegregation cases in northern cities where there had been no prior laws explicitly requiring racial segregation in school enrollment.<sup>19</sup> The first of these to reach the Supreme Court was *Keyes v. School District*.<sup>20</sup> In that case, the Court clarified that even school districts without a history of legally mandated racial segregation throughout the district could be subject to

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13. See *This Day in History, September 25: Little Rock Nine Begin First Full Day of Classes*, HISTORY (Sept. 23, 2020), <https://www.history.com/this-day-in-history/central-high-school-integrated> [https://perma.cc/F6WW-65FP].

14. 391 U.S. 430 (1968).

15. See *Bd. of Pub. Instruction v. Braxton*, 402 F.2d 900 (5th Cir. 1968); H.R.J. Res. 353, 2008 Sess. (Va. 2008).

16. See *Green*, 391 U.S. 430.

17. *Id.* at 437–38.

18. See *id.* at 436.

19. See Will Stancil, *The Radical Supreme Court Decision That America Forgot*, ATLANTIC (May 29, 2018), <https://www.theatlantic.com/education/archive/2018/05/the-radical-supreme-court-decision-that-america-forgot/561410/> [https://perma.cc/GVV5-D4XL].

20. 413 U.S. 189 (1973).

desegregation orders if the school board's segregative action has been proven with respect to a portion of the school system.<sup>21</sup>

Northern officials who opposed federal desegregation efforts also began using school district boundary lines to perpetuate the status quo — injecting money into new, suburban schools that effectively prohibited Black attendance by drawing district boundary lines consistent with segregated housing patterns.<sup>22</sup> The Court addressed this conduct in *Milliken v. Bradley*,<sup>23</sup> which arose two decades after the *Brown* decision. *Milliken's* landscape was metropolitan Detroit, where at the time, almost two-thirds of city students were Black, while nearly all students in the growing suburban localities were white.<sup>24</sup> *Milliken's* class action plaintiffs filed suit, alleging that Detroit's school districting policies amounted to segregation and thereby violated the Equal Protection Clause.<sup>25</sup> The district court held that the government's actions established and maintained a pattern of residential segregation throughout Detroit and devised a remedial plan that created clusters of schools across Detroit's school districts.<sup>26</sup> Without such a plan, the court reasoned, Detroit would end up with a central, city school system educating mostly Black students, surrounded by a suburban ring of mostly white school districts.<sup>27</sup> The court of appeals affirmed, but the Supreme Court voted 5–4 to overturn, holding that remedial efforts could not cross district boundaries unless the Detroit School Board committed unconstitutional actions that had a segregative impact on other districts, or the segregated condition of the relevant schools must itself have been influenced by segregative practices in the surrounding districts into which the remedy would extend.<sup>28</sup> Where there were no such actions or practices, district lines would confine future remedial efforts.<sup>29</sup>

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21. *See id.* at 210.

22. *See* Elissa Nadworny & Cory Turner, *This Supreme Court Case Made School District Lines a Tool for Segregation*, NPR (July 25, 2019), <https://www.npr.org/2019/07/25/739493839/this-supreme-court-case-made-school-district-lines-a-tool-for-segregation> [<https://perma.cc/AL7M-NE9S>].

23. 418 U.S. 717 (1974).

24. *See id.*; *see also* Nadworny & Turner, *supra* note 22.

25. *See Milliken*, 418 U.S. at 721–23.

26. *See id.* at 724–25.

27. *See id.* at 724–27.

28. *See id.* at 763 (White, J., dissenting).

29. *See id.*

Justice Thurgood Marshall, who joined the bench in 1967,<sup>30</sup> issued a scathing dissent, characterizing *Milliken*'s majority opinion as an "emasculat[ion] of our constitutional guarantee of equal protection of the laws."<sup>31</sup> Justice Marshall argued that if a plan focused on desegregating only Detroit and excluded its surrounding suburbs, schools would remain segregated, and "[t]he very evil that *Brown I* was aimed at will not be cured, but will be perpetuated."<sup>32</sup> Justices William O. Douglas, William J. Brennan Jr., and Byron White joined in Justice Marshall's dissent, with two of the Justices also writing dissents of their own.<sup>33</sup> But the majority had spoken, and to the dismay of many, Congress did not intervene.<sup>34</sup>

Despite decades of criticism,<sup>35</sup> *Milliken* remains the law today, and inter-district segregation is the rule in most U.S. metropolitan areas. More than half of U.S. schoolchildren are in school districts where over

30. See Fred P. Graham, *Senate Confirms Marshall As the First Negro Justice; 10 Southerners Oppose High Court Nominee in 69-to-11 Vote*, N.Y. TIMES (Aug. 31, 1967),

<https://www.nytimes.com/1967/08/31/archives/senate-confirms-marshall-as-the-first-negro-justice-10-southerners.html> [<https://perma.cc/J529-HH68>].

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

32. See *id.* at 802.

33. Justice Douglas argued that permitting segregation through district creation allowed "the State [to] wash[] its hands of its own creations." *Id.* at 757–62 (Douglas, J., dissenting). Similarly, Justice White argued that in the wake of *Milliken*'s majority opinion, "deliberate acts of segregation and their consequences will go unremedied, not because a remedy would be infeasible or unreasonable . . . but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State." *Id.* at 762 (White, J., dissenting).

34. See *id.* at 724–30 (majority opinion); *Relationship of Milliken and Sheff Decisions*, OFF. LEGIS. RSCH. (July 21, 1998), <https://www.cga.ct.gov/PS98/rpt%5Colr%5Chtm/98-R-0907.htm> [<https://perma.cc/K9CJ-A7ML>] (stating that "[t]he *Milliken* decision not only set the standard for subsequent federal school desegregation cases for which an interdistrict remedy was sought, but it was codified in a federal statute," namely 20 U.S.C. § 1756).

35. See, e.g., *Brown at 60 and Milliken at 40: A Collection of Essays from People Involved in and Affected by the Most Pivotal Court Decisions Related to Education*, HARV. ED. MAG. (2014), <https://www.gse.harvard.edu/news/ed/14/06/brown-60-milliken-40> [<https://perma.cc/U9RP-KA35>]; see also Rebekah Enoch, *Baugh: The Detroit School Busing Case: A Failure of Public Leadership*, TRUMAN SCHOLARS ASSN. (Feb. 28, 2011),

<https://trumanscholars.org/status-update/baugh-the-detroit-school-busing-case-a-failure-of-public-leadership/> [<https://perma.cc/Q2AR-PYAG>] (noting that "Gary Orfield, Director of the Harvard Project on School Desegregation and a leading expert on this issue, argued that *Milliken* 'rendered *Brown* almost meaningless for most of the metropolitan North by blocking desegregation plans that would integrate cities with their suburbs' and 'lock[ed] millions of minority schoolchildren into inferior, isolated schools'" (alteration in original)).



75% of students are either white or nonwhite.<sup>36</sup> But the mechanisms that keep these schools segregated overpower the voices of educators, parents, and students who wish to change them, leaving lawyers and legislatures to pick up the pieces.<sup>37</sup>

Due to decades of policy-driven “white flight” from cities to suburbs and exclusionary policies that trapped Black and Latino people in the cities that whites had abandoned, the *Milliken* decisions effectively prevented meaningful school desegregation across northern metropolitan regions.<sup>38</sup> By the late 1970s, there were simply not enough white children in most northern city school districts to make integration feasible.<sup>39</sup> The most notable exception to this pattern was New York City.<sup>40</sup>

Over the next 30 years, U.S. Supreme Court jurisprudence increasingly sought to end the involvement of the federal courts in school integration, yet some school districts began adopting integration plans even when not ordered to do so by federal courts. Capping off its general trend, the Court in 2007 severely limited school districts’ discretion to promote racial integration voluntarily in K–12 schools. *Parents Involved in Community Schools v. Seattle School District*<sup>41</sup> presented a major new challenge for integration advocates. In this decision, the Court struck down two voluntary integration programs

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36. See *Nonwhite School Districts Get \$23 Billion Less Than White Districts Despite Serving the Same Number of Students*, EDBUILD, <https://edbuild.org/content/23-billion#CA> [<https://perma.cc/RX6X-BGXC>] (last visited Oct. 13, 2020).

37. See, e.g., Will Stancil, *School Segregation Is Not a Myth*, ATLANTIC (Mar. 14, 2018), <https://www.theatlantic.com/education/archive/2018/03/school-segregation-is-not-a-myth/555614> [<https://perma.cc/7LWE-RTBN>] (“Dedicated advocates and smart policymakers can thwart school resegregation, and eventually reverse it. But it will not reverse itself.”); see also Krista Kauble, Comment, *Litigating Keyes: The New Opportunity for Litigators to Achieve Desegregation*, 31 CHICANO-LATINO L. REV. 103 (2012) (discussing opportunities for lawyers to meaningfully involve themselves in desegregation efforts).

38. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2018).

39. See, e.g., John R. Logan, Deirdre Oakley & Jacob Stowell, *School Segregation in Metropolitan Regions, 1970–2000: The Impacts of Policy Choices on Public Education*, 113 AJS 1611 (2008).

40. See, e.g., Eliza Shapiro, *Segregation Has Been the Story of New York City’s Schools for 50 Years*, N.Y. TIMES (Mar. 26, 2019), <https://www.nytimes.com/2019/03/26/nyregion/school-segregation-new-york.html> [<https://perma.cc/NK99-4PP3>] (noting that “[i]n the 1970s, the specialized schools were overwhelmingly white”).

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

implemented in Seattle, Washington, and Louisville, Kentucky. The Seattle program permitted students to select any school in the district, but if schools were oversubscribed, the district would use the racial composition of the school's student body as a tiebreaker for school admissions; if the school's student body deviated significantly from the racial composition of all students in Seattle (approximately 60% nonwhite and 40% white), then students of the overly represented group would not be admitted.<sup>42</sup> Similarly, the Louisville program rejected applicants if that school had reached the "extremes of the racial guidelines" (meaning Black enrollment of less than 15% or higher than 50%), and such students would further contribute to the racial imbalance.<sup>43</sup>

A majority of the Court (five Justices) applied strict scrutiny to the cases and held that both plans were unconstitutional because they were not sufficiently narrowly tailored.<sup>44</sup> Justice Anthony Kennedy, however, specifically refused to join portions of the plurality opinion that found no compelling governmental interest to justify either of the two plans. Rather, he recognized compelling interests in "avoiding racial isolation" and "achiev[ing] a diverse student population. Race may be one component of that diversity" — a small, but significant, point of overlap with the four dissenting Justices.<sup>45</sup> Justice Kennedy's concurrence with the majority rested on a belief that the districts could have achieved such goals through more narrowly tailored means.<sup>46</sup> He listed specific actions that school districts could take in pursuance of school diversity that would be unlikely to trigger strict scrutiny, stating that "[s]chool boards may pursue . . . strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion."<sup>47</sup>

Although *PICS* did not go so far as to ban all consideration of race in K–12 student-enrollment policies completely, the ruling prompted many states and districts across the country to scale back or eliminate efforts to pursue racially integrated student bodies.<sup>48</sup> The U.S.

42. *See id.* at 710–14.

43. *See id.* at 716; *id.* 786 (Kennedy, J., concurring); *id.* 817–18 (Breyer, J., dissenting).

44. *See id.* at 720–25 (majority opinion).

45. *See id.* at 797–98 (Kennedy, J., concurring).

46. *See id.* at 783–87.

47. *Id.* at 789.

48. *See* Erica Frankenberg et al., *The New Politics of Diversity: Lessons from a Federal Technical Assistance Grant*, 53 AM. EDUC. RSCH. J. 440, 442; *see also* Tamar Lewin, *Across U.S., a New Look at School Integration Efforts*, N.Y. TIMES (June 29,

Department of Education intensified the chilling effect on local governments when it released, under President George W. Bush, a “Dear Colleague” letter with an extremely narrow and arguably misleading interpretation of *PICS*, suggesting that there was little school districts could lawfully do to pursue racial integration.<sup>49</sup>

Justice Kennedy’s opinion, in recognizing the compelling interest of reducing racial segregation in schools, acknowledged the value of “an integrated society that ensures equal opportunity for all of its children.”<sup>50</sup> Justice Breyer, in his dissent, also highlighted the importance of integrated schools in “overcoming the adverse educational effects produced by and associated with highly segregated schools,”<sup>51</sup> a relationship that has been borne out through research.

Throughout America’s history, an “opportunity gap” in academic outcomes<sup>52</sup> between Black, Hispanic, and white students has persisted.<sup>53</sup> The opportunity gap is attributed to a multitude of discriminatory practices that are often consequences of segregation —

2007),

<https://www.nytimes.com/2007/06/29/washington/29schools.html?searchResultPosition=86> [<https://perma.cc/4WR5-AFC5>] (describing school districts considering other methods by which to achieve diversity).

49. See Letter from Stephanie J. Monroe, Assistant Sec’y for C.R., U.S. Dep’t of Educ., to Colleague (Aug. 28, 2008) [hereinafter Dear Colleague Letter], <https://www2.ed.gov/about/offices/list/ocr/letters/raceassignmentese.html> [<https://perma.cc/MCL7-EEHZ>] (“The Department of Education strongly encourages the use of race-neutral methods for assigning students to elementary and secondary schools. Unlike the assignment plans in *Parents Involved*, genuinely race-neutral measures — for instance, those truly based on socio-economic status — do not trigger strict scrutiny and are instead subject to the rational-basis standard applicable to general social and economic legislation.”).

50. *PICS*, 551 U.S. at 797.

51. *Id.* at 839 (Breyer, J., dissenting).

52. In this Essay, the Authors have chosen to use the phrase “opportunity gap” to describe the gap in test scores and educational outcomes that are typically experienced by students of color (when compared to white students) and students of lower socioeconomic status (when compared to wealthier students). Although much of the social science literature uses “achievement gap” to describe these issues, we feel that “opportunity gap” better captures that these discrepancies result from differences in the opportunities given to these students, rather than differences in ability. When describing conclusions of or quoting from articles that use “achievement gap,” the Authors continue to use that phrase in the footnotes.

53. See *Racial and Ethnic Achievement Gaps*, STAN. CTR. FOR EDUC. POL’Y ANALYSIS,

<https://cepa.stanford.edu/educational-opportunity-monitoring-project/achievement-gaps/race/> [<https://perma.cc/PL9S-HU32>] (last visited Oct. 24, 2020) (finding that the nationwide white-Black and white-Hispanic achievement gaps, based on National Assessment of Educational Progress test scores, range from 0.5 to 0.9 standard deviations and noting that the gaps vary at the state level, with many states experiencing gaps larger than 1.0 standard deviation).

lack of resources at segregated schools attended by predominantly nonwhite students, academic tracking within schools, and discriminatory discipline practices — as well as some external factors — parents' economic resources and educational background.<sup>54</sup> The effects of the opportunity gap compound over the lives of the students, making it more challenging for nonwhite students to obtain prestigious degrees and high-paying jobs and accrue wealth over time,<sup>55</sup> therefore contributing to the racial wealth gap. Despite the persistence of the continuing consequences of segregation, the opportunity gap is not inevitable. Black and white students narrowed the opportunity gap (as measured by test scores and dropout rates) significantly during the peak of desegregation efforts, although the gap widened in the 1980s and 1990s as desegregation efforts stalled, indicating that school integration is one of many steps that societies should take to reduce the gap.<sup>56</sup>

Racially and socioeconomically integrated schools are a necessary component of creating a more equitable society with opportunities for students of all backgrounds. Two decades of research have shown that

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54. See Carrie Spector, *Racial Disparities in School Discipline Are Linked to the Achievement Gap Between Black and White Students Nationwide, According to Stanford-Led Study*, STAN. GRADUATE SCH. EDUCATION (Oct. 16, 2019), <https://ed.stanford.edu/news/racial-disparities-school-discipline-are-linked-achievement-gap-between-black-and-white> [https://perma.cc/X2PY-VBK9]; *What Explains White-Black Differences in Average Test Scores?*, EDUC. OPPORTUNITY PROJECT STAN. UNIV., <https://edopportunity.org/discoveries/white-black-differences-scores/> [https://perma.cc/D4AS-7KFT] (last visited Oct. 24, 2020) (“Our research suggests that the most important predictor of achievement gaps is school segregation. This is readily evident in the data . . . . If it is possible to provide equal educational opportunity under conditions of segregation, no community in the U.S. has discovered the way.”).

55. See Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS INST. (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/> [https://perma.cc/R7PK-WZES].

56. See GARY ORFIELD, C.R. PROJECT, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 10 (2001), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/schools-more-separate-consequences-of-a-decade-of-resegregation/orfield-schools-more-separate-2001.pdf> [https://perma.cc/7H9U-56PU]; Roslyn Arlin Mickelson, *Twenty-First Century Social Science Research on School Diversity and Educational Outcomes*, 69 OHIO ST. L.J. 1173, 1203–05, 1215–17 (2008) (finding that high school dropout rates for Black students were reduced in the 1970s and 1980s, “the decades when desegregation policies were pursued most actively,” and were reduced to the greatest magnitude in the school districts with the greatest declines in school segregation and that the “[B]lack-white gap in reaching achievement is significantly smaller in schools with between 25% and 54% [B]lack, Hispanic, and Native-American students”); *What Explains White-Black Differences in Average Test Scores?*, *supra* note 54.

the integration of schools not only results in academic but also socioemotional gains.<sup>57</sup> For example, researchers have found that students of *all* races and socioeconomic status attending racially, ethnically, and socioeconomically diverse schools tend to have higher achievement in math, science, language, and reading, with the greatest benefits accruing to students in middle and high school.<sup>58</sup> Research has also shown that diverse schools “prepar[e] students to live in a multicultural society — particularly in terms of promoting interracial understanding and comfort, friendship building, and fostering civic and democratic engagement.”<sup>59</sup> These benefits similarly accrue to students of all racial and ethnic groups and include “lower likelihood of involvement with the criminal justice system” and an increased likelihood of choosing to live and work in integrated environments in the future.<sup>60</sup> Interactions between students of different races in schools create the opportunity for them to develop interracial friendships, which, studies have shown, reduce “intergroup anxiety” experienced by students when interacting with individuals of a different race,<sup>61</sup> reduce individual levels of racial prejudice and stereotyping, and increase self-confidence, civic development, and commitment to racial equity for all students involved in interracial friendships.<sup>62</sup> The well-documented benefits of integration do not inure to the benefit of children who attend school in segregated classrooms.

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57. See Mickelson, *supra* note 56, at 1173–216 (noting that most studies have found that segregation has a negative impact on nonwhite students’ achievement).

58. See ROSLYN ARLIN MICKELSON, NAT’L COAL. ON SCH. DIVERSITY, SCHOOL INTEGRATION AND K–12 OUTCOMES: AN UPDATED QUICK SYNTHESIS OF THE SOCIAL SCIENCE EVIDENCE 1–2 nn.4–10 (2016), <https://www.school-diversity.org/pdf/DiversityResearchBriefNo5.pdf> [<https://perma.cc/25VF-NU3Q>]; see also Mickelson, *supra* note 56, at 1173–216.

59. MICHAEL A. REBELL, FLUNKING DEMOCRACY: SCHOOLS, COURTS, AND CIVIC PARTICIPATION 146 (2018).

60. Roslyn Arlin Mickelson, Mokubung Nkomo & George L. Wimberly, *Integrated Schooling, Life Course Outcomes, and Social Cohesion in Multiethnic Democratic Societies*, 36 REV. RSCH. EDUCATION 197, 208; see also REBELL, *supra* note 59, at 60.

61. See Kristin Davies et al., *Cross-Group Friendships and Intergroup Attitudes: A Meta-Analytic Review*, 15 PERSONALITY & SOC. PSYCH. REV. 332, 333 (2011) (citing Shana Levin, Colette van Laar & Jim Sidanius, *The Effects of Ingroup and Outgroup Friendships on Ethnic Attitudes in College: A Longitudinal Study*, 6 GRP. PROCESSES & INTERGROUP RELS. 76 (2003)); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 751 (1998).

62. See Mitchell J. Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 J. HIGHER EDUC. 430, 432 (2006); see also Mickelson et al., *supra* note 60, at 209, 217–19 (finding that students who attended racially and ethnically diverse schools “were more likely to prefer to live and work in diverse settings as adults”).

### B. School Integration in New York City

The history of segregation in New York traced that of the rest of the United States. A few years after *Plessy*, the New York State Court of Appeals held that a state law providing separate schools for “colored” children was constitutional so long as the State provided facilities equal to those for white children.<sup>63</sup>

The statute authorizing separate schools for Black students was repealed in 1938,<sup>64</sup> but school segregation persisted.<sup>65</sup> Black and Puerto Rican people migrating to New York City in the twentieth century arrived to pervasive housing discrimination confining them to certain neighborhoods and excluding them from others.<sup>66</sup> Student-assignment policies mirrored this segregation by encouraging students to attend schools within their neighborhoods.<sup>67</sup> In 1954, during a conversation with a Harlem audience about schools populated entirely by Black students, the President of New York’s Board of Education (the Board), Arthur Levitt, attributed school segregation to housing discrimination and segregated communities, rather than governmental action or inaction.<sup>68</sup> Levitt argued that there was “no segregation in schools deliberately imposed by legislation.”<sup>69</sup>

Meanwhile, New York City Superintendent of Schools, William Jansen, insisted that the State’s school system was already properly integrated and resisted calls for additional remedial measures.<sup>70</sup> The Board was similarly ineffectual, carrying out poorly planned integration attempts in the late 1950s before finding itself embroiled in a corruption scandal in 1961.<sup>71</sup> And while ideas for desegregation

63. *See People ex rel. Cisco v. Sch. Bd. of Borough of Queens*, 56 N.E. 81 (N.Y. 1900); *see also* JOHN KUCSERA & GARY ORFIELD, C.R. PROJECT/PROYECTO DERECHOS CIVILES, *NEW YORK STATE’S EXTREME SCHOOL SEGREGATION: INEQUALITY, INACTION AND A DAMAGED FUTURE* 13 (2014), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/ny-norflet-report-placeholder/Kucsera-New-York-Extreme-Segregation-2014.pdf> [<https://perma.cc/97MC-SACD>].

64. *See* KUCSERA & ORFIELD, *supra* note 63, at 13.

65. Until 1957, there was no ethnic census of the New York City school system as a whole, or even of individual schools. *See* DIANE RAVITCH, *THE GREAT SCHOOL WARS: A HISTORY OF THE NEW YORK CITY PUBLIC SCHOOLS* 251 (2000).

66. For a description of policies and practices by whites that restricted where Black people could live in New York City and other northern cities, see generally ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS* (2011).

67. *See* RAVITCH, *supra* note 65, at 251–52, 257.

68. *See id.* at 252.

69. *Id.*

70. *See id.* at 255.

71. *See id.* at 255–65.

continued to float around, none seemed to take hold. One of these ideas was busing — the practice of assigning and transporting students to schools beyond New York City’s attendance zones to alleviate segregation.<sup>72</sup> In New York City, busing would entail transferring students from predominantly Black and Puerto Rican schools to predominantly white schools, and white students to predominantly Black and Puerto Rican schools.<sup>73</sup> This two-way plan was designed to integrate schools in both districts while avoiding the overcrowding and underutilization that might result from one-way transfers. Many white parents vehemently opposed this idea and even sued to prevent it from taking place.<sup>74</sup> But as civil rights leaders joined the fight to improve New York’s school system, busing became a pivotal component of their desegregation planning.<sup>75</sup>

Civil rights leaders negotiated with the Board between 1963 and 1964, repeatedly threatening boycotts if no serious desegregation plan was put in place.<sup>76</sup> But in February 1964, after several half-hearted integration proposals from the Board, the leaders decided that enough was enough. They staged picketing at 300 of New York’s 860 public schools, with nearly 45% of New York students out of school that day and thousands of demonstrators marching to the Board headquarters to demand integration.<sup>77</sup> It was the largest civil rights protest in New York City’s history, but little came of it, or of the second, smaller boycott that leaders organized on March 16.<sup>78</sup> Aside from gestures toward integration following these demonstrations,<sup>79</sup> the Board’s

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72. See Marie Lily Cerat & Whitney Hollins, *An Integration Plan That Never Was: Looking for Brown v. Board of Education in the Board’s 1954 Commission on Integration*, THEORY RSCH. & ACTION IN URB. EDUC., <https://traue.commons.gc.cuny.edu/volume-iii-issue-1-fall-2014/integration-plan-never-looking-brown-v-board-education-new-york-city-board-educations-1954-commission-integration/> [https://perma.cc/DS3C-TX96] (last visited Oct. 25, 2020) (describing early debates in New York City about using bus transportation to reduce segregation in schools).

73. See MATTHEW F. DELMONT, *WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION* 24 (2016).

74. See RAVITCH, *supra* note 65, at 271.

75. See *id.* at 273 (“Galamison said that while bussing was only one way of achieving integration, ‘anyone who talks about integration and is against bussing is not serious about the matter.’”).

76. See *id.* at 269–76.

77. See *id.* at 276.

78. See *id.* at 276–79; see also Yasmeen Khan, *Demand for School Integration Leads to Massive 1964 Boycott — In New York City*, WNYC (Feb. 3, 2016), <https://www.wnyc.org/story/school-boycott-1964> [https://perma.cc/2TILS-2BEF].

79. For example, State Commissioner of Education James Allen, Jr. released a comprehensive integration report at the Board’s request, and Superintendent of

proposals did not include any programs advanced by advocates that were expected to ignite significant pushback from white parents.<sup>80</sup>

By 1977, New York City faced “white flight” out of the city and school system at such stark levels that the Board projected that the white student population would drop to 14% of the total within ten years.<sup>81</sup> Many felt that it was too late for a citywide integration plan.<sup>82</sup> The courts did not provide effective recourse for racial segregation either; a few individual schools and nearby districts were placed under desegregation court orders,<sup>83</sup> but New York City was never subject to a citywide desegregation order.<sup>84</sup>

### C. Status Quo in 2011

A 2014 report by UCLA’s Center for Civil Rights found that between 1989 and 2011, the percentage of schools in the New York City metro area in which “minority” students made up 90%–100% of the student body increased from 27.3% to 46.4%; the percentage of schools

Schools Calvin Gross drafted a partial integration plan in collaboration with civil rights leaders. *See* RAVITCH, *supra* note 65, at 280–86.

80. *See, e.g., id.* at 284 (“[T]he Allen Report undermined support for most of the programs that integrationists had been fighting for. While accepting the neighborhood primary school, the report rejected bussing, enforced transfers, pairings, or any other program that was not mutually acceptable to both minority groups and whites.”); *id.* at 286 (“It became apparent why Gross lost the support of the civil rights groups: the plan included no compulsory assignment of whites to Negro schools, no new pairings, and no junior high school zoning changes.”).

81. *See* Lesley Oelsner, *If New York City Is Lagging on School Integration Now, What About the Future?*, N.Y. TIMES (Nov. 21, 1977), <https://www.nytimes.com/1977/11/21/archives/if-new-york-city-is-lagging-on-school-integration-now-what-about.html> [<https://perma.cc/HP9V-ZDT5>].

82. For example, former Deputy Chancellor Bernard Gifford. *See id.*

83. *See, e.g.,* *United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1538, 1541 (S.D.N.Y. 1986), *aff’d*, 837 F.2d 1181 (2d Cir. 1987) (mandating a desegregation plan including the creation of magnet schools and implementation of an assignment program and requiring a court-appointed monitor); *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1281 (S.D.N.Y. 1985) (holding that Yonkers illegally and intentionally segregated the city’s public schools and public housing along racial lines); Jennifer Medina, *Desegregation Order Lifted from a School in Brooklyn*, N.Y. TIMES (Feb. 23, 2008), <https://www.nytimes.com/2008/02/23/nyregion/23school.html> [<https://perma.cc/2GNU-CDHL>] (describing the end, in 2008, of a desegregation order that had been imposed on Mark Twain Intermediate School in District No. 21 in 1974).

84. *See* C.R. PROJECT/PROYECTO DERECHOS CIVILES, *NEW YORK STATE’S EXTREME SCHOOL SEGREGATION: INEQUALITY, INACTION AND A DAMAGED FUTURE 2* (2014) [hereinafter *NEW YORK STATE’S EXTREME SCHOOL SEGREGATION*], [https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/ny-norfler-report-placeholder/NYmetro\\_NY\\_CBSA\\_intrastate\\_tables\\_2014\\_March21\\_v2.pdf](https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/ny-norfler-report-placeholder/NYmetro_NY_CBSA_intrastate_tables_2014_March21_v2.pdf) [<https://perma.cc/CZK4-TRWR>].



in which “minority” students<sup>85</sup> made up 50%–100% of the student body increased from 45.4% to 65.9%.<sup>86</sup> In contrast, the number of “multi-racial schools,” defined as schools in which any three races (categorized in the study as white, Black, Latino, American Indian, and Asian) represent “10% or more of the total student enrollment respectively,” only increased by two percentage points: from 25.1% during the 1989–1990 school year to 27.4% during the 2010–2011 school year.<sup>87</sup> This increase in school segregation was both the result of choices by individual parents to oppose integration or leave the New York City schools for the suburbs or private schools, as well as a failure by policymakers to prioritize school integration after the failed fights of the 1960s.<sup>88</sup>

The situation worsened in New York City through the 2000s, as “education reform” advocates placed their focus on accountability efforts and choice-focused policies that ignored issues of race and poverty. In 2002, New York City Mayor Michael Bloomberg took office and implemented an “education reform” program under Chancellor Joel Klein that focused on increasing “school choice,” teacher and school accountability based on testing, and charter schools.<sup>89</sup> Integration, by contrast, “was generally not a priority of the Bloomberg administration.”<sup>90</sup>

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85. The report defines “minority” as “[B]lack, Latino, American Indian, Asian, Pacific Islander, and multi-racial students.” KUCSERA & ORFIELD, *supra* note 63, at vi n.4. “The use of ‘minority’ to describe non-whites has decreased in popularity and has been increasingly replaced with ‘people of color.’” Daniel Blake, *The Case for Rebranding Minority-Serving Institutions*, DIVERSE: ISSUES HIGHER EDUC. (Jan. 17, 2017), <https://diverseeducation.com/article/91247/> [<https://perma.cc/ZSP7-XHZG>]. Furthermore, whites now represent a minority of K–12 students in the United States. See Grace Chen, *White Students Are Now the Minority in U.S. Public Schools*, PUB. SCH. REV. (Oct. 14, 2019), <https://www.publicschoolreview.com/blog/white-students-are-now-the-minority-in-u-s-public-schools> [<https://perma.cc/J7TE-XU5Z>].

86. See NEW YORK STATE’S EXTREME SCHOOL SEGREGATION, *supra* note 84, at 2.

87. See *id.* at 2–3.

88. See generally KUCSERA & ORFIELD, *supra* note 63.

89. See Valerie Strauss, *Mike Bloomberg Was in Charge of the Country’s Largest Public School District. Here Are 8 Key Questions for Him.*, WASH. POST (Feb. 25, 2020, 8:00 AM), <https://www.washingtonpost.com/education/2020/02/25/mike-bloomberg-was-charge-countrys-largest-public-school-district-here-are-8-key-questions-him/> [<https://perma.cc/Y9GR-KTPT>].

90. Matt Barnum, *Michael Bloomberg Is Running for President on His Education Record. Here’s What Research Found About Those Policies.*, CHALKBEAT (Feb. 25, 2020, 8:10 PM), <https://www.chalkbeat.org/2020/2/25/21178652/michael-bloomberg-is-running-for-pre>

The proliferation of charter schools and other forms of unmanaged school choice under the Bloomberg Administration<sup>91</sup> likely exacerbated segregation.<sup>92</sup> One study of enrollment data from 2006 to 2016 found that school-choice policies allow affluent, privileged, and disproportionately white families to navigate the system to their advantage and hoard resources and opportunity: “White families . . . tended to choose schools that have more White children than their zoned schools do. Black and Hispanic families, on the other hand, [chose] schools with the same proportion of Black and Hispanic children as the schools to which they were zoned.”<sup>93</sup> In a 2013 policy briefing, Appleseed wrote, “[p]ut starkly, New York City’s hybrid system allows parents with means to flee schools they don’t like even as it excludes others from the schools that affluent parents do like.”<sup>94</sup>

Similar issues emerged from the Bloomberg Administration’s emphasis on increasing the use of selective schools with competitive admissions processes. In 2002, only 15.8% of school programs screened in this way.<sup>95</sup> By 2009, it was 28.4%, even though as early as 1986, a task force convened by the New York City Chancellor of Schools to

sident-on-his-education-record-here-s-what-research-found-about  
[<https://perma.cc/24YF-CFVQ>].

91. *See, e.g.*, GROVER J. WHITEHURST & SARAH WHITFIELD, BROWN CTR. ON EDUC. POL’Y AT BROOKINGS, *SCHOOL CHOICE AND SCHOOL PERFORMANCE IN THE NEW YORK CITY PUBLIC SCHOOLS — WILL THE PAST BE PROLOGUE?* 4–5 (2013), <https://www.brookings.edu/wp-content/uploads/2016/06/School-Choice-and-School-Performance-in-NYC-Public-Schools.pdf> [<https://perma.cc/4R2N-DEHB>] (analyzing the expansion of school choice under the Bloomberg Administration).

92. *See* KUCSERA & ORFIELD, *supra* note 63, at viii; *see also supra* notes 82–84 and accompanying text (describing an increase in racially segregated schools from 1989 through 2011).

93. NICOLE MADER ET AL., CTR. FOR N.Y.C. AFFS., *THE PARADOX OF CHOICE: HOW SCHOOL CHOICE DIVIDES NEW YORK CITY ELEMENTARY SCHOOLS* 17 (2018), <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5aecb1c3352f537d3541623b/1525461450469/The+Paradox+of+Choice.pdf> [<https://perma.cc/S8Q7-ELX2>].

94. N.Y. APPLESEED, *WITHIN OUR REACH: SEGREGATION IN NYC DISTRICT ELEMENTARY SCHOOLS AND WHAT WE CAN DO ABOUT IT: SCHOOL-TO-SCHOOL DIVERSITY* 11 (2013) [hereinafter *WITHIN OUR REACH: ELEMENTARY SCHOOLS* 2013], [https://nyappleseed.org/wp-content/uploads/First-Briefing-FINAL-with-Essential-Strategies-8\\_5\\_13.pdf](https://nyappleseed.org/wp-content/uploads/First-Briefing-FINAL-with-Essential-Strategies-8_5_13.pdf) [<https://perma.cc/DP5P-EVR3>]. This insight was corroborated with quantitative data from the Center for New York City Affairs. *See* MADER ET AL., *supra* note 93, at 18–22.

95. Monica Disare, *Great Divide: How Extreme Academic Segregation Isolates Students in New York City’s High Schools*, CHALKBEAT (Dec. 19, 2016, 6:00 AM), <https://ny.chalkbeat.org/2016/12/19/21103651/great-divide-how-extreme-academic-segregation-isolates-students-in-new-york-city-s-high-schools> [<https://perma.cc/C6U2-DM2H>].

improve school quality and access warned against this problem.<sup>96</sup> The task force was particularly wary of screening methods like interviews, tests developed by schools, and admissions preferences for those who attend open houses, and cautioned people to avoid “invalid and/or biased admissions criteria.”<sup>97</sup>

Attendance at screened high school programs also falls along racial lines. In 2011, *The New York Times* noted that in the entering high school class, only 7% of freshmen admitted to “the most selective schools” using an exam as admissions criteria were Black and only 8% were Hispanic, despite the fact that Black and Hispanic students made up approximately 30% and 39%, respectively, of applicants in New York City that year.<sup>98</sup> The numbers were closer to representative in “the most selective schools” using minimum grades or state test scores, in which Black and Hispanic students made up 27% and 34%, respectively, of students admitted.<sup>99</sup> Black and Hispanic students were most represented, however, in “unselective schools,” in which they made up 41% and 48% (in schools requiring “only a visit”) and 34% and 47% (in schools “accept[ing] all academic levels”).<sup>100</sup>

Analyzing data from the 2001–2002 to 2010–2011 school years, Appleseed concluded that the already high levels of segregation for Latino and white students had not improved during the Bloomberg years and that racial isolation for Asian students at all school levels and for Black high school students had actually increased.<sup>101</sup> By the end of the Bloomberg Administration, New York City demonstrated aspects of the “dual system” at issue in *Green*.<sup>102</sup>

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96. *See id.*

97. WITHIN OUR REACH: ELEMENTARY SCHOOLS 2013, *supra* note 94. This insight was corroborated with quantitative data from the Center for New York City Affairs. *See MADER ET AL.*, *supra* note 93, at 18.

98. *See* Elizabeth A. Harris & Ford Fessenden, *The Broken Promises of Choice in New York City Schools*, N.Y. TIMES (May 5, 2017), <https://www.nytimes.com/2017/05/05/nyregion/school-choice-new-york-city-high-school-admissions.html> [<https://perma.cc/UAE6-2PT3>].

99. *See id.*

100. *See id.*

101. *See IBO Data on School Segregation 2001–2010*, N.Y. APPLESEED, <https://www.nyappleseed.org/work/ibo-data-school-segregation-2001-2010/> [<https://perma.cc/6KAT-52HX>] (last visited Nov. 5, 2020) (analyzing data from the Independent Budget Office).

102. *See Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 435 (1968); DOUGLAS READY ET AL., EDUC. FUNDERS RSCH. INITIATIVE, THE EXPERIENCES OF ONE NEW YORK CITY HIGH SCHOOL COHORT: OPPORTUNITIES, SUCCESSES, AND CHALLENGES 35 (2013), <https://files.eric.ed.gov/fulltext/ED562061.pdf> [<https://perma.cc/F6G9-J3K3>] (“[T]hese findings suggest that in many ways this one cohort of students experience two different school systems.”).

## II. FRAMING THE ROLE FOR LEGAL ADVOCACY

Such was the landscape that Appleseed and Orrick entered in 2011. New York City media and research outlets rarely addressed issues of school segregation, and when they did, integration was not the proposed solution.<sup>103</sup> The only approach that could plausibly be described as an integration initiative — a modest student-assignment plan in a small community school district on the Lower East Side of Manhattan — had been terminated by NYCDOE perhaps in anticipation of the *PICS* decision.<sup>104</sup> NYCDOE’s hard-nosed “no excuses” policies under Chancellor Klein and its selective application of the Bush Administration K–12 “Dear Colleague” guidance made it impossible for community members to make headway in reinstating the plan.<sup>105</sup>

In 2011, New York Appleseed was the New York City office of a network of nonprofit Appleseed organizations in the United States and Mexico. Members of the Harvard Law School Class of 1958, led by Ralph Nader, established the network in 1993 shortly after their 35th reunion.<sup>106</sup> “[R]ather than filing individual lawsuits,” Nader envisioned that the new network would “solve problems at their root” by engaging pro bono lawyers and community stakeholders.<sup>107</sup> Author David Tipson took the helm at New York Appleseed in 2010 after working as an attorney at the Lawyers Committee for Civil Rights

103. Exceptions included Richard Kahlenberg, *Levelling the School Playing Field: A Critical Aim for New York’s Future, in FROM DISASTER TO DIVERSITY: WHAT’S NEXT FOR NEW YORK CITY’S ECONOMY?* (2009); Nat Hentoff, *Segregation 2010: Bloomberg’s Schools*, VILL. VOICE (Mar. 24, 2010), <https://www.villagevoice.com/2010/03/24/segregation-2010-bloombergs-schools/> [<https://perma.cc/MSP6-8RXD>]; Michael Meyers, *The Shameful Resegregation of New York City Schools*, N.Y. C.R. COAL., <https://nycivilrights.org/688> [<https://perma.cc/MX9U-GDTV>] (last visited Oct. 27, 2020).

104. See N.Y. APPLESEED, WITHIN OUR REACH: SEGREGATION IN NYC DISTRICT ELEMENTARY SCHOOLS AND WHAT WE CAN DO ABOUT IT: 2020 EDITION 10 (2020) [hereinafter WITHIN OUR REACH: ELEMENTARY SCHOOLS 2020], [https://www.nyappleseed.org/wp-content/uploads/Appleseed-Elementary-School-Briefing-Within-Our-Reach-July-2020\\_V2\\_REV1-Single-Pages.pdf](https://www.nyappleseed.org/wp-content/uploads/Appleseed-Elementary-School-Briefing-Within-Our-Reach-July-2020_V2_REV1-Single-Pages.pdf) [<https://perma.cc/J7GT-9EP7>]; *New York Schools Wonder: How White Is Too White?*, N.Y. TIMES (Feb. 16, 2016), <https://www.nytimes.com/2016/02/17/nyregion/program-aims-to-keep-schools-diverse-as-new-york-neighborhoods-gentrify.html> [<https://perma.cc/5EPD-2HHQ>].

105. See Dear Colleague Letter, *supra* note 49.

106. See Sandra Torrey, *Harvard Law Group Tackles Social Injustice*, WASH. POST (Feb. 18, 1994), <https://www.washingtonpost.com/archive/politics/1994/02/18/harvard-law-group-tackles-social-injustice/27412588-f3a1-4f74-8552-69a20586c656/> [<https://perma.cc/6PXF-PMWW>].

107. *Id.*

Under Law in Washington. Tipson had worked under the legendary civil rights and school desegregation attorney John Brittain and had served on the team of lawyers developing the Lawyers' Committee's response to *PICS* in the summer of 2007. Tipson took the position at Appleseed, hoping to address school segregation in what he knew to be one of the few northern city school districts with sufficient racial diversity to make school integration possible without encountering the barriers presented by *Milliken*.

In his first year at Appleseed, Tipson put out an open request to law firms to work with the organization to address school segregation in New York City. Responding enthusiastically to Appleseed's request was Author Rene Kathawala, pro bono counsel at Orrick, and his team of 15 pro bono attorneys. Kathawala offered Orrick's assistance on the condition that the project dedicate itself exclusively to results-driven advocacy securing actual policy change benefitting New York City students. Reports, white papers, and analyses would only be useful insofar as they furthered the goal of achieving long-lasting change to address structural systems that maintained inequality and fostered segregation.

Raised eyebrows, chuckles, and friendly admonishments were the norm when Orrick attorneys began speaking with experts about the possibility of reviving school integration as a solution to educational inequality in New York City. The high poverty rate and relatively small number of white children in the public school system,<sup>108</sup> the far-flung, archipelagic geography of a city of 8.5 million, the widespread conventional wisdom that school segregation was simply a product of neighborhood segregation, and the general sense that the Supreme Court had precluded school districts from pursuing voluntary integration strategies all conspired to make integration efforts seem anachronistic and naïve. Some community organizations indicated that integration was not a priority for their members and could even be a distraction from advocacy for equitable distribution of resources across schools.

At the time, the public debate around education was governed almost exclusively by the binary politics of "education reform" and the roles of charter schools and teachers' unions in particular. Organizations and individuals became defined as *for* or *against* making

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108. See N.Y. STATE ASS'N. OF SCH. BUS. OFFS., GROWING STUDENT POVERTY: CHALLENGES FOR ACHIEVEMENT AND STATE FUNDING 6 (2017), [https://cdn.ymaws.com/www.asbonewyork.org/resource/resmgr/reports/Growing\\_Student\\_Poverty\\_2017.pdf](https://cdn.ymaws.com/www.asbonewyork.org/resource/resmgr/reports/Growing_Student_Poverty_2017.pdf) [<https://perma.cc/J26N-4L23>] (showing that 72% of students were "economically disadvantaged" or eligible for reduced-price meals).

it difficult — if not impossible — to engage in policy discussions that could theoretically advance integration without reference to these polarized and entrenched camps (and the risk of alienating groups that opposed them).

But Appleseed and Orrick quickly learned that the objections to prioritizing integration also suggested their counterarguments: although neighborhood segregation did in fact present the primary barrier to school integration, it did not explain the all-too-frequent incidence of school segregation *within* diverse community school districts — a situation notably different from the stark realities of *inter*-district segregation at issue in *Milliken*.<sup>109</sup> School segregation had actually increased under the Bloomberg Administration<sup>110</sup> — a fact suggesting that policy played an important role. Although poverty rates were very high on average across the City,<sup>111</sup> demographics varied greatly across community school districts,<sup>112</sup> and the City's enormous size and fragmented educational geography lent itself well to initiatives at the community school district level<sup>113</sup> — each of these districts comprised an average population the size of the city of Buffalo.<sup>114</sup> Additionally, it stood to reason that at least some individuals on either side of the debate around education reform and

109. In 2013, New York Appleseed estimated that “half of all school districts already have or are on their way to having sufficient numbers of middle-class or white students to pursue traditional racial and economic diversity strategies.” WITHIN OUR REACH: ELEMENTARY SCHOOLS 2013, *supra* note 94, at 18.

110. *See supra* notes 87–88 and accompanying text (highlighting increases in the percentage of Black and Latino students attending majority-minority and hyper-segregated schools).

111. In New York City public school, 72.8% of students are classified as “economically disadvantaged” as of the date of this writing. *See DOE Data at a Glance*, N.Y.C. DEP’T EDUCATION, <https://www.schools.nyc.gov/about-us/reports/doe-data-at-a-glance> [<https://perma.cc/59JM-CSFW>] (last visited Nov. 5, 2020).

112. *See generally* MICHAEL HOLZMAN, SCHOTT FOUND. FOR PUB. EDUC., A ROTTING APPLE: EDUCATION REDLINING IN NEW YORK CITY (2012), <http://schottfoundation.org/resources/education-redlining-new-york-city> [<https://perma.cc/B5UX-FTYE>].

113. *See* WITHIN OUR REACH: ELEMENTARY SCHOOLS 2020, *supra* note 104, at 18.

114. The population of New York City in 2011 was estimated to be 8,244,910. *See* Sam Roberts, *Population Growth in New York City Is Outpacing 2010 Census, 2011 Estimates Show*, N.Y. TIMES (Apr. 5, 2012), <https://www.nytimes.com/2012/04/05/nyregion/census-estimates-for-2011-show-population-growth-in-new-york.html> [<https://perma.cc/S72Y-8KUK>]. The population of Buffalo, New York, is 255,244. *Buffalo*, WORLD POPULATION REV., <https://worldpopulationreview.com/us-cities/buffalo-ny-population> [<https://perma.cc/B96H-4FDV>].

the role of charter schools in the City might agree to reasonable initiatives to reduce segregation.

Perhaps most importantly, Appleseed's review of demographic trends and recent literature on school integration threw into relief the fact that New York City — like many cities in the United States — was in the throes of ongoing demographic change of cataclysmic and historic proportions.<sup>115</sup> Its population was increasing, and growing numbers of more affluent people were choosing to live in New York City.<sup>116</sup> The traditional metropolitan configuration of the last 40 years that allowed the *Milliken* decisions to act as a block was breaking down in the City, and, however much neighborhood patterns drove school segregation within the City, those patterns were altering rapidly.

Orrick's legal analysis had also determined that the *PICS* decision did *not* in fact prevent school districts from promoting racially diverse schools and preventing racial isolation, and that the Bush Administration guidance for school districts was misleading.<sup>117</sup> In short, we believed there was a compelling argument that legal advocacy, done right, could transform the public school discussion in New York City.

In the twentieth century, the most prominent role of legal advocacy in pursuing school integration had been, of course, to coordinate and bring litigation. In 2011, however, Appleseed and Orrick set upon a different path. We knew that, even if a legal theory could be developed, litigation would be uncertain in its impact, prohibitively costly, and likely to take decades before improving conditions for students.<sup>118</sup> Moreover, the network of Appleseed centers had been founded by attorneys drawing on their experiences that administrative agencies (the executive branch of government) represented a fruitful and too-often overlooked target for legal advocacy. Knowing that clients seeking assistance from law firms with problems with government agencies typically seek to avoid costly processes of

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115. See JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 15–16 (2011).

116. See Sam Roberts, *Census Estimates Show Another Increase in New York City's Non-Hispanic White Population*, N.Y. TIMES (June 30, 2014), <https://www.nytimes.com/2014/07/01/nyregion/census-estimates-show-another-increase-in-new-york-citys-non-hispanic-white-population.html> [<https://perma.cc/6PWL-C2WK>].

117. See Dear Colleague letter, *supra* note 49.

118. For example, see Susan Eaton's account of the heartbreakingly long process of the *Sheff* case. See SUSAN EATON, *THE CHILDREN IN ROOM E4: AMERICAN EDUCATION ON TRIAL* (2009).

litigation or lobbying for new legislation, Appleseed’s founders believed that pro bono attorneys could productively appeal to the discretion that administrative officials enjoy under existing law.<sup>119</sup>

Our understanding of the history of school integration also gave rise to concerns about the way in which attorneys — often beneficiaries of privilege and rarely trained in matters of education and pedagogy — took center stage in the twentieth century, crowding out the voices of those most directly affected by school segregation (low-income students and parents of color) and those most expert in matters of educating children (educators and school leaders). Moreover, as scholar Vanessa Siddle-Walker has uncovered, the popular historical narrative about the role of lawyers is incomplete — the success of these attorneys was supported at every step by a network of Black educators.<sup>120</sup> Our organizations were convinced that attorneys should no longer lead movements for school integration.

Yet we were equally skeptical of the idea that legal organizations should go to the other extreme and play a passive role in identifying social problems and possible solutions. Placing too much burden on affected communities to solve complex problems and racist structures not of their own making seemed all too convenient to the status quo. How, for instance, were stakeholders to know that integration was even a possible goal so long as NYCDOE’s attorneys maintained a bovine insistence that it was constitutionally prohibited?

Appleseed and Orrick started with the premise that legal advocates might play an important role in providing reliable and independent analysis of the policies and other governmental decisions underpinning and exacerbating school segregation, and, in the process, expand the range of policy solutions for stakeholders to consider. Our organizations believed that if people knew more about the realities and the possibilities, we could engender a public discussion of school integration and support stakeholders — those living in the affected communities and facing the impacts of the racist policies directly — who would be interested in proposing solutions to NYCDOE.

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119. See *Our History*, APPLESEED, <https://www.appleseednetwork.org/our-history.html> [https://perma.cc/RSW4-MXEF] (last visited Oct. 26, 2020).

120. See VANESSA SIDDLER-WALKER, *THE LOST EDUCATION OF HORACE TATE: UNCOVERING THE HIDDEN HEROES WHO FOUGHT FOR JUSTICE IN SCHOOLS* 10 (2018) (“[T]he country has been almost unilaterally steeped in a story repeatedly told and almost universally accepted: the NAACP protested injustice and crafted the successful *Brown v. Board of Education* Supreme Court case that was supposed to deliver black children from poor schools to new opportunities.”).



At its core, “theory of change” methodology calls on organizations to engage in an iterative process focused on articulating the long-term issue they are trying to address,<sup>121</sup> and from there explicitly identifying (1) the organization’s core competencies,<sup>122</sup> (2) the appropriate stakeholders needed to design and make these changes,<sup>123</sup> (3) concrete steps that the organization can take to improve these issues in both the near and long-term,<sup>124</sup> and (4) benchmarks by which to judge success.<sup>125</sup> The organization should then revisit its theory of change periodically to refine its inputs and target outputs as the movement evolves.<sup>126</sup>

While “working backwards” may sound like common-sense planning, it is a particularly important exercise for legal organizations advocating for change in non-litigation contexts. Litigation, once undertaken, has a clear aim (albeit divergent paths to get there): achieve a positive outcome for the client at hand.<sup>127</sup> A broad policy

121. See, e.g., Jean Ellis, Diana Parkinson & Avan Wadia, *Making Connections: Using a Theory of Change to Develop Planning and Evaluation*, CHARITIES EVALUATION SERVS. 11–13 (Feb. 2011), <https://www.salfordsocialvalue.org.uk/wp-content/uploads/2016/06/makingconnectionsusinatheoryofchangetodevelopplan-800-808.pdf> [<https://perma.cc/QN2L-QPU2>].

122. See, e.g., ORGANIZATIONAL RSCH. SERVS., THEORY OF CHANGE: A PRACTICAL TOOL FOR ACTION, RESULTS AND LEARNING 10–11 (2004), <https://www.aecf.org/resources/theory-of-change/> [<https://perma.cc/478T-E62E>] (describing core competencies as “the building blocks that enable powerful strategies to become actualized” including “people, processes, supports, models, techniques, structures, plans, frameworks and other inputs needed to enact, bring to scale and sustain powerful change”).

123. See, e.g., Ellis et al., *supra* note 121, at 3.

124. See, e.g., *id.* at 2–4.

125. See, e.g., Chris L.S. Coryn et al., *A Systematic Review of Theory-Driven Evaluation Practice from 1990 to 2009*, 32 AM. J. EVALUATION 199 (2014) (reviewing systems of theory-driven evaluation); PK Thornton et al., *Responding to Global Change: A Theory of Change Approach to Making Agricultural Research for Development Outcome-Based*, 152 AGRIC. SYS. 145, 151 (2017) (describing the application of theory of change to measurement); Ellis et al., *supra* note 121, at 19.

126. See ANDREA A. ANDERSON, ASPEN INST., THE COMMUNITY BUILDER’S APPROACH TO THEORY OF CHANGE: A PRACTICAL GUIDE TO THEORY DEVELOPMENT 27 (2006), [http://www.theoryofchange.org/pdf/TOC\\_fac\\_guide.pdf](http://www.theoryofchange.org/pdf/TOC_fac_guide.pdf) [<https://perma.cc/XW2H-N48Z>] (“The best way to use a theory [of change] is to periodically update it by convening a group to review the pathway of change and assumptions in the theory and compare it to the real-world initiative they have implemented.”).

127. Of course, litigation can also be (and has been) part of a larger strategy to create social change. In impact litigation, in particular, attorneys seek to select cases that will help them move case law in a positive direction. See Kevin R. Johnson, *Lawyering for Social Change: What’s a Lawyer to Do?*, 5 MICH. J. RACE & L. 201, 220–21 (1999). Nonetheless, because lawyers have a duty to zealously pursue the interests of their client throughout litigation, a lawyer’s ability to advocate for broad social change and

goal (without identifying specific steps) could, in contrast, encompass many divergent aims that leave an organization spread too thin to make contributions where its core competencies could have the greatest impact. The iterative process of theory of change is also useful for long-term movements, including reducing school segregation.

Appleseed and Orrick already had a long-term mission in mind: to increase racial and socioeconomic integration in New York City schools to the benefit of all students. Part of this process necessarily involved lifting artificially placed barriers to advocacy from affected communities. This view of lawyers as vital co-participants and supporters in social justice movements, rather than leaders, relates to ideas of “community lawyering.” Charles Elsesser describes community lawyering as “a wide range of community-building and advocacy-related activities through which advocates contribute their legal knowledge and skills to support community identified initiatives that return power to the community.”<sup>128</sup> Rather than seek to drive change through litigation or by pulling community organizations in one direction, community lawyers seek to leverage their experiences in meeting with policymakers, drafting proposals and policies, and advocating positions both publicly and privately, to *support* communities in achieving the policy solutions they desire.<sup>129</sup>

Implicit in Appleseed and Orrick’s approach, however, was the limitation that legal advocates would provide such support only to those organizations and community members who shared their goal of increased school integration. While it could be argued that all community lawyers bring their own biases and priorities into the decisions about which community organizations to support, the point has special salience in light of the fact that the landscape of advocacy for education justice was highly contested and that most community organizations focused on educational justice did not prioritize school integration as a solution in 2011. For better or for worse, our advocacy proceeded from our own conclusions about the importance of school

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to resolve conflicts within a movement will be constrained to the extent their client’s interests and desires differ from the movement’s broader goals. *See, e.g., id.* at 217–20 (describing how a traditional, client-centered view of professional responsibility can constrain an attorney’s ability to mediate conflicting demands of class members in class action cases).

128. Charles Elsesser, *Community Lawyering — The Role of Lawyers in the Social Justice Movement*, 14 *LOY. J. PUB. INT. L.* 375, 376 (2013) (internal quotations omitted) (quoting Ellen Hemley, *Supporting Local Communities Through Community Lawyering*, 45 *CLEARINGHOUSE REV.* 500, 505–06 (2012)).

129. *See id.* at 384–85. *See generally* Johnson, *supra* note 127.

integration rather than as a response to priorities expressed by communities.<sup>130</sup>

Accordingly, Appleseed and Orrick determined early on that (1) we needed to remove any legal or regulatory structures preventing NYCDOE action, (2) we needed to create a precedent for a student-assignment plan that would promote diversity, and (3) NYCDOE would need to offer some leadership — not to displace the role of affected communities, but to enable it. These initiatives would build on Appleseed and Orrick’s core competencies. As legal organizations, we recognized that we could use our institutional knowledge and legal analysis to advocate within the administrative state. We also recognized the limitations of lawyers as movement leaders<sup>131</sup> and prioritized input and agreement from community stakeholders to ensure that a proposed plan opened the door for a solution that community members actually desired. More importantly, we adopted a mission and framework that became a pivotal building block in catalyzing and sustaining effective policy change.

### III. IMPLEMENTATION

#### A. Challenging Legal and Regulatory Structures Inhibiting NYCDOE Action

Beginning in the spring of 2011, Appleseed and a team of 15 Orrick attorneys and staff began interviewing a wide range of experts, scholars, and community members and reviewing documents on issues pertaining to school segregation and the possibilities of school integration in New York City. Whenever possible, we conducted these interviews in person in or near the offices or homes of the individuals involved. Over the course of a year, Orrick attorneys used the information from these interviews to develop a comprehensive memorandum analyzing the legal and administrative structure of NYCDOE. The memorandum outlined the scope of and limitations on NYCDOE’s administrative and regulatory powers within state law to show the extent to which NYCDOE could promote integration within the existing framework.

Orrick’s legal analysis concluded that there were few legal constraints on NYCDOE’s ability to act unilaterally to integrate its schools under the *PICS* framework. Some important exceptions

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130. See discussion of the research underlying the benefits of school integration *supra* notes 54–62.

131. See *supra* notes 128–131 and accompanying text.

applied, however — most importantly, (1) the power granted by state law to parent boards established in each community school district called Community Education Councils (CECs) to veto the modification of attendance-zone lines for elementary and middle schools,<sup>132</sup> (2) the power of the Mayor to replace the Chancellor of Schools at any time,<sup>133</sup> (3) state law conferring significant autonomy on charter schools within the City,<sup>134</sup> and (4) state law governing the City’s famous “specialized” high schools and effectively preventing NYCDOE from interfering with admissions standards at the four most prestigious of these schools.<sup>135</sup> Our research also revealed that, contrary to popular understanding, there was evidence of some recent initiatives that could plausibly be understood as having integration goals — most notably a modest student-assignment plan in Community School District 1 in Manhattan. Every one of these initiatives, however, had been eliminated or severely cut back under the Bloomberg Administration.<sup>136</sup>

This analysis lent support to our working premise that legal advocacy would need to take place in coordination with stakeholders at the community school district level — to secure the buy-in of CECs and, when the time came, that of the Mayor and Chancellor of Schools.

132. *See* N.Y. EDUC. LAW § 2590-e (McKinney 2019). According to the law, CECs were given the responsibility to review the districts’ educational programs and assess their effects on student achievement, submit an annual evaluation of the superintendent, and provide input to the Chancellor and City Board on matters of concern. *See id.*

133. *See id.* § 2590-h.

134. *See id.* §§ 2850–57.

135. *See id.* § 2590-h(1)(b). The sheer symbolic impact of these schools meant that whatever embryonic debate about segregation and exclusion was occurring in 2011 focused on these four schools.

136. NYCDOE terminated Community School District 1’s modest student-assignment plan around 2006. *See* WITHIN OUR REACH: ELEMENTARY SCHOOLS 2020, *supra* note 104, at 6, 10. Around the same time, the Brooklyn New School was told to stop giving extra weight to students from low-income families. *See* Interview by Ctr. for Pub. Rsch. & Leadership with Anna Allanbrook, Principal of Brooklyn New Sch. (Feb. 17, 2012). During Mayor Bloomberg’s tenure, the number of “educational option” high schools declined significantly. *See* N.Y. APPLESEED, WITHIN OUR REACH: SEGREGATION IN NEW YORK CITY HIGH SCHOOLS AND WHAT WE CAN DO ABOUT IT: HIGH SCHOOL CHOICE (2014) [hereinafter WITHIN OUR REACH: HIGH SCHOOLS 2014], <https://nyappleseed.org/wp-content/uploads/Within-Our-Reach-3rd-Brief-April-2014-FINAL.pdf> [<https://perma.cc/FXD6-7KWK>]. Also, under Bloomberg’s watch, two of the City’s top specialized high schools, Stuyvesant and Bronx Science, both terminated their participation in the Discovery Program. *See* Megan Finnegan & Stephon Johnson, *Benign Neglect? Who Killed the Discovery Program?*, OUR TOWN (May 12, 2011), <https://issuu.com/ourtown/docs/051111/8>.

It also suggested a strategy to avoid thorny issues pertaining to charter schools (even though there was considerable commentary at that time suggesting that charter schools might be a good place to experiment with integration),<sup>137</sup> because of the difficulty of scaling up successful models within NYCDOE and because of the intense polarization around the issue. We also decided not to focus on the specialized high schools given the longtime failure of advocates to effect change in admissions to these schools, the necessity of dedicating large amounts of resources to legislative lobbying at the state level, and the relatively small number of students affected as a percentage of the total high school population in New York City.<sup>138</sup>

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137. James Ryan opined that most school districts would want to avoid district-wide programs like the controlled choice plans in Wake County, North Carolina, and Cambridge, Massachusetts, in favor of “less coercive methods.” He specifically recommended combining neighborhood school options with choice elements — particularly magnet and charter schools. See RYAN, *supra* note 115, at 296–97. Richard Kahlenberg and Halley Potter wrote in a 2012 report that, “[t]he charter school movement is uniquely positioned to lead innovation in this area and demonstrate both the feasibility and benefit of an integrated learning model.” RICHARD KAHLENBERG & HALEY POTTER, *POV. & RACE RSCH. ACTION COUNCIL & CENTURY FOUND., DIVERSE CHARTER SCHOOLS: CAN RACIAL AND SOCIOECONOMIC INTEGRATION PROMOTE BETTER OUTCOMES FOR STUDENTS?* 4 (2012), [https://production-tcf.imgix.net/app/uploads/2012/05/24013615/Diverse\\_Charter\\_Schools-8.pdf](https://production-tcf.imgix.net/app/uploads/2012/05/24013615/Diverse_Charter_Schools-8.pdf) [<https://perma.cc/WQ89-ZBE9>]; see also Sarah Carr, *The Integrationists*, NEXT CITY (Aug. 20, 2012), <https://nextcity.org/features/view/the-integrationists> [<https://perma.cc/SHG3-97BX>]. Jennifer Stillman concluded, “[w]hat charter schools have as a policy tool is the ability to start as new schools, which are much easier to craft into diverse schools with the right outreach efforts. Changing existing schools, though possible, is very challenging.” Jennifer Stillman, *Charter Schools No Silver Bullet for Integration, But a Start*, CHALKBEAT (July 5, 2012, 12:00 PM), <https://ny.chalkbeat.org/2012/7/5/21096675/charter-schools-no-silver-bullet-for-integration-but-a-start> [<https://perma.cc/P83Y-JNWA>]. Stillman published a book based on her research. See JENNIFER BURNS STILLMAN, *GENTRIFICATION AND SCHOOLS: THE PROCESS OF INTEGRATION WHEN WHITES REVERSE FLIGHT* (2012). Scholar Priscilla Wohlstetter emphasized the promise of diverse charter schools and echoed the sentiments of many experts in writing that, given current realities, “the likelihood of achieving socioeconomic integration throughout all urban schools seems very dim, indeed.” Priscilla Wohlstetter, *A New Solution to an Old Problem: School Integration*, HUFFINGTON POST (Nov. 23, 2016), [http://www.huffingtonpost.com/priscilla-wohlstetter/a-new-solution-to-an-old\\_b\\_8630760.html](http://www.huffingtonpost.com/priscilla-wohlstetter/a-new-solution-to-an-old_b_8630760.html) [<https://perma.cc/G2KF-UEC3>]. For a contemporary response to these arguments, see David Tipson & Khin Mai Aung, *Op-Ed: Aim for Diverse Schools, But Don’t Leave It Up to Charters*, NEXT CITY (Feb. 28, 2013), <https://nextcity.org/daily/entry/op-ed-aim-for-diverse-schools-but-dont-leave-it-up-to-charters> [<https://perma.cc/VD6F-2YRA>].

138. For the 2019–2020 school year, there were a total of 325,842 high school students, and 15,869 went to specialized high schools (4.9%). *Information and Data Overview*, N.Y.C. DEPT EDUC.: INFOHUB, <https://infohub.nyced.org/reports/school-quality/information-and-data-overview> [<https://perma.cc/U3CC-VPS6>] (last visited Oct. 26, 2020) (click “Demographic

### B. Creating a Precedential Student-Assignment Plan

As Appleseed and Orrick were reaching these conclusions, one of the experts we interviewed, a former NYCDOE official, shared that some within the agency's leadership ranks — now under a new Chancellor of Schools, Dennis Walcott — were concerned about the increased levels of segregation attained under former Chancellor Joel Klein's tenure and might be open to collaboration on the issue.<sup>139</sup> After some initial conversations, NYCDOE officials told us about a school building under construction near the border between Community School Districts 13 and 15. The new building would house elementary schools for both districts — an unusual situation. Community members had already begun to note the very different demographics of the two districts: District 13 had a relatively large Black and Hispanic population and small white population;<sup>140</sup> District 15, by contrast, had a relatively small Black population and a relatively large white and affluent population.<sup>141</sup> The prospect of two separate-but-equal schools co-located under the same roof alarmed community members and NYCDOE.<sup>142</sup> We recognized an opportunity to realize one of our goals: creating a precedent for a student-assignment plan that would promote diversity.

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Snapshot" hyperlink); *see also Specialized High Schools*, N.Y.C. DEP'T EDUCATION, <https://www.schools.nyc.gov/enrollment/enroll-grade-by-grade/specialized-high-schools> [<https://perma.cc/AZ8V-2W9X>] (last visited Dec. 29, 2020) (click "What Are the Specialized High Schools?" drop down box).

139. Based on Authors' oral communication.

140. *See* HOLZMAN, *supra* note 112, at 75.

141. *See id.* at 83.

142. Co-location of schools within a single building is common in New York City. *See* Suzanne Wulach & James Kemple, *Trends in School Co-Locations in NYC*, RSCH. ALL. FOR N.Y.C. SCHS., [https://research.steinhardt.nyu.edu/site/research\\_alliance/2016/09/12/trends-in-school-co-locations-in-nyc/](https://research.steinhardt.nyu.edu/site/research_alliance/2016/09/12/trends-in-school-co-locations-in-nyc/) [<https://perma.cc/2VMG-E8BM>] (last visited Dec. 29, 2020).

**Location of New School Site Near the Border of  
Districts 13 and 15 in Brooklyn.<sup>143</sup>**



We note at this juncture that some of the advocates we had met in our outreach expressed grave concerns about collaborating with both the individual who introduced us to NYCDOE officials and with NYCDOE officials themselves due to the polarized debates about the Bloomberg education policies. These advocates advised that true collaboration with government actors was impossible because power dynamics would render such arrangements illusory and unacceptable compromise and cooption were the inevitable results of any attempt. Best, according to this frame of mind, to work separately to allow movements to express their ideologies not only in their goals, but also in every aspect of their practices and to generate demands untainted by the agendas and values of oppressive government regimes. Perhaps underlying these views was the idea that actors in a movement need at all times to embody and model the moral principles motivating their advocacy; working with the wrong person or with institutions represented a compromise of essential values.

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143. Map created by Appleseed.

Appleseed and Orrick, however, were not part of a movement but were seeking to lay the foundation for one. When Appleseed wavered in response to these critiques, attorneys at Orrick invoked principles of legal advocacy: the importance of results over idealistic pronouncement, the discipline of strategy, and the self-effacing, often dispassionate role of the attorney in advancing the client's interest — a role in which the lawyer's individual ideology and need for validation must be set aside. Appleseed and Orrick decided to move forward with the project. Direct engagement with government officials became a hallmark of our advocacy over the years that followed (not untempered by instances of harsh criticism).

The school building at issue was strategically important not only because of its unfortunate potential for a stark showcasing of racial and economic segregation, but also because it provided an opportunity to work within the apparent safe harbor of Justice Kennedy's concurring opinion in *PICS*: the building's site on the border of two community school districts offered the chance to employ "strategic site selection of new schools."<sup>144</sup> These new schools would by necessity require re-drawing of attendance zones and therefore offered the chance to do so "with general recognition of the demographics of neighborhoods."<sup>145</sup> Depending on how these lines were drawn, there might also be opportunities for "recruiting students and faculty in a targeted fashion."<sup>146</sup>

In the spring of 2012, Orrick provided Appleseed with financial support to retain the services of the Center for Public Research and Leadership at Columbia Law School (CPRL). Orrick attorneys worked with CPRL to conduct extensive research and interviews in the course of which we learned, among other things, that there was substantially more flexibility in the way NYCDOE managed student assignment for elementary schools than we had previously understood. Through the efforts of CPRL's director, we persuaded NYCDOE to use a single school for students of both districts — the same school whose original building had previously occupied the construction site — P.S. 133.

By the late summer, the community task force convened by Councilmember Stephen Levin to address the gamut of issues arising from the building's ongoing construction had turned to issues of

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144. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. (PICS)*, 551 U.S. 701, 852 (2007).

145. *Id.*

146. *Id.*



student assignment for the school. The task force included principals and assistant principals from P.S. 133 and several nearby schools, parents serving the school originally on the construction site, community-education council members from both school districts, parents at P.S. 133, and representatives from the teachers' union. Appleseed unapologetically pursued its own agenda of establishing a model for student assignment for integration on this task force. Using the findings from legal and other research compiled by Orrick and CPRL, Appleseed challenged NYCDOE's insistence that student assignment by traditional attendance zone or by choice (open to all students but limited by lottery) were the only two options on the table. Task force members showed an interest in learning more from Appleseed and Orrick about other ways of admitting students to the school.

Once the task force had decided upon a goal of an intentionally diverse school, Appleseed and Orrick shifted to something more like a community-lawyering role, providing research memoranda to the task force with a menu of student-assignment options available under the *PICS* decision. Task force members, drawing on their expertise and experience, gravitated towards an option using enrollment targets established by New York State law to require charter schools to serve English language learners and students eligible for the free and reduced-price lunch program at rates "comparable to the enrollment figures" for those categories of students across the relevant community school district.<sup>147</sup> The task force members wisely chose this approach as a political strategy with a charter-school-friendly administration — a key consideration that Appleseed and Orrick may not have anticipated on our own.

NYCDOE representatives on the task force initially reported that setting enrollment targets for students in this way was prohibited under *PICS*. Appleseed and Orrick were able to assist the task force in rebutting this argument, and with help from the press and new federal guidance from the Obama Administration, NYCDOE's arguments were defeated.<sup>148</sup> Even though the objections lacked merit, we viewed

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147. See N.Y. EDUC. LAW § 2852(9-a)(b)(i) (McKinney 2015).

148. See Alan Neuhauser, *School Officials, DOE Embroiled in Affirmative Action Fight at P.S. 133*, DNAINFO (Oct. 15, 2012, 11:21 AM), <https://www.dnainfo.com/new-york/20121015/sunset-park/school-officials-doe-embroiled-affirmative-action-fight-over-ps-133> [<https://perma.cc/EE3Q-E78K>]; see also *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, U.S. DEP'T EDUCATION (Nov. 2011), <https://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html> [<https://perma.cc/UR3J-LGMN>]. On July 3, 2018, the Trump Administration removed

this advocacy as part of our work to eliminate legal and regulatory structures preventing NYCDOE action. Having conceded the point, NYCDOE studied the mechanisms by which some charter schools had modified their admissions lottery to meet the enrollment targets and proposed the same for P.S. 133. With this action, NYCDOE established a precedent of prioritizing students for admission by rough indicators of socioeconomic status. Chancellor Walcott announced that P.S. 133 could be a model for traditional public schools across the City.<sup>149</sup>

But schools had already taken note of this development before the Chancellor's announcement. Almost immediately after the official adoption of the P.S. 133 plan by the two local school districts in early 2013, other schools began seeking their own versions of the plan. Appleseed provided guidance to several of these school communities on legal and practical elements involved in the plans and helped them advocate for permission to prioritize students — again by providing information and advice rather than attempting to dictate how each school should proceed.

The appointment of Carmen Fariña as Chancellor of Schools by newly elected Mayor Bill de Blasio in January of 2014, however, represented an unexpected setback. The spring of 2014 found advocates seemingly right back to where they started, with NYCDOE attorneys once again questioning the legality of the P.S. 133 plan and of prioritizing students by socioeconomic indicators in general. Once again, it appeared that specious legal objections served to mask antipathy to integration. The constant presence of Orrick attorneys in meetings and written communications on the state of the law represented a bulwark against these arguments, but by the fall of 2014, NYCDOE had failed to budge.

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its support for this guidance and re-posted the Bush-Administration guidance. The 2011 guidance is still available online. See U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., RESCINDED: GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2011), <https://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf> [<https://perma.cc/PW9S-94T8>].

149. See Anika Anand, *P.S. 133's Innovative Admissions Model Aims for More Diversity*, CHALKBEAT (Aug. 29, 2013, 5:01 PM), <https://ny.chalkbeat.org/2013/8/29/21091165/p-s-133-s-innovative-admissions-model-aims-for-more-diversity> [<https://perma.cc/P22Q-MTZ4>].

### C. Coordination with the State Education Department and NYCDOE

New York State Commissioner of Education John King, Jr. provided an opportunity to break through the logjam. In the summer of 2014, King had tapped Appleseed and Orrick to help develop a statewide grant program. The UCLA Center for Civil Rights had released a damning report earlier that year with quantitative information showing that New York State schools were more segregated than those of any other state in the nation.<sup>150</sup> Commissioner King, who harbored a longtime interest in integration, seized the moment to take action. As with the former NYCDOE official, King was viewed by many progressive education advocates as too closely associated with education-reform ideologies to work with.

In addition to providing legal research by Orrick attorneys on the possibilities of using federal school-improvement grants to advance integration, Appleseed and Orrick advised on the structure of the grant program ultimately called the Socioeconomic Integration Pilot Program (SIPP)<sup>151</sup> and crafted a draft Request for Proposals for the New York State Education Department (NYSED). In the process, Appleseed and Orrick ensured that the new program would require school districts to use “a choice-based admissions policy that [would] promote socioeconomic diversity in the school’s entry grade through consideration of at-risk factors for each applicant,” effectively *requiring* recipients to do the very thing that NYCDOE was claiming to be constitutionally prohibited.<sup>152</sup> In 2015, NYCDOE applied for eight grants under SIPP and never again challenged the legality of the P.S. 133 plan.

During this period, Appleseed and Orrick also moved forward on our goal to push NYCDOE to take a leadership role on school integration. Our 2013 and 2014 policy briefings based on Orrick’s research identified the lack of a clear policy statement from NYCDOE on the benefits and importance of school diversity as contributing to confusion and diffidence among NYCDOE employees — particularly

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150. See KUCSERA & ORFIELD, *supra* note 63, at iv.

151. See Press Release, New York State Educ. Dep’t, NYS Schools to Receive Grants to Promote Socioeconomic Integration (Dec. 30, 2014), <http://www.nysed.gov/news/2015/nys-schools-receive-grants-promote-socioeconomic-integration> [<https://perma.cc/W499-5M3M>].

152. 2015–18 Title I School Improvement Section 1003(a): Socioeconomic Integration Pilot Program, N.Y. ST. EDUC. DEP’T 4 (2014), <http://www.p12.nysed.gov/funding/2015-18-title-1-ses-integration-grant/ses-integration-grant.pdf> [<https://perma.cc/JB6A-52TH>].

school principals uncertain about the extent to which they were permitted to plan for or even speak about integration.<sup>153</sup>

In the fall of 2014, City Council Member Brad Lander tapped Appleseed, Orrick, and consulting firm Metis Associates to help develop reporting requirements for a bill to be introduced in the City Council. A hearing on the bill was held in December 2014 where Appleseed's Executive Director testified on the need for clear direction from NYCDOE;<sup>154</sup> a new student-organizing initiative IntegrateNYC<sup>155</sup> also testified as to student experiences with segregated schools.<sup>156</sup> In 2015, the City Council passed the law along with a resolution calling on NYCDOE to adopt the kind of policy statement we were seeking in support of school diversity.<sup>157</sup> After requiring some changes to the bill, Mayor de Blasio used a public ceremony to sign the School Diversity Accountability Act into law.<sup>158</sup>

Even a state grant program and the new attention to school integration from the City Council, however, did not seem to be enough to push NYCDOE to action on the schools waiting for diversity admission plans. The final push came from a flurry of news reporting in the fall of 2015. High-profile public processes to re-draw attendance zone boundaries for two elementary schools — one on the Upper West Side<sup>159</sup> and the other in Brooklyn<sup>160</sup> — could not have been better

153. See WITHIN OUR REACH: ELEMENTARY SCHOOLS 2013, *supra* note 94, at 8. For other briefings, see WITHIN OUR REACH: HIGH SCHOOLS 2014, *supra* note 136; N.Y. APPLESEED, WITHIN OUR REACH: SEGREGATION IN NYC DISTRICT ELEMENTARY SCHOOLS AND WHAT WE CAN DO ABOUT IT: ADDRESSING INTERNAL SEGREGATION AND HARNESSING THE EDUCATIONAL BENEFITS OF DIVERSITY (2014), <https://nyappleseed.org/wp-content/uploads/Within-Our-Reach-2nd-Brief-February-2014-FINAL.pdf> [<https://perma.cc/J9KM-32TR>].

154. See *Testimony of David F. Tipson, Director of New York Appleseed: New York City Council — Committee on Education*, N.Y. APPLESEED (Dec. 11, 2014), <https://nyappleseed.org/wp-content/uploads/NYA-TESTIMONY-FOR-CITY-COUNCIL-12-11-14.pdf> [<https://perma.cc/VK6G-7F44>].

155. At the time, IntegrateNYC was known as IntegrateNYC4Me.

156. For video and other materials relating to the December 11, 2014, hearing, see *December 11, 2014 Committee on Education*, N.Y. CITY COUNCIL (Dec. 11, 2014), <https://legistar.council.nyc.gov/MeetingDetail.aspx?ID=360348&GUID=9D434FA2-8295-4560-B7FA-3AB11C69BDE7&Options=info|&Search=> [<https://perma.cc/VCZ8-K8N3>].

157. See N.Y.C. Council Resolution No. 453 (2015).

158. See N.Y.C. LOCAL LAW NO. 59 (2015).

159. See Kate Taylor, *Education Dept. Drops Proposal to Rezone Upper West Side Schools*, N.Y. TIMES (Nov. 18, 2015), <https://www.nytimes.com/2015/11/19/nyregion/education-department-drops-proposal-to-rezone-upper-west-side-manhattan-schools.html> [<https://perma.cc/L65U-DVUN>].

160. See Kate Taylor, *Race and Class Collide in a Plan for Two Brooklyn Schools*, N.Y. TIMES (Sept. 22, 2015),

timed to undermine the longtime canard that school segregation was exclusively a product of neighborhood segregation. Painfully clear in both rezonings was the fact that simple adjustment of lines could lead to dramatic levels of integration; as with P.S. 133, schools in New York City could see more integration simply by changing the way that they admitted *nearby* students. These were hardly the first rezonings from which these conclusions could be drawn; the difference in 2015 was that the prior three years of advocacy had framed key questions squarely and challenged knee-jerk responses.<sup>161</sup>

Soon, however, reporters extended their investigative efforts far beyond these immediate issues. Over a period of about a year, reporters like Patrick Wall from Chalkbeat and Amy Zimmer from DNAInfo.com thoroughly probed the issue of school segregation in New York. Wall wrote hard-hitting pieces on NYCDOE's failure to approve diversity admissions plans for elementary schools that had requested them.<sup>162</sup> Perhaps most famously, Zimmer caught Chancellor Fariña stating publicly that "pen-pal" relationships between students at segregated schools might be a solution.<sup>163</sup> Reporters, in our view, were drawn to the issue's novelty, its clear nexus to some of the most famous events of the American civil rights movement, and its endless complexity. We note, however, that much of the intense interest in

<https://www.nytimes.com/2015/09/23/nyregion/race-and-class-collide-in-a-plan-for-two-brooklyn-schools.html> [<https://perma.cc/6KYC-W689>].

161. Daniel Hunter, citing Bill Moyer, writes that two otherwise similar bellwether events separated by time can generate very different public responses if, in the intervening years, movements emerge to "seed local groups, . . . hone responses [to opposition,] and develop alternative policy platforms." Daniel Hunter, *Don't Believe the Lie That Voting Is All You Can Do*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/08/04/opinion/voting-2020-election-blm-movement.html> [<https://perma.cc/MU4X-GGNT>]. They do this by "amplify[ing] complex questions that otherwise get simplified to sound bites." *Id.*

162. See Patrick Wall, *Fariña Says City Is Still Reviewing Schools' Diversity Plans, with Quick Changes Unlikely*, CHALKBEAT (Sept. 8, 2015, 8:13 PM), <https://ny.chalkbeat.org/2015/9/8/21092358/farina-says-city-is-still-reviewing-schools-diversity-plans-with-quick-changes-unlikely> [<https://perma.cc/GDN2-STHN>]; Patrick Wall, *Nearly a Year After NYC Principals Float Diversity Plans, City Has Yet to Sign Off*, CHALKBEAT (Sept. 1, 2015, 6:15 PM), <https://ny.chalkbeat.org/2015/9/1/21092367/nearly-a-year-after-nyc-principals-float-diversity-plans-city-has-yet-to-sign-off> [<https://perma.cc/58X9-HXD7>].

163. See Amy Zimmer & Noah Hurowitz, *Schools Boss Touts Pen Pal System as Substitute for Racial Integration*, DNAINFO (Oct. 29, 2015, 11:59 AM), <https://www.dnainfo.com/new-york/20151029/upper-west-side/schools-boss-touts-pen-pal-system-as-substitute-for-racial-integration/> [<https://perma.cc/M58P-25BW>]; see also Amy Zimmer & Nicholas Rizzi, *Racial Segregation in City Schools Is Just 'Reality,' De Blasio Says*, DNAINFO (Oct. 29, 2015, 6:16 PM), <https://www.dnainfo.com/new-york/20151029/park-slope/racial-segregation-city-schools-is-just-reality-de-blasio-says/> [<https://perma.cc/C4DD-ZJTL>].

reporting on segregation in 2015 stemmed from the interests of often formally educated and white journalists. What was unclear at the time was if this sudden interest included a readership that reflected other demographics outside of their own — particularly the perspectives and concerns of voices of color on this topic — a pattern many marginalized communities know too well.

Appleseed and Orrick remained ready resources for reporters during this period and managed in many cases to influence the way in which they framed their articles. In November 2015, just weeks after the “pen-pal” statement appeared in the press, NYCDOE announced that seven elementary schools would be permitted to use diversity admissions plans based on the P.S. 133 model under a new admissions pilot.<sup>164</sup> The precedent established by P.S. 133 had extended to more schools and would become the essential building block that NYCDOE would use in nearly all future integration initiatives. As of 2020, 136 school programs across New York City were using set-aside admissions plans to promote diversity.

#### **D. Building on Progress**

The announcement of the new pilot represented a victory for all three of our initial goals: creating a precedent, eliminating legal and regulatory barriers, and pushing NYCDOE to lead on the issue of school integration. It also represented the moment at which communities directly affected by the problem of segregation — in this case, the parents and educators at the seven schools, not Appleseed and Orrick — largely began to lead a broad-based movement for integrated schools. At Appleseed and Orrick, we knew that we had likely accomplished most of what legal advocates could and should accomplish in the absence of such a movement.

Throughout 2015, IntegrateNYC started to transform meetings of advocates by centering the experiences and research of students. These students’ careful research and passionate advocacy undoubtedly contributed to NYCDOE’s decision to move forward with the pilot. Appleseed partnered with this exciting new initiative and began to plan for a shift in its strategy. While still advocating for NYCDOE to adopt a formal policy statement (this did not happen until 2017), by the end of 2015, we viewed our initial goals as having been mostly achieved and

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164. See Amy Zimmer, *7 Elementary Schools Will Try to Boost Student Diversity in Pilot Program*, DNAINFO (Nov. 22, 2015, 9:48 PM), <https://www.dnainfo.com/new-york/20151120/fort-greene/7-brooklyn-manhattan-schools-win-fight-for-diversity-based-admissions/> [https://perma.cc/M757-H899].

began to shift more into a supporting role for a nascent movement led by affected communities. Appleseed began a search to hire a new employee to direct its school-integration work — a new leader who would draw not on legal training but on a wholly different set of skills to work with the students of IntegrateNYC and other communities to build a movement.

Starting in the fall of 2016, Appleseed’s new School-Diversity Project Director worked closely with the students of IntegrateNYC and with other allies to support the development of a new citywide coalition of advocates. Appleseed supported the student leaders in the development of a new Real Integration framework for defining and evaluating integration efforts derived from the *Green* factors<sup>165</sup> that eventually became the lens used by NYCDOE itself.<sup>166</sup> The “5 R’s” of the Real Integration framework defines integration as a holistic solution to dismantling school segregation beyond merely moving students from one school to another by (1) achieving **R**acial, ethnic, and economic diversity in composition, (2) appointing leadership **R**epresentative of this diversity, (3) facilitating **R**elationships across people of different backgrounds, (4) practicing **R**estorative justice, and (5) sharing equitable access to **R**esources and opportunities.<sup>167</sup> As a result of this framework, Appleseed was able to move away from the limitations of the term “desegregation” and toward more innovative strategies.<sup>168</sup> This Real Integration framework became the basis for a new stage in the development of Appleseed’s theory of change — one that distinguished the limitations on legal advocacy in *desegregation* efforts from expanded opportunities for legal advocacy in supporting *Real Integration*.

To center the needs of community members and influence the necessary stakeholders for policy solutions, Appleseed had to expand past traditional core competencies of legal organizations. The Real

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165. *See Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 436 (1968).

166. *See Real Integration*, INTEGRATENYC, <https://www.integratenyc.org/realintegration> [<https://perma.cc/9MUJ-PTCL>] (last visited Jan. 3, 2021).

167. *See id.*

168. Some define “desegregation” as the act of “dismantling the beliefs, policies, and practices that physically separate students into racially and economically isolated schools, tracks, classes, and/or programs, that invariably results in inequitable access to programs, resources and opportunities.” N.Y.C. DEP’T OF EDUC., SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE: THE PATH TO REAL INTEGRATION AND EQUITY FOR NYC PUBLIC SCHOOL STUDENTS 108 (2019), [https://docs.wixstatic.com/ugd/1c478c\\_4de7a85cae884c53a8d48750e0858172.pdf](https://docs.wixstatic.com/ugd/1c478c_4de7a85cae884c53a8d48750e0858172.pdf) [<https://perma.cc/8EBZ-SX6R>]. The term “desegregation” has often been misunderstood as interchangeable with the term “integration.” *See id.* at 23.

Integration framework allowed Appleseed to do this by creating space for advocacy unconfined by strictly legal strategies focused only on desegregation.<sup>169</sup> If Appleseed had defined success against school segregation narrowly as desegregation, the role of lawyers in integration initiatives for the twenty-first century would have become unnecessarily costly and artificially constrained.

This new framework fostered new pathways and conversations regarding what the role of a lawyer outside litigation could be. Legal advocates could now identify obstacles and propose new language to allow innovation for integrative policies and practices. Defining the 5 R's of Real Integration created a guide not only for Appleseed and partnering lawyers but also for other stakeholders that had previously faltered in envisioning integration as an essential piece to achieving educational equity.<sup>170</sup> Appleseed formally incorporated the framework into its mission statement in 2018.<sup>171</sup>

Using this new theory of change, Appleseed was able to continue exerting influence on the movement for school integration even as students' and local communities' initiatives increasingly led. In 2017, IntegrateNYC and Appleseed commenced an ambitious initiative to eliminate the practice of "screening" students into stratified middle schools. This same year, with funds from SIPP, the District 1 community employed the P.S. 133 precedent to secure a school-integration plan covering schools across the entire district.<sup>172</sup> Meanwhile, advocates in comparatively affluent District 15 and Councilmember Lander convinced NYCDOE to commence a massive public-engagement process to address segregation in the District's middle schools.<sup>173</sup> In 2018, the process yielded a bold plan to remove

169. As discussed earlier, the thought of resolving school segregation through litigation was a nonstarter for many lawyers that balked at the feasibility of such claims, due in part to most recent court cases such as *PICS* as well as the costly and inefficient nature of education litigation. *See generally* EATON, *supra* note 118 and accompanying text (describing Appleseed's perspective on integration litigation and more effective uses of legal advocacy in the modern era).

170. *See Real Integration*, *supra* note 166.

171. *See New York Appleseed's Mission Statement Annotated*, N.Y. APPLESEED, <https://www.nyappleseed.org/our-mission/> [<https://perma.cc/DHQ6-9DS5>] (last visited Oct. 26, 2020).

172. *See* Matt Gonzales, *City Views: City Schools Make a Downpayment on Diversity*, CITYLIMITS (Nov. 28, 2017), <https://citylimits.org/2017/11/28/cityviews-city-schools-make-a-downpayment-on-diversity/> [<https://perma.cc/H8TL-WQ7T>].

173. *See Mayor de Blasio and Chancellor Carranza Announce District 15 Middle School Diversity Plan and Launch \$2M School Diversity Grant Program*, OFF. MAYOR, CITY OF N.Y. (Sept. 20, 2018), <https://www1.nyc.gov/office-of-the-mayor/news/478-18/mayor-de-blasio-chancellor-ca>



screens from the schools and use the P.S. 133-type set-aside admissions plans to prioritize vulnerable populations.<sup>174</sup> Appleseed provided critical guidance to both of these processes using its accumulated knowledge on the issues.

From 2017 to 2019, Appleseed participated in a School Diversity Advisory Group appointed by Mayor de Blasio.<sup>175</sup> Although likely intended as a dilatory tactic by the Mayor, Appleseed's ability to devote large amounts of time and resources to the process helped lead to a call to end middle school screens and other clear and bold recommendations in the final report, demonstrating that the Mayor and Chancellor could advance major advances in school integration practically overnight.<sup>176</sup> In December of 2020, Mayor de Blasio acceded to three years of advocacy and issued a temporary suspension of the practice of screening students for middle schools in response to the realities of the ongoing public-health crisis.<sup>177</sup>

The need for legal advocacy of all the modes described in this Essay continues (and Appleseed and Orrick continue to serve in that role), but today's leadership of the *movement* is in the hands of affected communities. Student leaders at IntegrateNYC and the more recent Teens Take Charge are now well-represented in the media and at the policy table.<sup>178</sup> Appleseed's school integration work is directed by

rranza-district-15-middle-school-diversity-plan-and#/0  
[https://perma.cc/KD4X-TE7N].

174. See SCH. DISTRICT 15 OF N.Y.C., D15 DIVERSITY PLAN: FINAL REPORT (2018), [http://d15diversityplan.com/wp-content/uploads/2019/06/190620\\_D15DiversityPlan\\_FinalReport.pdf](http://d15diversityplan.com/wp-content/uploads/2019/06/190620_D15DiversityPlan_FinalReport.pdf) [https://perma.cc/RD4H-T47L].

175. See *School Diversity Advisory Group*, N.Y.C. DEP'T EDUCATION, <https://www.schools.nyc.gov/about-us/vision-and-mission/diversity-in-our-schools/school-diversity-advisory-group> [https://perma.cc/6Y7N-2E8Y] (last visited Oct. 26, 2020).

176. See generally SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE II: NEW PROGRAMS FOR BETTER SCHOOLS (2019), <http://statenlander.org/wp-content/uploads/2019/08/Making-The-Grade-II-New-Programs-For-Better-Schools-by-SDAG.pdf> [https://perma.cc/FMP6-N4QJ].

177. See *2020: Advancing Justice in a Year of Turmoil*, N.Y. APPLESEED'S YEAR-IN-REVIEW (N.Y. Appleseed, New York, N.Y.), <https://myemail.constantcontact.com/Advancing-Justice-in-a-Year-of-Turmoil.html?oid=1125732021736&aid=BaM0WBFtkes> [https://perma.cc/RY2T-V7R6] (last visited Jan. 12, 2021).

178. For examples of these groups' advocacy activities, see Christina Veiga, *Report: Eliminate Middle School Screens, Make High School Admissions More Fair Next Year*, CHALKBEAT (May 12, 2020, 5:40 PM), <https://ny.chalkbeat.org/2020/5/12/21256538/middle-school-screens-high-school-admissions> [https://perma.cc/36LZ-9DEJ]; *Segregation Is Killing Us . . .*, TERRITORIAL EMPATHY (July 29, 2020), <https://storymaps.arcgis.com/stories/b9d7b073400c4c18950469ef79efe98a>

Author Nyah Berg, whose graduate education was in education policy rather than law.

### CONCLUSION

New York City has only begun to address the segregation of its public schools. Despite the progress described in this Essay, in 2019, the UCLA Center for Civil Rights again identified New York State as having the most segregated schools for African-American students: 65% of New York’s African-American students attended “intensely segregated” schools.<sup>179</sup> New York was also the second most segregated state for Latino students.<sup>180</sup>

Yet now, the need for integration strategies is a prominent issue in the public conversation, and NYCDOE is under significant pressure to address segregation. Assessing the difference between the landscape in 2011 and 2020, we believe that advocacy by legal advocates at Applesseed and Orrick played an essential role in creating the conditions for an integration movement to flourish and be rightfully led by affected communities, students, and educators as we see today.<sup>181</sup>

[<https://perma.cc/QS23-AD6R>]; Christina Veiga, *Turning Up the Pressure for Integration, NYC Students Plan Citywide School Boycott*, CHALKBEAT (Feb. 5, 2020, 6:30 PM), <https://ny.chalkbeat.org/2020/2/5/21178556/turning-up-the-pressure-for-integration-ny-c-students-plan-citywide-school-boycott> [<https://perma.cc/Z6BF-NYGM>].

179. See ERICA FRANKENBERG ET AL., C.R. PROJECT/PROYECTO DERECHOS CIVILES & CTR. FOR EDUC. & C.R., *HARMING OUR COMMON FUTURE: AMERICA’S SEGREGATED SCHOOLS 65 YEARS AFTER BROWN 5* (2019), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf> [<https://perma.cc/E86N-3GVM>]; see also *New York City Students Are Fighting for School Integration*, PBS NEWS HOUR (June 29, 2019, 5:28 PM), <https://www.pbs.org/newshour/show/new-york-city-students-are-fighting-for-school-integration> [<https://perma.cc/2WVV-KA64>].

180. See FRANKENBERG ET AL., *supra* note 179, at 29.

181. An essential, but insufficient role: we could have accomplished nothing without the work and advocacy — both parallel and coordinated — of entities and organizations such as the Alliance for School Integration & Desegregation, the Asian American Legal Defense Fund, the Century Foundation, District 28 Equity Now, District 30 Equity Now, ERASE Racism, the Fair Housing Justice Center, IntegrateNYC, Teens Take Charge, the New York Civil Liberties Union, the NYU Metropolitan Center for Research on Equity and the Transformation of Schools, the Center for Asian-American Children & Families, the Center for Public Education & Leadership, Community Education Council 1, Community Education Council 13, Community Education Council 15, District 15 Parents for Middle School Equity, the P.S. 133 school community, the Arts & Letters School community, the P.S. 705 community, the Children’s School community, the Castle Bridge School community,

That role, however, was not made effective through litigation — the role most commonly played by legal advocates pushing for integration in the twentieth century. Through this summary of the role of legal advocacy over nearly ten years, we hope to challenge conventional wisdom around the proper role of lawyers in supporting movements for social change and argue for a broader definition of “legal advocacy.”<sup>182</sup> Our experiences suggest that lawyers and those with legal training must bring the same range of modes and skills to social movements that they do to their clients (who typically avoid litigation because of its excessive cost and delay), including exhaustive legal research; carefully crafted memoranda, briefings, and reports explaining that research for the public; negotiation; advocacy within both legislative and administrative frameworks; familiarity with the workings and professional style of government; and perhaps most of all, the ability to analyze large, complex problems, develop a strategy that breaks these problems into winnable advocacy goals, and adhere closely to that strategy over a sustained period of time. While acknowledging the unique size, diversity, and political geography of New York City, this Essay draws lessons from our work for the benefit of school-integration advocates across the country and offers a framework that organizations and lawyers in other jurisdictions could adopt as an alternative to litigation in advocating for school integration and other social justice issues.

Attempting to embody the principles and values underlying advocacy goals may well be critical for sustaining community, hope, and a sense of purpose over a multi-year movement in which all that stands in the way of goals is determined opposition. It is impossible not to be moved by the stirring words of the late John Lewis talking about how the great civil rights leaders of the twentieth century proleptically created within their own movement the kind of “beloved

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the Brooklyn New School community, the Earth School community, the Neighborhood School community, the High School Application Advisory Committee convened by the Feerick Center for Social Justice, the New York City Bar Association, PARCEO, Council Member Brad Lander and his staff, Council Member Stephen Levin and his staff, and, of course, scores of committed and courageous public servants at NYCDOE and NYSED.

182. For a related argument, see Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1332 (2014) (noting that “[t]o understand all the ways lawyers implement Title VI, one must resort to sometimes-vague phrases: multipronged lawyering, problem-solving advocacy, and administrative lawyering”).

community” that they were seeking to establish.<sup>183</sup> The Authors of this Essay find this vision of advocacy deeply moving.

When, however, ideological commitments, longstanding polarization, or the fear of cooption prevent working within government institutions or with influential individuals deemed tainted, then our work suggests that the disinterested, dispassionate, and professional demeanor of the legal advocate may be useful. In apparent (if not actual) tension with the idea of affected communities being their own best advocates stands the idea that the attorney should never be their own client. Central to this adage is the notion that it is precisely the ability of the attorney to maintain distance from the emotions and passions of the dispute that makes them effective.<sup>184</sup> One does not have to abandon a commitment to the idea that the communities affected by certain problems are typically in the best position to craft solutions to those problems to think that there may be certain instances where the somewhat removed stance of the legal advocate may be required. This is likely to be particularly true when, as was the case here, a movement led by affected communities has not yet developed, the challenges are more technical than political, and a relatively quick incremental victory seems possible.

Our work should also be distinguished, at least partially, from “community lawyering” if that phrase means adopting a mere support role for pre-existing initiatives led by communities directly affected by segregation. Our strategies recognized that, on the one hand, simply forcing NYCDOE to act in a top-down fashion — either through litigation or administrative complaints premised on the rights of

183.

And you live that you’re already there, that you’re already in that [beloved] community, part of that sense of one family, one house. If you visualize it, if you can even have faith that it’s there, for you it is already there. And during the early days of the movement, I believed that the only true and real integration for that sense of the beloved community existed within the movement itself.

*John Lewis: Love in Action*, ON BEING WITH KRISTA TIPPETT (July 23, 2020), <https://onbeing.org/programs/john-lewis-love-in-action-jan2017/#transcript> [<https://perma.cc/Y6U3-Z6SX>].

184. “Finally, and perhaps most importantly, [an attorney representing an attorney] can provide a reality check — defendants can become so convinced of their justifications that they can’t imagine how a jury could possibly disagree with them.” Brian Palmer, *If John Edwards Were to Represent Himself, Would He Have a Fool for a Client?*, SLATE (June 7, 2011, 6:08 PM), <https://slate.com/news-and-politics/2011/06/why-is-it-so-bad-for-an-attorney-to-represent-himself.html> [<https://perma.cc/PU6F-6L26>].

individuals or by media pressure — was unlikely to generate successful long-term integration planning informed by the priorities of historically marginalized peoples. On the other hand, we recognized that an important policy solution backed solidly by available evidence and scholarly research (and still universally supported by mainstream civil rights organizations) had largely fallen out of the public conversation in New York City by 2011. Our work suggests that there may be instances in which legal advocates can act responsibly and productively to create models or templates, break down legal and regulatory barriers (real or imagined), and force leaders to exercise the minimal amount of leadership necessary to empower others to raise questions and innovate so that issues and solutions can emerge into the public debate.

Such a role may be especially appropriate for addressing large, structural problems that extend beyond individual neighborhoods and, in fact, have systemic impacts across entire cities or school districts. In a school system of 1.1 million students, there are difficult questions pertaining to who is in fact directly affected: should one focus on students, parents, educators, principals? How does a government or legal advocate meaningfully engage every community in a large city — particularly a city of 8.5 million people and thousands of neighborhoods? Historian Thomas Sugrue describes how the emphasis on “maximum feasible participation” in Johnson-era laws precipitated a shift towards “community-development” issues assumed to be limited to the boundaries of particular neighborhoods at the expense of the large structural issues that were in fact exacerbating local problems.<sup>185</sup> This development proved all-too-convenient to many predominantly white communities in New York City wary of integration efforts. As we asked before, if we agree that the mechanics of systemic racism are entirely created by a white power structure and typically often labyrinthine and invisible, is it fair or reasonable to expect our most marginalized communities — often disconnected from one another in a large metropolis — to have the time and resources to explore legal, policy, and pedagogical issues of immense complexity?

Such a role for legal advocates may also be particularly appropriate when widespread misunderstanding of the state of the law or the impact of current policy decisions appear to be obscuring the full range of solutions for affected communities to consider, when government officials appear to be using legal issues as an excuse for failure to take

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185. THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* 368–74, 398–99 (2008).

substantive action, or when government officials genuinely need guidance on how to move forward. The combined effect of the Bush Administration's guidance and the even more extreme stance adopted by NYCDOE represented an extraordinary hurdle that required sustained advocacy by legal advocates both at the federal level and the local level. Similarly, elementary school admissions policies for New York City schools were opaque and largely unwritten.<sup>186</sup> Even Appleseed and Orrick had to hire consultants early in 2011 to develop a full understanding of those policies before we could analyze new possibilities for the community task force later that year.

But if it was appropriate for Appleseed and Orrick to act with some independence, it was also important for us to limit that independence. Even in our first year of work, while we yielded to no one arguing for a diverse P.S. 133, we simultaneously deferred to community task force members on how to accomplish that goal. And we have continued to maintain this posture in nearly all of the community meetings we attend so long as we are assured that participants are acting in good faith in the interest of school integration. Nearly all of our advocacy goals — whether creating an admissions model, removing legal hurdles, contributing to government grant programs, placing reporting requirements on NYCDOE, or having NYCDOE adopt a policy statement — had the effect of *expanding* the information and options for promoting integration available to affected communities, rather than dictating how to proceed. (An exception is our advocacy to remove from community school districts the practice of “screening” young children from educational opportunities based on evaluations of “merit.”<sup>187</sup> In this case, we cannot view a defense of such practices as consistent with a good-faith goal of integration). As soon as IntegrateNYC took shape, we immediately partnered with this initiative, adopted its integration framework, aligned our policy goals, and centered the voices of its students. Perhaps the best indicator of our success is that leadership of the school integration movement is now squarely in the hands of the students of New York City's segregated schools.<sup>188</sup>

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186. The Chancellor's Regulations purport to codify admissions policies, but they are incomplete at best. See N.Y.C. DEP'T OF EDUC., REGULATION OF THE CHANCELLOR, NO. A-101 (2020).

187. Letter from Philip Desgranges & Laura D. Barbieri, N.Y.C. Bar Ass'n, to Hon. Richard A. Carranza, Chancellor, N.Y.C. Dep't of Educ., and Members, Sch. Diversity Advisory Grp., N.Y.C. Dep't of Educ. (May 1, 2019), <https://s3.amazonaws.com/documents.nycbar.org/files/2019521-CompetitiveAdmissionsDOE050119.pdf> [<https://perma.cc/EG5S-SBYD>].

188. See *supra* note 153 and accompanying text.

The only conclusion we make with complete confidence is that the broadest possible definition of “legal advocacy” is needed in thinking about appropriate roles for lawyers in social change — perhaps even broader than the already flexible definitions of “community lawyering” we have discussed here. The full range of skills that legal organizations today bring to their clients can also be employed successfully in supporting social change. Beyond that, this Essay mainly intends to raise questions. Our experience suggests that there may be at least some instances in which “unaffected” legal advocates may play a role in opening up new opportunities for advocacy, and that there may be at least some instances in which the removed and dispassionate posture of trained advocates may prove useful to supplement or galvanize advocacy by affected communities.